Balancing Reasonable Justice

John Rawls and Crucial Steps Beyond

Ville Päivänsalo

BALANCING REASONABLE JUSTICE

John Rawls's pioneering work of political philosophy *A Theory of Justice* has had far reaching influence on modern liberal political philosophy. Rawls's principles of justice as fairness: the principle of liberty, the principle of fair equality of opportunity and the famous 'difference principle' have been both heavily criticized and incorporated into other political theories.

In this book Päivänsalo both presents a deep analysis of the whole Rawlsian canon and builds upon and goes beyond Rawls's conception by introducing a fresh theoretical framework to clarify and modify different balances of the elements of Rawlsian justice. Justice as fairness is analyzed into its parts and elements, critically examined to find the strongest most favourable interpretations of each principle and in this light the principles are reconstructed and rebalanced in such a way as to resist the most significant criticisms of the Rawlsian project.

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Preface

John Rawls's *A Theory of Justice* (1971) and his later books have enormously influenced the debates in ethics and political philosophy during the past few decades. His writings have divided views sharply and inspired new approaches. In the current study, I have followed my long-standing desire to delineate my own position on the basis of a careful, first-hand analysis of his texts.

In 1998, my application for funding to undertake doctoral studies on Rawls was approved by my supervisors, Professors Jaana Hallamaa and Heikki Kirjavainen. They have subsequently demonstrated their support on a great many occasions, and I am deeply grateful to them. On 9 April 2005, I successfully defended my dissertation *Balances of Reasonable Justice: Rawls and beyond* at the University of Helsinki.

I have revised my thesis for publication in this series, highlighting my main claims and deleting a number of passages that a broad audience might find excessively technical. Above all, the introduction and the conclusions have been modified, because the focus of the book has shifted: now I wish to present a framework for balancing reasonable justice and not only a framework for balances of reasonable justice. A thorough quest for justice cannot end with a framework that explicates possible balances of the conceptual elements characteristic of justice. Although we may not know how to proceed to the balancing of those elements confidently, in a thorough quest for justice we have no other choice but to try to do this as well as we can.

I am grateful to Docent Terho Pursiainen, who has translated *A Theory of Justice* into Finnish, for many inspiring discussions. Professors Simo Knuuttila and Reijo Työrinoja have also supported my effort, as have many other teachers and researchers at the Department of Systematic Theology at the University of Helsinki. The research project Viewpoint Ingredients in Socio-Ethical Argumentation and Theory Construction, led by Hallamaa and Kirjavainen, has been inspirational and I want to thank all its participants. Hilkka Ranki in the office of the department deserves special thanks for her patient help.

I would like to thank the Emil Aaltonen Foundation for funding my research for three years and the University of Helsinki 350th Anniversary Foundation (University of Helsinki Research Foundation) for one year's support. Thanks are also due to the Finnish Graduate School of Theology for funding two months of research in 1999 and transportation and accommodation expenses relating to my trip to Boston in January and February 2001. At Boston University I had an opportunity to discuss my ideas with Professors Charles L. Griswold, Jaakko Hintikka, David B. Lyons, Leroy S. Rouner, and Adam B. Seligman, and at Harvard University with Professor Christine M. Korsgaard. I am grateful to them for these discussions and to Docent Ghita Holmström-Hintikka and Associate Professor Juliet Floyd for helping me to arrange the journey and for illuminating discussions. I thank Professors Juha Sihvola and Heikki Kirjavainen for reading, commenting on, and evaluating my licentiate

List of Abbreviations

Rawls's Texts

Study	*A Study in the Grounds of Ethical Knowledge: Considered with Reference to Judgments on the Moral Worth of Character* (1950)
"Outline"	"Outline of a Decision Procedure for Ethics" (1951)
"Two Concepts"	"Two Concepts of Rules" (1955)
Theory	*A Theory of Justice* (1971)
"Themes"	"Themes in Kant's Moral Philosophy" (1989)
Liberalism	*Political Liberalism: With a New Introduction and the "Reply to Habermas"* (1996, first edition 1993)
"Public Reason"	"The Idea of Public Reason Revisited" (1997)
Papers	*John Rawls: Collected Papers* (1999)
Peoples	*The Law of Peoples: With "The Idea of Public Reason Revisited"* (1999)
Revised Theory	*A Theory of Justice: Revised Edition* (1999)
rev.	*A Theory of Justice: Revised Edition* (1999, this abbreviation is used when page numbers are referred to)
Lectures	*Lectures on the History of Moral Philosophy* (2000)

Notions on Abbreviations

I refer to Rawls's articles as published in *Papers*, except in the case of "Reply to Habermas" to which I refer as published with *Political Liberalism* in 1996. For a full list of Rawls's texts referred to in this book, see Bibliography.

For explanations of symbols used to classify assumptions (for example: P1, F1, D1…), see Introduction, p. xxi.

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Introduction

Rawls and Beyond

Justice as Fairness and Crucial Steps Beyond

John Rawls (1921–2002) completed his doctoral dissertation, *A Study in the Grounds of Ethical Knowledge*, at Princeton in 1950. By 1962, Rawls's academic career had proceeded through Oxford, Cornell and MIT to Harvard, where he became James Bryant Conant Professor of Philosophy in 1979. Rawls retired in 1991, but continued to make important contributions to political philosophy for several years.[1]

Rawls's pioneering book of political philosophy, *A Theory of Justice*, was published in 1971. This theory rested on traditional social contract theory "as represented by Locke, Rousseau and Kant,"[2] which Rawls revised with updated philosophical tools.

Rawls's *Theory* became world-famous in the late twentieth century and it will remain influential for a long time to come. Undoubtedly, future students of ethics and political philosophy will also count Rawls's *Political Liberalism* (1993/1996), *The Law of Peoples* (1999), and *Lectures on the History of Moral Philosophy* (2000) among the most significant contributions to the discussions of these topics in Rawls's times.[3] Rawls's critics, however, have been busy as well. Although few conclusive answers have emerged from these debates, it seems clear that without modification no version of Rawls's theory is feasible in the world of the twenty-first century. Balanced revisions to his conception are necessary.

My enterprise has been to take into account critical objections to Rawls from quite different quarters and to construct a revised conceptual framework for balancing

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1   John Bordley Rawls was born into a wealthy and politically active family in Baltimore. His father was a successful lawyer. His mother took part in local Democrat politics, defending women's voting rights. Two of Rawls's four brothers died from infection, which was a devastating experience for young John. He was educated at an Episcopal school. In the Second World War Rawls served as an infantryman in the Pacific. He completed his doctoral studies at Princeton, studied a year at Oxford, and moved to Cornell University 1953. He held a position at MIT in 1960–62 before joining Harvard for the rest of his career. Rawls had four children with his wife Mardy. Thomas Pogge, *John Rawls* (Munich, 1994), pp. 11–34; Ben Rogers, "John Rawls," *The Guardian*, 27 November 2002; Christine Korsgaard et al. "John Rawls," *Harvard University Gazette*, 19 May 2005.

2   John Rawls, *A Theory of Justice* (Cambridge, 1971), pp. viii/xviii rev. Rev. refers to the pages of John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, 1999).

3   John Rawls, *Political Liberalism: With a New Introduction and "Reply to Habermas"* (New York, 1993/1996); *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, 1999); *Lectures on the History of Moral Philosophy*, ed. Barbara Hermann (Cambridge, 2000).

reasonable justice. Although I share with Rawls a quest for justice, reasonableness, considered judgments, democracy, and the coherence of theory, I attempt to combine these ideals with other important ideals, such as good, truth, global sustainability, neighborly love, and care, more thoroughly than Rawls did.

Rawls called his own conception "justice as fairness." It includes, centrally, two principles of justice and an attempt to justify them with the aid of a construct which he called the "original position." The two principles are applied to the basic structure of a democratic society. They would guarantee for all citizens extensive liberties and sufficient means to enjoy them. In *Justice as Fairness: A Restatement* (2001) Rawls formulated these two principles in the following form:

[1.]   Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; …

[2.]   Social and economic inequalities are to satisfy two conditions: first, [a.] they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, [b.] they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[4]

Rawls affirmed the priority of the first principle, *the principle of liberty* (1.), over the second. He also stated the priority of *the principle of fair equality of opportunity* (2a.) over *the difference principle* (2b.).[5]

Rawls's original position resembles the accounts of the state of nature advanced by the traditional social contract theorists. According to such contract theorists as Hobbes and Locke, rational people in the state of nature would establish an ordered society. In an ordered society, people would be better off than in the state of nature.

The account of the original position that Rawls gave in his exposition of justice as fairness describes certain pre-societal circumstances as well. Rawls used the original position as a theoretical device in order to model the circumstances under which the guiding principles for an ordered society would be fairly chosen.[6] Rawls intended to guarantee the fairness of the procedure by assuming that the hypothetical participants of the original position do not know their place in the society in which they are to live. Quite radically, Rawls also assumed that they are ignorant of their natural assets, conceptions of good, and psychological propensities.[7] Rawls ended up arguing that his concept of fairness is democratic from the beginning, although not all democratic people would endorse it fully. Eventually, he defended the view that the basic social structure that accords with his two principles of justice is acceptable to all

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4   John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, 2001), pp. 42–43.

5   Ibid., pp. 43, 163.

6   Rawls, *Theory*, pp. 17–22/15–19 rev., 118–192/102–168 rev., 302/266 rev.

7   Ibid., pp. 12/11 rev., 136–142/118–123 rev.

the reasonable members of the democratic society in question. For him this meant, primarily, the United States.[8]

Would all reasonable persons of any actual democracy endorse Rawls's principles? And would they do it for the right reasons? Not even Rawls anticipated unconditionally positive answers to these questions, for he saw that reasonable persons' considered judgments would always vary to some degree. But how would it be possible to incorporate any genuinely realistic pluralism into the theory in a transparent way?

Let us consider for a moment a democratic society in which the loyalties of reasonable people hover between Rawls's two principles and other reasonable principles. These reasonable people would seek to balance the commonly discussed principles properly in the face of the social challenges of their time. For this they would need sufficiently systematic theories that articulate moral convictions as well as factual claims. Such conceptual frameworks would help people to steadily transform their societies in accordance with their realistic utopias. There is no need to expect that any single balance of reasonable principles would achieve a stable consensus. Once in a while, clashes of intuitions are inevitable. Nevertheless, suitable conceptual frameworks can help reasonable people deal with the disputed differences thoughtfully.

My purpose here is to present one such framework that has several conceptual and intuitive advantages compared to that of Rawls's. I will *present a conceptual framework for reasonable balancing of the elements of Rawlsian justice internally, critically, and inclusively*. My quest for internal balancing follows Rawls's fundamentals and is limited to balancing the elements of Rawls's conception of justice. Critical balancing takes into account the criticism that has been leveled against Rawls's theory. Inclusive balancing reaches beyond Rawls's position in a constructive way.

Some of Rawls's critics have argued that he ignored communitarian morality, while others have claimed his thinking is not libertarian enough. Still others criticize him for disregarding virtues, merits, capabilities, global justice, cultural differences, sustainability, animal welfare, and so on. Although there is always room for critical questions, not all criticism is equally serious.

I propose that the reasonable credibility of the Rawlsian approach is in danger unless at least five critical positions are taken into account and the corresponding five steps are taken beyond his position. In some cases this can be done in a very Rawlsian spirit, in others the criticism implies more fundamental revisions. In each case, the basic critical notions are familiar from the literature. I wish to contribute to the discussion by stating these notions systematically and by constructing a framework that allows us to continue balancing reasonable justice beyond Rawls.

The five critical notions are, briefly, the following:

1. Rawls's account of justification with the idea of the original position is not sufficiently dialogical.
2. Rawls's conception of person and his principle of fair equality of opportunity have egalitarian implications that he failed to discuss transparently.
3. Rawls's difference principle disregards important considerations of pluralism, merits, and beneficence.

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8   Rawls, *Liberalism*, pp. xviii–xxiii; *Justice as Fairness*, pp. 39–43.

4. Rawls's conceptions of good and truth are unnecessarily thin.
5. Rawls failed to extend his view to global questions in a thorough and flexible way.

I do not suggest that these critical notions are devastating to Rawls's inheritance, for we can modify Rawls's conception of justice without losing its major strengths. The five crucial steps beyond Rawls follow the five critical notions correspondingly. My revised framework is represented as (1) more dialogical and (2) more egalitarian than that of Rawls's. (3) Considerations of pluralism, merits, and beneficence as well as (4) the relevance of more content-rich conceptions of good and truth are integrated into it. Finally, (5) extending Rawls's framework to address global questions can be done more thoroughly and flexibly than is possible under Rawls's account.

My approach is more openly intuitionist than that of Rawls, but this does not imply that I despise moral theorizing—as Rawls believed that many intuitionists had done. I will defend a kind of constructive intuitionism. I will return to this notion below, but before doing so it is appropriate to relate Rawls's position to some of its major alternatives.

Alternative Approaches to Social Justice

The traditional theory of social contract is one of the four major historical approaches to social justice that Rawls discussed in *Theory*. The three others are utilitarianism, intuitionism, and perfectionism. While classical utilitarians urged the maximization of overall welfare, intuitionists have characteristically fretted that utilitarian policies violate some persons' intuitively known rights. Rawls hoped he could bridge the gap between utilitarianism and intuitionism by elaborating the traditional theory of social contract. He intended to avoid using some notion of human perfection as a guide for social design.[9] As representatives of this approach he mentioned authors as varied as Aristotle, Aquinas, and Nietzsche.[10]

Rawls wrote more on Kant than on any other author—and Rawls can be described as a political Kantian. He also joined the liberal democratic tradition represented by James Madison and Thomas Jefferson in the early history of the United States. I will discuss Rawls's views on Kant as well as his view on certain topics debated by Jefferson and Madison, but most of the alternatives to Rawls I discuss are recent.

A great deal of the earlier criticism of Rawls's *Theory* can be characterized as libertarian or communitarian. Robert Nozick famously articulated the libertarian position in *Anarchy, State, and Utopia*. Libertarians agree with Rawls on the necessity of providing extensive liberties for all, but disagree with him in matters of

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9   Rawls, *Theory*, pp. vii–viii/xvii–xviii rev., 52/46 rev., 326/286 rev.
10   Ibid., pp. 25/22 rev., 554/485 rev. As historical examples of intuitionists he uses Richard Price, G.E. Moore, and W.D. Ross. Jeremy Bentham and Henry Sidgwick are among his examples of utilitarians. Ibid., pp. 22–34/19–30 rev.

distributive justice. From the libertarian perspective the Rawlsian state interferes too strongly in the distribution of (economic) goods.[11]

Among the foremost proponents of communitarian thought are Alasdair MacIntyre and Michael Sandel. Both of them have argued that Rawls's justice as fairness relies on an exceedingly narrow conception of the person. They believe that the persons of the original position are detached from their particular perspectives that are related to their communities, traditions, and personal narratives.[12] In *Liberals and Communitarians*, Mulhall and Swift classified Charles Taylor and Michael Walzer as communitarians as well, but properly emphasized the significant differences between them.[13]

One branch of the criticism of *Theory* that has much in common with communitarianism is rooted in the feminist ethics of care. Pioneered by Carol Gilligan and Nel Noddings, care feminists have argued that the universalistic (Kantian) conception of person of the original position depicts moral thinking that is characteristic of males. Taking the virtues of care into account would be the proper response to this problem.[14]

Another branch of the criticism of Rawls aims at being more comprehensively liberal than justice as fairness. It has many forms. Susan Okin has argued that a relatively straightforward application of Rawlsian liberalism to the institution of the family would address feminist concerns.[15] Thomas Pogge, Charles Beitz, and Brian Barry have extended the universalistic aspect of justice as fairness beyond one society to embrace questions of global justice.[16] Liberals akin to Robert Audi have

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11   Robert Nozick, *Anarchy, State, and Utopia* (Oxford, 1974). J. Angelo Corlett characterizes the conflict as follows: "According to Nozick's theory, economic distributions are just if and only if they arise out of justice in the acquisition or transfer of that object by just means. If this is true, Nozick argues, then it follows that Rawls's Difference Principle is in no way a principle of justice." J. Angelo Corlett, "Introduction," in J. Angelo Corlett (ed.), *Equality and Liberty: Analyzing Rawls and Nozick* (New York, 1991), pp. 2–3.

12   Alasdair MacIntyre, *After Virtue* (2nd edn, Notre Dame, 1984); *Whose Justice? Which Rationality?* (London, 1988); Michael Sandel, *Democracy's Discontent: America in the Search of Public Philosophy* (Cambridge, 1996); *Liberalism and the Limits of Justice* (2nd edn, Cambridge, 1998).

13   Mulhall and Swift (*Liberals and Communitarians*, 2nd edn, Oxford, 1996, p. 38) say that both MacIntyre and Sandel "accuse liberals of deploying a conception of the person that detaches the individual from her ends; but their reasons for making this accusation, and their sense of its consequences for liberalism, are significantly different—and as a result any critique of their positions may have to take a different form in each case."

14   Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge 1982); Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (Berkeley, 1984); *Educating for Intelligent Belief or Unbelief* (New York, 1993); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, 1993); Robin West, *Caring for Justice* (New York, 1997).

15   Susan Okin, *Justice, Gender, and Family* (USA, 1989); "*Political Liberalism*, Justice and Gender," *Ethics*, 105/1 (1994).

16   Thomas Pogge, *Realizing Rawls* (Ithaca, 1989); Charles Beitz, *Political Theory and International Relations* (Princeton, 1979); Brian Barry, *Theories of Justice* (Oxford, 1989); *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, 2001).

argued that religious reasons do not count as proper (Rawlsian) public reasons.[17] Christine Korsgaard and Onora O'Neill have paid particular attention to the Kantian foundations of liberalism.[18]

In *Political Liberalism* (1993/1996) Rawls restricted, more clearly than before, justice as fairness to certain basic questions of political justice. He argued that in this form his conception could be endorsed by a plurality of reasonable comprehensive doctrines. Accordingly, Rawls intended to avoid the comprehensively Kantian position, although he acknowledged his debt to Kant. Jürgen Habermas has argued that the starting point in Kant would lead to a somewhat different political philosophy—to discursive democratic proceduralism.[19] One related difficult question is whether Rawls meant to rely less fundamentally on Kantian philosophical arguments and more fundamentally on the constitutional tradition of the United States. Neither the answer to this question nor its implications are easy to pin down, but I argue that often the differences do not involve fundamental controversies, but rather balancing the same conceptual elements differently.

Nordic participants in this discussion have often linked justice as fairness to the Nordic traditions and the respective Nordic models of the welfare state.[20] I argue that the Nordic emphasis on welfare can be integrated in the Rawlsian approach quite smoothly. I will also suggest that certain modifications in this direction could be intuitively convincing to the citizens of democratic societies outside the Nordic countries.

Rawls's last publications did not remove all the mist around his position. In *The Law of Peoples* (1999), he faced important challenges of international justice. In *Justice as Fairness* (2001), he restated his national conception in a compact form.

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17   Robert Audi, *Religious Commitment and Secular Reason* (New York, 2000). See also the critical discussions in the books edited by Paul Weithman (*Religion and Contemporary Liberalism*, Notre Dame, 1997) and Nancy L. Rosenblum (*Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, Princeton, 2000). Robert P. George and Christopher Wolfe ("Introduction," in Robert P. George and Christopher Wolfe, *Natural Law and Public Reason*, Washington, D.C., 2000, p. 1) articulate the core of the controversy as follows: "The Rawlsian doctrine of public reason provides a new form of justification for 'bracketing' of fundamental and controversial moral, philosophical, and religious issues in politics … . Nonliberals, or at least those whose liberalism is of an older and more traditional stripe—especially those whose fundamental views are shaped by religion or ideas about natural law—are naturally suspicious of such a doctrine."

18   Christine Korsgaard, *Creating the Kingdom of Ends* (New York, 1996); Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge, 1989); "Constructivism in Rawls and Kant," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), pp. 347–367.

19   Jürgen Habermas ("Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy* 92/3 (1995), pp. 109–131.

20   Andreas Føllesdal ("Rawls in the Nordic Countries," Arena Working Papers WP 02/15, 2002) has provided an overview of the studies of Rawls in the Nordic countries. Terho Pursiainen translated Rawls's *Theory* into Finnish (John Rawls, *Oikeudenmukaisuusteoria*, trans. Terho Pursiainen, Porvoo, 1988). Pursiainen (*Isänmaallisuus: Keskinäinen osakkuus ja kepeyden filosofia*, Tampere, 1997) discussed justice as fairness in depth in his dissertation.

Rawls did not claim that he had managed to make justice as fairness fully coherent.[21] Instead, he urged others "to slowly build up a reasonable conception."[22] This would include the reflection of justice as fairness "at all levels of generality."[23]

In the recent discussion many of the old boundaries that separated Rawlsian liberals and their critics have not been as sharp as they used to be. For example, Michael Walzer's view neatly mediates the liberal and communitarians perspectives.[24] Advocates of multiculturalism and deliberative democracy have also articulated fresh ways of combining various elements from the older views.[25] In the debate over culture and equality Martha C. Nussbaum, Seyla Benhabib, and Susan Mendus, among others, have provided insightful discussions which mediate overtly polarized views.[26] Some kind of balancing clearly belongs to the programs of several influential authors of our time. Let us try to be more explicit about the idea of balancing in the arguments on social justice.

A Quest for Intuitive Contents and Systematic Clarity

In the face of the current threats to peace, human rights, democratic welfare structures, sustainability, and to social justice itself, we need to be aware of contributions from all sorts of disciplines that provide us with relevant factual knowledge and explanations. Acute critical thinking is called for, as well as an increased awareness of the hermeneutical challenges along the way. However, I do not see how we can avoid intuitive balancing of our considered judgments in our accounts of social justice. Suitably principled conceptual frameworks help us to do the balancing in a systematic and thorough way.

I articulate the core content of balancing reasonable justice in terms of eight principles (to be stated fully at the end of Chapter 2). The first two are principles of

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21   Rawls, *Justice as Fairness*, pp. xii–xiii. Although *Justice as Fairness* (2001) was published comparatively late in its final form, it was mainly written in the 1980s. According to its preface, after 1989 Erin Kelly—the editor of the book—and Rawls made only minor changes to the text.

22   Ibid., p. 134.

23   Ibid., pp. 26–28.

24   Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (New Haven, 2004).

25   William Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995); Paul Kelly (ed.), *Multiculturalism Reconsidered:* Culture and Equality *and Its Critics* (Cambridge, 2002); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge 1996); James S. Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Melden, 2003).

26   Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge, 1997); *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, 2001); "Rawls and Feminism," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003); Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge, 1992); *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, 2002); Susan Mendus, *Impartiality in Moral and Political Philosophy* (Oxford, 2002).

dialogical reasonableness. Principles three and four are principles of liberties and opportunities. The next two are principles concerning the least advantaged, and the last two are principles of good and truth. These eight principles are meant to help us balance our moral intuitions at various levels of generality without being disturbed by certain conceptual problems in Rawls's work.

In addition to these eight principles, my conceptual framework for balancing reasonable justice (also stated fully at the end of Chapter 2) includes a conception of thoughtful persons in a real society. This means people like you and me—us. We are not prisoners of constructed principles, for we can modify them in the light of our considered judgments. Nevertheless, without principles our considered judgments are too scattered to guide any steadfast social reform.

With a sufficiently coherent theoretical framework at hand, we can quite flexibly move between individual considered judgments, the revision of the constructed principles, the application of the principles, and the revision of the framework itself. After we have proceeded on this road for a while, we can look back and see how far we have come. I have taken Rawls's theory as the starting point of my analysis. The five crucial steps beyond Rawls listed above summarize the main moves I hope to have made.

In deciding to take Rawls's work as a starting point for my views on balancing reasonable justice, I join several influential authors—Norman Daniels, Rex Martin, Daniel Dombrowski, and Partick Hayden, just to mention few—who have utilized important Rawlsian ideas in their thinking as well.[27] John Harsanyi, Robert Alejandro, G.A. Cohen, and Diana Tietjens Meyers are among the more critical participants in this discussion.[28] *Reading Rawls*, *The Idea of Political Liberalism*, and *The Cambridge Companion to Rawls* head the list of anthologies that have made important contributions to the on-going discussion.[29] My use of Rawls's conception as a theoretical starting point should not create the impression that I am uncritical of his work. However, Rawls provides one widely known theoretical approach to the questions at hand, and I will explicitly defend certain aspects of it.

Martha Nussbaum has defended the application of the Aristotelian method according to which a philosopher aims at rescuing the best aspects of the previously

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27   Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (New York, 1996); Rex Martin, *Rawls and Rights* (Lawrence, 1985); *A System of Rights* (Oxford, 1997); Daniel A. Dombrowski, *Rawls and Religion: The Case for Political Liberalism* (Albany, 2001); Patrick A. Hayden, *John Rawls: Towards a Just World Order* (Cardiff, 2002).

28   John Harsanyi, *Essays on Ethics, Social Behavior, and Scientific Explanation* (Dordrecht, 1976); Robert Alejandro, *The Limits of Rawlsian Justice* (Baltimore, 1998); G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge, 1995); *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, 2001); Diana Tietjens Meyers, *Subjection and Subjectivity: Psychoanalytic Feminism & Modern Moral Philosophy* (New York, 1994).

29   Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls'* A Theory of Justice (Oxford, 1975); Victoria Davion and Clark Wolf (eds), *The Idea of Political Liberalism* (Lanham, 2000); Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003).

presented conceptions.[30] In Finland, Marja-Liisa Kakkuri-Knuuttila has elaborated this method, and Jukka Mäkinen, a Finnish economist, has pointed out that Rawls himself applied it, for example when he wished to save the best aspects of the system of natural liberty and the fundamentally egalitarian approach to distributive justice.[31] Still, the question about the final criteria behind balancing remains. I suggest they can be properly called intuitive but not necessarily self-evident criteria. Our intuitions can change as we try to be more explicit about them and to connect them to a coherent and realistically applicable theoretical framework.[32]

A major theme in this study is the articulation of the philosophically challenging transition from the idea of considered judgments to a certain set of principles. Few steps on this path are free of controversy. While I believe that every step forward relies somewhat on intuition, people across a broad variety of cultures and religions ought to be able to endorse as reasonable—or at least as not unreasonable—every step from the very idea of considered judgments to the eight principles for balancing reasonable justice. At some point, of course, intuitions begin to differ dramatically. But precisely in this respect my framework helps us to evaluate how far the common argumentative ground extends.

Once we grasp the idea of constructing principles by taking intuitively convincing steps onwards from broadly acceptable starting points, we can move on to discuss examples of controversial questions. Taking into account global perspectives as well as more specific questions of distributive justice, good, truth, trust, virtues, and the like, I present and defend eight principles for balancing reasonable justice and, eventually, five crucial steps beyond Rawls.

As questions of social justice become complex, it becomes increasingly difficult to ensure that the debated conceptions of justice retain their coherence. I have found it helpful to enumerate the major assumptions I study and elaborate. This helps one to see at which point the debated assumptions differ from each other and at which point they contradict. When I specify different assumptions of Rawls's—and relevant alternative assumptions—I use three major conceptual categories: normative principles (P), factual claims (F), and definitions (D). All of these are hypothetical to some degree. The eight principles of balancing reasonable justice (P1–P8) have a special status, though. They articulate a framework that will be more resistant to the examined criticism than Rawls's theory.

A few words about the status of the normative principles of this research are appropriate at this point. The central aspects of Rawls's justice as fairness are

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30   Aristotle, *The Nicomachean Ethics* (trans. Hippocrates G. Apostle, Dordrecht, 1975) bk. VII, ch. 1; Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, 1986), pp. 240–263.

31   Marja-Liisa Kakkuri-Knuuttila, *Dialectic and Inquiry in Aristotle* (Helsinki, 1993); Jukka Mäkinen, *John Rawlsin oikeudenmukaisuuskäsityksen merkitys normatiiviselle taloustieteelle* (Helsinki, 2004).

32   Rex Martin has emphasized the criterion of coherence in the justification of a system of political authority. He points out that a philosophical anarchist cannot say concerning the political authority supported by a coherent system of political concepts that it "is an incoherent or contradictory notion and, for that reason, is impossible." Martin, *A System of Rights*, p. 23.

concerned with normative morality. Similarly, my eight principles for balancing reasonable justice are articulated as normative moral principles. This form connects the principles to a discussion of *should*-questions. It is necessary for the sake of clarity to entertain the should-category without claiming that it is possible to provide a complete argument for the principles as moral norms. The considerations I present are meant to support the status of the principles as moral norms as far as possible. However, my considerations can be of use in clarifying how reasonable balancing of moral principles *could* be accomplished, even if the quest for the final justification of the presented principles will remain open for further debate.

It is a Rawlsian approach to start with *hypothetical moral norms* (and other hypothetical elements). An important aspect of Rawls's argumentation was his attempt to show, little by little, how certain norms would be chosen from a set of hypothetical alternatives.[33] Then, after careful consideration of related questions at all levels of generality, he was quite confident that the norms he proposed had the status of *categorical moral norms* (or something of the sort).[34] My general approach is similar. The normative elements to be discussed can first be regarded as hypothetical. I then try to show, little by little, that the ones that find their place in balancing reasonable justice stand up to well-grounded objections. It is convenient to call norms that withstand criticism broadly and have a certain intuitive plausibility *prima facie moral norms*. In assessing how seriously we should take these as moral, I regard them to fall somewhere between hypothetical and categorical norms.[35] Arguably, the eight principles for balancing reasonable justice will be categorical rather than hypothetical norms in this spectrum.

Amy Gutmann and Dennis Thompson have drafted their version of deliberative democracy similarly in this respect: it includes explicit normative principles that are open to contestation. They have argued that it is a strength rather than a weakness of their approach that the principles are provisional.[36] A related difficult question is

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33   The argument from the original position has this kind of a structure. Rawls articulated a similar way of starting from hypothetical norms in his interpretation of Kant's categorical imperative as a procedure. John Rawls, "Themes in Kant's Moral Philosophy," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, 2003), pp. 498–500. Consider also the way he formulated the main problem of political liberalism: "How is it *possible* that there may exist over time a stable and just society … [my emphasis]?" Rawls, *Liberalism*, p. xx.

34   In his later writings he claimed that his conception made it possible to identify "the most reasonable" terms of social cooperation. Rawls, *Justice as Fairness*, pp. 7–9.

35   My use of the prima facie moral norms leaves open the question whether certain of them should be regarded as categorical, or whether we should say a little more modestly that prima facie justification for them is the best we can hope for. W.D. Ross's wording in *The Right and the Good* (Oxford, 1930, p. 19) specifies a sense in which prima facie duties may approach being categorical: "When I am in a situation, as perhaps I always am, in which more than one of these *prima facie* duties is incumbent on me, what I have to do is to study the situation as fully as I can until I form the considered opinion (it is never more) that in the circumstances one of them is more incumbent than any other; then I am bound to think that to do this *prima facie* duty is my duty *sans phrase* in the situation."

36   Gutmann and Thompson, "Deliberative Democracy Beyond Process," in Fishkin and Laslett (eds), *Debating Deliberative Democracy* (Malden, 2003), pp. 31–32.

whether Gutmann and Thompson regard some principles to be so fundamental they are actually not provisional after all. Their position does not seem clear to me in this respect.[37]

In this study I will assume that critical reflection can enhance the moral validity of hypothetical principles. In the structure of the argument that I examine and elaborate I do not regard this assumption as provisional. At least a very limited authority of critical thinking is presumed in justice as fairness and I retain it in the task of balancing.[38] But overall, it seems inevitable that direct questions of moral validity will remain intuitive. This need not result in paralysis. Instead, the recognition of relative variations among our intuitions may inspire us to become involved in constructive efforts to balance our intuitions systematically, taking into account the realities of the world we live in.

Order of Presentation

I have now reviewed the basic features of Rawls's justice as fairness, including its background in the tradition of social contract thought, the original position, the two principles of justice, and the basic structure of the society as its subject. I have also mentioned some of his other ideas, such as considered judgments and his way to construct principles of justice for a democratic society from a set of hypothetical principles onwards.

In 1.1 I launch into a detailed examination of Rawls's thought, beginning with his early ideas from the 1950s. His article "Justice as Fairness" (1958) was a milestone in the development of his thought. Here he presented an early version of his two principles of justice and a way to justify them through a procedure similar to the original position of *Theory*. In my discussion of that article and of Rawls's later publications, I will use the terms "Rawls's conception of justice" and "justice as fairness" interchangeably. After the publication of the 1958 article, his main effort was to elaborate this conception further.

In 1.2 I turn to Rawls's *Theory* and its account of the original position. Step by step I follow Rawls's arguments for the different parts of justice as fairness. Along the way, I identify assumptions that are not explicitly included in justice as fairness but which clearly seem more resistant to criticism. I identify two different readings of his original position, viz. an artificial interpretation and a commonsensical interpretation. I also examine how Rawls's original position relates to what he called the categorical imperative procedure.

I summarize my findings and modifications of Chapter 1 in 1.3. I identify four fundamental parts in justice as fairness: (1) *reasonable persons in a real society*, (2) *parties of the original position*, (3) *citizens of a well-ordered society*, and (4)

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37 "[The approach] incorporates into the theory itself the insight that democratic theorists and citizens may be mistaken about both procedural and substantive principles." Ibid., p. 39.

38 This theme is central in Rawls's early writings and I will analyze it in detail in Chapter 1. The analysis prepares the way for understanding his method of reflective equilibrium in *Theory* and later.

constructed principles. The first three of these can also be seen as starting points of construction for the constructed principles. In this sense they are even more fundamental than the constructed principles.

In Chapter 2 I concentrate on the later forms of justice as fairness in *Liberalism* (1993/1996) and thereafter. I work out Rawls's conception of a well-ordered society and a flexible way to modify it. Such fundamental ideas as reasonableness and democracy allow for the development of quite different well-ordered societies, depending on circumstances. In order to examine the related challenges transparently, I will distinguish between various degrees of reasonableness, more or less common conceptions of goods, and more or less content-rich accounts of consensus. I will also refer to Rawls's remarks on persons as responsible citizens.

At the end of Chapter 2 I draw together the main implications of the preceding discussions and then present the framework and the eight principles of balancing reasonable justice.

In Chapter 3 I explain with the aid of three major examples how the framework for balancing reasonable justice can be used. The first example deals with religion and justice as fairness. I will discuss this topic with reference to Rawls's accounts of a decent society, (equal) religious liberty, and his comments on the debate between Patrick Henry and James Madison in the Virginia General Assembly. In addition, I elaborate Rawls's historical approach by another example from the early United States—Jeremiah Evarts's argumentation against the removal of the Cherokee Indians from their traditional lands.

In 3.2 I discuss the difference principle and economic inequalities. I relate the positions of two imaginary Rawlsians, two imaginary (modest) egalitarians, and one imaginary libertarian to the difference principle and to statistical data from the United States from 1979 to 2001. This approach allows me clarify certain ambiguities of the difference principle—ambiguities that depend on the choice of starting point. It makes a difference in the argument whether the starting point is the hypothetical position of equality or that of an actual society akin to the United States in the late twentieth century. I also consider the possibility of religious support for economic justice, and I end up defending a more egalitarian scheme than that of Rawls's.

In 3.3 I take up my third major example regarding the public value of care. I identify several different aspects of the concept of care and the related implications of the burdens of judgment and consider the possibility of attaching more value to care as a common good than Rawls did.

Justice as fairness is about broad themes of social justice rather than detailed questions of law, economics, sociology, or theological dogmatics. In this respect the examples should be at the suitable level of generality—and I believe that the three major examples of Chapter 3 serve this purpose.

I conclude by returning to the proposed five crucial steps beyond Rawls. My approach to reasonable justice is (1) more dialogical in the issues of justification and (2) more egalitarian in the issues of distribution than Rawls's conception. It (3) recognizes the merits of beneficence better than Rawls's view. Finally, balancing reasonable justice encourages (4) more comprehensive considerations in terms of good and truth and it is (5) a globally responsible conception of reasonable justice more conscientiously than Rawls's justice as fairness.

Chapter 1

Fundamentals of Construction

1.1 Justification, Judgments, and Circumstances

Rawls on Justification in his Dissertation

In his dissertation, *A Study in the Grounds of Ethical Knowledge* (1950), Rawls specified three major attitudes to the question of justification of moral principles. First, according to authoritarianism, the authority of a state, party, tradition, church, or of an "individual's act of faith" justifies principles.[1] The second attitude is positivism. In the form of emotivism, social structuralism, pure theory of law, or the like, positivism claims that moral principles cannot be "validated or invalidated by reason."[2] Rawls defends the third attitude, but he does not give a handy name to it. I call it the broad use of reason. This approach includes various ways of using reason.

In the third attitude one examines principles of practical reason that are supposed to guide one's conduct. These principles can work as rational instruments for settling conflicts and justifying choices, and they may also introduce reason to our search for the good life. Rawls sees the broad use of reason as a traditional way of engaging in moral philosophy.[3] He mentions Henry Sidgwick's *The Methods of Ethics* as one example[4] and the democratic conception of government as another. Particularly in the latter, "[r]ational discussion is not outlawed or held to be irrelevant."[5] Instead, it is seen as a crucial part of the process. In the broad use of reason, moral authority is located "in the collective sense of right of free and intelligent men and women … after the widest inquiry has been made on the questions involved."[6]

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1   John Rawls, *A Study in the Grounds of Ethical Knowledge: Considered with Reference to Judgments on the Moral Worth of Character* (Ann Arbor, 1950), pp. 1–2. Perhaps surprisingly, Rawls (ibid., p. 2) also includes in this category the claim that certain principles are "given as a priori postulates of reason." This claim would paralyze the discussion of the principles at stake.

2   Ibid., pp. 3–4.

3   Ibid., pp. 4–5.

4   Rawls (ibid., p. 5) says about Sidgwick's *The Methods of Ethics*: "The book itself is the attempt to analyze the rational procedures and principles which men use to guide decisions, and which seem natural and intuitively justifiable."

5   Ibid., p. 7.

6   Ibid., p. 8. Rawls (ibid., p. 8) suggests that in this respect *Study* could contribute to two fields of thought: "A clear understanding of the problems involved, and some idea of their solution, may, it is hoped, be an addition to democratic theory, as well as to ethical philosophy."

Far from calling this approach infallible, Rawls proposes that it is the best we have.[7]

Rawls emphasizes that the use of reason he favors is not mechanical. What is needed first is a guess as to where the solution lies. Then the guess is to be pursued and finally the results considered.[8] All this Rawls attempts to do in *Study* as carefully as possible in order to see to what extent rational principles can have a valid role as mediators between authoritarian institutions—which in practice may be supported by quite ruthless propaganda—and emotional convictions.[9]

One of the main challenges Rawls then tackles is to describe a class of men[10] who are reasonable in a relevant sense. They would consider the proposed principles and decisions without reducing morality to trivialities. Among the properties that Rawls assigns to them are that they are maturely developed, have knowledge and education, are able and willing to reason logically, and that they have "sympathy and understanding" for the interests of other people.[11]

In the second part of the book Rawls then tries to explicate principles that could be implicit in the intuitions of such reasonable men.[12] Rawls intends them to be principles "explicating judgments on character."[13] These six principles are not similar to the two principles of justice that were meant in his later writings to apply to the basic structure of a society.

In the third and last part of *Study* Rawls attempts to justify the explicated principles.[14] Rawls also brings a wide range of other elements into the discussion. But as the "crucial test of reasonableness" he specifies the principle's "capacity to

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7   Ibid., p. 9.

8   Ibid., p. 11. Rawls refers to Francis Bacon's *Novum Organum* as a pioneer in this approach.

9   Ibid., pp. 15–16.

10   In the preceding quote Rawls explicitly included women in this "class of men" to start with. Had Rawls reminded the reader (and himself) once in a while that he consistently means reasonable women as well, we could be more confident that he did not mean to favor males.

11   Rawls, *Study*, pp. 32–37.

12   Ibid., p. 103.

13   Ibid., p. 110. The first principle (ibid., p. 110) is: "An act is not to be considered as indicative of the moral worth of the agent's character, unless, in the circumstances under which it was performed, the agent could have done otherwise if he had so chosen." The second principle (ibid., p. 120) states the preference for avoiding an evil act over merely contemplating to avoid it. The third principle (ibid., p. 131) distinguished similarly between merely contemplating a right act and also doing it. According to the fourth principle (ibid., pp. 140, 172) it is more worthy to do a right act out of duty rather than out of some other motive and according to the fifth principle it is less unworthy to do a wrong act from a mistaken moral motive rather than from some other motive. The sixth principle (ibid., p. 175) says: "For an act to be indicative of the moral worth of an agent, and therefore to be a justifiably condemned act, or a justifiably praised act, so far as it is said to evidence the moral character of an agent, the agent must be capable of understanding a rule, or framing intentions, and of intelligently carrying them out."

14   Ibid., p. 211.

get itself willingly accepted by reasonable men who have critically reflected upon it in the light of their conscience."[15]

Finally, Rawls reminds us that this kind of an ethical inquiry is distinct from empirical inquiries as well as from mere logic.[16] By specifying one example of the use of reason to solve practical moral problems he, in any case, claims to have refuted at least the strongest forms of authoritarianism and positivism in morals. Of course there remain plenty of moral problems to which no reasonable answers are in sight.[17]

Rawls discusses a number of other themes in his dissertation in order to bolster his main thesis. Among these is the helpfulness of studying the meaning of moral terms by paying attention to their use.[18] In *Study* Rawls also comments on certain aspects of Christian ethics in an effort to show that it is not impious from a Christian point of view to use one's reason in the way he proposes. For example, he suggests that the common sense precepts akin to the golden rule are in line with it.[19] Rawls also quotes Lord Acton, who saw that Christian ethics could support the political conscience of the people, and that such conscience would, in turn, maintain one's ability to recognize that any particular authority may err. Rawls does not expect this kind of religious conception to be only private.[20]

A more detailed examination of the related discussions in *Study* could clarify the beginnings of Rawls's project even further.[21] However, I now turn to his attempt to

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15   Ibid., p. 282. Rawls's more specific account of the process of justification includes six steps. The first states that a given maxim should be rational in terms of "appropriate means" and "comprehensive and inclusive ends." According to the sixth, in the case of a particular maxim there is a stopping point at which the maxim is shown to endure in the face of rational criticism and discussion well enough vis-à-vis the known alternatives. Ibid., pp. 317–318.

16   Ibid., pp. 341–343.

17   Ibid., p. 346. He (ibid., p. 346) continues: "[T]hat there are difficult, and perhaps insoluble moral problems, is no reason for doubting those principles and solutions we *do* have [Rawls's emphasis]."

18   Rawls's analysis owes much to Moore and Wittgenstein. However, he (ibid., p. 249) rejects the claim that "*the* meaning *is* the use [Rawls's emphasis]." Neither does he (ibid., p. 249) accept that the meaning is reducible to facts, habit, image of mind, or the like: "Rather, it is said that it is *helpful*, if we wish to clarify what a linguistic form means, to study its use [Rawls's emphasis]."

19   Rawls (ibid., p. 25) also refers to two earlier examples of the similar common sense "summaries of the moral law" in the Bible: "Walk in my presence and be blameless" (Gen 17:1) and the commandment "to do justice, and to love kindness, 'And to walk humbly with your God[.]'" (Micah 6:6-8). Such "rules of thumb … presuppose good conscience and right reason," but Rawls does not regard them to be sophisticated enough to provide any clear decision rule. He says this as a part of his general criticism of intuitionism. Ibid., pp. 24–29.

20   Ibid., pp. 9–10. In the view of his example, "[t]he Revelation and Grace of God is not a private thing which works along humanly defined channels. From its very nature it spreads abroad into every man who will receive it."

21   Ville Päivänsalo, *Justice with Understanding: Rawlsian Procedures and Responsible Persons* (Helsinki, 2003), pp. 57–60 has a somewhat lengthier discussion of Christian ethics in *Study*.

present his conception on justification compactly in the article "Outline of a Decision Procedure for Ethics" (1951).

Judgments of Reasonable Persons

In "Outline" Rawls used the term *considered judgment* more systematically than before. Despite this, it is still difficult to make out the central argumentative structure of the article. I attempt to do this by formulating the first principle in Rawls's broad use of reason as follows:

   P9[22]   A moral judgment should be a considered judgment.

The consideration may include widely different ways of using reason. Little by little—following Rawls—I add definitions, principles, and factual assumptions that connect his broad use of reason to the more specific uses of it.

   In "Outline," Rawls pays particular attention to the considered judgments of men and women whom he calls competent moral judges.[23] He sees them as people whose consideration is most likely to lead to correct decisions in situations where questions of justice arise. His characterization of competent moral judges is similar to that presented in *Study* about reasonable persons. However, the procedural idea becomes clearer: whatever the outcome of the decision process of the competent moral judges (in certain circumstances), e.g. their considered judgment, it is taken as a correct and thus acceptable outcome.[24]

   When the following definitions are added to P9, the structure of the procedure becomes more definite:

   P9   A moral judgment should be a considered judgment.

   D1   A considered judgment is an outcome of a process where reasonable persons consider a moral question (i.e. a process of reasonable consideration).

   D2   A reasonable person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, mature skills of reasoning, and widely recognized moral insight.

It may be surprising that hardly any explicitly moral terms can be discerned in these sentences. P9 states the authority of reason in a very general and thin normative sense. Definitions D1 and D2 give it a more specific meaning, but mainly in terms

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   22   Here I start with P9 in order to save P1-P8 for my discussion of principles for balancing reasonable justice.

   23   John Rawls, "Outline of a Decision Procedure in Ethics (1951)," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, 1999), p. 2.

   24   Ibid., pp. 5–7. Rawls (ibid., p. 7) also states the idea as follows: "One can say, then, that those judgments which are relevant for our present purposes are the considered judgments of competent judges as these are made from day to day on the moral issues which continually arise. No other judgments, for reasons previously stated, are of any concern."

of knowledge and skills. What is commonly held to be moral is incorporated into the procedure in D2: "widely recognized moral insight" connects the definition of reasonable person to the intersubjective morality of the common sense of a large group of people. Rawls proposes that the judgments of persons who are generally trusted are more likely to be correct in adjudicating between conflicting interests than the judgments of others. Rawls carefully tries to avoid defining the reasonable persons in terms of moral principles in order to avoid circularity in the procedure. The reasonable moral principles should be explications of the decision making of reasonable persons.[25]

Rawls's procedure does not clarify how high the standards of knowledge, skills, and reputation are that he requires of reasonable persons. To start with, he says that a normal level of intelligence is enough. But in his more detailed description it seems that the competent judges should be willing and able to eliminate prejudice and bias from their reasoning in a remarkably mature way.[26] Let us call the interpretation that about one tenth of real women and men could be properly called reasonable persons a *one-tenth interpretation of a reasonable person*. In a *nine-tenths interpretation*, on the other hand, someone with quite limited capacity to sympathize, with little knowledge of the world in general or the case in particular, driven by biases of many kinds, and having hardly any moral reputation, could be called a reasonable person, too. Not many others besides hardened criminals and some mentally retarded people would be excluded.[27]

In "Outline," Rawls did not really discuss how the criterion of the fundamental equality of all persons relates to his conception of reasonable persons. Indeed, all humans are not equally included in either interpretation of them. Peter Singer has drawn attention to the related difficulties. He has argued that Rawls assumes all humans to be in approximately equal possession of certain properties and then uses this understanding of moral personality as the basis for equality. But Rawls fails in this, Singer says, because people actually have the kind of properties included in Rawls's moral personality in different degrees. Singer's own proposal was to regard the principle of "equal consideration of interests" as fundamental.[28] He also included the relevant interests of (higher) nonhuman animals.[29]

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25   As Rawls (ibid., p. 4) articulates this point: "[W]e cannot define a competent judge, at least at the beginning of our inquiry, as one who accepts certain principles. The reason is that we wish to say of some principles for adjudicating interests that one ground for accepting them as reasonable principles is that competent judges seem to apply them intuitively to decide moral issues."

26   Ibid., pp. 2–3. Eventually, "a competent judge is required to have the capacity and desire to lay before himself in imagination all the interests in conflict, together with the relevant facts of the case, and to bestow upon the appraisal of each the same care which he would give to it if that interest were his own." Ibid., p. 3.

27   Rawls (ibid., p. 10) mentions mentally ill persons in "Outline." He says that if we reflected on the matter, we would not really trust the principles implicit in their decisions.

28   Peter Singer, *Practical Ethics* (Cambridge, 1979), pp. 16–19; *Animal Liberation* (2nd edn, London, 1991).

29   As Singer (*Practical Ethics*, p. 48) puts it: "I shall suggest that, having accepted the principle of equality as a sound moral basis for relations with others of our own species, we

Does Singer's criticism disturb Rawls's idea of justification at the fundamental level? At least in two respects it does not seem to do so. First, we might believe that Rawlsian reasonable persons also would agree that the interests of animals are to be considered seriously. It is hard to imagine, however, that the interests of nonhuman species would be counted strictly as equals with human interests. This is a notably controversial step in Singer's argument in any case, and criticism that depends on it is not particularly worrying for the Rawlsians. Second, as far as Singer addresses his argument to reasonable persons (neither to nonhuman animals nor to human infants or the like), he seems to affirm some interpretation of the class of reasonable persons. Surely it is difficult to define that class. Perhaps we should more radically include, for example, children. Or perhaps we should place more trust in the views of the few wise persons we might be able to specify. Compared to these alternatives, Rawls's solution appears a relatively egalitarian mediating position. But much depends on which interpretations of it we follow, as well as on the particular principles that are argued to be implicit in the decisions of the reasonable persons.

Lawrence Kohlberg has proposed that less than one-twentieth of the adult Americans exemplify the kind of moral reasoning that Rawls recommends in *A Theory of Justice*. This interpretation suits Kohlberg's model of moral development, in which the sixth stage is the highest: "The Stage of Universal Ethical Principles."[30] But the general tone of Rawls's text in "Outline" would hardly allow as elitist an interpretation of reasonable persons as this. Nor was Rawls's procedure of justification as structured as in *Theory*. Nevertheless, the average competent person of "Outline" would have the properties mentioned in D2 more than average human persons without any qualifications.

Let us now consider a person of average competence or somewhat above, but whose particular considered judgment would be widely regarded as wrong. Rawls allows this possibility in "Outline," because competent persons are only "most likely to make correct decisions."[31] But one logically tricky question remains: when Rawls uses the term "likely" here, he acknowledges the possibility of another standard of morality that is independent of the criteria that define the procedure. In "Outline" Rawls presents the procedure as a procedure of justification, but he still leaves it somewhat open to other criteria. In this sense it only provides a prima facie justification. I write this down in the form of the following hypothetical definition of the justification of a particular judgment:

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are also committed to accepting it as a sound moral basis for relations with those outside our own species—the nonhuman animals."

30   Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (San Francisco, 1981) vol. 1, pp. 192, 409–412. Kohlberg's one-twentieth interpretation of the reasonable person need not be regarded as particularly extreme. Recall Plato's classical criticism of democracy in *Republic* (trans. I.A. Richards, Cambridge, 1966), bk. VIII. He argued that democracy is not a stable form of government, because democratic people are not competent enough in their use of reason. Hence, we should entrust the task of government to philosopher-kings, who are the most competent. The corresponding platonic figure would perhaps be something like the *one ten thousandth interpretation*.

31   Rawls, "Outline," p. 7.

D3   To justify a judgment prima facie is to show that it is a considered judgment.

The notion "prima facie" in this reading of "Outline" marks an open place for something else that may be needed for the justification of a judgment than that it is a considered judgment.

How does Rawls tie the justification of principles to their "explication?" And how is the explication of principles related to the considerations of competent persons? I formulate Rawls's idea of justifying principles in "Outline" in these terms:

P10   A moral principle should be implicit in the process of reasonable consideration.

F1   There are many principles implicit in the process of reasonable consideration.

D4   To justify a principle prima facie is to show that it is implicit in the process of reasonable consideration in many similar cases.

I write F1 as a factual proposition because Rawls proposes as an essential test for a principle that it really is implicit in a decision made by reasonable persons. But Rawls is careful to emphasize that the principle does not need to be an actual cause of the decision. The question is not a psychological one. In order to show that a principle is implicit in a decision leading to a considered judgment, it is enough to show that it could have been a cause of it.[32]

Rawls says that a typical form of a considered judgment of reasonable persons states a "felt preference" concerning the conflicting interests M, N, O,... , where A, B, C,... are the facts of the case. Explicated principles should provide "general directives" that could have led the persons to the considered judgment. Rawls includes the requirement of generality, because "nothing is gained if we require a separate principle for each case."[33] He recognizes the possibility that no such general principles exist. However, if they do exist, we are not likely to find them unless we are willing to make the effort.[34]

Rawls regrets that he is not able to formulate elegant moral principles in "Outline," but only a number of quite elementary ones. Among these are, for example, that "conflicting claims shall be evaluated by the same principle" and that "[n]o claim shall be denied a possible satisfaction without a reason."[35] The numerous

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32   Ibid., p. 8. In contrast, Kohlberg (*The Philosophy of Moral Development*, p. 192) has proposed that a proper moral theory needs a corresponding psychological theory (that Kohlberg can provide): "This capacity of Rawls's model to generate moral judgments at the highest stage springs from a correspondence between his explanatory theory and my explanatory or psychological theory." But at least Rawls's text in "Outline" suggests that Rawls wishes to avoid confusing justificatory explication with psychological explanation.

33   Rawls, "Outline," p. 9.

34   Ibid., p. 9.

35   Ibid., p. 14.

principles that Rawls organized in seven groups in "Outline" are neither particularly close to those of *Study* nor to the two principles of justice in justice as fairness.[36] The continuity of Rawls's thought is clearer in his idea that the reasonableness of any particular principle is to be tested by asking whether it could be accepted by competent persons or not.[37]

In "Outline" Rawls deals with one more aspect which turned out to be notably important in his later writings. It is the description of appropriate circumstances for the decision procedure. We may think that if reasonable persons are firm enough in their consideration, they do not let their own interests bias their judgment even under tempting circumstances. However, Rawls wants to relieve competent judges from difficulties of this kind by assuming, for example, that there is no immediate personal gain available to them. Neither should any of them "be punished for deciding the case one way or another."[38]

An interesting feature in these requirements is that because they define the process of reasonable consideration, they seem to bring in normative criteria that are logically independent from what takes place within the procedure. Let the principle that specifies this kind of normativity be:

P11   The process of reasonable consideration should take place in circumstances where reasonable persons' own interests do not bias their judgments (i.e. in appropriate circumstances).

Accordingly, if the considered judgments result from a process that took place in chaotic circumstances, they are not counted as valid considered judgments. Principle P11 could thus be included in definition D1—to put it neatly:

D1'   A considered judgment is an outcome of a process where reasonable persons consider a moral question in appropriate circumstances (i.e. a process of reasonable consideration).

It would be misleading to assume that D1' simply replaced D1 (or something similar to D1) in Rawls's thought in the 1950s or later. We may separate two lines of development in his thinking. In D1, the considered judgments are only very generally defined by terms of reason and knowledge that are nonmoral, at least apparently. Often this leaves the more precise content of proper considered judgments remarkably open. The other line (D1') evolves towards a description and definition of the appropriate circumstances. Rawls's next attempt to develop the latter course of thought was to examine the circumstances as defined by the rules of actual societal institutions.

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36   The seventh of the seven sets of principles Rawls (ibid., pp. 14–15) states here, however, resembles his later account of the original position as a preliminary position of equality. The first part of Rawls's seventh principle says: "Given a set of equal claims, as determined by their strength, all shall be satisfied equally, if that is possible." Its other parts proceed to considerations of preferred unequal satisfaction of competing claims.

37   Ibid., pp. 10–12, 16.

38   Ibid., p. 5.

Practices and Justification

When struggling with the questions introduced in "Outline," Rawls began to concentrate on the concepts of rules and practices. In an article entitled "Two Concepts of Rules" (1955) he defined a practice as a system of rules. Rawls aimed to show the importance of the distinction between justifying a practice and justifying a particular action falling under that practice.[39] In the article "Justice as Fairness" (1958) he then formulated his two principles for the purpose of justifying practices.

In "Two Concepts," Rawls examines the institution of punishment. He suggests that it can be supported by a utilitarian argument as an institution in which a single trial actually proceeds according to the rule of law, and the overall utilitarian calculations are not extended to apply to a particular judgment. When enacting the laws, the legislator may take into account their future consequences in a complicated way. But once fixed, the law constitutes a rule that is to be followed. In this view an innocent person should not be punished even though some might believe that such a judgment would benefit society as a whole.[40] Rawls wonders if the case-utilitarian institution for punishment should be called "telishment." In the "trial" of this institution, the question would be whether to condemn the innocent is in the best interests of a society. Rawls suggests that it is not difficult to imagine the results of the experiment. The institution would soon cause chaos, which would certainly not be in the utilitarian interests either.[41]

In "Two Concepts" Rawls argues at length for a view that many of our actions would not be the same actions at all if they were not defined by the rules. For instance, to run around with friends, to throw a ball, and to swing a piece of wood would not be playing baseball without the rules of baseball.[42] Of course a batter could rather have four strikes instead of three. But if someone asked for a fourth strike in the middle of the game, that would probably be taken as a joke. Surely it can be discussed, says Rawls, whether baseball would be a better game with four strikes. But that would mean that the rules would have to be changed.[43] Especially, Rawls defends the kind of "practice conception" of rules, which takes into account the significance

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39   John Rawls, "Two Concepts of Rules (1955)," in *Papers*, p. 20.

40   Ibid., 23–26. Rawls (ibid., 25–26) suggests that morally sensitive utilitarians would not wish to justify the punishment of the innocent for the purposes of the common good. On reflection, they would rather come to accept an "amended" criterion. It "is not the greatest benefit of society *simpliciter*, but the greatest benefit of society subject to the constraint that no one's rights may be violated [Rawls's emphasis]."

41   Ibid., pp. 27–28. Rawls (ibid., p. 28) refers to W.D. Ross's account, which is similar to the "amended" criterion mentioned above. Concerning an extreme conflict between utility and rights Ross writes as follows: "The interests of the society may sometimes be so deeply involved as to make it right to punish an innocent man 'that the whole nation perish not'. But then the *prima facie* duty of consulting the general interest has proved more obligatory than the perfectly distinct *prima facie* duty of respecting the rights of those who have respected the rights of others." W.D. Ross, *The Right and the Good* (Oxford, 1930), p. 61.

42   Rawls, "Two Concepts," pp. 36–40. "Only by reference to the practice can one *say* what one is doing [Rawls's emphasis]." Ibid., 39.

43   Ibid., pp. 37–39.

of the rules of a particular practice for justifying an action. A more straightforward "summary view" does not do the job. Rawls proposes that utilitarianism is more defensible when linked with the practice conception than when linked with the summary view.[44]

At the end of "Two Concepts" Rawls denies having argued for the conservative view that one should accept the practices of one's society and follow their rules, whatever they are. He presented a view of conceptual relations that connect a practice and an action falling under it. In addition, he made some remarks concerning their justification, especially from the utilitarian point of view.[45]

In the following I have expressed some of the central aspects of these ideas in a compact form:

F2   A person cannot do certain things unless she or he follows the rules of the practice defining these things.

P12   A person should not prima facie do things that are forbidden by a reasonable system of rules.

D5   A reasonable system of rules is compatible with justified principles.

P13   A person should not break the law based solely on a calculation of interests, at least not in judging a punishment in the court.

The factual premise F2 is illustrated by the example that people cannot play baseball, and win without following the rules of baseball at least most of the time. If there were a need for a more accurate analysis of borderline cases, we should need a more accurate definition for "baseball"—what does the concept mean? We can compare these notions with some examples from H.L.A. Hart. In *The Concept of Law* Hart asks similarly: "Is it still 'chess' if the game is played without a queen?"[46] In answering this we may apply a strict definition of chess and say along the lines of F2 that one cannot win in chess unless one follows the rules of chess, including the rule that both sides must start the game with a queen. Hart's analogous examples from the context of law are valid contracts and marriages. The legal rules about these provide individuals certain "*facilities* for realizing their wishes [Hart's emphasis]."[47]

F2 fits together with Hart's claim that a court and a legislature are themselves creatures of law. Hart wrote: "Only when there are certain types of laws giving men

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44   Ibid., pp. 33–36. Rawls (ibid., 34) says about the summary view: "It regards rules in the following way: one supposes that each person decides what he shall do in particular cases by applying the utilitarian principle; one supposes further that different people will decide the same particular case in the same way and that there will be recurrences of cases similar to those previously decided."

45   Ibid., 42–43.

46   H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford, 1997), p. 4. Hart (ibid., p. 4) continues: "Such questions may be instructive because they force us to reflect on, and make explicit, our conception of the composition of the standard case."

47   Ibid., p. 27.

jurisdiction to try cases and authority to make laws do they constitute a court or legislature."[48]

More details are not needed to make F2 understandable, for I do not intend to deal with difficult cases here. I am aware that there can be surprising difficulties in the interpretation of even the most obvious rules. For instance, as Hart says, a rule that requires signing a certain official paper may sound clear at first sight. But do only initials constitute a valid signature? Or what if the signature is written at the top of the first page, although it should have been written at the bottom of the last?[49] Hart assumes that some cases are clearer than others. Similarly, someone "with a shining smooth pate" is more clearly bald than another "with a fringe of hair here and there."[50]

P12 states another aspect of rules: within a practice—in terms of both Rawls and Hart—rules set limitations on its participants. Akin to principles P9, P10, and P11, principle P12 sets a condition for acceptable decision making. According to the rules of baseball a batter is entitled to a maximum of three strikes. It would be misleading to say only that the rules provide an opportunity to play baseball, but not to recognize that they also set limitations. There are similar aspects in the system of law. To cite another example of rules in a system of law from Hart, criminal law requires us to live within certain limits and, at least in the clearer cases, we either obey the law or break it.[51]

P12 leaves open the possibility that in some cases breaking the rule is justifiable. P13 denies a certain kind of justification for this concerning the rules of law— this is in the line with the argumentation provided by Rawls in "Two Concepts." Case-utilitarian justification that is based solely on a calculation of interests is not acceptable.[52]

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48   Ibid., p. 5.
49   Ibid., pp. 12–13. The two other difficulties that he mentions here are: "What if the testator used a pseudonym? Or if his hand was guided by another?"
50   Ibid., p. 4.
51   Ibid., p. 27. Hart (ibid., p. 3) provides a list of five features of law that are common to legal systems of various countries and that are most commonly recognized by educated people: "They comprise (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones."
52   Here it is significant that one does not interpret "interests" extremely broadly to include all kinds of moral criteria as well. Rawls does not do this and I follow his use of these terms.

The Practice of Justice as Fairness

In "Justice as Fairness"[53] Rawls did not attempt to explain how the principles may be applied to persons' particular actions. He limited his examination to the principles that concern practices. As social systems of rules, these practices, in turn, define positions, offices, powers, liabilities, rights, and duties. The role of the principles of justice, as Rawls regards them in this article, is to formulate restrictions to the rules of the practices.[54]

When proposing certain principles Rawls did not claim that they are *the* principles of justice. Instead he said that, to begin with, "it is sufficient that they are typical of a family of principles normally associated with the concept of justice."[55] Nor did he propose that the presented two principles should define all the virtues of the institutions. For that purpose a social ideal would be needed. He said that justice is "only one part of any such conception."[56]

Rawls said that the principles he had formulated were "of course" familiar to the reader.[57] In "Justice as Fairness" they are presented in this form:

[F]irst, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all.[58]

It is somewhat unclear in which sense Rawls supposed these principles to be familiar. He could not have meant that this particular formulation of the two principles is generally known. He rather seems to have thought that their essential elements are familiar from various contexts, despite having been put together and looked at in a fresh way.[59]

Rawls tells us that he used three elementary ideas in the formulation of these principles: "liberty, equality, and reward for services contributing to the common good."[60] In a footnote Rawls referred to "another similar analysis" by W.D. Lamont

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53　　John Rawls, "Justice as Fairness," in *Papers*, pp. 47–72. Actually Rawls published two articles with the same title "Justice as Fairness" in the years 1957 and 1958. In the latter, published in the *Philosophical Review* (and in *Papers*—to which I refer) the topic is discussed in more detail than in the first article, which appeared in *The Journal of Philosophy*. Rawls, *Papers*, p. 623.

54　　Rawls, "Justice as Fairness," pp. 47–48.

55　　Ibid., p. 48.

56　　Ibid., p. 48. Particularly he mentioned that "[t]here may well be inequalities which one concedes are just, or at least not unjust, but which, nevertheless, one wishes, on other grounds, to do away with."

57　　Ibid., p. 47.

58　　Ibid., p. 48.

59　　Rawls (ibid., p. 47) says about the familiarity of the principles: "It may be possible, however, by using the notion of justice as fairness as a framework, to assemble and to look at them in a new way."

60　　Ibid., p. 48.

in *The Principles of Moral Judgment*, where Lamont had formulated a principle of justice in the following form: "The Equitable recognition of Liberty and Merit."[61] In the same footnote Rawls referred to Hart's article "Are There Any Natural Rights?" from the year 1955, which had apparently provided inspiration for Rawls in this phase of his work (and later). In the article Hart had argued that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free."[62] This formulation of a fundamental natural right is not very different from Rawls's first principle.[63]

On what grounds did Rawls choose these particular elements and why did he organize them in this form? Rawls explains his choices by elaborating some central ideas of the social contract tradition in a specific way. Rawls suggests that the participants in an already established practice would choose the two principles. He gives a set of assumptions concerning the participants and their circumstances. These include that the persons are mutually self-interested as representatives of themselves or of their "families, nations, churches, and the like."[64] Certain other features in the nature of their interests and rationality are given.[65] Rawls then asks us to imagine that each of the participants proposes principles that would serve as a test for everyone's claims on future occasions and as a test for the practices that affect their lives. The proposals would then constitute a list of hypothetical principles. From this list the two principles would be chosen, after a due process of refinement and negotiation.[66]

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61 W.D. Lamont, *The Principles of Moral Judgment* (Oxford, 1946), p. 161. Similarly to Rawls, Lamont (ibid., pp. 159–160) assigns a certain priority to liberty. In questions of equality he regards the burden of proof to rest upon those who argue for inequalities. In addition, "the claims of Merit necessarily modify the distribution of rights which would be indicated by the mere conception of Liberty." Ibid., p. 161.

62 H.L.A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64/2 (1955), p. 175. Hart (ibid., pp. 175–176) provides basically two reasons for calling this right natural: "(1) This right is one which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other. (2) This right is not created or conferred by men's voluntary action; other moral rights are [Hart's emphasis]."

63 In addition, the part in Rawls's second principle that states that offices of special advantages should be open to all is well in line with Hart's article "Are There Any Natural Rights?" With respect to the principle of expected advantage to everyone, Rawls ("Justice as Fairness," p. 51) says that both David Hume and John Stuart Mill recognized it. However, neither of them paid particular attention to its significance. Rawls's references are to Mill's *Utilitarianism*, ch. 5, par. 36, and to Hume's *A Treatise of Human Nature*, bk. III, pt. ii, sec. 2, par. 22.

64 Ibid., p. 52. Rawls emphasized that "it is not necessary to suppose that these persons are mutually self-interested under all circumstances, but only in the usual situations in which they participate in their common practices."

65 These include the persons' sufficient knowledge of their interests and their capability to trace out the consequences of their choices. The persons will also have certain resistance to weakness of will and envy. Their needs and interests are "roughly similar" and "in various ways complementary." Ibid., pp. 52–53.

66 Ibid., pp. 53–54.

In "Justice as Fairness" Rawls continued along the line of thought marked by D1', where the circumstances of the process of reasonable consideration are more exactly specified. But it is evident that Rawls had not forgotten the more open test of considered judgments of competent persons (D1). At the end of the article he points out that this test still applies to the newer construction as a whole: "The analysis will be successful to the degree that it expresses the principles involved in these judgments when made by competent persons upon deliberation and reflection."[67]

Rawls was working with a hopeful model where these two kinds of justification eventually converge. His attempts to bridge the gap can be regarded as an on-going construction project in which assumptions are added one after another. At first a thin normative principle regarding authority of reason (P9[68]) is assumed. Then stronger assumptions are introduced, little by little, and more complex principles are constructed on their basis. The two principles of justice may be seen as the result of this process of gradual testing and assembly. In this sense they can be called *constructed principles*. They contain many elements of the numerous principles that are implicit in the considerations of real reasonable people, but they are organized in a fresh and rather complicated manner, including the notion of their specified range of application. Rawls's account of the two principles leaves open other possibilities to do the construction appropriately. The less restricted approach articulated in the beginning (D1) is not played out.

Above I cited the three elementary principles that Rawls particularly mentioned when he stated the two principles in "Justice as Fairness." Rawls apparently assumed that they are widely implicit in the decision making of reasonable persons. To say how they are related to each other and to the other relevant principles would require a more specific explication. However, these elementary principles may be written down in the form of a following factual hypothesis:

F3   Elements of liberty, equality, and a reward for services contributing to the common good are implicit in the process of reasonable consideration (i.e. they are elements in the prima facie justified principles).

Of these three elements the last one is least explicit in Rawls's later works. Rather than speaking of reward, he speaks of efficiency, incentives, and the like. They may not be far apart from each other, but they are still different. Moreover, he does not use the concept "common good" in that innocent manner later. What kind of more definite meaning is given to it makes a notable difference in the practical implications of the constructed principles.

Several of the ideas that Rawls famously presented in *Theory*—and even in his later writings—were already there in the 1950s.[69] Little by little he elaborated

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67   Ibid., p. 71.

68   P9 A moral judgment should be a considered judgment.

69   Referring to Rawls's model as presented in "Justice as Fairness," Robert Paul Wolff says: "[D]espite its shortcomings, however, the first form of the model is, I will argue, the real foundation on which all the rest of Rawls's theory is constructed." Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice* (Princeton, 1977), p. 25.

his conception further. Even though there were many interesting, intermediate developments,[70] I now find it proper to move straight on to *Theory*, where the various ideas were collected into one systematic whole.

1.2 Original Positions

"The Initial Position of Equality"

From the 1950s onward, one of the major problems that Rawls struggled with was to define appropriate circumstances for the decision-making of reasonable people. Rawls was working on the hypothesis that in appropriate circumstances persons' own interests should not bias their judgments (P11) and that the elements of liberty, equality, and reward (F3), among others, are implicit in any reasonable process. In *Theory*, then, the original position plays basically the following role: "[It] incorporates certain procedural constraints on arguments designed to lead to an original agreement on principles of justice."[71]

The opening passages of *Theory* show, however, that Rawls seems to have made some changes in his earlier views. Freedom and equality stand out as the fundamental elements in the conception, but reward or merit does not. Rather than worrying about rewards, Rawls concentrates on eliminating the possibility that principles of justice would give an advantage based on "natural fortune or social circumstances."[72] I will argue that Rawls's solution made equality the dominant element in his original position. Indeed, he called it "the initial position of equality."[73] But this solution implies certain limitations to the freedom of the participants of the original position. Eventually, I will also analyze his concept of rationality in *Theory*.

The decision-makers in the *original position*, behind the veil of ignorance, are in a considerably different situation to that of these living in the United States, Finland, or in other *real societies*. Nor do the circumstances of the original position resemble those of *well-ordered societies*. Rawls does not seem to assume that a well-ordered society differs much from a real society, although there is a reasonable and stable consensus about the principles of justice. But the decision-makers and their circumstances in the original position are described so that it may not be easy to figure out "what really goes on behind the veil of ignorance," to use Michael

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70   In particular, I will return to Rawls's article "Constitutional Liberty and the Concept of Justice" (1963) in 3.1.

71   John Rawls, *A Theory of Justice* (Cambridge, 1971/1999 rev.), p. 3/3 rev.

72   Ibid., p. 18/16 rev. This starting point of Rawls's can immediately be seen to predict a relatively strong form of the welfare state. As David A. Strauss put it: "But if the basis of equality of opportunity is in the unfairness of allowing arbitrary factors to affect a person's chances of life, it is immediately apparent that equality of opportunity might require extensive government welfare and redistribution programs." David A. Strauss, "The Illusory Distinction between Equality of Opportunity and Equality of Result," in Neal Devins and Davison M. Douglas (eds), *Redefining Equality* (New York, 1998), p. 53.

73   Rawls, *Theory*, p. 11/10 rev.

Sandel's expression.[74] Rawls says that persons do not know their "place in society," "natural assets and abilities," "conceptions of the good," or "special psychological propensities."[75] What they know are the "general facts about human society."[76] This framing of their knowledge, together with certain procedural rules about their communication that situate them symmetrically, is supposed to guarantee the fundamental equality of persons.[77]

Under these conditions, the parties would then choose principles which should guide the design of the well-ordered society and consequently of real societies: "Justice as fairness begins, as I have said, with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions."[78]

After the principles have been chosen, the parties would choose a constitution for the particular society. This choice would take place under a somewhat thinner veil of ignorance: the parties would have particular knowledge of the society in question. In legislation and jurisdiction they are allowed to use all or almost all knowledge they can possibly have when they make their decisions within the already chosen framework of a well-ordered society.[79] Hence, Rawls does not ask one to make judgments on most of the currently debated moral questions as if one did not know anything about oneself. But if someone wants to take part in the design of the basic structure of the society—to use one's power to modify these fundamental societal conditions—he or she should be willing to respect the proposed framework of the original position.

While freedom, equality, and rationality are all fundamental normative elements in *Theory* as a whole, I suggest that in the original position, equality dominates the others. As Ronald Dworkin says, the concept of equality is remarkably abstract here.[80] However, it is a radical one. Dworkin continues that the two principles of justice Rawls proposes may fall short of the egalitarian ideal, but not the original position, which "is well designed to enforce the abstract right to equal concern and respect."[81] People who knew their class, for instance, could favor it either consciously

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74   Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge, 1998), p. 122.

75   Rawls, *Theory*, p. 12/11 rev. Rawls also mentions here that the parties do not know their "class position or social status." However, these restrictions seem to be already included in the restriction that they do not know their "place in society."

76   Ibid., p. 137/119 rev. This knowledge is meant to be extensive: "They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology." Rawls even continues that they "know whatever general facts affect the choice of the principles of justice."

77   Ibid., pp. 18–19/16–17 rev.

78   Ibid., pp. 13/11–12 rev.

79   Ibid., pp. 13/12 rev., 195–201/171–176 rev.

80   Ronald Dworkin, "The Original Position," in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls'* A Theory of Justice (Oxford, 1975), p. 49.

81   Ibid., pp. 50–51.

or unconsciously. The same holds for their conceptions of good.[82] The procedure can be criticized in many ways, says Dworkin, but "it cannot be denied in the name of any more radical concept of equality, because none exists."[83]

The restrictions in the original position are so heavy that the freedom of the parties is quite limited. To put it another way, they are free within a framework that is like a narrow and slippery road, or a narrow entrance. A rigid interpretation of the veil of ignorance is not necessarily much less perfectionist than the Sermon on the Mount, where Jesus exhorted his disciples to have a higher morality than that of the Pharisees. In *Study* Rawls said that the requirement to "be free from the weakest tendencies to evil" is forceful in the sermon.[84]

Rawls's approach includes a certain conception of common assets. A strong reading of it would be that, at least in principle, all abilities are possessed in common. A somewhat relaxed reading of Rawls would say that assets are common only in a limited sense. The notion is only used to clarify the argument for the difference principle, which counts people's natural assets as facts—not as people's merits.[85] Jonathan Wolff has suggested that Rawls's conception of common assets is exaggerated. Wolff proposes that even if we do not think that people are automatically entitled to their natural assets as Nozick seem to assume, a Rawls supporter has a reason to move towards Nozick's libertarian position.[86] Eric Rakowski is among the scholars who have argued that at least some "redress" from disadvantaged starting points can be justified. But to disregard desert entirely is not convincing either.[87]

Sandel has advocated the latter point. "On Rawls's conception," he says, "no one can properly be said to deserve anything because no one can properly be said to possess anything, at least not in the strong, constitutive sense of possession necessary to the notion of desert."[88]

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82   Ibid., pp. 50.

83   Ibid., p. 52. He proposes that, once Rawls has put forth his argument from the original position, it is the burden of Rawls's critics to try to criticize it. Dworkin (ibid., p. 53) predicts, however, that they "cannot say that Rawls's basic assumptions and attitudes are too far from their own to allow a confrontation."

84   Rawls, *Study*, p. 129.

85   Rawls (*Theory*, p. 179/156 rev.) puts the case, for example, in the following ways: "The two principles are equivalent, as I have remarked, to an undertaking to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out." Rawls has added the notion "in some respects" to the sentence after "abilities" in *Revised Theory*. "The natural distribution is neither just nor unjust; nor is it unjust that men are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts." Ibid., p. 102/78 rev. In *Revised Theory* Rawls replaced "men" by "persons."

86   "Nozick's second objection was that even if people do not deserve their natural assets they may still be entitled to them. We grant this point, but ask why it is thought that people are entitled to their natural assets. To point out that desert is not necessary for entitlement is not in itself a reason for believing that people are entitled to their natural assets." Jonathan Wolff, *Robert Nozick, Property, Justice and the Minimal State* (Stanford, 1991), pp. 122–123.

87   Eric Rakowski, *Equal Justice* (Oxford, 1991), pp. 112–119.

88   Sandel, *Liberalism and the Limits of Justice*, p. 85.

The arguments vary in more than just details. But the strong reading of common natural assets seems to be exaggerated. It is not clear why we should not give any weight to desert or merit in reflective equilibrium. We may even give it a certain weight in the name of equality. As Rakowski puts it, "Rawls's refusal to accept effort and productivity as legitimate sources of material entitlement fails to treat those of like talent and diligence equally."[89] Such equality assumes persons who are not entirely detached from their particular features. This will not disturb us, however, if we are going to give up the strictly detached conception of person in any case.

Actually Rawls's argument does not become mired in the position of strict equality but proceeds from it onwards. But even if we accept that merit should be granted some weight at some stage of the argument, Rawls's strong concept of fundamental equality might be useful as one possible starting point for the analysis. Our personal features and interests of all kinds *may* be sources of undeserved inequalities. And they *may* bias our use of power, although they do not do so necessarily and not to the same degree. By comparison, another study could use a Marxist assumption of exploitation as one starting point for an analysis. But much more analysis would be needed to show that a particular form of exploitation occurs.[90]

The original position is a highly egalitarian procedure in a liberal theory of justice. Perhaps we should relax the egalitarianism of the procedure a bit and add some particularities to the description of the parties in order to permit it to survive the criticism leveled by so many thoughtful and sympathetic people. But exactly how should it be relaxed? Freedom could be stressed more by allowing the parties to introduce their particular interests into the procedure. Perhaps they should at least be guaranteed the freedom to retain their identities meaningfully. However, given that the procedure is designed to adjudicate between people whose particular interests conflict, increasing freedom in this sense might easily leave the conflicts just as they were. The powerful would be able to use their advantageous position and to bargain for a better position again and again. Soon there would hardly be any equality at all in the "well-ordered" society.

Brian Barry's example specifies one way in which economic inequalities can influence bargaining situations. In it a rich and a poor person are to bargain freely how to share a hundred dollars given to them. For the poor person it is very important to get as large a share of it as possible. The rich person is not that concerned. Neither gets anything if they fail to agree. But because it is most important for the poor person to get at least something, the rich person is in the better bargaining position. The rich person can use the possibility of nonagreement to advantage.[91] After discussing this

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89   Rakowski, *Equal Justice*, p. 119. Wolff (*Robert Nozick, Property, Justice and the Minimal State*, p. 120) has similarly paid attention to a kind of asymmetry in the difference principle, which seems unfair to the best-off group of people. We may also note that if we accept that people can properly be entitled to a reward for their contributions to the common good, we need not commit ourselves to regard that good only in material terms.

90   Wolff's (ibid., p. 130) suggestion for such a program would be the following: "Making out a charge of exploitation will depend, first, on arriving at a clear characterization of exploitation, second, on showing that exploitation in the sense characterized is wrong, and third, showing that under the circumstances in question, exploitation takes place."

91   Brian Barry, *Theories of Justice* (vol. 1, London, 1989), pp. 13–15.

example, then Barry commented on Rawls's original position: "Rawls wants to get 'morally irrelevant' considerations out of the process of bargaining, but he believes that everything about people is morally irrelevant when it comes to choosing principles of justice for a society."[92]

Above, I have suggested that a person's merits are not irrelevant factors. However, Rawls's solution to take radical equality as a baseline of the contract—a concept of equality that nullifies all the particularities of persons' interests and other features—may serve as an analytical tool to find a strongly egalitarian solution first. Bargaining over how to share one hundred dollars is not the same as arguing about the principles of justice, but if there are similarities between these cases, there is hope in the approach.

We can keep the strengths and weaknesses of the original position in mind pending a search for a broader justification for societal inequalities in justice as fairness. However, I will next explore the possibility of applying a slightly thinner veil of ignorance which would not require perfect self-purification. The question of identity is important here, but also the assumptions about rationality and altruism of the parties.

Identity in the Original Position

A central line in the communitarian critique of *Theory* has focused on the concept of the self in the original position—the self that is radically detached from its particular features. I will turn to this kind of criticism by Sandel shortly.[93] But before doing so, we must ask whether Rawls uses such a concept of self in *Theory*. In particular, we might ask which reading of the "self" is essential for the original position.

Dworkin assumes that the parties of the original position can basically be seen as ordinary human beings that are only described under certain hypothetical conditions. He mentions some of the conditions (e.g. the parties' temporary ignorance of their particular features), but does not think that these requirements prevent us from speaking of the parties as if they were quite like particular humans. Each participant in the original position can still be understood as a woman or a man—and, by his or her attitude, a conservative or a risky gambler.[94]

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92   Barry (ibid., p. 74) continues: "Thus, he starts from the idea that the principles of justice should arise from bargaining, but he then insists that it must be bargaining purged not only of threats but of all other strategic considerations." Regardless of this criticism, Barry wrote in the Introduction of *Justice as Impartiality* published six years later that he used Rawls's *Theory*, in particular, as the starting point for his own conception. Brian Barry, *Justice as Impartiality* (vol. 2, Oxford, 1996), p. xii.

93   Sandel, *Liberalism and the Limits of Justice*. Other interesting critiques of Rawls's conception of person include, just to mention few, Alasdair MacIntyre's widely known *After Virtue* (2nd edn, Notre Dame, 1984) and the chapters on Rawls in C. Fred Alford's *The Self in Social Theory: A Psychoanalytic Account of Its Construction in Plato, Hobbes, Locke, Rawls, and Rousseau* (New Haven, 1991) and in Jaana Hallamaa's *The Prisms of Moral Personhood: The Concept of Person in Contemporary Anglo-American Ethics* (Helsinki, 1994).

94   Dworkin, "The Original Position," pp. 16–17.

There is some looseness in the way in which Dworkin interprets Rawls's idea of the original position here. What could it mean for the decision procedure, for example, to say that a party is "a woman" if she does not know that she is a woman at the time she makes her decision? What is the point of calling that representative a woman? Should we perhaps presuppose certain unconscious values that would enter into the procedure after all? Maybe it makes sense to think that despite being called on to argue as if she had forgotten herself, she will inevitably include something of her being a woman, *being herself*, just as a man will bring in something of his *being himself* despite a sincere attempt to weigh the issue at hand from the viewpoints of both sexes (or genders) equally. Then we might expect a genuine conversation between these two agents as separate persons. They would try to eliminate their unconscious biases as well. But precisely because they cannot do this completely, meaningful conversation is possible.[95]

One step further would be to assume as normative a dialogue in which there is no requirement to forget oneself, although the basically equal setting of the situation would be retained. This would bring us into the midst of various forms of discursive and dialogical ethics. While Jürgen Habermas's project has been widely influential in the last few decades, George Herbert Mead presented similar ideas earlier.[96] Recently, for example Daryl Koehn has said with references to Carol Gilligan, Nel Noddings, Seyla Benhabib, and Diana Tietjens Meyers:

> Women theorists suspect ethics derived from some theoretically objective, impartial point of view and emphasize instead the importance of talking with particular persons who have a history and who are facing some highly contextual dilemma or choice. We are to listen to their stories and attempt to negotiate with them to arrive, if at all possible, at a course all affected parties find acceptable.[97]

A much-debated question related to this approach is how it is possible to retain the equality of the setting and yet be increasingly contextual. Even if we thought that at some point there would be a limit, perhaps there are proper balances in between. As was the case in the above discussion on merit, these mediating positions might be supported by arguments of equality between persons who are not detached from

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95   How to distinguish between using the given values of this particular woman and the given values of women in general would be a question of the degree of particularity in the description of the parties. To be a woman or a man, namely, is a particular thing but clearly not as particular as being a certain woman or certain man.

96   Mead had a conception of "full development of self" through participation in social communicative practices: "Of these abstract social classes or subgroups of human individuals the one which is the most inclusive and extensive is, of course, the one defined by the logical universe of discourse (or system of universally significant symbols) determined by the participation and communicative interaction of individuals." George Herbert Mead, *On Social Psychology: Selected Papers*, ed. Anselm Strauss (Chicago, 1956), p. 222.

97   Daryl Koehn, *Rethinking Feminist Ethics: Care, Trust and Empathy* (London, 1998), p. 8.

their particularities.[98] But how could we specify more exactly at which points there really are significant differences between the approaches?

Sandel distinguishes between two theories of the self by using the expressions "'I *am* x, y, and z'" and "'I *have* x, y, and z', (where x, y, and z are desires, etc.) [Sandel's emphasis]."[99] In the latter, the possessive conception of self, there is an abstract deontological moral subject behind one's particular attributes. The former conception Sandel calls a radically situated self. In this view the self cannot be totally detached from its empirically given features.[100] For the purposes of the analysis, let us suppose—in accordance with the conception of radically situated self—that this much is a fact:

> F4   One (a person) cannot detach oneself entirely from one's empirical features.

Compared to this factual claim, the original position of justice as fairness includes conceptually normative elements. The original position can be read to require that, to the extent possible, persons *should* argue as if they did not know their particular features. Perhaps there is much that can be said against such a view as a morally normative assumption. But it does not need to contradict F4. Real people always fall short of the deontological ideal implied by *Theory*. In this sense there *is* no such thing as a deontological self. But a Rawlsian may propose that it *should* be used in a conception of justice, and then draft a conception in accordance with this normative assumption.

But the original position as a normative concept still retains elements that seem to be incompatible with the idea of the radically situated self. It might be particularly worrying if the original position does not tolerate even situated selves—ones that are distinct persons with distinct identities. According to one reading of the original position, the identities of the persons in it are excluded so that there really is no difference between them. Rawls says: "[S]ince the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random."[101]

Rawls goes on to say that we can make the situation "more vivid" by imagining that the parties really communicate through a referee. Hence at least in this paragraph the *artificial interpretation* of the original position, as we might call it, is the fundamental one. The more vivid *commonsensical interpretation* of the original position is an illustration of it. In the artificial interpretation the parties are basically

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98   Koehn (ibid., p. 8) finds promise in the approach in female ethics that integrates the criterion of equality into the ethical argument as follows: "Making sure that conditions for discourse are such that conversants are equal participants becomes every bit as important, if not more so, than spelling out the allegedly objective form ethical reasoning must assume in order to be ethical."

99   Sandel, *Liberalism and the Limits of Justice*, p. 20.

100   Ibid., pp. 20–21.

101   Rawls, *Theory*, p. 139/120 rev. In *Revised Theory* "choice" is replaced by "agreement."

not real persons at all, but sets of assumptions. Even if they could be called "pure deontological persons," there is no difference in their deontological personality.

In *Theory* the parties must end up with an agreement because, according to the artificial reading, the agreement was already built into the given criteria. They are constructed only as illustrations of the criteria that actually determine the outcome. In the case of computer programs, we can understand how the parties could have *identical knowledge*. As Rawls assumes for the sake of simplicity, the parties have full knowledge of general facts.[102] In this artificial interpretation of the original position, we may expect this to mean identical knowledge. Such conditions of identical and perfect (general) information might be assumed in limited games and models of quite different types. But surely the problems would increase rapidly if we should venture to say what this general knowledge about real societies is. As Norman Frohlich and Joe A. Oppenheimer put it: "Any explicit assignment of basic knowledge is sure to be contestable; any implicit assignment, suspect.[103]

I call an alternative to an artificial interpretation of the original position a commonsensical interpretation of it. In a commonsensical interpretation, the decision-makers are real people who cannot completely distance themselves from their particular features, and these features influence the outcome. As Rawls suggests, they are willing to reason "in accordance with the appropriate restrictions."[104] But they still are real human persons with separate identities.

The distinction between an artificial and a commonsensical interpretation of the original position has implications for the epistemology of "general knowledge." According to a commonsensical interpretation, the persons concerned argue by using that general knowledge that each of them can have. Truth is counted among the important virtues in the related questions of knowledge—perhaps even as the first virtue, as Rawls put it in the beginning of *Theory*.[105] If the supposed knowledge turns out to be highly biased by the structures of power, less biased knowledge is searched for.[106] But according to the commonsensical interpretation of the original position

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102   Ibid., pp. 137/119 rev., 142/122–123 rev.

103   Norman Frohlich and Joe A. Oppenheimer, *Choosing Justice: An Experimental Approach to Ethical Theory* (Berkeley, 1993), p. 19.

104   Rawls, *Theory*, p. 138/119 rev.

105   "Justice is the first virtue of institutions, as truth is of systems of thought." Ibid., p. 3/3 rev.

106   Such a search for knowledge might well include asking questions that are, as Caroline Ramazanoglu suggests, characteristic of many recent forms of feminism—for example questions about "what we mean by knowledge, and why some forms of knowledge are seen as more valid than others." Caroline Ramazanoglu, *Feminism and the Contradictions of Oppression* (London, 1989), p. 9. Ramazanoglu's list of what is characteristic of feminism includes factual assumptions, although the emphasis is on the transformation of the existing practices. Two of Ramazanoglu's (ibid., p. 8) points are: "1 all versions of feminism assert that the existing relations between the sexes, in which women are subordinated to men, are unsatisfactory and ought to be changed; 2 feminism challenges much of what is taken for granted as natural, normal and desirable in various societies." Furthermore, in Ramazanoglu's (ibid., p. 9) account, feminism very much relies on the common sense of what is just. As she puts it in her seventh point: "Even the most moderate advocates of women's rights must take

this does not imply that any single conception of general knowledge is shared by all the subjects. At least, it is not shared in the sense that two computer programs share identical information. The persons' conceptions of general knowledge are not the same.

Would such a commonsensical interpretation suffice for the idea of equal consideration that is, at least in Dworkin's view, the strength of Rawls's original position? One possible reply is to say that (radically) situated persons are not asked to detach themselves from their condition more than what is needed for the equal consideration of the concerned persons' viewpoints. If the original position becomes theoretically so rigorous that it starts to disturb the application of the principle of equal consideration, the commonsensical interpretation of the original position has reached its limit. If people forget themselves so totally that they are no longer able to meaningfully relate the alternatives at hand to human experience, they cannot apply common sense in their judgments.[107]

If we do not require the parties of the original position to detach themselves from their contextual features entirely, do we allow them to bring into the procedure their particular conceptions of good? If so, would these somehow disturb the procedure? In particular, what are the implications if the parties are not presupposed to be mutually disinterested—as Rawls assumed them to be in *Theory*?

The Parties as Rational and Mutually Disinterested

It has been claimed that justice as fairness builds too strongly upon the concept of rationality. In particular, Rawls's concept of the rational life plan has appeared—as Robert Paul Wolff puts it—at the same time too "culture-bound" and too insensitive to the "developmental character" of human personality.[108] Next, I focus on two of the troubling aspects in Rawls's characterization of the parties of the original position: that they are *rational* and *mutually disinterested*.

Rawls gives a certain theoretical primacy to the narrow reading of rationality in *Theory*. The instrumental core of the concept is expressed as follows: "[T]he concept of rationality must be interpreted as far as possible in the narrow sense, standard in

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the view that men have rights which are unjustly denied to women." In the commonsensical interpretation of the original position it is relevant, accordingly, what persons consider as proper knowledge about existing relationships and what is taken to be natural and just in various societies.

107   Of course, it is also possible to relax the requirement of equal consideration. Then it would be more proper to speak simply of considered judgments or the like. But this would not clarify the arguments that rely on a relatively strong element of equality.

108   Robert Paul Wolff (*Understanding Rawls*, p. 137) specifies the following two difficulties in Rawls's notion of the rational life plan: "The first is that the conception is excessively culture-bound, so that it builds into the supposedly formal constraints of the original position certain unexpressed assumptions that give ideological expression to a particular socioeconomic configuration and set of interests; the second is that, as Rawls conceives it, the ideal of rational plan of life conflicts with the organic, developmental character of a healthy human personality."

economic theory, of taking the most effective means to given ends."[109] In the same passage Rawls promises to modify the concept later to some extent. He refers to §25 of *Theory*, where he discusses such ideas as freedom from envy (as a special case of mutual disinterest), rational life plans, etc.[110] Yet Rawls emphasizes that, at least in the beginning, it is important to avoid reading "any controversial ethical elements" into the concept of rationality.[111] Consistently, Rawls distinguishes rationality from the broad use of reason, which is an essential element in his method of reflective equilibrium, and from reasonableness, which clearly includes the moral element of fairness.

Sometimes it requires particular care to note which kinds of assumptions about individuals and their conditions accompany the used concepts of rationality. The assumptions may be explicit or implicit. Jon Elster has formulated the following working definition for the normative theory of rational choice which he introduces as the standard theory: "It tells us what we ought to do in order to achieve our aims as well as possible. It does not tell us what our aims ought to be."[112]

At the first sight there may not appear to be any significant difference between this definition and Rawls's definition of instrumental rationality. Nevertheless, there is. In real life it often happens that "we" cannot give any clear statement of "our" aims, neither as individual human beings nor as a collective body of them. On the other hand, in formal (theoretically rigorous) normative decision theory the "aims" or preferences are simply taken as given, at the beginning of the study at least. In *Decision Theory and Decision Behaviour* Anatol Rapoport states that normative decision theory "need not refer to anything in the 'real', i.e. the observable, world."[113]

Because Rapoport's approach to normative decision theory avoids referring to "us" as the agents of rational choice, I find it suitable to interpret Rawls's idea of instrumental rationality in this type of framework, at least to start with. I think that Rawls has formulated the above-mentioned definition with care, having the theoretically rigorous, artificial original position in mind. There are decision-makers that are not quite like us. In which respects they are and in which respects not,

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109   Rawls, *Theory*, p. 14/12 rev.

110   Ibid., pp. 142–150/123–130 rev.

111   Ibid., p. 14/12 rev. In my master's thesis I examined in detail certain distinctions between normative, descriptive, and moral approaches to the concept of rational choice. Ville Päivänsalo, *Rationaalisuus henkilökohtaisissa valinnoissa: Normatiivinen, deskriptiivinen ja moraalinen näkökulma* (Helsinki, 1997).

112   Jon Elster, "Introduction," in Jon Elster (ed.), *Rational Choice* (New York, 1986), p. 1.

113   Anatol Rapoport, *Decision Theory and Decision Behaviour: Normative and Descriptive Approaches* (Dordrecht, 1989), p. vii. He continues: "They [the notions of mathematically formalized decision theory] are meant to capture only the essentials of a decision situation, which in real life may be obscured by complex details and ambiguities. It is these details and ambiguities, however, that may be crucial in determining the outcomes of the decisions. Their omission from the models may lead to the deduced consequences of decisions being entirely different from the actual outcomes. For this reason, the assertions of normative decision theory, generated by rigorous deduction from assumed idealized conditions, cannot be interpreted as predictions of actual human decisions or of their consequences."

and when, is supposed to be under the control of the theorist.[114] Elster's definition of rationality (the one referred to above) resembles more what I call empirical rationality. It is presented as meaningful to "us" in our contextual life and where our interests and beliefs concern the observable or the real world.[115]

Although there are differences in the concepts of rationality used in the original position and in real life, according to *Theory* the persons in both circumstances should be rational. The assumption of mutual disinterest, however, accompanies rationality in the original position, but in the real world it is not supposed to be in force. Rawls says that in the original position the parties do not "have ties of sentiments and affection."[116]

Rawls gives as a reason for the mutual disinterest in the original position that he attempts to avoid strong assumptions.[117] Sandel has commented, however, that it is far from clear in which sense the assumption of mutual disinterest is claimed to be weaker than the assumption of benevolence. Is Rawls suggesting that if the assumption of benevolence were conceived of as true, this would imply that many other controversial assumptions should be true, too? Therefore, the assumption of benevolence would be a strong assumption (that is to be avoided). Or does Rawls mean that one could check statistically how strong the assumption is? Sandel's example of this approach is the motivational assumptions of "welfare economists": "When [they] refer to motivational assumptions as strong or weak, they mean to describe the likelihood that the motivation applies to a large portion of the population."[118] Neither of these approaches seems a sufficient ground for introducing the assumption of mutual disinterestedness into the conception as a "weak assumption."

An additional ground may be that it is easier to design a procedure for parties who are not benevolent. However, it may be useful to try to include the theoretically tricky assumption of altruism and then consider again whether the initial scheme is still worth retaining. For example, benevolent interests may cause difficulties in designing a workable procedure for dividing a cake equally. In Rawls's example the one who divides the cake gets the last piece, and he or she is therefore supposed to aim at an equal division.[119] But what if the divider is, say, a parent who does not prefer to maximize the size of her or his own piece? Then the results are not as equal as feasible, but the procedure still guarantees that the parent cannot get more than an equal share (unless also the children are benevolent and leave a large portion to their parent after all).

Sandel suggests that Rawls can be read to have a certain conception of good as part of the description of the original position. Then, after this conception is used

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114   Recall Rawls's (*Theory*, p. 20/18 rev.) notion that the search of reflective equilibrium involves modifying the original position in the light of the other considerations so that, eventually, the presentation is coherent.

115   My purpose is not to comment on Elster's way of using the rational choice theory in general. The point is just to take this particular definition of his in order to clarify its difference from an even more formal presentation of the theory.

116   Rawls, *Theory*, p. 129/111 rev.

117   Ibid., p. 129/111 rev.

118   Sandel, *Liberalism and the Limits of Justice*, pp. 44–46.

119   Rawls, *Theory*, p. 85/74 rev.

in the choice of the principles, Rawls proposes a somewhat different conception of good as proper for "the community" (or the well-ordered society). Both of these are relatively thin conceptions of good, although the latter is not as thin as the former. The latter conception of good should accord with the two principles of justice that are now prior to good.[120] Rawls certainly assumes that there would be benevolence at the latter stage. Given this, we may ask why we should assume that at the former stage—in the original position—the parties are mutually disinterested.

It may even be easier to handle the interests in the original position (or the like) if we allow benevolent interests there—and perhaps malevolent interests as well. We can try out various balances of benevolent and nonbenevolent interests in it. We may not welcome all kinds of malevolent interests even at the start, but the procedure would nevertheless be more sensitive to different views at that stage.[121]

Outside rigorous mathematical models, the whole notion of mutual disinterest is vague. According to Rawls's negative definition, the parties are not egoists in the sense that they are only after "wealth, prestige, and domination."[122] But what else they could then aim for if their interests in the interests of others are denied? The room for such aims in between appears quite narrow. Many hobbies might be included, though. And perhaps certain religious interests—as somehow separated from their altruistic dimensions. But would this mean that religion is treated lightly as a kind of hobby, as Stephen L. Carter has claimed that liberals often do?[123] If yes, that would hardly be a weak assumption.

Dropping the assumption of mutual disinterest from the description of the original position would not necessarily have a significant impact on it. Once the veil of ignorance is made thicker, each participant becomes interested in the interests

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120   Sandel, *Liberalism and the Limits of Justice*, pp. 25–26. He continues: "It is important to note that although the thin[ner] theory of good is prior to the theory of right and the principles of justice, it is not substantial enough a theory to undermine the priority of the right over the good that gives the conception its deontological character."

121   The basic approach that includes all kinds of interests to start with is articulated by Barry (*Justice as Impartiality*, p. 32) as follows: "Except where otherwise specified, 'advantage' is to be construed broadly in what follows, so that anything that conduces to the realization of somebody's conception of the good counts as being to that person's advantage." Samuel Freeman has articulated a somewhat more restricted approach, which he regards to be in line with Rawls's conception: "But it is not as if neutrality among conceptions of good were a desirable goal to begin with—what's the point, after all, of being neutral towards racist or other intolerant doctrines which deny the values of fairness or equal freedom?" Samuel Freeman, "Introduction: John Rawls—An Overview," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), p. 13.

122   Rawls, *Theory*, p. 13/12 rev.

123   Carter has made his claim about the related narrow conception of rationality, for example, as follows: "The consistent message of modern American society is that whenever the demands of one's religion conflict with what one has to do to get ahead, one is expected to ignore the religious demands and act… well… *rationally* [Carter's emphasis]." Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York, 1993), p. 13.

of every real person anyway—approximating equal consideration.[124] An egoist is forced to consider everyone's interests increasingly as if they were his or her own. And a zealous altruist, who would otherwise fail to recognize the biases rooted in her class, gender, religion, or in the altruistic conception itself, is forced to take the fundamental equality of persons more seriously.[125]

How could we articulate this sort of flexibility between egoism and altruism more specifically? Let us say that, in the commonsensical interpretation of the original position, we start with a conception of reasonable persons regarded as quite ordinary persons. The stronger (supposedly more controversial) assumptions would be added in order to limit biases of both kinds, but only to a degree that would really promote equal consideration. It would not be necessary that every single individual consider equally the interests of everyone else. But every individual should take steps towards equal consideration of everyone's views. The views would include various balances of more or less benevolent interests in accordance with the persons' conceptions of good. At every step they could also express sincerely which kind of compromise that step implies for their conception of good—if it actually implies a compromise in the first place. Then the others would take this into account in their consideration. Little by little the process would move towards equality to a point where people's particular interests were really taken seriously and considered, but not as distinct from the connected conceptions of good. At no point of the procedure would the persons involved be required to be mutually disinterested.

We may compactly articulate the commonsensical interpretation of the original position in the following form:

P11'   The process of reasonable consideration should take place in circumstances which encourage equal consideration of the views of all persons concerned (i.e. in appropriate circumstances).

D2   A reasonable person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, mature skills of reasoning, and widely recognized moral insight.

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124   It seems to me that it does not make a significant difference if one wants to avoid the term ignorance and think of Thomas Nagel's characterization of "the impersonal standpoint" instead: "One has set aside only the fact that a particular standpoint is one's own, if any of them is. It isn't that one doesn't know; one just omits this fact from the description of the situation." Thomas Nagel, *Equality and Partiality* (New York, 1991), p. 10. In the above reading of Rawls's original position, however, such particular facts are only omitted one by one, not everything at once. Respectively, in the commonsensical interpretation the particular interests are considered one by one, so that at no point is there need for a total "amnesia" for anyone.

125   Rawls (*Theory*, p. 129/112 rev.) even says here that religious conflicts are "the most tragic of all." I will return to his views on religion particularly in Chapter 3.

In P11' an important requirement of P11[126] is relaxed. While P11 aims at nullifying the bias connected to real persons' *interests*, P11' does not include this requirement. The requirement could disturb the consideration of real persons' *views* that often have benevolent interests. The "all persons concerned" of P11' are persons with particular features. Their views (including benevolent interests, conceptions of good, etc.) are regarded as broader than their mere interests.

In the commonsensical interpretation of the original position I have retained a definition of a reasonable person (D2) that is familiar from Rawls's early view. Particularly the notion "widely recognized moral insight" connects the definition to what is commonly thought to be moral. The other three items on the list could be called the rationality of these reasonable persons: their knowledge of human interests and the facts of the world, and their skills of reasoning. Thus, the crucial elements that would turn mere rationality into reasonableness would be the morality of common sense and the appropriate circumstances of consideration.

An alternative interpretation of the original position can be called an artificial interpretation of it. In it, a person's rational consideration is artificially detached from his or her commonsensical morality. An artificial interpretation of the original position can be articulated as follows:

P11''   The process of rational consideration should take place in circumstances which encourage equal consideration of the views of all persons concerned (i.e. in appropriate circumstances).

D2'   A rational person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, and mature skills of reasoning.

F5   All rational persons share the same knowledge and apply the same rules of reasoning.

Here, the persons whose consideration is decisive in the procedure are no longer called reasonable, but rational persons. The idea is that appropriate circumstances include all the necessary and sufficient elements of morality for this case. In particular, the circumstances give incentives to rational persons to engage in equal consideration of the views of all persons concerned. The morally fundamental element of equality is thus made procedural. Because all the supposedly relevant morality is already built into the procedure, the notion "widely recognized moral insight" is omitted from the D2-based definition. The procedure does not block the introduction of various moral

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126   P11: The process of reasonable consideration should take place in circumstances where reasonable persons' own interests do not bias their judgments (i.e. in appropriate circumstances).

In 1.1 I articulated the link between considered judgments, reasonable persons and process of reasonable consideration in D1' as follows:

D1'   A considered judgment is an outcome of a process where reasonable persons consider a moral question in appropriate circumstances (i.e. a process of reasonable consideration).

notions into it later, but as such the procedure does not assign to them any special weight.

The artificial interpretation of the original position adjudicates between the views of a plurality of persons, "the views of all persons concerned" (P11''), but it is not necessary to think that there is more than one rational person whose consideration represents the consideration of all rational persons. Without F5, the procedure would still maintain the distinctiveness of the rational persons as well. This mediating position (P11'' and D2') explicates a step between the commonsensical and the artificial interpretation of the original position. Once F5 is added, the procedure clearly becomes an artificial one. The distinctions between the rational persons who make the decision disappear and the procedure only relies on the knowledge and the rules of reasoning that the theorist chooses to incorporate in it. The artificial descriptions of the decisions, however, need not become trivial. The theorist can well assume, for example, that the relevant knowledge is highly complex—including knowledge about the plurality of the views of all concerned persons—and that the applied rules of reasoning are sophisticated.

Rawls did not succeed in making the argument from the original position fully transparent. Much technical expertise would be required to determine all the variables in the argument precisely.[127] I suggest, however, that the above analysis is sufficient to make discernible the differences between the commonsensical and the artificial interpretation of the original position. I propose that Rawls remained somewhat ambivalent between these lines of thought. This issue is not resolved simply by reading his texts more carefully.

Sandel, Benhabib, and many others have criticized Rawls's original position on account of its insensitivity to contextually embedded moral views. But particularly the commonsensical interpretation of the original position shows how it is possible to take into account the embedded views dialogically. At the same time it shares many fundamental elements with the artificial interpretation of the original position, and the artificial interpretation can occasionally be used in the examination of the arguments that are put forward in accordance with the commonsensical interpretation.

Rawls regarded the most important historical parallel for his original position to be Kant's categorical imperative. Rawls's presentation of it as a procedure (the CI-procedure) also illuminates the structure of justice as fairness.

The CI-Procedure and Political Constructivism

In *Theory* Rawls presented a "Kantian Interpretation of Justice as Fairness."[128] In it he interpreted the parties of the original position as the noumenal selves of Kant's conception. Later, Rawls distinguished his own position from Kant's more carefully: justice as fairness is a political conception of justice and Kant's view is a comprehensive one. However, Rawls said that justice as fairness is "far closer" to

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127   Two helpful books for further attempts of this kind are Ken Binmore, *Game Theory and Social Contract* (Cambridge, 1994) and John E. Roemer, *Theories of Distributive Justice* (Cambridge, 1996).

128   Rawls, *Theory*, pp. 251–257/221–227 rev.

Kant's view "than to the other traditional moral conceptions."[129] Rawls proposed that Kant's categorical imperative can be presented as a procedure of construction which specifies a certain conception of person as one of its elements. The outcome of the procedure is expected to be "the content of the first principles of justice."[130]

Rawls articulates the most detailed accounts of the CI-procedure in an article entitled "Themes in Kant's Moral Philosophy" (1989)[131] and in *Lectures*. Both of them present it basically as a four-step procedure, although there are minor differences in their formulation. According to *Lectures*, which was published in 2000, the four steps are:

1. I am to do X in circumstances C in order to bring about Y unless Z. (Here X is an action and Y is an end, a state of affairs.) …
2. Everyone is to do X in circumstances C in order to bring about Y unless Z. …
3. Everyone always does X in circumstances C in order to bring about Y, as if by a law of nature (as if such a law was implanted in us by natural instinct). …
4. We are to adjoin the as-if law of nature at step (3) to the existing laws of nature (as these are understood by us) and then think through as best we can what the order of nature would be once the effects of the newly adjoined law of nature have had sufficient time to work themselves out.[132]

Rawls distinguishes this CI-procedure from the moral law and the categorical imperative in his reconstruction of Kant's conception. The *moral law* is the idea of reason. It applies to all reasonable and rational persons whether or not they are finite beings with needs like these of humans. For instance, God is included. The *categorical imperative* is directed to the finite beings, who also have needs and who "experience the moral law as a constraint." The *CI-procedure*, finally, takes into account our circumstances in the order of nature.[133]

The CI-procedure starts from the subjective viewpoint of one finite rational person with needs. Then it adds the requirements of the categorical imperative

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129   John Rawls, "Kantian Constructivism in Moral Theory (1980)," in *Papers*, pp. 304–305. Rawls characterized justice as fairness as a Kantian conception only in a sense of analogy, not identity.

130   Ibid., p. 304. Already in his article "A Kantian Conception of Equality (1975)" (in *Papers*, pp. 254–255), Rawls relied explicitly on a certain conception of person. Unsurprisingly, it is a that of a free, equal, rational, etc. person with few modifications. In that article Rawls did not discuss Kant's conception in detail.

131   John Rawls, "Themes in Kant's Moral Philosophy (1989)," in *Papers*, pp. 499–500.

132   John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Hermann (Cambridge, 2000), pp. 168–169.

133   Ibid., pp. 167–168. Concerning the third step, particularly, Rawls refers to the passage in Kant's *Groundwork of the Metaphysics of Moral*, where Kant (*Grundlegung zur Metaphysik der Sitten*, ed. Karl von Vorländer, 3rd edn, Hamburg, 1952, 43, II:421) presents the categorical imperative also in this form: "[H]andle so, als ob die Maxime deiner Handlung durch deinen Willen zum *allgemeinen Naturgesetze* werden sollte [Kant's emphasis]."

and the realities of natural circumstances to the procedure. At the first step of the CI-procedure the agent has some ends to strive for and "a particular hypothetical imperative" which explicates the means by which these ends are to be achieved in the given circumstances.[134] At the second step the particular hypothetical imperative is generalized by stating it as a "universal precept" for everyone. At the third step everyone is supposed to act according to the universal precept as if "by natural instinct." At the fourth step the existing laws of nature are added. Then we get a new conception of rational and reasonable beings living together within the order of nature. This settled equilibrium stage Rawls calls the "adjusted social world."[135]

According to Rawls's interpretation of Kant, we should act only as if we were members of the adjusted social world. In addition, we should will this social world itself. If an act would seem rational in our present circumstances, but could not be done in the adjusted social world with its moral legislation, it should not be done in the real world either. It should not matter here what the consequences of the choice would be for the fulfillment of our natural desires and needs in the real world.[136]

As one example of the application of the CI-procedure Rawls takes an imperative examined by Kant: to help others when they are in need. Rawls suggests that we cannot sincerely will an adjusted social world where everyone is indifferent to the needs of the others (unless it is in one's own interests to be altruistic).[137] Indeed, in *Groundwork of the Metaphysics of Moral* Kant rejected a social world in which the maxim of indifference to our needs was in force.[138] Rawls interprets Kant's example

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134 Rawls, *Lectures*, pp. 167–168. "[T]he agent's maxim at the first step is both sincere and rational. … [I]t expresses the agent's personal intention to act from the maxim." Ibid., p. 168.

135 Ibid., pp. 168–169. Rawls uses the term 'perturbed social world' in "Themes" (p. 500).

136 Rawls, *Lectures*, p. 169. In a footnote Rawls (ibid., p. 167) expresses his gratitude to Onora O'Neill, Thomas Pogge, and Barbara Herman. But actually, Herman expressed doubts concerning the last stage of the procedure: "What remains is the idea of the totality of general precepts that can be 'jointly willed.' I am not sure where this last requirement comes from, or what sort of further constraint it actually introduces. … Perhaps it is our distance from 'purity of will.'" Barbara Herman, "Justification and Objectivity: Comments on Rawls and Allison," in Eckart Förster (ed.), *Kant's Transcendental Deductions: The Three* Critiques *and the* Opus postumum (Stanford, 1989), p. 141. O'Neill has suggested that to take both natural and artificial aspects into account actually implies a quite flexible conception of person—as she aims to do in her "more Kantian constructivism": "Natural persons are always artificial too, in many ways. Their beliefs and desires and their very identities can interlock in many ways, which only approximate to varying ideals of the person. Constructivism that does not privilege any one ideal of the person cannot be premised on a fixed account of the forms of rationality or the degree of mutual independence of agents." Onora O'Neill, *Constructions of Reason: Explanations of Kant's Practical Philosophy* (Cambridge, 1989), p. 213.

137 Rawls, *Lectures*, pp. 172–173.

138 Kant (*Grundlegung zur Metaphysik der Sitten*, 45, II:423) says about the will that willed a world, where persons were indifferent to the needs of the others: "Denn ein Wille, der dieses beschlösse, wurde sich selbst wiederstreiten, indem der Fälle sich doch manche ereignen können, wo er anderer Liebe und Teilnehmung bedarf, und wo er durch ein solches aus seinem eigenen Willen entsprungenes Naturgesetz sich selbst alle Hoffnung des Beistandes, den er sich wünscht, rauben würde."

so that in a properly adjusted world "love and sympathy" would have an important role in our response to the needs of the others.[139] This interpretation may extend Kant's argument further than Kant himself would have been prepared to go. In any case, Rawls attempts to summarize Kant's normative position regarding the question of needs as follows: "I am to help others in order that their true needs be met when I am in a position to do so, but not to the extent that I become needy myself."[140]

In "Themes" Rawls explains further why he thinks that it is proper to pay particular attention to the true human needs. In this way it becomes possible to avoid excessively strong interpretations of taking care of (all of) the needs of others. He proposes that we do not want a social world in which we should help others if this "seriously interferes with our plans."[141] Instead, Rawls's approach is to compare the alternative social worlds and "to take into account the balance of likely effects over time for our true human needs."[142] Rawls's general position seems to be that a significant degree of help should be provided to meet the true human needs. More extensive help may also be provided—motivated by love, sympathy, and related reasons—within the constraints of the CI-procedure.[143]

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139   Rawls, *Lectures*, pp. 172–173. As Rawls puts it: "Kant says that we cannot will the adjusted social world associated with the maxim of indifference because presumably many situations may arise in that world in which we need the love and sympathy of others."

140   Ibid., p. 174. Rawls refers here to Kant's phrase "true human needs" in *Metaphysics of Morals* (6:393, 432f., 453ff.) and continues: "I understand Kant to say that we have certain true human needs, certain requisite conditions, the fulfillment of which is necessary if human beings are to enjoy their lives."

141   Rawls, "Themes," p. 501.

142   Ibid., p. 502. We may try to explicate the argument even more closely. Rawls's recommended position about helping others can be written explicitly into the CI-procedure as follows:

1.   I am to help others in order that their true needs be met when I am in a position to do so, but not to the extent that I become needy myself.

2.   Everyone is to help others in order that their true needs be met when one is in a position to do so, but not to the extent that one becomes needy oneself.

3.   Everyone always helps others in order that their true needs be met when one is in a position to do so, but not to the extent that one becomes needy oneself.

4.   We are to adjoin the as-if law of nature at step 3. to the existing laws of nature (as these are understood by us) and then think through as best we can what the order of nature would be once the effects of the newly adjoined law of nature have had sufficient time to work themselves out.

In this case the CI-procedure would recommend an imperative that many persons could affirm based on common sense as well.

143   Ibid., p. 503. "The CI-procedure restricts empirical practical reason by requiring the agent's rational and sincere deliberations to be conducted in accordance with the stipulations we have just surveyed." In *Lectures* (pp. 179–180) Rawls explained that to watch that one's actions are within the limits allowed by the CI-procedure does not mean that one could not perform one's duties "cheerfully and gladly." But in hard times, when persons have fallen into "a deadly insensibility, they can still do as duty requires."

Although Rawls presented the CI-procedure in a favorable light, he did not claim it to be a suitable "way of generating the content … of a reasonable moral doctrine."[144] Accordingly, I do not attempt a full-scale analysis of the CI-procedure here. Instead, I pay attention to two respects in which the CI-procedure is different from the original position. First, the CI-procedure is *basically a nondialogical procedure*, while in the case of the original position this depends on its interpretation. The commonsensical interpretation of the original position is a *basically dialogical* procedure, but the artificial interpretation of it is a basically nondialogical one.

The CI-procedure starts from one person's rational viewpoint (step 1.). Next, (step 2.) this person universalizes the maxim: she or he imagines that everyone follows it. Finally, after step 3., Rawls presumes at step 4. that there is a plurality of subjects ("we") who consider the case. Hence, I would not say that the CI-procedure is entirely nondialogical. But it is basically nondialogical, because steps one to three are presented as the consideration of a single person. In contrast, the commonsensical interpretation of the original position assumes a plurality of considering subjects all the time. The universalizing element in the procedure does not undermine the persons' distinctiveness (with their different hypothetical imperatives, conceptions of good, etc.). The persons simply consider the case under circumstances that "encourage equal consideration of the views of all persons concerned."[145]

Another major distinction between Kant's categorical imperative and the original position became important in Rawls's later formulation of justice as fairness: the categorical imperative is a central part of a *comprehensive moral doctrine*, while the original position is *only applied to the choice of the basic structure of society*.

In the introduction to *Political Liberalism* (1993) Rawls characterizes his idea of political constructivism as follows: "The principles of political justice are the result of a procedure of construction in which rational persons (or their representatives), subject to reasonable conditions, adopt the principles to regulate the basic structure of society."[146] As Rawls immediately remarks, this basic idea is familiar from the account of the original position of *Theory*. I would add that in this passage he comes closest to the artificial interpretation of the original position, but without the assumption that all rational persons share the same knowledge and apply the same rules of reasoning (F5). The choosers are assumedly separate individuals and they are depicted as rational. They make their choice in appropriate conditions that are meant to include the fundamental moral elements of reasonableness.

Besides Kant's comprehensive moral doctrine, Rawls contrasts his political constructivism to the rational intuitionism of Samuel Clarke, Richard Price, Henry Sidgwick, and W.D. Ross. Rawls mentions that in their rational intuitionism moral principles are taken as true statements about an order of moral values which is regarded as independent of the activity of human minds. In political constructivism this is not so. The principles—the core content of a moral conception—are presented

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144 Rawls, *Lectures*, p. 163.

145 P11' and P11''.

146 John Rawls, *Political Liberalism: With a New Introduction and "Reply to Habermas"* (New York, 1993/1996), p. xxii.

as the outcome of a procedure of construction with a certain structure and with rational agents as its participants.[147]

Despite this and certain other differences,[148] Rawls regards it to be crucial for political constructivism not to contradict rational intuitionism, at least not automatically. The values that are the outcome of the procedure are understood as practical political values which may also be compatible with an independent order of moral values if that order exists. Both views rely on reason. A constructivist makes a conjecture which he or she hopes, upon full reflection, is endorsed by rational intuitionists as well.[149]

Rawls interprets Kant's view to be basically constructivist. But a major difference between political constructivism and Kant's doctrine is that Kant's "ideal of autonomy has a regulative role for all of life."[150] Political constructivism has its limited range of application. It suffices for it to be doctrinally autonomous in its specific role. Moreover, Rawls does not think that it is necessary for political constructivism to presuppose Kant's transcendental idealism. Doing so would not be compatible with transcendental realism, as would rational intuitionism. Kant's view is an important historical predecessor of political constructivism. But Rawls does not think that similar comprehensive considerations need to be included in a political conception that a plurality of views could endorse. At least so Rawls hopes.[151]

Rawls does distinguish between what is constructed and what is not. The procedure itself, he says, is "simply laid out."[152] It includes certain starting points: "the basic conceptions of society and person, the principles of practical reason,

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147   Ibid., pp. 91, 93.

148   According to Rawls (ibid., pp. 91–94), rational intuitionism basically relies on theoretical reason and its concept of a moral person as a "knower" of the independent order of values, the moral truth. Political constructivism basically relies on practical reason and a relatively complex conception of a person as a reasonable citizen. However, Rawls suggests that both views acknowledge the idea of reflective equilibrium. Richard Price, for example, clearly defended the rationality and objectivity of morality, and his view on the independent moral order has been articulated as follows: "Assuming that God is both omnipotent and benevolent, and that His will is bound by the eternal law of rectitude, Price argues that nature exhibits a 'perfect order of administration'. … Since benevolence is a rule or reason, and a creative principle that is higher even than the principle of beauty or principle of order, we can assume that God's administration is designed to secure the well-being and happiness of all His creatures." O.D. Thomas, *The Honest Mind: The Thought and Work of Richard Price* (Oxford, 1977), p. 28.

149   Rawls, *Liberalism*, pp. 95–96. In this case, the "intuitionists will say that their considered judgments are now true, or very likely so, of an independent order of moral values. The constructivist will say that the procedure of construction now correctly models the principles of practical reason in union with the appropriate conceptions of society and person." Ibid., p. 96. Thomas (*The Honest Mind*, p. ix), on the other hand, has suggested that these two principles of political philosophy were central to Price: "that every man has a duty and right to do what he thinks he ought to do, and that every man capable of independent judgment has the right to participate in the government of his society."

150   Rawls, *Liberalism*, p. 99.

151   Ibid., pp. 99–100.

152   Ibid., p. 104.

and the public role of a political conception of justice."[153] It is not a "view from nowhere."[154] Nor does it attempt to specify "practical reason as such" separated from the other parts of the doctrine. In Kant's terms, Rawls says that the point of view is that of the members of a realm of ends.[155]

From *Study* onwards, Rawls strongly relied on the common sense moral judgments of reasonable people in elaborating his theory. He systematized the moral intuitions of ordinary people, and the theoretical procedures he "laid out" reflected this broader project. In this sense, I would say, his theoretical procedures really were connected to the other parts of the doctrine and they were not "simply" laid out. Hence, the contrast between traditional rational intuitionism and Rawls's political constructivism is not quite as sharp as the passage in question might lead us to believe. Rawls did not want to commit himself to the claim that intuitive common sense moral judgments have a basis in an independent order of moral values, but arguably he nevertheless relied on intuitive judgments as they appear in common sense. If we deleted the word "simply" from the above quote, we would make his conception more coherent.

Rawls attempted to combine various viewpoints in the same conception. These are particularly important: the viewpoint(s) of the parties of the original position, the viewpoints of the citizens of a well-ordered society, and "our" viewpoints, those of "you and me."[156] However, his texts are not entirely clear as to whether all of these are equally included at the most fundamental level of justice as fairness. Rawls's remark about the kingdom of ends seems to support the claim that the viewpoint of the citizens of the well-ordered societies is at the most fundamental level of justice as fairness. Previously he referred to "shared fundamental ideas implicit in the public political culture" as the starting point for "developing from them a political conception."[157] This would accord with the starting point in the society of his time.

So far we may say that all three fundamental viewpoints are maintained by Rawls: those of the parties in the original position, those of the persons in the actual societies, and those of persons in the well-ordered societies. I will say more about their interaction in the remaining chapters, but I will regard all of them as fundamental parts of the architecture of Rawls's justice as fairness.

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153   Ibid., p. 104.

154   Ibid., pp. 115–116. The phrase is familiar from Thomas Nagel, *The View from Nowhere* (New York, 1986).

155   Rawls, *Liberalism*, pp. 115–116. "In Kant's doctrine, it is the point of view of such persons as members of a realm of ends. This shared point of view is possible since it is given by the categorical imperative which represents the principles and criteria implicit in their common human reason."

156   Ibid., p. 28. In *Liberalism* (p. 106), Rawls still regards the original position too as a proper way to present the argument. In it, the subjects are "mere artificial personages."

157   Ibid., pp. 100–101.

1.3 Three Starting Points of Construction

Four Main Parts of Justice as Fairness

As stated in the introduction, the purpose of this research is *to present a conceptual framework for reasonable balancing of the elements of Rawlsian justice internally, critically, and inclusively*. So far, I have mainly focused on the preliminary analytic and critical analysis of Rawls's conception of justice, but the revised framework for further balancing is emerging.

   In "Justice as Fairness" (1958) Rawls presented his conception as a systematic whole, and his later refinements made no radical changes in it. The main parts of the early conception incorporated the original position, the two principles of justice, the well-ordered society (the system of practices ordered according to the principles), and the reflection of the conception in the light of the pre-theoretical considered judgments. They can be presented in a figure as follows.
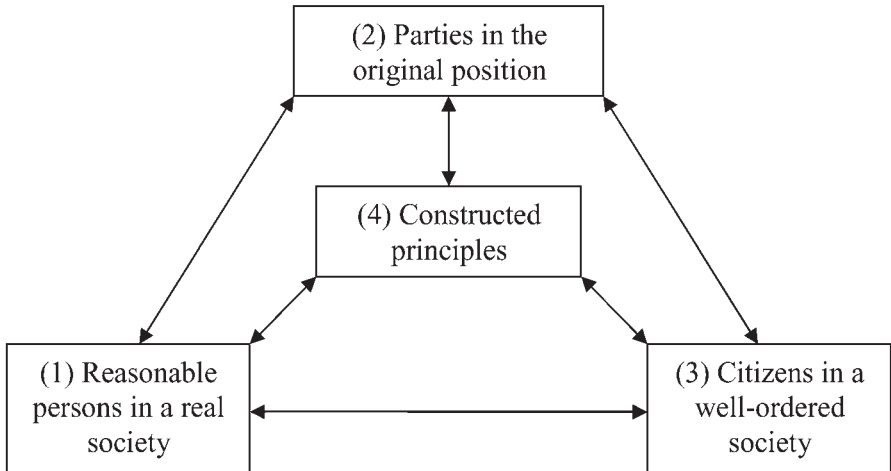

Figure 1.1   Four main parts of justice as fairness

Figure 1.1 illustrates the possibility of highly different interpretations of the relations of the four main parts of justice as fairness. To begin with, the arrows suggest that each part may have implications for any other part. Closer analysis suggests that one may give more specific meanings to the relations.

   I propose that, in justice as fairness, parts (1), (2), and (3) are more fundamental than part (4). At the very core of my deliberations has been Rawls's attempt to show that the parties of the original position would choose the two principles of justice. Thus, it is proper to say that (2) is more fundamental than (4) in justice as fairness.

   We may also say with confidence that (1) is more fundamental than (4): Rawls expected the two principles to survive the test of pre-theoretical considered judgments of reasonable persons. In the broader sense, the considerations of reasonable persons (1)

may concern any part of justice as fairness. This kind of thoughtfulness is broad indeed, but Rawls did not mean to build everything on it. I suggest that he regarded the other fundamental parts as starting points in their own right. In his search for a reflective equilibrium he attempted to adjust the approaches from all the fundamentals of the conception to each other. I will return to the questions of adjustment. At any rate, I do not claim that (1) is the only part at the most fundamental level of justice as fairness.

Rawls's view on the relation between the citizens of the well-ordered society (3) and the constructed principles (4) is not straightforward. Which of these is more fundamental? On the one hand, Rawls assumes that the well-ordered society depends on the two principles. Its basic structure should be arranged according to them. On the other hand—in later justice as fairness particularly—Rawls presumes many elements of the well-ordered society as his starting points. Hence, as I will argue, some elements of the well-ordered society are so fundamental in justice as fairness that the constructed principles should accord with them in any case. But first I summarize the results of this chapter with reference to the assumptions that I have specified.

Principles Under Construction

I called Rawls's early attempt to justify principles broad use of reason. In it he started from a remarkably broad normative assumption about moral judgments—which I articulated in the form of P9—and from definitions akin to D1 and D2.

P9   A moral judgment should be a considered judgment.

D1   A considered judgment is an outcome of a process where reasonable persons consider a moral question (i.e. a process of reasonable consideration).

D2   A reasonable person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, mature skills of reasoning, and widely recognized moral insight.

I pointed out that D2 allows significantly different readings about the degree of knowledge and skills of reasonable persons. To require a low degree may allow considerations that are excessively flawed. To require a high degree runs the risk of elitism. However, relatively high requirements at this stage do not imply, necessarily, that the requirement to take equal consideration of the interests of all persons is violated.

Rawls's early views on justifying judgments can be articulated in the form of D3. D4 specifies the step from justifying judgments to justifying principles. F1 suggests, further, that there are principles meant in D4 in the process of reasonable consideration. Hence, an attempt at justification would be possible in this respect.

D3   To justify a judgment prima facie is to show that it is a considered judgment.

D4   To justify a principle prima facie is to show that it is implicit in the process of reasonable consideration in many similar cases.

F1   There are many principles implicit in the process of reasonable consideration.

While D4 is a definition, P10 expresses its content in a normative form. F3 specifies a set of elementary principles that Rawls proposed to be implicit in the process of reasonable consideration.

P10   A moral principle should be implicit in the process of reasonable consideration.

F3   Elements of liberty, equality, and a reward for services contributing to the common good are implicit in the process of reasonable consideration (i.e. they are elements in the prima facie justified principles).

This way of justifying the principles does not refer to the appropriate circumstances of consideration akin to the original position. In terms of Figure 1.1, the starting point is in the considerations of reasonable persons in a real society (1). The moves made are from (1) to (4) directly.

Rawls's attempt to specify appropriate circumstances for reasonable consideration led him to a fundamentally different starting point for argumentation. D1' and P11 articulate important steps in this direction.

D1'   A considered judgment is an outcome of a process where reasonable persons consider a moral question in appropriate circumstances (i.e. a process of reasonable consideration).

P11   The process of reasonable consideration should take place in circumstances where reasonable persons' own interests do not bias their judgments (i.e. in appropriate circumstances).

An intriguing challenge to P11 is that a person's own interests may easily bias that person's considerations of social justice. Indeed, Rawls's rather extreme response was to make the parties ignorant of all their particularities so that the procedure would be purified from all biases and undeserved inequalities. In rebuttal, communitarian and dialogical ethicists have brought forth claims akin to F4:

F4   One (a person) cannot detach oneself entirely from one's empirical features.

Much of this criticism may be reconciled to the Rawlsian approach if the fundamental elements of the original position are articulated slightly differently. And after all, it is

not clear why we should be extremely careful about the biases rooted in the interests if this cuts the links between the procedure and the morality of common sense.

I used the combination of P11' and D2 to specify the commonsensical interpretation of the original position.

P11'   The process of reasonable consideration should take place in circumstances which encourage equal consideration of the views of all persons concerned (i.e. in appropriate circumstances).

D2   A reasonable person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, mature skills of reasoning, and widely recognized moral insight.

In this interpretation, the equal consideration of the views of the persons—not simply of the interests—is made the dominant normative element. This element is smoothly connected to the use of reason and the morality of common sense. One may argue, however, that the connection is too smooth to clarify the distinction between the rational and the reasonable—the distinction that was characteristic of the original position of justice as fairness. In the artificial interpretation of the original position, the loose notions of reasonableness and "widely recognized moral insight" are dropped. The assumedly moral aspect of reasonableness is incorporated into the procedure as "equal consideration," and the consideration is only depicted as rational.

P11"   The process of rational consideration should take place in circumstances which encourage equal consideration of the views of all persons concerned (i.e. in appropriate circumstances).

D2'   A rational person is a person who has wide sympathetic knowledge of human interests, wide knowledge of the facts of the world, and mature skills of reasoning.

F5   All rational persons share the same knowledge and apply the same rules of reasoning.

Without F5, the artificial interpretation would still allow that the persons of the procedure do not share a single parcel of general knowledge. Hence, akin to the commonsensical interpretation, this mediating interpretation would stand up relatively well in the face of criticisms akin to F4. The full-blooded artificial interpretation of the original position admittedly includes a highly detached conception of person. Nevertheless, nothing prevents rigorous theorists from assuming that the artificial personages share the very same knowledge, as expressed in F5. This assumption may help the theorists to clarify the structure of the arguments at stake and, in suitable cases, enable them to incorporate empirically tested knowledge into the models. But while it may be theoretically interesting to consider the extreme case of the artificial interpretation, I would regard more dialogical accounts of justification as more relevant to humans—to us as embedded in our contextual particularities.

Rawls intended the procedure of the original position to apply to the basic structure of a society. If the designers were successful in their effort, the basic structure would be brought closer to the ideal expressed in D5:

D5   A reasonable system of rules is compatible with justified principles.

Rawls did not, however, think that skilful design of the institutions would automatically bring about the well-ordered society. From his early articles on he expected persons to adjust their plans to the system. Once the system is sufficiently in place, it would limit the options and considerations in particular cases (P12 and P13). On the other hand, the system would provide its participants numerous opportunities that cut deep into their modes of life (F2).

P12   A person should not prima facie do things that are forbidden by a reasonable system of rules.

P13   A person should not break the law based solely on a calculation of interests, at least not in judging a punishment in the court.

F2   A person cannot do certain things unless she or he follows the rules of the practice defining these things.

A moderate reading of F2 is hardly controversial. There are things that we cannot do if we do not follow the rules. But it seems that in *Liberalism*, Rawls affirmed a relatively strong modification of F2: we cannot do proper normative theorizing without relying on the implicit ideas of our background practices and culture. Or at least Rawls came to rely on the constitutional democracy and the public political culture characteristic to the United States more heavily than before.

Chapter 2

Reasonable Democracy and Responsible Persons

2.1 Outlines of a Reasonable Democracy

An Unrealistic Flaw in A Theory of Justice

So far I have not discussed in detail the differences in justice as fairness between a well-ordered society and a real society. An explication of these differences can have far-reaching consequences for the analysis, criticism, and further development of Rawls's view.

In his later books *The Law of Peoples* (1999) and restated *Justice as Fairness* (2001) Rawls frequently calls his conception of justice as fairness a realistic utopia. How the utopian elements of the conception relate to the realistic ones was a truly essential question for him in his writings after *A Theory of Justice*, especially from the early 1980s on.[1] In the introduction to *Political Liberalism* (1993) he leaves no room for doubt about this: "[T]he serious question I have in mind concerns the unrealistic idea of a well-ordered society as it appears in *Theory*."[2]

The major unrealistic flaw that Rawls pays attention to in that introduction has to do with the sort of pluralism that prevails in modern democratic societies. Rawls's first concern here was not pluralism, as such, as an empirical phenomenon, but whether that pluralism was reasonable.[3] Reasonable pluralism does not prevail, primarily, because of sociological factors, but because everyone's reasonable consideration cannot be expected to lead to the same solutions to a great variety of moral questions. As Rawls puts it, reasonable pluralism "is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."[4] In this way Rawls finds the first challenge within the conception itself. He condemns his own conception as inconsistent if it fails to realize "its own principles under the best of foreseeable conditions."[5]

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1   John Rawls, *Political Liberalism: With a New Introduction and the "Reply to Habermas"* (New York, 1993/1996), p. xix.

2   Ibid., p. xviii.

3   Rawls (ibid., p. xix) writes: "The fact of a plurality of reasonable but incompatible comprehensive doctrines—the fact of reasonable pluralism—shows that, as used in *Theory*, the idea of a well-ordered society of justice as fairness is unrealistic."

4   Ibid., p. xviii.

5   Ibid., p. xix. A strong criticism in terms of realism would say that the kind of consensus that justice as fairness of *Theory* presumes is no more likely to occur than a consensus on religion. Samuel Freeman has articulated this possibility, although Rawls

In *Theory* Rawls explained clearly enough that he was starting from an ideal view. Considerations of more realistic circumstances followed little by little. He did not think even then that his ideal well-ordered society was feasible in its most stringent theoretical form. In essence he had defined an ideal well-ordered society as "a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles."[6] Rawls was aware that people of the existing societies disagree on principles of justice, but he did not see how acknowledging relatively broad pluralism in this respect could frustrate his way to proceed. In *Theory*, Rawls considered the questions of pluralism and stability in due course. But if there were virtually no agreement on justice, he points out, it is hard to imagine any kind of realistically stable and mutually beneficial society.[7]

In the article "Fairness to Goodness" (1975) Rawls then presented the assumptions concerning his conception of a well-ordered society so as to include the requirements of the sense of justice and stability, among others.[8] However, in the reasonable

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himself hardly regarded *Theory* as that unrealistic. Freeman writes: "Because of problems with the stability argument in *Theory*, Rawls is led to rethink the justification for justice as fairness. … If agreement on a comprehensive moral or philosophical doctrine is no more likely in a well-ordered society than agreement on religion, then not only is the stability of justice as fairness jeopardized, but so too is the general acceptance and stability of almost any liberal conception." Samuel Freeman, "Introduction: John Rawls—An Overview," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), pp. 32–33.

6   John Rawls, *A Theory of Justice* (Cambridge, 1971/1999 rev.), p. 5/4 rev.

7   Ibid., pp. 5–6/5–6 rev. Rawls writes: "In the absence of a certain measure of agreement of what is just and unjust, it is clearly more difficult for individuals to coordinate their plans efficiently in order to insure that mutually beneficial arrangements are maintained. Distrust and resentment corrode the ties of civility, and suspicion and hostility tempt men to act in ways they would otherwise avoid." About stability Rawls (ibid., p. 454/398 rev.) says: "One conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly."

8   Rawls's list is this: "(1) Everyone accepts, and knows that others accept, the same principles (the same conception) of justice. (2) Basic social institutions and their arrangement into one scheme (the basic structure of society) satisfy and are with reason believed by everyone to satisfy these principles. (3) The public conception of justice is founded on reasonable beliefs that have been established by generally accepted methods of inquiry. … (4) [The members of a well-ordered society are, and view themselves as free and equal persons which means that they] have, and view themselves as having, a sense of justice (the content of which is defined by the principles of the public conception) that is normally effective (the desire to act on this conception determines their conduct for the most part). (5) They each have, and view themselves as having, fundamental aims and interests (a conception of their good) in the name of which it is legitimate to make claims on one another in the design of the institutions. (6) They each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be regulated. … (7) Basic social institutions generate an effective and supporting sense of justice." John Rawls, "Fairness to Goodness," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, 1999), pp. 278–279.

pluralism of *Liberalism*, the "reasonable" is a legitimate source of pluralism already within an ideal theory. Having achieved "the best of foreseeable conditions" in the empirical world would not do away with pluralism in its reasonable form. But while Rawls extends his theory in the direction of pluralism at the ideal level, he looks for an overlapping consensus of real-life reasonable doctrines as well. His concept of the reasonable in *Liberalism* disrupts the consensus of the ideal well-ordered society of *Theory*, but only within certain limits—limits that could be reasonably acceptable to a plurality of religious and moral comprehensive doctrines.

To examine which conditions could be favorable enough to permit a Rawlsian reasonable society to come about is thus *not only* a problem of the inner coherence of his view. If "existing reasonable comprehensive doctrines" would not endorse the kind of principles Rawls proposes, the conception would not be stable.[9] The reasonable doctrines he talks about can be understood not only as analytical parts of the model (which can be manipulated by the definitions of the theorist), but also as more robust views of life as they appear in actual democracies. Any of the main formulations of the problem of political liberalism that Rawls gives us in the introduction to *Liberalism* seem to allow this dual reading. Rawls reaches towards an inner coherence of the conception of justice that would also be a realistic ideal for contemporary democratic societies. One of his formulations is the following: "The problem of political liberalism is to work out a conception of political justice for a constitutional democratic regime that the plurality of reasonable doctrines—always a feature of the culture of a free democratic regime—might endorse."[10]

As formulated, the problem immediately specifies some normative concepts. These include *democracy*, *reasonableness*, and *freedom*.[11] The question itself, however, is not posed directly as a normative one—not with the verb "should" but with "might." This "might" leaves the conception dependent on the content of the real comprehensive doctrines, although some of them are excluded as unreasonable.

Another formulation of the problem of political liberalism is stated similarly as a problem of a possible society. The words "How is it possible ...?" are followed by normative concepts, including *stability* and *equality*: "... that there may exist over time a stable and just society of free and equal citizens ...?"[12] Finally there is the factual assumption of *pluralism* and the normative assumption of reasonableness: "...profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[13]

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9   Rawls (*Liberalism*, p. xx) writes: "[P]olitical liberalism takes for granted not simply pluralism but the fact of reasonable pluralism; and beyond this, it supposes that of the main existing reasonable comprehensive doctrines, some are religious."

10   Ibid., p. xx.

11   We may expect that the "conception of political *justice* [my emphasis]" (ibid., p. xx) includes other normative elements as well.

12   Rawls, *Liberalism*, p. xx. The concept "just" is of course there, too. But once equality and stability are added, it becomes increasingly difficult to see exactly what normative elements Rawls includes in political liberalism already in the formulation of its problem.

13   Ibid., p. xx. Rawls continues with another formulation of the problem: "Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?"

One difficulty in reading these formulations is that they do not tell us directly which of their normative requirements are supposed to be the more realistic ones. It is possible that freedom, included in the basic rights, and a democratic form of government are the more realistic normative requirements. At least the relative success of liberal political thought would suggest this. Thomas Nagel has remarked that although particular branches of liberalism are frequently criticized, nowadays the Western political argument usually "goes on between" these branches.[14] Yet we must say that extensive ideals of freedom, reasonableness, and equality—including social and economic structures—are controversial.

Towards Reasonable Democracy and Beyond

The historical account that Rawls gives in the introduction to *Liberalism* supports this kind of approach to the problem of political liberalism, an outlook in which basic rights and some form of democracy are seen as the most realistic part of his utopia. Such ideals have a relatively successful history. Rawls placed their origins in the Reformation and its aftermath in the sixteenth and the seventeenth centuries. In particular, the ideal of religious toleration was an issue then. At first it was not thought to be possible except in a somewhat marginal sense. Little by little, however, it gained more currency until it became a (relatively) permanent feature of modern democratic regimes.[15] For Rawls the idea of religious toleration serves as a prime example of how reasonable people can live peacefully and reasonably together.[16] Rawls gives medieval society dominated by Catholic Christianity as his prime example of a nonliberal society. Accordingly, the democracies of Rawls's time are closer to the well-ordered society of Rawls's political liberalism than medieval Catholic societies were.[17]

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14   Nagel has observed that its "great historical figures are Locke, Rousseau, Constant, Kant, and Mill, and, in our century, its intellectual representatives have included Dewey, Orwell, Hayek, Aron, Hart, Berlin, and many others. With the recent spread of democracy, liberalism has become politically important in countries throughout the world." Thomas Nagel, "Rawls and Liberalism," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), p. 62.

15   Rawls, *Liberalism*, pp. xxiii–xxxii. Rawls (ibid., p. xxvi) credits neither Luther nor Calvin with this development. Following Hegel's thought, Rawls says that "pluralism made religious liberty possible, certainly not Luther's and Calvin's intention."

16   The growing importance of this idea in Rawls's thought after *Theory* becomes clear for example in his "Reply to Alexander and Musgrave (1974)" (in *Papers*, p. 235) where he wrote: "It is far better to regard the notion of a well-ordered society as an extension of the idea of religious toleration than of the idea of a competitive economy."

17   Rawls, *Liberalism*, p. xxv. Rawls (ibid., p. xxiii) does not contrast his idea of a politically liberal society to the ancient Greek society as sharply: "The Greeks celebrated Homer and the Homeric poems were a basic part of their education, but the Iliad and the Odyssey were never sacred texts. As long as one participated in the expected way and recognized the proprieties, the details of what one believed were of no great importance." Daniel A. Dombrowski says, however: "Rawls is on a shaky ground when he claims, without argument, that Homer's *Iliad* and *Odyssey* were not sacred texts (in what sense were they not sacred?—Plato was scandalized by Homer's stories because they inaccurately portrayed the *gods*), that

Having this historically based approach in front of us, we may compare it to the ideas in Rawls's theoretical approach. One important question for Rawls is: How religious people are able to endorse the main lines of political liberalism.[18] Rawls tries to clear the path for them by saying that political liberalism follows Hume's and Kant's comprehensive liberal views only in a limited sense. In relation to religion, Rawls explicates three assumptions that he regards characteristic for both Hume and Kant:

1. Every "normally reasonable and conscientious" person, not only a few (clergy or other elite), know or are aware "of how we are to act."
2. Morality is not derived from God's intellect but arises from human nature and "the requirements of our living together in society."
3. We do not need external sanctions (by God, state, or the like) for moral motivation but "we have in our nature sufficient motives."[19]

Rawls affirms these assumptions in the limited political questions he is working on, but does not take "a general position" on them in the sense that Hume and Kant did. He thus aims at limiting the range of these assumptions enough for it to be possible for a religious comprehensive doctrine to be reasonable, without affirming much of what Enlightenment trumpeted.[20] It is not immediately clear, however, if it is realistic to think that other than thoroughly secularized Christian views could endorse such assumptions even in the limited area of political morality. Moreover, Rawls says here that the background culture is relevant to political morality.[21] This does not suggest that the limited political range is notably small.

Existing democratic societies and the various comprehensive doctrines are important sources of conceptual material for Rawls. On the other hand, political liberalism is presented as a freestanding conception with its own fundamental ideals, and other ideas that cannot necessarily be reduced to either of these sources. This

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Greek religion was not dependent on priests (what of the priests and priestesses at the holiest place in ancient Greek religion, Delphi?), and that in Greek religion immortality did not play a central role (although not a negligble role, either, as in the Orphic cult, the Pythagoreans, and the Eleusinian mysteries) [Dombrowski's emphasis]." Daniel A. Dombrowski, *Rawls and Religion: The Case for Political Liberalism* (Albany, 2001), pp. 3–4.

18   Rawls, *Liberalism*, pp. xxvi–xxx. In his new introduction to the book, Rawls (ibid., xxxix-xli) emphasized this challenge behind political liberalism.

19   Ibid.*,* pp. xxviii–xxix.

20   Ibid., pp. xxviii–xxx. Rawls (ibid., p. xxix) comments on these assumptions further: "They [Hume and Kant] believe that the moral order arises in some way from human nature itself, as reasons or feeling, and from the conditions of our life in society. … Indeed, both Hume and Kant are about as far as one can get from the view that only a few can have moral knowledge and that all or most people must be made to do what is right by means of such sanctions."

21   Ibid., p. xxx. "The general problems of moral philosophy are not the concern of political liberalism, except insofar as they affect how the background culture and its comprehensive doctrines tend to support the constitutional regime."

left Rawls and his contemporaries with at least three different conceptual categories of ideals:

1. ideals that were already realized in the liberal democracies of the late twentieth century;
2. ideals that should have been realized in the liberal democracies of the late twentieth century according to comprehensive doctrines, which are often incompatible; and
3. ideals that could reasonably have been realized in the liberal democracies of the late twentieth century.

In the early twenty-first century, our prospects for making various ideals come true are somewhat different from those of Rawls and his contemporaries. Nevertheless, the fundamental distinctions between these three kinds of ideals remain, and they give rise to intriguing controversies as to which ideals *are already realized*, which ideals *should be realized*, and which ones *could reasonably be realized*. An approach emphasizing the realism of a realistic utopia would concentrate on the ideals that are already realized (1). If we adopt a dominantly utopian approach, we would formulate a comprehensive societal ideal regardless of its incompatibility with a number of other comprehensive ideals, as in (2). Political liberalism, finally, combines the realized and utopian ideals on the basis of what is reasonably possible (3).

Part of the difficulty of reading Rawls's later publications is that it is not always clear which of these three categories he is applying. Sometimes he starts from an at least partially realized liberal democracy (the United States), sometimes from a comprehensive doctrine (a Kantian one), and sometimes from one or more ideals defined in political liberalism itself (as a freestanding view). Controlled shifts between the three starting points and the corresponding categories of ideals can be used to deepen both the ideal and realistic dimensions of the conception. How Rawls did this is a challenge for *analysis*. A challenge for *critical analysis* includes the question of how well his political liberalism is able to deal with the problems related to any of the categories, once they are specified. Further steps of *constructive criticism* include the examination of certain possibilities to articulate the requirements of reasonableness, democracy, common goods, etc. in thinner, thicker, or in otherwise different forms.

I use the term *reasonable democracy* to refer to a reading of the well-ordered society that I use for the purposes of analysis and constructive criticism. Let the definition be:

D6   Reasonable democracies are well-ordered societies that are outcomes of functioning democratic procedures and reasonable communication.

This reading is not immediately available in Rawls's texts, but it provides certain opportunities to clarify justice as fairness and its alternatives that are, nevertheless, reasonably democratic. D6 includes two fundamental criteria of Rawls's later views— reasonableness and democracy—while it allows flexible variation of the additional criteria of the well-ordered society. Quite different well-ordered societies could be

both democratic and reasonable. Thus, this definition allows us to supplement the two criteria with additional criteria that might be needed for a full account of a well-ordered society. Accordingly, I will take up more substantial ideals from justice as fairness, step by step, and ask in which sense the added assumptions might be acceptable.

Does the approach of P6 imply too much weight for the concepts of reasonableness and democracy in the modified conception as a whole? Not necessarily. P6 allows a wide range of different reasonable democracies, but this does not imply that all reasonable democracies are equally just, good, and feasible. The framework I develop encourages us to balance a broad variety of intuitive appealing ideals. Reasonableness and democracy are relatively important among them.

One of the major themes in Rawls's later work was the shift of emphasis from the general assumptions of the circumstances of justice to the more specific assumptions of the circumstances of a reasonably liberal democratic regime. Although the circumstances of reasonable democracy are more limited than any "circumstances of justice," as Rawls uses the term, his account of the circumstances of justice included several controversial assumptions. Once we are aware of these, we are in a better position to discuss the circumstances of reasonable democracies and to elaborate a framework for further extensions and balancing.

Objective and Subjective Circumstances of Justice

In addition to the three positions mentioned in the introduction to *Liberalism* (the rejection of moral elitism, the rejection of theistic morality, and the rejection of external moral sanctions),[22] there is at least one part of Rawls's conception where he is close to Hume's view: the description of the circumstances of justice. Rawls used the idea of the circumstances of justice already in his article "Justice as Fairness," where he modeled an early version of the original position. In *Theory* Rawls clearly said that he follows Hume in the idea of circumstances of justice. He worked with the idea primarily as a moral theorist, not as an historian of ideas.[23] Nevertheless, for both Hume and for Rawls these are circumstances in which the questions of justice arise. They are, namely, "marked by a conflict as well as identity of interests."[24] But what are these circumstances, more exactly? And where are they supposed to prevail—in the original position, in a well-ordered society, or in real societies?

In *Theory* Rawls makes a distinction between objective and subjective circumstances of justice. One of the objective circumstances of justice he mentions is that "many individuals coexist together at the same time on a definite geographical

22   Rawls, *Liberalism*, pp. xxviii–xxix.

23   Rawls, *Theory*, pp. 127–128/110 rev.

24   Ibid., p. 126/109 rev. As Hume put it in the section to which Rawls referred: "Here then is a proposition, which, I think, may be regarded as certain, *that 'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for its wants, that justice derives its origin* [Hume's emphasis]." David Hume, *A Treatise of Human Nature*, ed. Ernest C. Mossner (London, 1969), bk. III, pt. II, sec. ii.

territory."[25] This circumstance seems to be present in real societies. But it is often difficult to define a relevant geographical territory. In which sense did the borders of the British Empire in the early 1770s form an appropriate geographical territory for considerations of social justice, or the borders of the colony of Virginia—either before 1776 or after? Nowadays Finns often wonder, whether the borders of Finland define the most relevant territory for their considerations of social justice, or those of the European Union.

Thomas Pogge has suggested that it is even "Rawls's most important conservative stipulation" that he has worked so strongly on the assumption that national borders are something like "moral watersheds."[26] Pogge starts, instead, with the whole globe. Many options are compatible with the territory criterion, but not all at the same time. While working with the well-ordered society as a theoretical construct, we may keep the question open for a while. However, if we wish to see a particular society as a well-ordered society, we should somehow fix the geographical or other borders of that society. Among Rawls's main grounds for focusing on national states is that they use coercive power which should be "the power of the public."[27] His other assumption is that people develop their identity within a certain society.[28] But even if national identity deserves this special place in a theory, its more exact role remains open to further debate.

The second objective circumstance of justice Rawls mentions is that the "individuals are roughly similar in physical and mental powers."[29] At this point he gives two specific criteria for this rough similarity. The individuals "are vulnerable to attack" and the others, if united, can block the plans of any particular individual.[30] If we really include only these two criteria into the rough similarity of physical and mental powers, we may agree that this holds for real people in real societies. However, for example, the difference in physical strength need not be broader than that between women and men, and the practical implications of this difference may be remarkable.[31] By way of comparison, the parties in the original position are far

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25   Rawls, *Theory*, p. 126/109 rev.

26   Pogge continues: "He [Rawls] thereby circumvents a crucial moral question, which his theory ought to *answer*, namely whether the institutionalization of national borders really has this magical force of shielding us from (or reducing the force of) the moral claims of 'foreigners' [Pogge's emphasis]." Thomas Pogge, *Realizing Rawls* (Ithaca, 1989), p. 10.

27   Rawls, *Liberalism*, p. 68. Rawls (ibid., pp. 61–62) goes so far as to say: "[C]itizens as free and equal have an equal share in the corporate political and coercive power of society." It is clear enough, though, that states and international (military) organizations more or less regularly use coercive power regardless of the boundaries of national states.

28   Ibid., pp. 40–41, 68.

29   Rawls, *Theory*, pp. 126–127/109–110 rev.

30   Ibid., p. 127/110 rev.

31   Simone de Beauvoir said in *Le Deuxième Sexe* that although a certain advantage of men in terms of physical strength was important in primitive societies, technological development can nullify this advantage. On the other hand, she argued that among the various physical differences between sexes the most important is that women give birth. Men have used this to keep women's public role relatively modest. Simone de Beauvoir, *Le Deuxième Sexe I. Les Faits et les Mythes* (29th edn, Gallimard, 1949), pp. 197–198.

more similar and equal in these respects, if not identical. In a well-ordered society people may be as varied in their physical and mental powers as in a real society. However, they are supposed to have less interest in attacking anyone because they already have secured their basic rights, fair opportunities, etc.

The third of the objective circumstances of justice Rawls mentions here is moderate scarcity. There is no extreme abundance of "[n]atural and other resources," but the conditions are not "so harsh that fruitful ventures must inevitably break down."[32] Such circumstances may well prevail both in real and in well-ordered societies, but again: there are significant variations in degree. There are variations between societies in different geographical territories. Some have abundant natural resources, while others do not. One could perhaps include in "other resources" such cultural resources as social trust. Trust, in turn, may have deep roots in the particular religious traditions of the society, among other things.[33] The questions of both degree and quality are complicated here: how much trust and what sort is needed in order that "fruitful ventures" do not break down?

Generally, Rawls understands the subjective circumstances of justice in *Theory* as "the relevant aspects of the subjects of cooperation, that is, of the persons working together."[34] This broad characterization is then specified by a more detailed description of such aspects of the subjects. Rawls assumes that the needs and interests of the persons in the circumstances of justice are "roughly similar" or complementary. They are supposed to have their "own plans of life" and to be mutually disinterested. In addition, Rawls assumes that their philosophical, religious, political, and social beliefs and doctrines are diverse.[35] He mentions in particular the "spiritual ideals of saints and heroes" as the sources of the conflicts that are "most tragic of all."[36]

Rawls's notion that the spiritual ideals of saints and heroes have been sources of conflicts has some appeal, both for theory-building and for the study of reality.

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32   Rawls, *Theory*, p. 127/110 rev.

33   Robert Putnam has studied in detail how the cultural tradition marked by networks of trust in northern Italy has included more social capital for development of political institutions than the culture of southern Italy. He notes that this accords with Alexis de Tocqueville's observation: "Democratic government is strengthened, not weakened, when it faces a vigorous civil society." Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, 1993), p. 182.

34   Rawls, *Theory*, p. 127/110 rev.

35   Ibid., p. 127/110 rev. Rawls says that his account "adds nothing essential" to Hume's more detailed discussion, but this notion is questionable. In particular, Hume's assumptions regarding self-interest and sympathy for public interests (or "confin'd generosity," Hume, *A Treatise of Human Nature*, bk. III, pt. II, sec. ii) appear to have significantly different content than Rawls's assumption of mutual disinterest. Hume (ibid., bk. III, pt. II, sec. ii.) writes: "*Thus self-interest is the original motive to the* establishment *of justice: but a* sympathy *with public interests is the source of the* moral approbation, *which attends that virtue* [Hume's emphasis]." He then describes how the artifice of politicians is needed to "assist nature in the producing of those sentiments." Eventually (when young people are socialized), this involves taking merit into account: "What farther contributes to encrease their solidity, is the interest of our reputation, after the opinion, *that a merit or demerit attends justice or injustice*, is once firmly establish'd among mankind [Hume's emphasis]." Ibid., bk. III, pt. II, sec. ii.

36   Rawls, *Theory*, 129/112 rev.

It is hard to see, however, what kind of generalization we are asked to swallow. Apparently Mother Teresa had a saintly ideal and even a heroic plan to make it true in the streets of Calcutta. But was her pursuit a source of conflicts of the sorts that are "most tragic of all"? In the medieval world there surely were saints who like Bernard of Clairvaux, preached the crusades, and heroic knights who went out on their behalf.[37] However, there were also advocates of nonviolence, like Peter Waldès and Alan of Lille[38]—not to speak of lovers of a simple life in peace akin to Saint Francis of Assisi. Such are instances from real societies, where religious and secular motives are intertwined in highly complicated ways, as studies by the historians and sociologists have shown. Today's world is probably even more complex in these respects, but Rawls's theoretical approach is quite simple. From his theoretical perspective, in "an association of saints … disputes about justice would not occur."[39] The saints "work selflessly" for a conception of the common good. Compared to this, Rawls's account of the circumstances of justice is more realistic, at least in the sense that it takes conflicting interests into account.[40] However, Rawls's theoretical approach may not help us to study the situations in which the conflict is not only about interests but also about identity—in a complex social world.[41]

Actually, Rawls was not satisfied with his account of the subjective circumstances of justice in *Theory* for long. In *Liberalism* he returned to the topic with a revised concept of reasonableness.

Circumstances of Reasonable Justice

Rawls's concept of reasonableness is more specific in *Liberalism* than it was before. It includes theoretical elements of fair social cooperation and a characterization of factors that make the specification of the exact content of the fair terms difficult. He states these *two basic aspects of reasonableness* together as follows:

> The first basic aspect of the reasonable, then, is the willingness to propose fair terms of cooperation and to abide by them provided others do. The second basic aspect, as I review now, is the willingness to recognize the burdens of judgment and to accept their

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37   James J. Megivern speaks of the development of the romanticization of fighting and violence. Related to it, St. Bernard's (1090–1153) theological "stance was that of the long tradition against churchmen being directly involved in bloodshed. … But no such restrictions held when it came to the Knights Templar. They were 'a new kind of soldier,' pledged to combine spiritual and temporal warfare, whose weapons only resulted in, not homicide, but 'malicide.'" James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (New York, 1997), pp. 61, 66–67.

38   Megivern, *The Death Penalty*, pp. 99–107.

39   Rawls, *Theory*, p. 129/112 rev.

40   Ibid., pp. 129–130/112 rev.

41   For example, sociologist Peter Beyer has suggested that it is fruitful to study the reaction to Salman Rushdie's book at the level of identity: "The key to the problem of *Satanic Verses* for many Muslims is that it represents the larger global pressure towards the relativization of religion and group-cultural identity as the price for fuller inclusion in the global system. They are asked to bracket who they are and what they hold most sacred." Peter Beyer, *Religion and Globalization* (London, 1994), p. 4.

consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime.[42]

The first basic aspect comes close to the commonsensical interpretation of the original position—as far as "fair terms" are understood as terms that could be acceptable in the original position if its technicalities are not necessarily taken rigorously. But it is noteworthy that the first basic aspect enters into full effect only in a well-ordered society. That is, the terms enter into force if and only if others are willing to abide by them. But who are the properly "willing" people in a real society? This is not an easy thing to say. At least from this perspective it still makes sense when reading *Liberalism* to adhere carefully to the distinction between a real and a well-ordered society.

The second basic aspect of the reasonable can be understood as an updated notion of an important part of the subjective circumstances of justice. The burdens of judgment explicate many of the subjective elements that seem to be permanently present in the discussion of social cooperation and its fairness. In short, the burdens of judgment are:

1. the complexity of evidence,
2. the disagreement about the weight of considerations,
3. the vagueness of all our concepts,
4. the influence of a person's total experience,
5. the difficulty of making overall assessments, and
6. the limited social space for different values.[43]

In these burdens of judgment Rawls explicates elements of subjectivity in any normative consideration. They are now included in justice as fairness as the second aspect of reasonableness. The burdens of judgment seem to confirm much of what I said above about Rawls's account of the objective and the subjective circumstances of justice in *Theory*. Even if the core of the proposed circumstances of justice is acceptable, disagreements are likely to follow quickly when quality and degree are taken into account. As far as the burdens of judgment confirm this, they seem to talk quite credibly about moral discussions in real pluralist societies. But much remains open in Rawls's account concerning what it means to be willing "to recognize the burdens of judgment and to accept their consequences."[44]

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42   Rawls, *Liberalism*, p. 54.

43   Ibid., pp. 56–57. In *Justice as Fairness* Rawls does not include item (6) in the list. He seems to think that the fact that any social space for values is limited is not a particular source of disagreement, because no one really denies it. John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, 2001), pp. 35–36.

44   Rawls's (*Liberalism*, pp. 54, 57) basic approach is that "a political conception tries to avoid, so far as possible, disputed philosophical theses and to give an account of the burdens of reason that rests on plain facts open to all." However, it seems that controversial argumentative steps would be necessary to study the possible consequences of the burdens of judgment.

One might assume that the first basic aspect of reasonableness, i.e. the fair terms aspect, holds primarily in the well-ordered society, while its second basic aspect, i.e. the burdens of judgment aspect, holds primarily in real societies. This assumption can be clarified by a comparison of *pluralism* and *reasonable pluralism*. We may expect that reasonable pluralism dominated by the burdens of judgment differs little from mere pluralism. Agreement on certain basic democratic procedures may prevail but not much else. In a somewhat more idealized version the fair terms aspect of reasonableness were also stressed. However, the burdens of judgment would significantly disturb attempts to advance social cooperation on fair terms. Finally, if one assumes that both aspects of reasonableness can be taken into account relatively harmoniously, we find ourselves working primarily with an ideal well-ordered society of reasonable pluralism.

With extensive references to empirical studies on the United States of the late twentieth century, George Klosko has argued that there is hardly any consensus on anything aside from certain procedural principles.[45] This supports the suggestion made above to call the latter two kinds of reasonable pluralism idealized concepts. Amy Gutmann and Dennis Thompson have used concepts similar to those of Rawls in noting that people argue on fair terms occasionally. According to Gutmann and Thompson people should only strengthen this aspect in their argumentation.[46]

Let us now move on to Rawls's explicit accounts of the "historical and social conditions of modern democratic societies." He uses this expression in reference to a list of five facts in his article "The Idea of Overlapping Consensus" (1987).[47] Later, in *Justice as Fairness*, he repeated the same list with the same heading. The sixth point about burdens of judgment (F10 below) was added. Except for this, virtually the only difference between the lists is that "the fact of pluralism" is now the "fact of reasonable pluralism." Otherwise the quoted expressions are the same in both:

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45   Klosko formulates these principles as follows: "(*a*) support for democracy as a central political value; (*b*) the need to support democratic political procedures; (*c*) a range of rights for all citizens, which must be generally respected; (*d*) respect for those rights necessary for the proper functioning of democratic processes; (*e*) distribution according to merit, supported by real equality of opportunity, in the economic sphere." George Klosko, *Democratic Procedures and Liberal Consensus* (Oxford, 2000), p. 230.

46   As Gutmann and Thompson put it: "Since on occasion citizens and their representatives already engage in the kind of reasoning that those principles [deliberative principles that can guide the practice of democracy] recommend, deliberative democracy simply asks that they do so more consistently and comprehensively." In this context they stress the principle of reciprocity, which they think to fall somewhere between impartiality and prudence. They continue that reciprocal citizens "seek fair terms of social cooperation for their own sake." Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, 1996), p. 2.

47   John Rawls, "The Idea of an Overlapping Consensus (1987)," in *Papers*, p. 445.

F5   the "fact of reasonable pluralism" (according to Justice as Fairness);

F6   the "fact of its permanence;"

F7   the "fact of oppression," i.e. "the fact that this pluralism can be overcome only by the oppressive use of state power;"

F8   the "fact of moderate scarcity;"

F9   the "fact of there being numerous possibilities of gains from well-ordered social cooperation, provided it can be established on fair terms;" and

F10   the "fact of the burdens of judgment" (according to *Justice as Fairness*).[48]

However, when we read F5 as in *Justice as Fairness* (reasonable pluralism), the meaning of the pluralism referred to in F6 and F7 also changes significantly compared to the earlier version. Indeed, the status of F6 and F7 as statements of facts about modern democratic societies might well be questioned. To what extent are the prevailing forms of pluralism really reasonable pluralisms?[49] And F9 refers to "fair terms" in a way which may well be questioned in realistically pluralist circumstances.

From the list of six facts (F5–F10) as given in *Justice as Fairness*, I would count F8 (the fact of moderate scarcity) and F10 (the fact of the burdens of judgment) as the most unquestionable factual propositions about real societies. F9 (the fact of gains from fair cooperation) seems relatively unquestionable as well, but it refers only to possibilities and it leans on a rather thick notion of fair terms. Hence, before suitable steps are taken, the status of F9 as a factual proposition remains somewhat open. There probably is much truth in it, though, as well as in F5, F6, and F7. There is no need to endorse them before discussing the concept of reasonableness more thoroughly.

Rawls has also explicated other factual claims about real societies. From those he dealt with in *Theory*, I crystallize two that I see no need to question seriously:

F11   the fact that people live in defined territories and

F12   the fact that people are vulnerable and needy.

In *Liberalism* Rawls makes one additional assumption that relies on a conception of democratic society:

F13   the fact that enduring democracy "must be willingly and freely supported by at least a substantial majority of its politically active citizens."[50]

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48   Rawls, *Justice as Fairness*, p. 197. The quoted phrase the "fact of oppression" is taken from Rawls, *Liberalism*, p. 37.

49   Perhaps pluralism is more permanent than reasonable pluralism, and perhaps there are other ways to move away from reasonable pluralism than by oppression. In particular, people may not want to be most reasonable, but pluralism among them would flourish.

50   Rawls, *Liberalism*, p. 38. Rawls explains further: "[T]his means that to serve as a public basis of justification for a constitutional regime a political conception of justice must be

This could also be stated as a norm, because it tells something of what an enduring democracy "must be." However, it can be taken as a kind of a norm that already is a part of an existing democracy. Rawls has given one explicit form to it—one that is not beyond question.

In addition to these, a major group of factual claims in Rawls's conception falls under the heading reasonable psychology.[51] This is another area where the utopian and realist aspects of the conception are intertwined in a complicated way. I return to this theme in 3.3.

Above, I explicated three categories of ideals in Rawls's conception of reasonable democracy: (1) ideals that have already been realized, (2) ideals that should have been realized according to comprehensive doctrines, and (3) ideals that could reasonably have been realized in the liberal democracies of the late twentieth century. Factual claims F5–F13 help us in the further analysis of the ideals related to the third category, in particular. Something like *democratic* pluralism has existed in the democratic societies of the recent decades, but not full-scale *reasonable* pluralism. Eventually, the analysis of the ideals that could reasonably have been realized in the liberal democracies of the late twentieth century can provide us with tools to consider which ideals might reasonably be realized in the twenty-first century.

So far, I take F8 (moderate scarcity), F10 (burdens of judgment), F11 (people in territories), and F12 (people as vulnerable and needy) to be relatively firm factual claims about real societies. I take them to be among the circumstances in which a reasonable democracy might work. However, we should carefully avoid emphasizing even these arbitrarily. Particularly in an era of intensified globalization, we should avoid stressing too much the fact that people are living in defined territories (F11).

2.2 Reasonable Democracy as a Procedure

Constitutionalism and Democracy

The fact that enduring democracy "must be willingly and freely supported by at least a substantial majority of its politically active citizens" (F13) is only one example of Rawls's reliance on democratic ideals, institutions, and culture. The more specific meaning of these concepts, however, is far from clear. Here, I turn to certain theorists of constitutional democracy who have been either Rawls's sources or his critics. In some claims Rawls joins them, in others not, and we may ask why. Frequently we return to the concept of democracy as well as to reasonableness.

In *Liberalism* Rawls mentions certain principles of constitutionalism which prepare the way for his further argument. Rawls starts with the Lockean distinction between the people's constituent power as the Higher Law and the ordinary power of the governmental officers and the electorate. In the Lockean view a democratic

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one that can be endorsed by widely different and opposing though reasonable comprehensive doctrines."

51   Rawls, *Justice as Fairness*, pp. 195–196.

constitution is "a principled expression" of a people's constituent power. Rawls adds: "The aim of public reason is to articulate this ideal."[52]

It belongs to Rawls's approach that the citizens fix "once and for all certain constitutional essentials," including basic rights and democratic procedures.[53] In this view, neither the legislature nor a supreme court has the ultimate power. The branches of the constitutional government are related to each other in "duly specified" ways so that each of them is "responsible to the people."[54] Rawls is particularly concerned with the power of legislative majorities. The legislators should be responsible to the people in other ways than simply by virtue of having to be elected by them. Reasonable political conceptions are needed to evaluate which governmental structures and related politics are due—also morally due.[55]

One constitutional scholar Rawls refers to at this point is John Agresto. Agresto takes American constitutionalism basically as an "idea of a written statement of binding principles and rules."[56] As a major problem, however, Agresto sees that to take such principles as the authority is not necessarily the most democratic solution. Frequent elections without further constitutional control may be a better means to make the legislation accord with the popular will. Constitutional principles may be democratic in one sense, but they also imply "restraints on the democratic will itself."[57]

Rawls's account of constitutionalism in *Liberalism* recognizes this tension. His solution is to give certain priority to constitutional principles. They should, in turn, be in line with "the most reasonable political conception of justice."[58] The basic rules for actual democratic processes are defined in a written constitution, but the results of the process are still subordinated to a reasonable interpretation of the constitutional

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52   Rawls, *Liberalism*, pp. 231–232.

53   Ibid., p. 232. Rawls continues: "It is through these fixed procedures that the people can express, even if they do not, their reasoned democratic will, and indeed without those procedures they can have no such will."

54   Ibid., p. 232.

55   In a footnote Rawls (ibid., pp. 232–233) suggests that this principle was expressed by Abraham Lincoln in his debate with Stephen Douglas about slavery. In "The Idea of Public Reason Revisited (1997)" (in *Papers*, pp. 609–610), Rawls returned to the example. His basic point is that Lincoln was not willing to exclude from politics his reasonable moral conviction that slavery is wrong. Douglas, on the other hand, was willing to grant too much power to the mere legislative majorities. When discussing the same example, Michael Sandel welcomes the idea that "it is not possible to detach politics and law from substantive moral judgment" in such matters. However, he says that moral liberalism can hardly avoid "violating its own strictures against appeals to comprehensive moral ideals." Michael Sandel, *Democracy's Discontent: America in Search of Public Philosophy* (Cambridge, 1996), p. 23.

56   John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, 1984), p. 48.

57   Ibid., p. 53. He continues: "Constitutionalism is, in brief, a method by which the democracy purposefully guides its activity in the light of certain expressed principles, and restricts its own actions now and in future. Constitutionalism was surely meant [in the early United States] as a limitation on the unbridled exercise of legislative power. And by that very fact it was also a conscientious limitation on the ordinary power of the popular will itself."

58   Rawls, *Liberalism*, p. 233.

principles. This leaves us to ask whether the role of actual democratic process is quite modest in Rawls's view. Note that here Rawls presents the constitutional principles and the most reasonable political conception of justice (with its account of public reason) largely as the same thing. However, one cannot find Rawls's two principles of justice in the Constitution of the United States, nor can he find there a description of the veil of ignorance. Mediating philosophical work must be presumed or undertaken. Finally, democracy may be significantly weakened if constitutional democratic procedures are limited both by constitutional principles and by these principles as elaborated and expressed in Rawls's "most reasonable" conception.

In defending the primacy of constitutional principles compared to actual democratic processes, Rawls joins Bruce Ackerman's conception of the dualist democracy.[59] In the dualist model the people have constituent power, which is expressed in the higher law of the constitution. The government is then to use its ordinary power constitutionally. Compared to Rawls's account, however, Ackerman would keep more distance between the constitutional principles themselves and the philosophical conceptions that are offered to accompany and check them. Ackerman believes that Rawls has imported Kantian philosophy into American constitutionalism in a similar vein as Nozick has imported Lockean philosophy.[60] Ackerman does not want the dualist conception to depend either on the descriptions of "abstract individuals, divorced from their social contexts," or on the notions of "'natural rights' to property and contract."[61] Nevertheless, in a footnote he includes Rawls's article "Justice as Fairness: Political not Metaphysical" (1985) among the sources he does not criticize.[62] So it seems that Ackerman is worried about the Kantian starting point in Rawls's conception, but not about Rawls's other starting point in the Constitution of the United States. For Rawls these starting points support each other. Ackerman is doubtful about this.

In defending dualism Ackerman rejects what he calls monism. He defines its core idea as follows: "Democracy requires the grant of plenary lawmaking authority to the winners of the last general election—so long, at least, as the election was conducted under free and fair ground rules and the winners don't try to prevent the next scheduled round of electoral challenges."[63] In this monistic view, he continues, institutional checks between elections are seen as antidemocratic. Ackerman regards this school as the dominant one in the twentieth-century United States. Its model, however, is the British parliamentary practice. In the United Kingdom the House of Lords, the Queen, and the Court let the House of Commons govern pretty much on its own. In particular, the ruling party has a remarkably free hand until the people

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59   Ackerman's dualism is basically in line with the principles of constitutionalism mentioned above—or so at least Rawls presents the case.

60   Bruce Ackerman, *We the People 1: Foundations* (Cambridge, 1993), p. 11.

61   Ibid., p. 30. In this passage he attaches Rawls to the same line of thought with J. S. Mill and Dewey. He says: "Rather than grounding personal freedom on some putatively prepolitical 'state of nature,' this kind of liberalism makes the cultivation of *liberal citizenship* central to its enterprise [Ackerman's emphasis]."

62   Ibid., pp. 327–328; John Rawls, "Justice as Fairness: Political not Metaphysical (1985)," in *Papers*, pp. 388–414.

63   Ackerman, *We the People 1*, p. 8.

say their word in the next election. In line with this ideal, a monist is quick to start complaining about a "countermajoritarian difficulty" if, for example, the Court intervenes in the practice. But a dualist like Ackerman would argue that the courts serve democracy best when they protect "the hard won principles of a mobilized citizenry against erosion by political elites."[64]

Rawls joins Ackerman here. He confirms that "[p]arliamentary supremacy is rejected."[65] In line with Ackerman Rawls says that the Court's process of judicial review may be "antimajoritarian with respect to ordinary law," but not "with respect to higher law."[66] Clearly enough, much is counted on the constitution being of right kind and the ability of the courts to interpret it in a right way. It is worth noting here that Rawls uses the term reasonable again, saying that the higher law must "reasonably accord with the constitution itself."[67] This is accompanied by his idea that the American Supreme Court is an exemplar of the use of public reason. The members of the Court are to justify their decisions consistently and solely by the constitution and connected to the "political values of the public conception."[68] Rawls makes it plain that there are "reasonable variants" of such public reason. In any case, the justices must hold their personal values, religious or philosophical, as irrelevant.[69]

When "constitutional essentials and basic justice" are not at stake, Rawls says that the citizens in general are not required to follow public reason as the justices of the Supreme Court are.[70] But a few pages later he seems to advocate a broader role for public reason. Here public reason means pretty much the same as Rawls's concept

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64   Ibid., pp. 8–10. He does not contrast, thus, the court's intervention to the will of people but to the will of the politicians: "[T]his ongoing judicial effort to look backward and interpret the meaning of the great achievements of the past is an indispensable part of the larger project of distinguish the will of We the People from the acts of We the Politicians." Ibid., p. 10.

65   Rawls, *Liberalism*, p. 233.

66   Ibid., p. 234. Rawls does not define what he means by judicial review, but it seems that he would have accepted Franck I. Michelman's definition: "a practice of some degree of reliance on an independent judiciary for effectuation of the constitutional essentials in the face of possibly wayward or careless legislative majorities." Franck I. Michelman, "Rawls on Constitutionalism and Constitutional Law," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), p. 403.

67   Rawls, *Liberalism*, p. 234.

68   Ibid., p. 236.

69   Ibid., p. 236. In a footnote Rawls says that he regards his conception as virtually the same as that of Ronald Dworkin's in *Taking Rights Seriously* (Cambridge, 1977) and in *Law's Empire* (Cambridge, 1986), Chapter 7. In the latter, Dworkin (ibid., pp. 226–227) distinguishes his view—law as integrity—from conventionalism and pragmatism: "Conventionalism requires judges to study law reports and parliamentary records to discover what decisions have been made by institutions conventionally recognized to have legislative power. … Pragmatism requires judges to think instrumentally about the best rules for the future. … Integrity does not require consistency in principle over all historical stages of a community's law[.] … It commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces."

70   Rawls, *Liberalism*, p. 235.

of the reasonable throughout *Liberalism*. Any of the reasonable comprehensive doctrines is supposed to articulate the reasonable political values, although with different backings and in somewhat different balances. Indeed, Rawls requires the citizens to limit themselves reasonably at the polls and in the related political debates: "What public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of public political values."[71]

At this point Rawls seems to assume that a relatively wide range of questions is relevant to public reason. Few pages further, he mentions the possibilities to extend public reason to the questions of future generations, international relations, health care, and the order of nature. He says that "justice as fairness can be reasonably extended to cover the first three" of these problems.[72] Only our relation to the natural world is clearly "a matter in regard to which citizens can vote their nonpolitical values."[73] Thus, much remains open as to which values—in voting as well as in the related discussions—Rawls really requires ordinary citizens to be able to explain in terms of public reason.

There are many ways to read Rawls for the purpose of extending the sphere of public reason. However, according to Rawls's account of reasonable democracy, the actual democratic process is to be limited in two ways at least. First, courts may intervene in it with reasonable interpretations of constitutional principles. Second, the citizens are to restrict themselves to reasonable grounds in voting and in political debates. In either case Rawls's focus is on matters of constitutional essentials and basic justice.

As a third limitation to democratic process we may mention the basic rights—although they can also be included in the two first restrictions. If we read Ackerman's formulation of the core idea of monism literally, it does not mention basic rights at all. In fact, perhaps the most obvious critical question for monists, or procedural democrats, is what would happen if the majority sought to trump the basic rights of the minority. But a somewhat different democratic theory, like that of Robert Dahl's,[74] does not really allow room for this possibility. Moreover, even Rawls regards it simply as a fact of political life that if a strong majority wants to assert its will, it can do so.[75] The question is rather whether we are to rely more on democratic

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71   Ibid., p. 243.

72   Ibid., 244–245.

73   Ibid., p. 246. Rawls (ibid., p. 246) first mentions a religiously founded attitude that "human beings should assume certain stewardship towards nature" and then continues: "In this case our attitude might be much the same as those who reject abortion on theological grounds. Yet there is this important difference: the status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice, as these have been specified." For Rawls, the right to abortion is a matter of public reason more than of our relation to the natural world. He tackled the question in more detail in a footnote where he (ibid., p. 243) says: "Now I believe that any reasonable balance of these three values [due respect for human life, ordered reproduction of political society, and equality of women] will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester."

74   Robert Dahl, *Democracy and Its Critics* (New Haven, 1989).

75   Rawls, *Liberalism*, p. 233.

process itself or on democracy with reasonable constraints to maintain a system in which basic rights are not at stake.

Rawls deals with similar matters in his discussion with Jürgen Habermas, published in 1995. Part of what makes this discussion interesting is that these philosophers could not use the Constitution of the United States as a common starting point.

Reasonable Communication in a Liberal Democracy

Habermas starts his article "Reconciliation through the Public Use of Reason" (1995) by celebrating Rawls as an outstanding renovator of Kantian moral philosophy. He takes Rawls as a developer of an intersubjective understanding of Kant's principle of autonomy, the core of which he formulates as follows: "[W]e act autonomously when we obey those laws which could be accepted by all concerned on the basis of a public use of their reason."[76]

Unfortunately, it seems to Habermas, Rawls's original position does not describe impartiality in a way that could work as a secure basis for justification. The constraints of impartiality—or neutrality, or the moral point of view—are situated in the wrong place: the veil of ignorance and the other restraints of the original position are to do the job. But when the knowledge of the parties is limited and they are to choose their "morally neutral" rational advantage, they cannot make up their minds about the alternatives in a fully autonomous and communicative manner.[77]

Habermas then refers to a possibility of describing the parties as more like real moral persons (in less egoistic terms). But, he says, this would destroy the division of labor between the various parts of Rawls's theory.[78] Consequently, Rawls's original position provides no firm foundation for basic rights, either. Habermas would leave the teleology of Rawls's original position aside and rely on the "strictly procedural" conception of practical reason. As he describes the conception, it is to keep the proper Kantian deontology pure. Moreover, Habermas understands basic rights as an integrated part of pure deontology: we need not ground them separately as primary goods which would *most likely* be chosen in the original position. Rawls has properly emphasized "the priority of right" particularly in *Liberalism*, says Habermas. But from the viewpoint of strict proceduralism the question of their acceptability in the Rawlsian original position is at best a secondary one.[79]

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76   Jürgen Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," trans. Ciaran Cronin, *The Journal of Philosophy* 92/3 (1995): 109. In short, Habermas puts Kant's own fundamental moral norm as follows: "we ought to do what is equally good for all persons."

77   Ibid., 110–111.

78   Ibid., 111–113. Habermas (ibid., 113) says: "For as soon as the parties step outside the boundaries of their rational egoism and assume even a distant likeness to moral persons, the division of labor between the rationality of choice of subjects and appropriate objective constraints is destroyed, a division through which self-interested agents are nonetheless supposed to achieve morally sound decisions."

79   Ibid., 114–115. It is not quite clear, however, why "the conceptual constraints of the model of rational choice [would] preclude Rawls from construing basic liberties from the

Habermas introduces his discourse ethics in opposition to Rawls's original position in the sense that it aims to enlarge the "interpretive perspectives" of the participants, not to limit them. Habermas describes the ideal communicative practice as a "noncoercive rational discourse among free and equal participants."[80] It is to be remarkably inclusive: "[E]veryone is required to take the perspective of everyone else, and thus project herself into the understanding of self and world of all others."[81]

Habermas's description of discourse ethics is at odds with Rawls's explicit use of a teleology of rational parties. However, it is not necessarily incompatible with most of the other features of Rawls's original position. Recall the commonsensical interpretation of the original position.[82] In it, people's perspectives do not disappear—just as they do not disappear in discourse ethics. In accordance with the artificial interpretation of the original position, by comparison, Rawls uses additional assumptions systematically in order to make explicit a choice of one particular set of principles over the other. Habermas would leave such assumptions more to the real persons in a liberal democracy.[83] The same applies to the founding of a liberal democracy. Habermas does not think that a proper way (to try) to do it is behind the veil of ignorance, or so that the essential discourses are already assumed by the theorist.[84]

Habermas takes Rawls's reflective equilibrium to be an open discourse similar to discourse ethics. However, when Rawls speaks of stability and acceptability in this forum, Habermas thinks that Rawls comes close to a kind of social functionalism. In reflective equilibrium one elaborates the intuitions found in actual societies. This is an effort to reach a "hermeneutic clarification of a contingent tradition" rather than justified normative validity.[85] According to Habermas, Rawls's concept of the reasonable in *Liberalism* indeed marks the place for deontological normative

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outset as basic rights and compel him to interpret them as primary goods." Ibid., 114. Why could not the basic rights (including the basic liberties) be introduced as an additional criterion that is independent of the procedure? Indeed, Rawls's method of reflective equilibrium seems to encourage such use of logically independent starting points.

80   Ibid., 117.

81   Ibid., 117. He continues: "[F]rom this interlocking of perspectives there emerges an ideally extended we-perspective from which all can test in common whether they wish to make a controversial norm the basis of their shared practice."

82   The commonsensical interpretation of the original position (P11' and D2 in 1.2) articulates virtually the same idea as the above quotes from Habermas (in the corpus text and in the footnote). I have only tried to be more specific about steps that actually distinguish it from the artificial interpretation of the original position.

83   Habermas ("Reconciliation through the Public Use of Reason," 118–119) says: "I have in mind the more open procedure of an argumentative practice that proceeds under the demanding presuppositions of the 'public use of reason' and does not bracket pluralism of convictions and worldviews from the outset."

84   Ibid., 128.

85   Ibid., 120. Habermas remarks here that Rawls's reflective equilibrium does not specify as contextualist an approach as that of Richard Rorty. In terms of Figure 1.1, we may think of various more or less contextual forms of justification between the reasonable persons in a real society (1) and the parties in the original position (2).

validity. It fails, on the other hand, to make visible the proper significance of this type of validity, which does not depend on the (intuitive) notions of "moral truth," whether political or comprehensive.[86]

Habermas takes the categories of positive law as normatively valid. The positive, coercive laws of a liberal democracy would go hand in hand with open discourses in which free, equal, and autonomous persons may enforce the laws morally as well. Legal democratic procedure and moral discursive procedure are thus brought into harmony.[87] The role of philosophy here is not the construction of more structured normative theories, but "the clarification of the moral point of view and the procedure of democratic legitimation."[88] For this purpose a reconstructive methodology is enough.[89]

In "Reply to Habermas," Rawls starts by stating that Habermas's view is a comprehensive one, while his own is limited to certain central questions of political justice. Political liberalism leaves the religious and metaphysical doctrines as they are, unless they deny either of the two basic aspects of reasonableness or the essentials of a democratic regime.[90] Rawls hopes that many comprehensive doctrines could endorse his political conception. Yet he presents political liberalism as freestanding in the sense that "it is not presented as depending upon, or as presupposing, any such view."[91] Habermas's discourse ethics, on the other hand, aims to give "a general account" of many forms of theoretical and practical reason. It also criticizes many religious and metaphysical doctrines at length, while political liberalism limits itself much more narrowly in this respect.[92]

On the other hand, Rawls does not see why moral philosophers should limit themselves to the clarification of discursive and democratic processes as Habermas proposes. The task of Rawls's political constructivism is to connect a certain conception of person to certain principles. The conception of a person is that of a

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86   Ibid., 121–122.

87   Ibid., 126–131. However, Habermas's text appears to leave the notion of "free and equal" citizens open in a way that does not reveal which kind of equality, in particular, is required for the process to be valid. If it means equal participation in certain procedures, which procedures are these more exactly? He (ibid., 130) writes: "[T]here can be … no legitimate law without democratic law-making by citizens in common who, as free and equal, are entitled to participate in this process. Once the concept of law has been clarified in this way, it becomes clear that the normative substance of basic liberal rights is already contained in the indispensable medium for the legal institutionalization of the public use of reason of sovereign citizens."

88   Ibid., 131.

89   Ibid., 131.

90   Rawls, *Liberalism*, p. 375.

91   Ibid., p. 376.

92   Ibid., p. 376. Rawls (ibid., pp. 378–379) characterizes Habermas's doctrine to be "one of logic in the broad Hegelian sense: a philosophical analysis of the presuppositions of rational discourse (of theoretical and practical reason) which includes within itself all the allegedly substantial elements of religious and metaphysical doctrines. His logic is metaphysical in the following sense: it presents an account of what there is—human beings engaged in communicative action in their life-worlds."

free and equal, reasonable and rational citizen of a democratic regime. The original position is a device that Rawls uses to present a conjecture that specifies the principles likely to be chosen by such persons. The outcome can then be checked in reflective equilibrium "at different levels of generality."[93] Why would this use of reason not be appropriate for a philosopher? He or she need not presuppose more authority than any citizen has.[94]

Indeed, Rawls's structured view of multiple levels of justification may help us to recognize how different comprehensive doctrines are reasonable with reference to different levels of justification. One example Rawls gives is that of the Quakers. As pacifists they would refuse to participate in a war, even if it had the support of a legitimate majority in a constitutional democracy. However, they may still affirm the democratic form of government with its basic values. Rawls would count their view as a reasonable one, although that view would be against a particular outcome of a democratic process and deeply rooted in religion. This is quite possible in a reasonable democracy which clearly leaves room for civil disobedience and conscientious refusal.[95]

Any democratic constitution without reasonable constraints would not do for Rawls, but in some cases he is uncertain. In 1787–91 the United States labored under "grave injustices" that the Constitution did not address. Rawls does not try to argue that, in fact, the circumstances were favorable enough for a constitutional prohibition of slavery in the late eighteenth century. To claim so would require detailed historical studies that he regards irrelevant for the most general choice of the principles of justice. Instead, Rawls approaches the question by presupposing reasonably favorable conditions for a democratic regime. And this will over time guide the plans to make the circumstances favorable enough in actual societies as well.[96] The founders were partly determined by their historical conditions, as we are by ours. The Americans of today are not in a position to found a new democratic regime, but to reflect reasonably on the one they have.[97] To endorse the Bill of Rights now is analogous to establishing it in the eighteenth century. James Madison did hard political work to get the Bill of Rights into the Constitution in 1789. Similarly, Rawls would take neither the current Constitution, nor the basic structure of the United States as given without reasonable objections. He mentions that the present system fails, for example, in the public financing of elections, in balancing the distribution of income and wealth sufficiently to ensure fair opportunities, and in providing proper health care for all.[98]

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93   Ibid., pp. 380–381. This includes that "[w]e also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection."

94   Ibid., p. 383.

95   Ibid., pp. 393–394.

96   Ibid., pp. 398–399. He mentions here two other "grave injustices" at that time: "denying suffrage to women and those who did not meet property qualifications."

97   Ibid., p. 403.

98   Ibid., pp. 406–407.

In commenting on Habermas's proceduralism, Rawls says: "any liberal view must be substantive."[99] A fair procedure expresses values, and a fair outcome expresses values. Interestingly, though, Rawls leaves aside "the special case of gambling." So he seems to push to the margin the idea of pure procedural justice, holding here that "the justice of a procedure always depends … on the justice of its likely outcome, or on substantive justice."[100]

In a democratic election, too, independent criteria of substantive justice matter— Rawls continues. Both the procedure and the outcome should still be kept within the limits of basic rights. Rawls finds that in Dahl's view these rights are included in the democratic process itself. However, if democracy is understood simply as majority rule, "nonpolitical speech … and liberty of conscience and the free exercise of religion," as well as other basic rights, are not guaranteed. A majoritarian would rely on the "spirit of the electorate" to honor such restrictions on majority rule. They could still join Dahl in arguing that the outcome would be worse with constitutional interventions. But this is no longer a purely procedural view in the sense that it is acknowledged that the outcome matters independently of the procedure.[101]

Rawls sees that Habermas's view is similar to Dahl's in leaving more substantial issues "to be settled by the more or less enlightened discussion of citizens."[102] But this does not undermine Habermas's commitment to a number of values of the procedure, including "impartiality and equality, openness … and lack of coercion, and unanimity."[103] Moreover, Rawls believes that Habermas recognizes that his discourse ethics is also substantive in an important sense. The debate will thus continue along the lines of more or less: namely, which matters should be settled by philosophical analysis and which were to be simply left to the democratic procedures to regulate. Habermas is quite satisfied with the legitimacy of political rule. Rawls would not assign legitimacy to a procedure that is too far from justice.[104]

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99   Ibid., p. 421.

100   Ibid., p. 421. Rawls (ibid., p. 422) expresses his gratitude to Joshua Cohen for helping him to get this straight. See also Joshua Cohen's "Procedure and Substance in Deliberative Democracy," in James Bohman and William Rehg (ed.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, 1997), pp. 407–437 and "For a Democratic Society," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003).

101   Rawls, *Liberalism*, p. 424. In a footnote Rawls explicates further what he regards to be Dahl's view: "He is not denying the great significance of the nonpolitical rights and liberties; rather, he questions, as a general political view, the effectiveness and need for the familiar constitutional devices." Dahl (*Democracy and Its Critics*, p. 168) articulates the conditions under which the "conflict between substantive outcomes and the democratic process would vanish" as follows: "if (1) majority rule in some form necessarily leads to the best substantive outcomes; (2) the substantive outcome in question is a right, privilege, opportunity, or obligation that is an integral part of the democratic process; or (3) insofar as the criterion of enlightened understanding is satisfied, the democratic process necessarily leads to the best substantive outcomes."

102   Rawls, *Liberalism*, p. 424.

103   Ibid., p. 425.

104   Ibid., pp. 426–428. Rawls notes that Thomas MacCarthy's analysis properly recognizes the sense in which the question is here a matter of degree. MacCarthy writes: "Precisely because of its highly formal nature, discourse ethics is compatible with different

The conceptual framework for balancing reasonable justice allows one to move transparently between Rawls's and Habermas's positions. Rawls seems to have addressed his arguments primarily to reasonable liberals in the United States. In other contexts, different balances of values might stand up better in the face of criticism. Rawls's discussion with Habermas gives a taste of this.

In Lecture IV of *Liberalism*, Rawls discussed a partially comprehensive position that would roughly endorse the fundamentals of his justice as fairness while allowing these to be balanced with nonpolitical values.[105] This position resembles balancing reasonable justice. Similarly, in Lecture VI he says that he expects liberal citizens to balance liberal political values in different reasonable ways. In both passages he proposes his own conception to be "the most reasonable" one.[106] But does Rawls's emphasis on reasonableness solve any crucial questions of social justice? Is this the way to approach the proper balance of values in the public sphere and to draw the proper limits of the public sphere? I do not see why it should be. Recall that Rawls's account of the reflective equilibrium is remarkably inclusive in any case. In different democratic societies political values and their balances vary, and properly so if the comprehensive conceptions of the people are supposed to have genuine impacts on the content of the political conceptions of a just basic structure of a given society.

Next I will have a look at Rawls's late writings on public reason. I will argue that certain aspects of it remained ambiguous.

Ambiguous Aspects of Public Reason

Rawls's original position can be interpreted in significantly different ways. Similarly, at different points, Rawls suggests significantly different answers to the question of how restrictive his conception of public reason is and in which ways. The ambiguity remains in his article "The Idea of Public Reason Revisited" (1997). In one sense this does not need to be a serious defect in justice as fairness. Where Rawls's text is not clear, we may think that his position falls somewhere between the extremes. However, this ambiguity is worth recognizing. This can help us to understand the

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substantive conceptions of the meaning and value of life. Inasmuch as these differences figure in judgments regarding the common good, they will translate into differences on substantive questions of justice, that is, on whether specific laws or policies are equally in the interests of, or equally good for, all. Here, I think, Habermas has to move in the direction of Rawls." Thomas MacCarthy, "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue," *Ethics*, 105/1 (1994): 57.

105   Rawls, *Liberalism*, p. 155. Rawls says here that such a view is "not systematically unified. [I]t includes the political values formulated by a freestanding political conception of justice [but it also leaves] all values to be balanced against one another." It seems, however, that another partially comprehensive doctrine might well be systematically unified and that it might specify several restrictions for acceptable values. This sort of view—such as balancing reasonable justice—can clarify Rawls's justice as fairness and its conceptual surroundings much better than a partially comprehensive view that is not systematic and allows an extremely broad variety of balances.

106   Ibid., pp. 156, 224–227.

problems involved in the more and the less restrictive interpretations of it—as well as in Rawls's project as a whole.

The *more restrictive reading of public reason* restricts, in particular, the argumentation that leans on comprehensive conceptions about truth, good, right, or the like. In "Public Reason" Rawls puts it as follows: "I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens."[107] Taken literally, this remark requires citizens to give up their search for truth and right in the relevant public matters. Elsewhere Rawls claimed that his view does *not* imply indifference in the questions of truth.[108] But we may say that if people are simply required to "replace" their conception of truth and right with other criteria, this surely is a demanding restriction.

In accordance with the *less restrictive reading of public reason*, Rawls continues on the question of truth. He says that people should stop struggling "to win the world for the whole truth."[109] Given the bloody history of religious wars, it is relatively easy to accept that political struggles for the "whole truth" should be gone. However, for example, an attempt to convince others that the factual assumptions of one's conception of justice are not false is more modest. In this case the struggle is not for the whole truth, but it is for important truths. I propose that the both readings of Rawls's public reason include a conception of truth, although they give different impressions of its relevance.

An even more extreme view than the restrictive reading of Rawls's public reason would replace the factual assumptions of one's moral theory altogether with the criteria of reasonableness. Perhaps one would somehow try to derive all relevant is-statements from ought-statements. By way of comparison, for example, Bernard Williams has plainly admitted that parts of his conception in *Truth and Truthfulness* are intended to be true. It includes fiction and, hopefully, reasonable, convincing, and illuminating philosophy, but the quest for these is not meant to replace the quest for truth. Moreover, Williams claims that truth mattered much to Nietzsche.[110] When discussing liberalism, Williams recalls the familiar argument for true information—an argument that depends on the interests of citizens. It is much more difficult for governments to become tyrannical if there are others, although not necessarily all citizens, who are able to have true information about their actions.[111] To this we may

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107   John Rawls, "The Idea of Public Reason Revisited (1997)," in *Papers*, p. 574. He confirms the claim later in the same article (ibid., p. 607).

108   Rawls, *Liberalism*, p. 150.

109   Rawls, "Public Reason," p. 574.

110   Bernhard Williams, *Truth & Truthfulness: An Essay in Genealogy* (Princeton, 2002), p. 19. An important starting point for his analysis is Nietzsche's genealogical approach. But Williams (ibid., p. 18) also says about Nietzsche: "[H]owever significant his inventions, in the end he not only defends the idea of there being truths but also gives every sign of thinking that he has uttered some."

111   Ibid., pp. 207–208.

add, straightaway, that Rawls's own idea of *realistic* utopia is lost if it is not admitted that truth matters a great deal for conceptions of justice.[112]

Let us next look for further textual support for a reading of Rawls's public reason that is less restrictive to the conceptions of truth in public discourses. In "Public Reason" Rawls continued to limit the use of public reason quite sharply to questions of "constitutional essentials and matters of basic justice."[113] Public reason is not meant to apply fully to others than judges of the Supreme Court, high governmental officials including legislators, and candidates for high public offices. To a lesser degree it applies to those holding public positions at lower levels. It applies to ordinary citizens most remotely.[114] Rawls talks about the "background culture," to which the public reason *is not* meant to apply, in surprisingly broad terms. Rawls's idea that churches and universities have their own nonpublic reasons is familiar already from his earlier writings.[115] But now he says that public reason also does not apply to nonpublic reasons of "media of any kind."[116] On this account, "newspapers, reviews and magazines, television and radio" fall outside its sphere. Hence, Rawls argues, some critics' concern that public reason might place unnecessarily high restrictions on open public discussion misses the target.[117]

Rawls does not maintain that the borderline between public reason and the background culture could or should block all the flux from one sphere to another. The wide view of public political culture should mediate them. Rawls clearly considers certain central parts of public reason as fixed. But he denies that he attempts to fix the whole content of public reason "once and for all." Varieties of reasonable comprehensive doctrines will always contribute to its more specific content. Rawls mentions Habermas's conception of legitimacy and Catholic views of the common good as examples in this respect.[118] In this sense, Rawls's account does not only leave plenty of space for nonpublic reasons, but it also is, to a degree, sensitive to their influence.

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112   If one maintains that truths about many questions are important to questions of justice, this does not commit one to an attempt to derive ought from is.

113   Rawls, "Public Reason," p. 575.

114   Ibid., pp. 574–575.

115   Rawls, *Liberalism*, p. 215. Rawls (ibid., p. 221) says about nonpublic reasons: "Consider the different authorities cited in a church council discussing a point of theological doctrine, in a university faculty debating educational policy, and in a meeting of a scientific association trying to assess the harm to the public from a nuclear accident. The criteria and the methods of these nonpublic reasons depend in part on how the nature (the aim and point) of each association is understood and the conditions under which it pursues its ends."

116   Rawls, "Public Reason," p. 576.

117   Ibid., p. 576. Nicholas Wolterstorff formulated the underlying critical question as follows: "[G]iven that it is the very essence of liberal democracy that citizens enjoy equal freedom in law to live out their lives as they see fit, how can it be compatible with liberal democracy for its citizens to be morally restrained from deciding and discussing political issues as they see fit?" Nicholas Wolterstorff, "The Role of Religion in Decision and Discussion of Political Issues," in Robert Audi and Nicholas Wolterstorff (eds), *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, 1997), p. 94.

118   Rawls, "Public Reason," pp. 582–583.

In regard of all comprehensive doctrines, and particularly religious ones, Rawls's wide view of public political culture includes a "proviso:" Persons are allowed to introduce religious reasons into the public discourse at any time, provided that "in due course" proper public reasons are offered as well.[119] The proviso makes it possible for Rawls to take a remarkably open-minded position about which kinds of views one could properly express in public discourses. He even goes so far as to put the case as follows: "These doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable."[120] Rawls is well aware of the difficulty of the questions about when and how this proviso should be satisfied.[121] But if these further conditions are not interpreted strictly, the proviso guarantees significant openness of the public sphere to a great variety of views.

As one way to express one's view in public Rawls mentions declaration. According to the wide view of public political culture, one may declare one's comprehensive doctrine, even though one does not expect others to share it. However, the proviso should eventually be satisfied. Rawls's example is that citizens of faith urge Jesus' parable of the Good Samaritan to be taken seriously as a guide to public politics. They may not expect others to acknowledge the example of the Samaritan as religiously authoritative. They would simply declare it and attach a public justification to the conclusions that they draw from it.[122] Now we return to the more restrictive public reasoning.

Rawls specifies here that public reasoning means correct reasoning "from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept."[123] Citizens of faith should, thus, present this type of sincere reasoning in addition to what they declare on the basis of their faith. Only then will the proviso be satisfied. Rawls ties his characterization of public reason tightly to the concept of reasonableness. Public discourses are meant to be widely open but, eventually, only reasonable premises and conclusions should count. Arguing like this involves making conjectures about what might be reasonably acceptable for different people. Although a conjecture may be against what other people explicitly claim, it should be sincere. In such public reasoning

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119 Ibid., pp. 584, 591–592.

120 Ibid., p. 592. Rawls's (*Liberalism*, pp. 220–222) concept of nonpublic reason is more demanding.

121 Rawls ("Public Reason," p. 592) emphasizes that the views should be sincere also in this respect. Robert Audi has proposed that in the proper "theo-ethical equilibrium" political questions are actually settled by secular reasons. Religious convictions have different roles in the background. For example, "reason itself can be considered as a gift from God." Audi mentions that in theo-ethical equilibrium "religious considerations can also lead to revision of one's secular moral views." But his more detailed discussion does not seem to leave much room for such an influence. Robert Audi, "Liberal Democracy and the Place of Religion in Politics," in Robert Audi and Nicholas Wolterstorff (eds), *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, 1997), pp. 21–24.

122 Rawls, "Public Reason," p. 594.

123 Ibid., p. 594.

the argument proceeds by assumptions that one reasonably thinks the others could accept as reasonable, too.[124]

The requirement of satisfying the proviso points in the direction that specifically religious views should not have a notably important public role. Declarations with deep religious notions of the good life could hardly satisfy it.[125] Nevertheless, it leaves significant room for religious declarations on public matters. Rawls is optimistic that those citizens of faith, who preach (declare) the example of the Good Samaritan, might succeed in meeting the proviso. Rawls's other examples include the Abolitionists and the Civil Rights Movement lead by Martin Luther King. He also notes that "a specific concern for the poor" in the Catholic social doctrine and the pacifism of Quakers could be argued for in terms of public reason.[126] His prime example of an unreasonable religion is that Calvin did not provide reasonable reasons for Servetus. The latter was burned at the stake with Calvin's permission.[127] Rawls maintains, however, that in "every actual society" there are "numerous unreasonable doctrines"—both religious and secular.[128]

We may say that Rawls's examples of candidates for reasonable religious views represent a relatively impressive list of supporters for many of the political values that are fundamental in justice as fairness. To this list we might add Jeremiah Evarts's struggle for the rights of the Indians during Andrew Jackson's administration (to be discussed in 3.1). But although Rawls might count these views as reasonable, his concept of "the most reasonable" underlines the importance of reasonable acceptability to all.[129] The reasonable orderings of political values that the citizens present should not be "distorted by particular reasonable doctrines."[130] This notion seems to block any flavor of the particularly situated perspective of the doctrine in question. Moreover, we could hardly deny that the mentioned reasonable Christian doctrines are "distorted," if this includes that they have stemmed from this particular religious tradition. In his more restrictive notions of reasonableness in "Public Reason," Rawls still maintains that we should not "view persons as socially situated

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124   Ibid., p. 594.

125   Rawls (ibid., p. 609) says that it is quite possible for a reasonable citizen to regard the Visio Dei to be "higher" value than the reasonable political values. Nevertheless, in a reasonable doctrine the reasonable political values are not "overridden" by religious values that are regarded as the higher ones.

126   Ibid., pp. 593–595.

127   Ibid., p. 579. Unfortunately Rawls does not specify what reasons Calvin offered in this particular case. In fact one reason was that Servetus saw no biblical basis for the doctrine of the Trinity while Calvin did. But it is also clear that the reasons for their quarrel as a whole were vastly more complicated, rooted in a long history of debate and violence in the past, as well as of fears about the future. G.R. Elton, *Reformation Europe 1517–1559* (London, 1963), pp. 108–109, 230; Megivern, *The Death Penalty*, p. 147. To determine how sensitively either of them understood the reasons for each other's views in this wider sense and what difference this might have made would require conceptual clarification that is not immediately available in Rawls's texts.

128   Rawls, "Public Reason," p. 613.

129   Ibid., pp. 593–594.

130   Ibid., p. 585.

or otherwise rooted."[131] We should even put aside our conceptions of human nature in the proper use of public reason.[132]

Rawls did recognize the need for balancing different reasonable political values,[133] but ambiguities in his text confuse the impression. The question of true knowledge is worth paying attention to here. Rawls expects that "the most reasonable" conceptions include "ascertainable evidence and facts open to public view."[134] But he provides no clear limit after which the quest for true knowledge becomes too comprehensive. It is not clear whether the step towards the most reasonable view means including more thorough accounts of truth or replacing them with the assumedly moral aspects of the reasonableness. A clarifying example may be that of state-supported television organizations with particular responsibilities to provide true information.[135] One may provide Rawlsian public reasons for and against them. But simply to stress that the reasons should be the most reasonable ones does not remove the difficult questions of balancing between the involved criteria of fairness, true knowledge, freedom, stability, etc.

Dimensions of Reasonableness

In 2.1 I defined the concept of reasonable democracy as follows:

> D6   Reasonable democracies are well-ordered societies that are outcomes of functioning democratic procedures and reasonable communication.

A closer look at Rawls's use of the concept of public reason shows that reasonableness is its crucial element. Public use of reason proceeds from reasonable premises to reasonable conclusions. However, Rawls's concept of reasonableness is complex. I propose that the concept becomes clearer if it is analyzed in three dimensions.

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131   Ibid., p. 607. Wolterstorff ("The Role of Religion in Decision and Discussion of Political Issues," p. 94) has proposed that such a restrictive conception of public reason oddly denies one from regarding one's own opinion as better grounded than that of another: "Now suppose that I form my opinion concerning some proposed policy, law, or constitutional provision, on the basis that I know you do not accept, and conduct my discussion with you on the same basis. In acting thus, I am not giving your view on the matter an equal weight with mine; I am not treating your voice as equal to mine."

132   Rawls, "Public Reason," p. 608. Indeed, these restrictive notions in Rawls's conception appear to function like a comprehensive doctrine. As Christopher Beem has put it: "While Rawls goes to great lengths to distinguish a political conception from a comprehensive one, in the end, he wants that political conception to function in society in the same way—albeit at the most minimal of levels—that a comprehensive doctrine would." Christopher Beem, *Pluralism and Consensus: Conceptions of the Good in the American Polity* (Chicago, 1998), p. 30.

133   Rawls, "Public Reason," p. 582.

134   Ibid., p. 593.

135   Williams (*Truth & Truthfulness*, pp. 214–216) uses the contrast between the state supported television organizations and the (entirely) market-driven channels to question the view according to which the radically free public culture as a "marketplace of ideas" would be a secure way to the truths.

In the first dimension, there are different degrees of reasonableness. I will use a scale of five steps. Though not systematically articulated in Rawls's texts, these degrees can be abstracted from his discussion of reasonableness: *most reasonable*, *reasonable*, *not unreasonable*, *unreasonable*, and *worse than unreasonable*. In the second dimension, there are the two main aspects of reasonableness of justice as fairness: the *fair terms* aspect and the *burdens of judgment* aspect. The third dimension of reasonableness is not directly articulated in Rawls's texts, although Rawls discusses it frequently. I intend to make the underlying conceptual framework explicit. I regard *inclusiveness of the elements of comprehensive views* as the third dimension in different interpretations of reasonableness.

These three dimensions of reasonableness can be used to chart alternative interpretations of reasonableness (or unreasonableness) in the following ways.

Table 2.1   Three dimensions of reasonableness

(A) *Degree of reasonableness*	(B) *Fair terms (FT) and burdens of judgment (BJ) aspects of reasonableness*	(C) *Inclusiveness of the elements of comprehensive views*
(1) Most reasonable	FT and BJ aspects endorsed emphatically	Ambivalent tendency to exclude comprehensive elements
(2) Reasonable	FT and BJ aspects endorsed	Partial inclusion of comprehensive elements
(3) Not unreasonable	The minimum requirements of FT and BJ aspects not violated	Partial inclusion of comprehensive elements
(4) Unreasonable	The minimum requirements of the FT or BJ aspect, or both, violated	Comprehensive elements incompatible with reasonableness
(5) Worse than Unreasonable	Serious violations of the FT or BJ aspect, or both	Comprehensive elements incompatible with reasonableness

We can now use this typology of reasonableness to examine the possibilities to gradually structure the idea of reasonable democracy.

To start with, let us take the element "functioning democratic procedures" in D6 as fixed and vary the notion of reasonableness in it. First, consider a democratic society in which unreasonable (4) and worse than unreasonable (5) conceptions would dominate the discourse, allowing various sorts of racist, sexist, egoist, and zealously altruist views to flourish. At least at the beginning of a certain period of time, democratic procedures would guarantee every adult citizen possibilities to influence the use of public power through elections at the national and local level. The formal rules of the game would be followed, but there would be little serious communication about justice. Once some totalistically oriented people had power, they would ruthlessly promote their comprehensive views. If these now powerful people were also rational enough, they might manage to keep the society stable. If worse than unreasonable people came into power, serious violations of basic rights would occur. By definition (D6), these leaders would allow the democratic

procedures to continue to function. However, it seems realistic to assume that at some point they would begin to break down.

Second, consider a democracy in which reasonable (2) and not unreasonable (3) views dominate the discourse. Many people promote fair terms sincerely, but they face difficulties in their efforts. There is much disagreement about the content of fair terms. Some people adhere to their own position without recognizing the burdens of judgment. Others are so overwhelmed by the burdens of judgment that they have little to say about justice. Still others do not care much about justice beyond basic liberties. However, the minimum requirements of the two aspects of reasonableness are not violated. Even in the case of reasonable views, the burdens of judgment soften the demands of the fair terms, and quite diverse views may arguably exemplify some sort of fairness. In the case of not unreasonable views, the focus is only on the minimum requirements of reasonableness, so that the included views may well range from forms of perfectionism and libertarianism to liberal socialism.[136] In general, reasonable and not unreasonable views—including the related conceptions of good and truth—would be vividly discussed in the culture and politics of this democracy. Societies in which the reasonable views dominate the discourse would approximate the reasonable democracy of D6.

Third, consider a democracy in which the most reasonable (1) doctrines dominate. Although many different comprehensive views would flourish, people would exclude the elements of their comprehensive views, as far as they could, in their arguments about the matters of basic justice. They would strive for the most reasonable balance of the public values at stake. Democratic procedures would function, but the consensus would reach beyond this. In particular, many would endorse Rawls's two principles of justice. But significant disagreements about these principles would remain. Although people would try to exclude those factual assumptions and conceptions of good that are characteristic to their comprehensive views, they would recognize the burdens of judgment. Their search would thus remain more or less ambivalent in terms of exclusion and inclusion. For example, they would continue to disagree about which truths and goods should be taken as relevant in their public reasoning.

In terms of Figure 1.1, the fair terms aspect of reasonableness would come close to the perspective of the original position. People in a real society (box 1) would apply the fair terms illustrated by the original position (box 2) in order to choose the principles of justice (box 4) to regulate the design of the well-ordered society (box 3). Taking the burdens of judgment aspect of reasonableness into account would

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136   In *Theory*, Rawls discusses a liberal socialist regime in which the government regulates the markets strongly. He mentions that it could, for example, satisfy the principle of fair equality of opportunity in the sense that it would allow "the free choice of occupation and of one's place of work." Rawls, *Theory*, p. 271/239 rev. As the distinctive features of a liberal socialist regime Rawls (ibid. p. 280/248 rev.) mentions that "the means of production are publicly owned and that firms are managed by workers' councils say, or by agents appointed by them. Collective decisions made democratically under the constitution determine the general features of the economy, such as the rate of saving and the proportion of society's production devoted to essential public goods." In his later terminology, he could well have counted such a regime as one example of a not unreasonable regime.

mean the recognition of the difficulties at any step of this constructive effort. But if the actual society in which the people live were formally democratic, they could also use democratic processes to its development. A reasonable democracy is a society in which democracy and reasonableness underpin all of its process. I would say that it is a Rawlsian democracy, too, if this combined procedure approximates consensus on the two principles and the other related elements of justice as fairness such as the primary goods.

2.3 Primary Goods, Common Goods, and Responsible Persons

Primary Goods for Rational Persons?

The concept of reasonable democracy (D6) and the systematic analysis of the dimensions and degrees of reasonableness (Table 2.1) specify a procedure in which people can introduce their conceptions of good according to more or less restrictive limits and guidelines. In a Rawlsian democracy a certain conception of good would become dominant in the design and reform of the basic structure. Rawls has listed a number of its central elements in his account of the primary goods. In brief, the primary goods include individual rights, economic goods, and support for self-respect. Now I turn to ask how Rawls argued for the prominent place of such goods in justice as fairness and what other conceptions of good justice as fairness includes, after all.

In the article "Justice as Fairness" (1958), Rawls stated that "reward for services contributing to the common good" was among the main elements in his freshly formulated principles.[137] From this perspective we may ask why any particular goods should be specified as "common goods." Why could we not count all the conceptions of good to be as "common" as any other—or as "public" or as "primary" as any other?

If the notion of reward is included, some of the answer seems to be that we cannot reward everyone for everything that someone considers as a contribution to common good. Given the scarcity of our resources we would soon run out of rewards. If the system of rewards is to be at all practically manageable, the set of "common goods" should somehow be more limited than anything that people might consider as "goods" in pluralistic societies. However, Rawls retreated from his early idea that reward was central in his approach. Communitarians akin to Sandel have been worried about it. From the liberal democratic viewpoint, Ross Zucker has recently developed an impressive theory of distributive justice that includes the notion of reward.[138] John Gray, on the other hand, has suggested that the plurality of goods is more fundamental than Rawls would have us understand. And so is the plurality of the terms of justice.[139] Finally, Ian Shapiro has pointed out that the whole debate about plural goods may not be decisive to the liberal democratic approach. More

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137   John Rawls, "Justice as Fairness (1958)," in *Papers*, p. 48. Discussed in 1.1.

138   Ross Zucker, *Democratic Distributive Justice* (Cambridge, 2001).

139   As Gray puts it: "A strictly political liberalism, which is dependent at no point on any view of the good, is an impossibility. The central catsegories [sic!] of such a liberalism—

fundamental is the principle that asks to avoid domination.[140] Granted that the debate over various ways of criticizing (and developing) the basically Rawlsian approach will continue, it may still be worthwhile to try to figure out on what grounds Rawls came to advocate the (primary) goods he did.

When Rawls developed his argument for the two principles of justice in *Theory*, he presented them as "a special case of a more general conception of justice."[141] The general conception relies on a position of equality as its baseline. Rawls formulated it as follows: "All social values—liberty and opportunity, income and wealth, and the [social] bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[142]

Rawls quickly admits the vagueness of this conception and goes on to make it more specific. However, there is an ambiguity in its wording that was apparently a difficult challenge for him to deal with. I mean his notion of *all social values*. Immediately after this, Rawls specifies only three groups of values. Rawls's account seems to suggest that there are no other relevant social values than "liberty and opportunity, income and wealth, and the [social] bases of self-respect."

The first specification that Rawls makes is that these values are referred to as the primary goods. They are "things that every rational man is presumed to want."[143] Rawls then mentions other goods as primary goods: health, vigor, intelligence, and imagination. However, he counts them as basically natural primary goods. By this he does not mean that the basic structure of a society does not influence their possession. They only are not as directly under its control as the three kinds of social primary goods are.[144]

It is understandable that Rawls makes such simplifications for theoretical purposes. It is difficult to imagine how he could possibly have formulated his argument had he tried to keep it open to literally all social values (all the time). As Wibren van der Burg has remarked, an ethical argument that aims at leading to any practicable conclusions has to exclude something.[145] Particularly in this case, the application of the difference principle requires some way of measuring the positions of the least advantaged. If the least advantaged (group) cannot be specified, we do not know whose position to maximize. In *Theory* Rawls emphasizes that it is not so important—and perhaps not necessary at all—to make interpersonal comparisons between the more advantaged.[146] In any case, the results of the argument should also

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'rights', 'justice', and the like—have a content only insofar as they express a view of the good." John Gray, *Two Faces of Liberalism* (Cambridge, 2002), p. 19.

140   Ian Shapiro, *The State of Democratic Theory* (Princeton, 2003).

141   Rawls, *Theory*, p. 62/54 rev.

142   Ibid., 62/54 rev. The bracketed word is only in *Revised Theory*.

143   Ibid., p. 62/54 rev.

144   Ibid., p. 62/54 rev.

145   Wibren van der Burg, "Reflective Equilibrium as a Dynamic Process," in *Applied Ethics and Reflective Equilibrium* (Linköping, 2000), pp. 75–77. Here van der Burg generally argued for reflective equilibrium as the method for (applied) ethics.

146   Rawls, *Theory*, pp. 93–95/80–81 rev. Rawls writes here: "The index problem largely reduces, then, to that of weighting primary goods for the least advantaged [for those with

survive the test of reflective equilibrium. Then it would be proper to make these values fit into considered judgments of different kinds, if possible.

Especially in the third part of *Theory*, Rawls tried hard to show that his conception of justice was congruent with a variety of conceptions of good. Rawls supposes that people have rational life plans—plans that accord with principles of rational choice.[147] Putting emphasis on different principles of rational choice would make for different life-plans. However, people would adjust their rational plans to the requirements of justice.[148] In the case of congruence, a person's "desire to act justly is also regulative of a rational plan of life."[149] Various profound conceptions of good would flourish in the well-ordered society, but in properly adjusted forms. Rawls expects that the primary goods would provide resources to live according to congruently rational plans. But for the most part it suffices for his argument if the primary goods provide such resources for the least advantaged persons.

Rawls's move from goodness as rationality to the primary goods takes place in three major argumentative steps: (1) sketching rational life plans for persons with different backgrounds, (2) abstracting from these common primary goods, and (3) taking into account the requirements of congruence. In *Theory* Rawls uses the term *deliberative rationality* in a sense that might suffice only for the first of these steps. In short, it is a condition for choosing the plan "with full awareness of the relevant facts and after a careful consideration of the consequences."[150] This kind of deliberative rationality is closely connected to "the principle of responsibility to self" in *Theory*. Its purpose is to ensure that "the self at each time can affirm the plan that has been and is being followed."[151]

In the recent discussion of *deliberative democracy* it has been customary to assume that the central elements in deliberation already include fair terms or the like. For example, Gutmann and Thompson have explicitly referred to Rawls's

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least authority and the lowest income, since these also tend to be associated]." The bracketed expression is in *Theory*, but not in *Revised Theory*.

147   Rawls (ibid., pp. 408–409/358–359 rev.) gives the following conditions for a person's life plan to be rational: "First, … (1) it is one of the plans that is consistent with the principles of rational choice when these are applied to all the relevant features of his situation, and (2) it is that plan among those meeting this conditions which would be chosen by him with full deliberative rationality, that is, with full awareness of the relevant facts and after a careful consideration of consequences. … Secondly, a person's interests and aims are rational if, and only if, they are to be encouraged and provided for the plan that is rational for him."

148   Ibid., pp. 398–399/349–350 rev.

149   Ibid., p. 456/399 rev. Rawls's (ibid., p. 513/450 rev.) other formulation of the concept is "a person's rational life plan supports and affirms his sense of justice."

150   Ibid., p. 408/359 rev. Rawls's longer definition for a plan chosen with deliberative rationality is "the plan that would be decided upon as the outcome of careful reflection in which the agent reviewed, in the light of all the relevant facts, what it would be like to carry out these plans and thereby ascertained the course of action that would best realize his more fundamental desires." Ibid., p. 417/366 rev.

151   Ibid., pp. 422–433/371 rev.

"fair terms of cooperation" as the crucial element in their account of deliberation.[152] Philip Pettit has argued that three elementary constraints are common in the recent accounts of deliberative democracy: inclusive constraint, judgmental constraint, and dialogical constraint.[153] Shapiro has contrasted the deliberative approach to the aggregative one. In the latter, the common good is, in principle, reckoned from the preferences as such. But deliberative democrats "hope to get it by transforming the preferences."[154] Because Rawls's account includes major moves from mere preferences towards the congruent conception, it clearly accords with the deliberative approach in this respect. In the use of terms we have to remember, though, that the "deliberative rationality" of *Theory* is only the first step on the way towards the broader deliberation that approaches the method of reflective equilibrium in Rawls's terms. We may also remark that the deliberative *democrats* do not expect that the practical issues concerning the common good can be solved by mere deliberation, but that the functioning democratic procedures do their share, too.

In the article "Social Unity and Primary Goods" (1982) Rawls then articulated the primary goods in five categories that can be expressed briefly as follows:

1. the basic liberties given in a list,
2. freedom of movement and choice of occupation,
3. powers and prerogatives of offices and positions of responsibility,
4. income and wealth, and
5. social bases of self-respect.[155]

In that article Rawls also connected an explicit list of basic liberties to his account, although he was somewhat unsure of its sufficiency.[156] In *Justice as Fairness* he was more confident of the following formulation:

> Freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of persons; and finally, the rights and liberties covered by the rule of law.[157]

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152   Gutmann and Thompson, "Deliberative Democracy Beyond Process," in James S. Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Malden, 2003), p. 34. In the beginning of their article Gutmann and Thompson (ibid., p. 31) put it as follows: "Theories of deliberative democracy consist of a set of principles that are intended to establish fair terms of political cooperation in a democratic society."

153   Philip Pettit, "Deliberative Democracy, the Discursive Dilemma, and Republican Theory," in James S. Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Malden, 2003), p. 139.

154   Shapiro, *The State of Democratic Theory*, p. 21.

155   John Rawls, "Social Unity and Primary Goods (1982)," in *Papers*, pp. 362–363.

156   The basic liberties that he (ibid., p. 362) immediately mentioned, "for example," were the following (and they remained virtually the same later): "freedom of thought and liberty of conscience; freedom of association; and the freedom defined by the liberty and integrity of the person, as well as by the rule of law; and finally the political liberties."

157   Rawls, *Justice as Fairness*, p. 44.

At the same time that Rawls's account of the content of the primary goods became sharper, he also became more specific about their grounding. In *Theory* he had presented complex arguments for the second step that I specified above—the step of abstracting the primary goods from the various rational life plans. But now Rawls grounded the primary goods more directly on the conception of a person with a rational conception of good *and* a reasonable sense of justice.[158]

In the preface to *Revised Theory* Rawls acknowledges a "serious weakness" in his original account of the primary goods. He regrets that he did not tie his conception of primary goods clearly enough to a moral conception of person. For the most part, one could read the original *Theory* as if the primary goods depended "solely on the natural facts of human psychology."[159] But now Rawls wants the primary goods to be understood in connection with the conception of a person in possession of a reasonable sense of justice and a rational conception of good. He writes: "Primary goods are now characterized as what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life."[160]

What does the change in Rawls's view imply in terms of the three argumentative steps that I articulated above? I would say that it changes the order of steps (2) and (3). The complex challenge of abstracting the primary goods can be fully faced only after the requirements of congruence for the rational life plans have been taken into account.

For a careful reader of *Theory*, Rawls's shift in emphasis hardly appears radical. Indeed, the requirement of congruence—step (3)—was already in force in *Theory*. What is new is rather that Rawls hopes that certain difficulties encountered at step (2) can be avoided because the primary goods are intended to be goods for persons who are, more specifically than before, defined as moral persons and as citizens. The theorist excludes consideration of primary goods for irrational and unreasonable persons and for those who are not fully cooperating members of the society for other reasons. One may justifiably worry whether this shift also implies that such persons' concerns are not taken seriously enough in the final conception. Little can be said about this until Rawls's accounts of the good in his conception as a whole are examined more closely.

Goods Beyond the Primary Goods

In *Justice as Fairness* Rawls listed six ideas of good in justice as fairness: (1) goodness as rationality, (2) primary goods, (3) permissible (complete) conceptions of good, (4) the good of the political virtues, (5) the political good of a well-ordered society, and (6) the good of such a society as a social union of social unions.[161] Taken together, these conceptions of good do not form a notably thin conception of good. Nevertheless, Rawls

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158   Rawls, "Social Unity and Primary Goods (1982)," p. 365. Such a person "desires to take part in social cooperation for mutual advantage."

159   Rawls, *Revised Theory*, p. xiii.

160   Ibid., p. xiii. Rawls (*Justice as Fairness*, p. 57) said that the primary goods "are various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their two moral powers, and to pursue their determinate conceptions of good."

161   Rawls, *Justice as Fairness*, pp. 141–142. Rawls (ibid. p. 140) is concerned to affirm that these concepts of good do not contradict the priority of right, but are complementary to it.

argues that these goods can be justified to free and equal citizens and that they do not presuppose any comprehensive doctrine.[162]

In Table 2.2 I have organized the conceptions of good in justice as fairness under three headings. The six ideas of goods of Rawls's list are given in columns (A) and (B)—with the reservation that I have divided "permissible (complete) conceptions of good" into two parts in column (B). The items in column (C) are not included in Rawls's list of six ideas of good. Their role as goods in justice as fairness is explicit in his more occasional textual passages.[163]

**Table 2.2   Common, plural, and relatively common goods
in justice as fairness**

(A) *Common goods of basic justice*	(B) *Plural goods within the limits of basic justice*	(C) *Relatively common goods*
Rationality	Plurality of permissible complete conceptions of good of comprehensive doctrines	Natural primary goods (including health and intelligence) and related capabilities
Primary goods		
Political virtues of reasonableness	Plurality of permissible incomplete conceptions of good	Care in families (and beyond)
Political good of a well-ordered society		Basic education
Well-ordered society as the union of social unions		Friendship, trust, democratic pride, caring for the environment, etc.
		Virtues of responsibility in ordinary politics, culture, media, foreign relations, etc.
		Freedom from hypocrisy, envy, spite, will to dominate, etc.

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162   Ibid., p. 141.

163   For example, Rawls discusses care in families in *Theory* (pp. 462–467/405–409 rev.) and in *Justice as Fairness* (pp. 162–198). In a rough list of social goods to be balanced—in *Justice as Fairness* (pp. 173–174)—Rawls mentions "medical and health needs," sustaining an "active and productive workforce," raising and educating children, investments (and paying depreciations), provisions for the retired, national defence, and a just foreign policy. In *Justice as Fairness* (p. 179) leisure time, "native endowments," and avoidance of physical pain are mentioned. In *The Law of Peoples* Rawls remarks, for example, that "free culture" and well-being of the citizens are fundamental interests of liberal peoples. John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, 1999), pp. 34–34. In another place (ibid., pp. 38–39) he includes "responsibility for their [the people's] territory and environmental integrity, as well as for the size of the population." See also his conditions for democratic peace (ibid., p. 50) to be discussed in 3.1. These include sufficient education, employment, and public financing of elections. He discusses freedom from envy, spite, and the will to dominate in *Justice as Fairness* (pp. 180–181, 202).

In *Justice as Fairness* Rawls affirmed that goodness as rationality is his starting point, and that from this starting point he has proceeded to include the other conceptions of good.[164] But all along the way he has intended to keep the conception of good thin enough so that it could be reasonably acceptable to all. I have included rationality and the primary goods under the heading "Common goods of basic justice," because Rawls expected the citizens of the well-ordered society to accept these to be good for them. The same holds for the other three items in column (A).

The fundamental criteria of reasonableness are a matter of *justice* for Rawls, but he also calls the respective political virtues *goods*. These are the very virtues that "specify the ideal of a good citizen of a democratic regime."[165] In addition to other, frequently mentioned notions that are related to reasonableness, they include "a spirit of compromise" and a willingness to cooperate.[166] Rawls admits that the good of political virtues relies on a "(partial) conception of moral worth."[167] However, he insists that these virtues are properly justifiable and that they do not presume any particular comprehensive doctrine. The political virtues of reasonableness complement rather than contradict his approach to justice. Rawls maintains that the other goods of justice as fairness do so as well.[168]

Rawls's distinction between the *political good of a well-ordered society* and the *goodness of a well-ordered society as a social union of social unions* is not entirely clear. Both of them differ from a *private society*, as Rawls explained in *Theory*. People would see a private society only as instrumental to their private interests. Rawls pointed out that one could support the ideal of a private society, and yet hold that social life is "a condition for our developing the ability to speak and think."[169] Thus, Rawls denied that the goodness of the well-ordered society follows from (the truism of) human sociability. Instead, he proposed that people in a well-ordered society would "value their common institutions and activities as good in themselves."[170]

The common institutions clearly include the *political institutions of the well-ordered society*. But the goodness of a well-ordered society as the union of social unions adds the goodness of *nonpolitical social unions*. Nonpolitical social unions provide diverse opportunities for persons to rationally strive for the good life as they

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164   Rawls, *Justice as Fairness*, p. 142.

165   Ibid., p. 142.

166   Ibid., p. 116. In this passage Rawls's basic approach is to point out how reasonable principles could encourage such virtues—which would, in turn, increase the stability of the regime. The principle of utility (ibid., p. 117) does not imply a similar commitment to reciprocity and the related gains in terms of stability.

167   Ibid., p. 142.

168   Ibid., pp. 140–142.

169   Rawls, *Theory*, p. 522/458 rev.

170   Rawls, *Theory*, p. 522/458 rev. In *Justice as Fairness* (pp. 201–202), for example, Rawls says that a reasonably just society is "a great social good and appreciated as such," and that "the good of political society itself" is among the reasons that move citizens "to do what justice requires."

see it. Hence, both the political union itself and the nonpolitical unions are goods in justice as fairness.[171]

Column (B) contains those conceptions of good about which Rawls did not expect consensus. First, there are complete conceptions of goods of comprehensive doctrines. Rawls's fundamental assumption is that there is a plurality of conceptions of good in a reasonable democracy. Second, there are permissible incomplete conceptions of good. In *Justice as Fairness* Rawls says that most persons probably do not have a fully articulated comprehensive doctrine.[172] An explicit distinction between complete and incomplete permissible goods helps us to deal with this kind of diversity. However, I will argue that the goods of column (B) have a significantly different role—in justice as fairness—to that of the goods of column (A) and column (C).

I have called the goods in column (C) "relatively common goods" of justice as fairness. Rawls did not include them in the list of six kinds of goods in *Justice as Fairness* and, accordingly, their role as goods in his conception has been controversial. In order to clarify their role one must look at the occasional textual passages where Rawls talked about them. I start with Rawls's reply to Amartya Sen's criticism of the inflexibility of the primary goods in *Liberalism*. Sen's other major concern was that justice as fairness does not put enough emphasis on capabilities.[173]

In the passage in question Rawls discussed four types of variations of particularly situated persons and the related conceptions of goods. In terms of *Theory*, important aspects of the first and the second types of variations are about natural primary goods. These belong to column (C). The third and the fourth types of goods belong to column (B).

First, Rawls discusses the "variations in moral and intellectual capacities and skills."[174] On the one hand, justice as fairness does not take into account such variations: Rawls says that all of them are above the line that marks sufficient capacity for the purposes of political liberalism. For example, he is concerned to argue that public offices are open to everyone in fair competition. Rawls says that the participants in the actual public practices are to decide about the relevant capacities and skills. As a political theorist he need not do it.[175] On the other hand, Rawls

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171 Rawls, *Justice as Fairness*, p. 142; *Theory*, pp. 520–529/456–464 rev. In *Justice as Fairness* (p. 198) Rawls continues to emphasize that the proper political institutions are not "purely instrumental to individual or associational ends."

172 Rawls, *Justice as Fairness*, p. 33.

173 Amartya Sen, *Inequality Reexamined* (Oxford, 1992), pp. 12–13, 22, 26–27, 39–42, 75–87.

174 Rawls, *Liberalism*, p. 184.

175 Rawls does not put obstacles in the way of theorists who attempt to take variations in intellectual and moral capabilities into account in more detail, even though he does not articulate any such attempt himself. Rawls seems to assume that of course such particularities must be balanced in proper ways with respect to the practices at stake. He (ibid., p. 184) writes: "These variations are handled by the social practices of qualifying for positions and free competition against the background of fair equality of opportunity, including fair equality of opportunity in education, together with the regulation of inequalities in income and wealth by the difference principle."

admits that people who have more moral and intellectual capacities qualify better for public offices.[176] In this sense he is not indifferent to their value. Indeed, his view seems to remain somewhat ambiguous. At times he seems to have held to the strictly democratic idea that every (adult) citizen is equal regardless of one's intelligence or moral capacities—in the same way as every citizen is equally entitled to vote. But from his early writings on he also attached particular value to the judgments of reasonable people. In *Peoples* he affirms that he regards extremely few to be mature enough for the role of a statesman.[177] One of Rawls's expressions that addresses this point is: "[A]ll citizens' sense of justice is equally sufficient relative to what is expected of them."[178]

The second kinds of variations are those that result from illness or accidents. In this case Rawls readily says that people may fall below "the line" in these respects.[179] He seems to assume something like the nine-tenths criterion—certainly not a one-tenth criterion—for fully cooperating members: about nine-tenths of (adult) citizens are healthy enough to participate fully in social cooperation. According to Rawls the question of how to arrange care for the persons who are not now healthy has to be dealt with at the legislative stage for the most part. Much has to be known about different illnesses, their severity, and the costs of their treatment. It is part of justice as fairness that health care services be arranged so that the sick can enter into full cooperation. But carrying this out requires a lot of particular information and adjusting between various other things on which the government should spend money.[180] Rawls thus assumes here—similarly to the case of variations in the intellectual and moral capabilities—that people themselves (especially legislators) do the hard work in balancing particular considerations of various kinds. There is no way simply to apply the principles of justice.

I suggest that moral and intellectual skills, and many other capacities including physical and mental health, should be thought of as relatively common goods in justice as fairness. Such a category is not fully explicit in Rawls's texts, but his argumentation presupposes it. On the one hand, Rawls expects people to agree that these capabilities are usually accepted as goods. On the other hand, they do not have as fundamental a place in his conception as the goods mentioned in columns (A) and (B). Had Rawls articulated the category of relatively common goods systematically, he might have been able to write about these goods less ambivalently. Moreover, this category could have helped him to deal with the questions related to the permissible, more or less complete conceptions of good in column (B).

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176 Rawls (ibid., p. 80) mentions judges as an example.

177 "[T]he statesman is an ideal, like that of the truthful or virtuous individual. Statesmen are presidents or prime ministers or other high officials who, through their exemplary performance and leadership in their office, manifest strength, wisdom, and courage. They guide their people in turbulent and dangerous times." Rawls, *Peoples*, p. 97.

178 Rawls, *Liberalism*, p. 80.

179 Ibid., p. 184.

180 Ibid., p. 184. Rawls basically affirms this approach in *Justice as Fairness* (pp. 170–176). He writes, for example: "Observe that what sets an upper bound to the fraction of the social product spent on medical and health needs are the other essential expenditures society must make, whether these are paid for by private or public funds." Ibid., p. 173.

Health is, however, such a fundamental good for most people that it might be too modest to regard it as a relatively common good. At least according to the *Constitution of the World Health Organization* "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being."[181] This declaration may not take sufficiently into account the practical need to balance the concerns of health with the other (relatively) common goods. Nevertheless, Rawls could hardly have denied that a number of aspects of health may be as reasonably justified as common goods as his social primary goods.[182] Norman Daniels has examined possible mediating solutions in detail. Basically, his position is that health-care institutions should be included among the background institutions that are to provide fair equality of opportunity.[183] Instead of discussing the issue here, I simply remark that reasonable people might well end up balancing the goods in this matter differently from Rawls.

The third kind of variation—which Rawls discusses in his reply to Sen in *Liberalism*—occurs in the conceptions of goods. Here Rawls is brief: some conceptions of good are not permissible and of those that are, not all "have the same chance to flourish."[184] Another passage of *Liberalism* clarifies the latter part of this notion. Rawls rejects what he calls the neutrality of effect. He says: "It is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time."[185]

Some conceptions of good can be relatively smoothly adjusted with the political virtues (of cooperation, toleration, and the like) that justice as fairness advocates.[186] In other cases this is more difficult. But Rawls affirms a certain conception of neutrality of aim which he thinks is implied by the proper priority of right. He articulates this neutrality as follows: "[T]he state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it."[187]

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181   *Constitution of the World Health Organization* (1946/1994), Preamble.

182   As a limiting case Rawls (*Justice as Fairness*, p. 174) mentions that cosmetic medicine "is not offhand a need at all." But at least the definition for health in the *Constitution of the World Health Organization* (Preamble) clearly reaches further than restoring persons to be fully cooperative citizens: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

183   Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge, 1996), p. 192. Daniels (ibid., pp. 192–193) compares here the health care system to the system of education. In the Rawlsian approach, both could be seen as proper responses to the morally arbitrary differences of opportunities that people have.

184   Rawls, *Liberalism*, pp. 184–185.

185   Ibid., p. 193. Rawls's (ibid., p. 193) definition of the kind of neutrality of effect that he abandons is "that the state is not to do anything that makes it more likely that individuals accept any particular conception rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this."

186   Ibid., p. 194.

187   Ibid., p. 193. Rawls (ibid., pp. 192–193) rejects another conception of neutrality of aim, which he articulates as follows: "[T]he state is to ensure for all citizens equal opportunity

Indeed, this concept of neutrality appears to imply insensitivity to arguments presented from the viewpoints of comprehensive doctrines. When someone regards herself as a representative of the state in this sense, she is literally expected to remain passive when arguments rooted in comprehensive considerations are presented to her. But for example in deciding about health care—as discussed above—Rawls does not seem to require the politicians at the legislative stage to regard themselves as representatives of the state in this sense. One can hardly deny that there is a certain ambiguity in his view. In particular, it is not clear if Rawls means that the state should do nothing to promote the relatively common goods of column (C).[188]

The fourth kind of variation occurs in persons' tastes and preferences—we may think that these belong to the incomplete conceptions of good. Rawls's position is that tastes and preferences are within people's own responsibility. They can be morally relevant. In particular, person's tastes and preferences may "render someone unable to cooperate normally in society."[189] It is part of being responsible (in Rawls's sense) to beware of causing such a problem—as it is to learn to deal with the problems already caused. We may say, hence, that Rawls considers a wide variety of tastes and preferences as permissible goods, but his conception is not entirely indifferent as to various permissible goods. Unfortunately, his position remains unclear about this: does he favor those tastes and preferences that support the relatively common goods of column (C)?

Robert E. Goodin has asked in more detail in which sense the preferences of democratic citizens might be expected to be reflective and responsible. He suggests that the preferences are proper inputs into the political process if they are sufficiently empathetic, considered, and far-reaching.[190] Goodin regards citizens as responsible when they take "due account of the impact of their actions and choices on all those (here and elsewhere, now or later) who will be affected by them."[191] When these kinds of preferences are actually detected, however, the distinction between the political and the comprehensive becomes relatively vague. Amy Gutmann and Susan Mendus have recently presented similar ways of retaining meaningful ethical identities and commitments (beyond the mere preferences) in a fundamentally democratic, liberal, and egalitarian society.[192] These conceptions might also be regarded to imply different balances of reasonable justice. But if the liberal democratic approach is

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to advance any conception of the good they freely affirm."

188   Rawls (ibid., p. 216) also says that public reason "applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements." This notion supports the more extensive reading of the public reason. However, he remarks here that it applies "above all to a supreme court."

189   Ibid., p. 185.

190   Robert Goodin, *Reflective Democracy* (Oxford, 2003), p. 7.

191   Ibid., p. 2. According to Goodin (ibid., p. 2), democratic citizens are responsive when they take "due account of the evidence and the experience embodied in the beliefs of others."

192   Amy Gutmann, *Identity and Democracy* (Princeton, 2003). Mendus puts the aim of her book as follows: "to explain the attractiveness of impartialist philosophy, and to show how its demands can be reconciled with the partial concerns and commitments that 'give life substance.'" *Impartiality in Moral and Political Philosophy* (Oxford, 2002), p. 7.

developed in this direction, how smoothly might the new insights be accommodated to justice as fairness?

In another passage in *Liberalism*, in which the freedom of the citizens is the dominant starting point, Rawls gives us to understand that the public conception of good *should* be continually in flux. However, in this passage Rawls does not discuss the relatively common goods. Had he done so, this would have challenged the neutrality of aim that he promoted.

In this passage Rawls *encourages* strong reliance on one's own conception of good. He emphasizes that in political liberalism the citizens view themselves as "self-authenticating sources of valid claims."[193] The requirements of justice set limits to these claims. But otherwise a citizen does not need to feel guilty about making claims based on one's conception of good, not even in making claims on their institutions. As Rawls puts it, the citizens "regard themselves as being entitled to make claims on their institutions so as to advance their conceptions of good (provided these conceptions fall within the range permitted by the public conception of justice)."[194] This statement appears to take the communitarian concerns into account more than Rawls's overall conception appears to do otherwise.[195] A consensus based on reasonableness would impose relatively modest limitations on the conceptions of good in the public. Nevertheless, Rawls wished to retain the symmetrical attitude towards the conceptions of good in question.

Rawls's example is that the position of Saul of Tarsus as a citizen did not change, although his religious outlook changed dramatically on the road to Damascus.[196] Rawls is concerned to maintain this kind of neutrality in regard to the deep (religious) conceptions of good in political liberalism. To be a Jew or a Christian is equally permissible politically. But it seems that a similar example would not be convincing in the case of the relatively common goods. If a caring parent becomes negligent, the grounds for liberal neutrality shake. Most thoughtful persons would not hesitate to say that the public culture should be balanced in the favor of caring parenting. Despite endorsing Rawlsian fundamentals in general, one might explicitly relax the neutrality of aim in a number of cases of this kind. Rawls could hardly have denied that such a position would be both reasonable and partially inclusive of the related comprehensive considerations.

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193   Rawls, *Liberalism*, p. 32.

194   Ibid., p. 32. Rawls continues: "These claims citizens regard as having weight of their own apart from being derived from duties and obligations specified by a political conception of justice, for example, from duties and obligations owed to society."

195   In Sandel's (*Democracy's Discontent*, pp. 5–6) account, a communitarian approach is compatible with "republican political theory." It "means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community." This involves a revival of the "civic virtues" that were characteristic to the early United States. In republican political theory, Sandel continues, "politics cannot be neutral towards the values and ends its citizens espouse. The republican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character self-government requires."

196   Rawls, *Liberalism*, pp. 30–31.

The freedom to strive toward one's conception of good in the public sphere reaches its limits in the Rawlsian approach if one does not affirm the equal basic liberties for all (to strive towards the goods of column B).[197] However, for the stability of the arrangement it particularly matters that the liberties are used responsibly. This accords with Rawls's requirement that the citizens are to use their reason to revise their conceptions of goods.[198] Consequently, responsible citizens will need a conceptual category that mediates the permissible goods (that they do not expect to become publicly established) and the common goods of basic justice (that assumedly have firm reasonable grounding). At times Rawls seems to have admitted this, but he does not do so consistently.

A further challenge to the neat division between the plurality of permissible goods and the common goods of basic justice is related to the varying degrees of consensus on the elements of Rawlsian justice. Much work of adjusting and balancing would be left to responsible persons.

Responsible Persons and the Search for Consensus

In one sense, Rawls's account of responsibility adds little to his view on persons as reasonable and rational. But particularly under circumstances in which no firmly overlapping consensus is available, the related questions of inclusiveness in (partially) comprehensive considerations become relevant.

In *Liberalism* Rawls says that citizens are understood "as capable of taking responsibility for their ends" in the following sense: "[G]iven just background institutions and given for each person a fair index of primary goods (as required by the principles of justice), citizens are thought to be capable of adjusting their aims and aspirations in the light of what they can reasonably expect to provide for."[199] Adjusting these aims and aspirations seems complicated. First, it is difficult to say when just background institutions exist and when citizens have a fair share of primary goods. If these are lacking, this formulation implies that requirement to adjust is not in force. Rawls seems to assume that the most reasonable cooperative scheme is already running. It is possible that reasonable persons would not agree upon the two principles of justice with the Rawlsian primary goods. In this case it would not be clear in which sense the responsible persons should take as given the "just background institutions" and the "fair index of primary goods."

Second, even if thoughtful persons accepted that sufficiently reasonable institutions are in place, much would remain open about their actual responsibilities. Recalling Rawls's early view, particularly in "Two Concepts of Rules," we may say that his approach is characterized by highly differentiated role responsibilities. In different practices people have different responsibilities. Some of these could be

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197   Rawls (ibid., p. 30) writes immediately after stressing the freedom to pursue one's conception of good: "We can imagine a society (history offers many examples) in which basic rights and recognized claims depend on religious affiliation and social class. Such a society … lacks a conception of equal citizenship."

198   Ibid., pp. 29–31.

199   Rawls, *Liberalism*, pp. 33–34.

characterized as prospective and others as retrospective, and some responsibilities are legal while others are moral. There is no lack of discussion on the practice-related responsibilities in general.[200] Characteristically, various conceptions of what counts as the relevant harm seem to accompany the different views.[201] But the underlying worry that I have in mind returns us to the first kind of complexities. If the consensus for a sufficiently reasonable scheme of cooperation is lacking, the very idea of the responsibility to adjust the aims has to be reconsidered: to which scheme are the citizens to adjust their aims?

In *Theory* Rawls said that if just institutions do not prevail, there is a natural duty to help to establish them.[202] Rawls could have included this duty in the demands of responsibility in *Liberalism*. In *Liberalism* he does not use the language of natural duties. However, he retains a similar requirement for the citizens of a constitutional democracy to support movement towards the overlapping consensus that includes the two principles of justice.

Rawls maintains that constitutional consensus has been relatively strong in the United States, but the country still lacks overlapping consensus. Constitutional consensus "is not deep:" it is not grounded on the public conception of persons as free and equal and the related ideas of society. Basically this consensus is about the democratic electoral procedures as such—or the establishment of them—and about the principles that enable the procedures to function. These principles include

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200   H.L.A. Hart, for example, has used a story of a drunken sea captain in order to analyze various uses of the concept of responsibility. It was said that the captain behaved *morally* irresponsibly during the journey. He was held *causally* responsible for the deaths of many people in the shipwreck (not only the winter storm was causally responsible). Doctors considered him to be responsible from the *psychological* point of view (he was not insane). The court found him *legally* responsible both criminally and in a separate civil proceeding. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1970), pp. 211–212.

201   Joel Feinberg has argued that the harm principle is the central justification for criminalizing certain acts. Joel Feinberg, *Harm to Others* (New York, 1984). Using game-theoretical models, Doughlas G. Baird et al. have analyzed various subtle ways of causing harm or the risk of harm. Their one example is the encounter of a motorist and a pedestrian, the related risk of an accident, and various degrees of being careful. It is possible that an accident occurs because the motorist is too careful—supposing that the pedestrian fails to predict that the motorist may slow down suddenly. Should the motorist be punished for being excessively careful (and unpredictable)? In the more standard case the harm is caused because one or another of them did not exercise due caution. Doughlas G. Baird et al., *Game Theory and The Law* (Cambridge, 1994), pp. 29–30.

202   The fourth of the natural duties that Rawls lists in *Theory* (pp. 114–115/98–99 rev.) is "the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves." The former three natural duties are: "the duty of help[ing] another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself; the duty not to harm or injure another; and the duty not to inflict [cause] unnecessary suffering." The bracketed wordings are according to *Revised Theory*.

the "right to vote and freedom of political speech and association."[203] Constitutional consensus is also "narrow in scope." It applies to procedures and related principles, but not to the basic structure in a broader sense.[204] In particular, constitutional consensus does not address social and economic inequalities; however, a very basic level of well-being and education for all is included.[205]

Overall, constitutional consensus lacks the conceptual resources to deal with the complicated problems of justice in the basic structure of a society. These include the questions of amending and interpreting the constitution and the questions of distributive justice. Rawls's political liberalism is meant to provide guidelines for dealing with such questions. Constitutional consensus is a consensus "taken literally," and overlapping consensus goes beyond that.[206]

Rawls's texts are not entirely clear about what he intends to be included in constitutional consensus and in overlapping consensus. It is not clear, for example, to what extent Rawls assumed other basic rights besides the political rights to be included in the constitutional consensus. But regardless of the exact wording of these terms in Rawls's text, it seems useful to distinguish between four accounts of (basic) liberties— accounts in which some of the major elements involved are transparently varied:

P3   The basic social structure should provide basic liberties for all.

P3'   The basic social structure should provide democratic political liberties for all.

P3'' The basic social structure should provide the most extensive system of equal basic liberties for all.

P3''' The basic social structure should provide a fully adequate (the most reasonable) scheme of equal basic liberties for all.

Recall that Rawls's list of the basic liberties includes political liberties such as the right to vote and to participate in politics.[207] Accordingly, P3 implies P3'. It also seems proper to say that Rawls's account of constitutional consensus includes both P3 and P3'. A narrow proceduralist conception of democracy would include only P3' or the like. By comparison, Frank Michelman has pointed out that "securing the core basic liberties" is a constitutional matter for Rawls. These are more than mere political rights, but not yet "a fully adequate scheme of basic liberties."[208]

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203   Rawls, *Liberalism*, pp. 158–159.

204   Ibid., p. 159.

205   Rawls (ibid., p. 166) says: "The constitutional essential here is rather that below a certain level of material and social well-being, and of training and education, people simply cannot take part in society as citizens, much less as equal citizens." We may say that the concept of constitutional consensus, as Rawls uses it, includes a narrow concept of equal citizenship.

206   Ibid., p. 165.

207   Rawls, *Justice as Fairness*, p. 44.

208   Michelman ("Rawls on Constitutionalism and Constitutional Law," p. 401) has drawn a table about what is a matter of public reason, priority of liberty, and constitutional

P3'' specifies a position that accords with Rawls's formulation of his first principle of justice in *Theory*. The extension of the system of basic liberties is maximized.[209] As Hart argued and Rawls partly agreed, this may imply a kind of unlimited extension of liberty that would be highly problematic. Hart suggests, for example, that it is strange if the system of liberty is not at all limited in order to prevent harm or suffering.[210]

Finally, P3''' compactly articulates Rawls's position in *Liberalism* and in *Justice as Fairness*. In it, the extension of the scheme of liberty is not necessarily maximized—the scheme should only be fully adequate. But the term "fully adequate" is not very informative in itself. It seems that we could at least as well say that Rawls meant the most reasonable scheme of equal basic liberties.

At this point I do not try to evaluate the arguments for P3, P3', P3'', P3''', or some similar principle. But it is worth remarking that P3' specifies the most modest consensus on (the negative) liberties. Conversely, it allows the broadest space for balancing the liberties with different normative elements that may be candidates for an overlapping consensus. The most extensive system of liberty (P3'') leaves the narrowest space for such balancing. Indeed, I move on to present a table that can be used to clarify thinner and thicker accounts of consensus in addition to some principle of basic liberties. One may also combine the accounts of different degrees of reasonableness (Table 2.1) and the various conceptions of good (Table 2.2) to the items in this table.

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law in justice as fairness. Four items are to be resolved as a matter of constitutional law: "basic governmental structure," "securing the core basic liberties (taken severally)," "formal equality of opportunity," and "provision for 'basic needs.'" The last notion, though, Michelman equipped with two question marks.

209   As a whole, the first principle is, according to *Theory* (p. 250/220 rev.): "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."

210   H.L.A. Hart, "Rawls on Liberty and its Priority," in Norman Daniels (ed.), *Reading Rawls: Critical Studies on Rawls'* A Theory of Justice (Oxford, 1975), pp. 244–247; Rawls, *Revised Theory*, pp. xii–xiii.

Table 2.3   Degrees of reasonableness and of consensus that could be expected after a period of more or less reasonable communication

(A) *Degree of reasonableness*	(B) *Consensus that could be expected after a period of more or less reasonable communication*
(1) Most reasonable	Full overlapping consensus, including all or almost all of Rawls's proposals
(2) Reasonable or (3) not unreasonable	Consensus on the relevant goods, including full or partial: consensus on the primary goods consensus on the other common goods consensus on the relatively common goods Consensus on the relevant principles of justice, including full or partial: consensus on the fully adequate scheme of liberties consensus on the principle(s) of opportunities consensus on the principle(s) of distribution Constitutional consensus, including relatively firm: consensus on the democratic political liberties consensus on the other basic liberties
(4) Unreasonable or (5) worse than unreasonable	Many or grave shortcomings of the overlapping consensus

If we assume that the most reasonable communication has predominated in a society over a period of time that is long enough, we could expect full overlapping consensus to occur. Whether we would have all or almost all of Rawls's proposals accepted depends on the interpretation of "the most reasonable." According to the interpretation that is akin to the theoretically rigorous original position, the argument would be presented in such a way that all proposals would be accepted. But if we assume that there are distinct and contextual persons who all count as most reasonable, we could expect some deviations from Rawls proposals.

When reasonable persons include aspects from their comprehensive views in their public reasoning, this makes an impact on the content of the resulting consensus. This is so at least if we affirm, in accordance with Table 2.1, that reasonable views are partially inclusive to the elements of comprehensive doctrines. From the viewpoint of reasonable democracy (D6), these deviations are not necessarily shortcomings when compared to Rawls's proposals. It may be the case that discussants have presented better reasonable arguments than Rawls. These arguments do not necessarily approximate Rawls's account of being most reasonable. The premises of different reasonable persons include assumptions that are different from those of Rawls's, although the two basic aspects of reasonableness would also be included.

The greatest deviations from the overlapping consensus can be expected when the unreasonable or worse than unreasonable views dominate the discourse. There could well be a firm consensus on some of the items of overlapping consensus. For example,

people might agree that the primary goods such as income and wealth are good for them. However, they might reject the difference principle that Rawls intended to regulate the distribution of the primary goods. If worse than unreasonable doctrines dominate, we could also expect serious shortcomings in terms of constitutional consensus.

I have not assumed that there is a conceptually binding link between the degrees of reasonableness and the expected consensus. Outside the theoretically rigorous interpretation of reasonableness (or the artificial original position), I suggest that this was also Rawls's way of arguing. Rawls did not intend to bind the minds of reasonable persons. Their sincere considerations were meant to contribute to the consensus to be realized. Rawls found it difficult to make this explicit because he seemed to lack a conceptual apparatus that makes various possible deviations from the presumed overlapping consensus transparent enough.

Rawls aimed to articulate his conception so that it would be realistic. He said that the following conditions should be feasible for a consensual liberal conception: "a. it is correctly based on more central fundamental ideas [of a democratic public culture as specified in justice as fairness]; and b. it is stable in view of the interests that support it and are encouraged by it."[211] However, Rawls recognized the possibility that these conditions are so challenging that they are not really feasible. In this case, "a full overlapping consensus cannot, it seems, be achieved."[212]

Studies have been made in order to examine in which respects actual persons might adjust their views to the Rawlsian constraints. Norman Frohlich and Joe A. Oppenheimer asked test subjects to choose between the difference principle and three other principles. The alternatives were: (1) maximizing the floor income (difference principle), (2) maximizing the average income, (3) maximizing the average with some floor constraint, and (4) maximizing the average with some constraints to the range of income (the distance between the rich and the poor).[213] The subjects were given the basic information about the principles at stake and the connected distributions. Then they were asked to make their choice without knowing to which artificial income class they would belong.[214] Interestingly, no more than 1.23 per cent of the subjects chose the difference principle (1). 8.64 per cent chose the range constraint (4), 12.3 per cent the maximum (average) income (2), and 77.8 per cent the floor constraint (3).[215]

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211 Rawls, *Liberalism*, p. 168.

212 Ibid., p. 168.

213 Frohlich and Oppenheimer, *Choosing Justice: An Experimental Approach to Ethical Theory* (Berkeley, 1993), pp. 35–36.

214 Frohlich and Oppenheimer (ibid., p. 191) said to their participants that they have a 5 per cent chance to "be in" the "high" income class. Respective chances were 10 per cent to be in the "medium high," 50 per cent in the "medium," 25 per cent in the "medium low," and 10 per cent in the "low" income class. Depending on which principles were chosen, each class gained different incomes. At the end, Frohlich and Oppenheimer gave real monetary assignments to the subjects that corresponded to the income class in which each of them randomly ended up. The subjects knew about this.

215 Ibid., p. 60.

A somewhat different presentation of the task for the subjects of the experiment would have produced different results. However, if Frohlich and Oppenheimer's choice situation illustrated Rawls's original position even roughly, the difference principle would not gain consensual support. A less than maximal income level for the poor would be fairer in this respect. On the other hand, Rawls did not claim that overlapping consensus actually prevails in the United States. His project was to rely on the concepts of reasonableness and democracy with the related elements of equality, freedom, and rationality.[216] Rawls could still argue that if the well-ordered society were already a reality (i.e. that the difference principle had been fully adopted and implemented) people would then support this arrangement. If people learned to adjust their life plans so that the lowest class would do as well as possible, the well-ordered society would also be stable.

Assumedly this argumentative strategy could be reasonably opposed, but some reasonable and responsible persons could follow it nevertheless. Some of the remaining differences in the views might follow from the more or less serious attempts to construct the most reasonable view. Some of them would depend on the pre-theoretical differences in the background judgments. And part of them would depend on the particular responsible adjustments and balancing. When faced with the need to balance, the discussants could also ask, for example, what kind of a relatively common good would it be to approximate the best attainable position for the poor?[217]

Klosko has examined justice as fairness from the viewpoint of popular consensus. Referring broadly to empirical studies, he has agreed with Rawls that there is broad support for the basic constitutional procedures and principles in the United States.[218] However, one difficulty in the attempts to specify the popular support for certain principles is that people may endorse them in abstract, but not live by them. A "large majority" of people is willing to support both democratic procedures and democratic

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216   In *Liberalism* (p. 167) Rawls reminds us of the starting point of justice as fairness in "the fundamental ideas of society as a fair system of cooperation together with the conception of the persons as free and equal."

217   Another way to elaborate Rawls's approach would be to admit that his fair terms do not guarantee a notably egalitarian outcome. Particularly when expressed in the form of the original position, they imply stringent equality. But as the argument proceeds, the conception quickly allows dramatic inequalities—especially in terms of income and wealth. In this scenario it nevertheless becomes doubtful whether these inequalities really are tolerable in a society of free and *equal* persons. One could ask if a more egalitarian distribution would meet Rawls's fundamental criterion of equality better. Then we may consider responsible persons who combine their conceptions of good *and* justice in such a way as to ensure that distribution of the relevant goods is more egalitarian. They would not claim that the fair terms alone require this degree of egalitarian distribution.

218   Klosko, *Democratic Procedures and Liberal Consensus*, p. 31. Klosko (ibid., p. 29) defines the terms in question as follows: "First is 'popular breadth', the proportion of the population in agreement on some issue or set of issues. … Second is what we can call 'extent' of agreement. Reference here is to the proportion of overall belief systems on which members of the consensus agree."

principles in abstract.[219] These principles include, for example, the principle of tolerance. However, surveys consistently show lower levels of tolerance in more concrete issues.[220]

Neither Frohlich and Oppenheimer's nor Klosko's studies are particularly optimistic about the feasibility of full overlapping consensus in the United States. Even if people considered the elements of Rawls's overlapping consensus from the (simulated) viewpoint of fairness, they would not necessarily endorse them. And even if they endorsed the "right" elements in words, they might not endorse them in deeds. The search for a stable consensus is not a simple process. In articulating the burdens of judgment Rawls anticipated this. Perhaps he did not, however, fully realize the implications of the vagueness of the consensus. When there is no consensually reasonable cooperation, there is no stable scheme that could serve as the basis for adjusting one's conception of good. In such a situation, should a responsible person make his or her public statements about good extremely thin? Or would it be more responsible to articulate one's deeply held conception of good courageously? Different responsible persons would have different answers. The terms of reasonableness could be taken seriously in a variety of responsible discourses, but the related comprehensive perspectives would not be excluded as irrelevant.

Questions of Hypocrisy and Trust beyond the Political

In Table 2.2 I suggested that the relatively common goods in justice as fairness include, for example, democratic pride and freedom from the vices of hypocrisy, envy, spite, and will to dominate. One might also say that these are unsystematic extensions of the political virtues that Rawls presented in *Justice as Fairness*. They provide one interesting point of departure to ask a question of fundamental importance for Rawls's project, namely in which sense Rawls's justice as fairness should be inclusive of the elements of comprehensive doctrines?

In the last pages of *Justice as Fairness,* Rawls returned to the theme of the *goodness of political society*. To have an enduring democratic society is "a great social good" in itself. Rawls believes that those in such a society can properly appreciate it as an historical achievement and feel pride about it, even if the society functions under "quite imperfect" conditions. Such a society can nevertheless be distinguished from undemocratic and unjust societies elsewhere and in earlier times.[221]

Hence, Rawls did not think that including proper national democratic pride would make justice as fairness a (partially) comprehensive doctrine. Instead, he connects

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219 See, for example, Klosko's discussion of the studies by John R. Hibbing and Elizabeth Theiss-Morse (ibid., pp. 123–126), James Hunter and Carol Bowman (ibid., 129–136), James Prothro and Charles Grigg (ibid., pp. 141–142), and Herbert McClosky (ibid., pp. 142–143).

220 Ibid., pp. 49–60. See, in particular, his discussion of the studies by Clyde Nunn, Harry Crockett, and J. Allen Williams (ibid., pp. 49–50) and John L. Sullivan, James Piereson, and George E. Marcus (ibid., pp. 50–53).

221 Rawls, *Justice as Fairness*, p. 201.

this kind of a pride to the progress that this society should make in achieving a number of virtues:

> The more they [the citizens] see their political society as good for themselves both as a corporate body and as individuals, and the greater their appreciation of the political conception in securing the three essentials of a stable regime, the less they will be prompted by the special attitudes of envy, spite, the will to dominate, and the temptation to deprive others of justice.[222]

Rawls actually exhorts people to see their society as good for them, even if the actual society is relatively imperfect. Its citizens are urged to appreciate the "three essentials of a stable regime:" fixed basic rights, reasonable clarity and reliability of the two principles of justice, and cooperative virtues of public reason.[223] In exchange, they are promised freedom from a set of rather classical vices—"envy, spite, the will to dominate, and the temptation to deprive others of justice."

We must remember that these are words in the last chapter of Rawls's book. We might expect the last pages to contain a peroration. But we can also say that the conception of good it advocates is not particularly thin. There are elements that go far beyond the primary goods and even beyond the six ideas of good that Rawls had listed before.[224] Including more such elements shifts Rawls's conception irresistibly closer to a comprehensive point of view. In Rawls's own terms, his solutions become increasingly weighed down by the burdens of judgment in this respect.[225] At this point we may ask in which sense it might have been better for Rawls to admit the partial comprehensiveness of justice as fairness instead of insisting that it does not presume any comprehensive doctrine? If Rawls promotes comprehensive elements under the cover of noncomprehensiveness, the approach becomes vulnerable to the accusation that its professed reasonableness is hypocritical.

One difficulty in Rawls's exhortation to be proud of an imperfect democracy is the danger of undermining the criticism of the regime in question. James Waller has called attention to the related "just-world phenomenon." Those who believe that the social order is just tend to follow its rules rigidly and to blame the weak—for example "the poor and homeless"—for their own suffering.[226] Although one might believe that Rawls did not exemplify this tendency himself, the concept of democratic pride raises some questions.

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222   Ibid., p. 202.

223   Ibid., pp. 115–117, 194.

224   Ibid., pp. 141–142.

225   Consider, for example, the fourth burden of judgment in Rawls's (ibid., pp. 35–36) list, which recognizes the influence of "our total experience" in our moral views. Surely people have differing total experiences about what kind of a society to be proud of and what kind of arrangements tend to free people from envy.

226   James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (New York, 2002), p. 252. Waller (ibid., pp. 250–251) relies on the earlier work on this theme, particularly, work done by the social psychologist Melvin Lerner and the psychologists Zick Rubin and Letitia Anne Peplau.

Noam Chomsky has been particularly bothered by rhetoric that exaggerates the democratic features in the politics of the United States.[227] Case by case he has attempted to show that the United States does not have as much reason to be proud of its democracy as its elites usually suggest.[228] Given that the communist revolution and two world wars started in Europe, the Europeans should be at least as careful in this regard. In addition, the deeds of many non-Western regimes darken the pages of the moral history of the twentieth century, as Jonathan Glover has documented.[229] To examine Chomsky's or Glover's claims case by case would require detailed historical, sociological, and linguistic studies. But at least Chomsky's reader becomes aware that the exhortations of democratic pride—by Harvard philosophers such as Rawls—are related to deeply contextual and comprehensive political debates. In this regard Rawls's other notion in *Justice as Fairness* is of interest: "[I]t is worse than unreasonable if one merely seems, or pretends, to propose or honor them [the fair terms of cooperation] but is ready to violate them to one's advantage as the occasion permits."[230] Thus, Rawls was well aware that the concepts of justice as fairness could be used in a hypocritical way, and he deplores such a use as worse than unreasonable.

The implications of Rawls's notion of hypocritical reasonableness are difficult to pin down. Rawls probably had hypocritical reasonableness of a very serious sort in mind, because he chose to classify the vice as "worse than unreasonable." Indeed, hypocrisy implies a double fault. First, a person fails to meet the relevant moral standard (reasonableness). Second, he pretends that he meets it. But we may expect comprehensive doctrines to have widely differing views of the challenge of hypocrisy to politics. Inspired by Montaigne, Judith Shklar has reckoned hypocrisy among the most serious political vices.[231] If Montaigne and Shklar are right, we might say that this vice should have had a much more central place in justice as fairness than it did. But had Rawls extended his treatment in this direction, he would have faced questions that have been discussed by theologians since the times of Jesus and the

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227 As Chomsky puts it when writing about the politics of the United States in recent decades: "At the rhetorical level, the yearning for democracy has indeed been a persistent theme, coexisting easily with the regular resort to violence and subversion to undermine democracy." Noam Chomsky, *Deterring Democracy* (London, 1991), p. 279.

228 For example, Chomsky (ibid., p. 245) says about the "standard comparisons" between the United States and the former Soviet Union during the Cold War: "It should be evident without further comment [that they were] virtually meaningless, designed for propaganda, not enlightenment."

229 Part Five of Glover's book primarily focuses on the communist regimes of Stalin, Mao, and Pol Pot. Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (Yale, 1999), pp. 235–314. Glover (ibid., pp. 119–122) discusses the horrible events of Rwanda, particularly in 1994, under the heading of tribalism. Waller's *Becoming Evil* also treats these themes. But for both Glover and Waller, Nazism remains the major subject of analysis.

230 Rawls, *Justice as Fairness*, p. 7.

231 Shklar connects hypocrisy to the list of other "ordinary vices" as follows: "Cruelty, hypocrisy, snobbery, treachery, and misanthropy all share a special quality: they have both personal and public dimensions." Judith Shklar, *Ordinary Vices* (Cambridge, 1984), p. 2.

Pharisees. Rawls should have acknowledged that he is a participant (and a partisan) in a relatively comprehensive moral debate—his position is not indifferent to the comprehensive views about the matter.

Rawls's condemnation of hypocrisy as "worse than unreasonable" may be misleading. Justice as fairness is primarily concerned with questions of basic justice. In these matters the meaning of "worse than unreasonable" can be compared to such expressions as "always unjust" or "great evil."[232] However, in ordinary politics minor violations of reasonableness may be common. Hypocrisy may make a minor violation of reasonableness into "worse than unreasonable" only in a limited sense— everyone's basic rights still remain inviolable. Hence, in one case hypocritical reasonableness might be as serious a vice as mere unreasonableness in another. But at a deeper level, we may expect different comprehensive doctrines to have different views of hypocrisy in politics. Rawls's position seems to be more compatible with those comprehensive views that take this vice seriously.

Let us next consider trust. Assumedly it is one of the relatively common goods of justice as fairness. Annette Baier has suggested that trust is a promising mediating concept between the viewpoints of justice and care. She has also expressed her appreciation of Rawls's theoretical efforts—she would be interested if someone managed to construct a theory around the concept of trust.[233] Indeed, Francis Fukuyama, Adam B. Seligman, and many others have contributed recently to such a discussion.[234] In justice as fairness, trust can be taken as one example of a concept that touches on fairness, goodness, rationality, well-ordered society, and real society, but cannot be classified under any of these major concepts straightforwardly.

Rawls assumes trust to develop little by little, as a society becomes a well-ordered society. It is intertwined in the practices and the public culture of a well-

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232   Rawls insisted that "slavery is always unjust." John Rawls, "Justice as Fairness (1958)," pp. 67–69; "Justice as Reciprocity (1971)," in *Papers*, pp. 219–221. In *Theory* (p. 247/217 rev.) he said with reference to Burke's view: "[U]nequal political liberty might conceivably have been a permissible adjustment to historical limitations, serfdom and slavery, and religious intolerance, certainly were not." In *Liberalism* (p. lxii) Rawls called the Holocaust as "the manic evil." In *Peoples* (p. 22) he remarked in reference to the Holocaust and the Inquisition: "Great evils are sufficient unto themselves."

233   Annette Baier, "What do Women Want from Moral Theory," in Mary Larrabee (ed.), *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (New York, 1993); "A Need for More than Justice," in Virginia Held (ed.), *Justice and Care: Essential Readings in Feminist Ethics* (Colorado, 1995), p. 54. Baier ("What do Women Want from Moral Theory," p. 27) says about trust: "This concept also nicely mediates between reason and feeling, those tired old candidates for moral authority."

234   Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London, 1995). Seligman summarizes as follows: "Our purpose in the above discussion is simply to establish the centrality of the issue of trust to modern social and political thought and in so doing, point out how inexorably woven together are the problems of trust and the construction of modern social and political orders: how the problem of establishing trust—or more specifically generalized trust—defines as it does the specificity of modernity." Adam B. Seligman, *The Problem of Trust* (Princeton, 1997), p. 16. Seligman (ibid., p. 18) finds the following threefold classification of the different forms of trust illuminating: "trust in persons, trust in institutionalised personal ties, and trust in abstract systems."

ordered society. Trust tends to grow when the citizens "with evident intention do their part in just or fair institutions."[235] But certain forms of trust are not acceptable in Rawls's view. Trust is not to be based on symbolic expressions that have religious significance for people. Rawls insisted that social unity should not be based even on a partially comprehensive doctrine.[236] We must note again, however, that this assumption plunges Rawls into controversy: even if there were no explicit public religion in a society, would there be an implicit civic religion? Could human societies rid themselves of a significant civic religion of some form, even if they tried? Or would the result only be a civic religion that would hide its religious nature? Joining the debate inspired by Robert Bellah, John F. Wilson has argued that such a civic religion has existed in the recent United States.[237] In the same collection of articles, Bellah himself wanted to draw more attention to the "forces of modern economic life"—forces which ordinary people of the United States find "destructive" to their public and private morality.[238]

In *Bowling Alone*, Robert Putnam argued with plenty of statistical evidence that participation in community life has declined in the United States in recent decades. People used to bowl in groups, but they now go alone. The numbers speak of lower rates of participation in recreational clubs, churches, and political parties since 1950s. Simultaneously, people's trust in the government has been in decline. Putnam suggests that the decline of communal life is one of the reasons for lower trust in the public institutions and policies.[239]

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235 Rawls, *Justice as Fairness*, p. 196.

236 Rawls (ibid., 198–199) says: "[J]ustice as fairness does indeed abandon the ideal of political community if by that ideal is meant a political society united on one (partially or fully) comprehensive religious, philosophical, or moral doctrine."

237 Wilson says: "Within the last several decades, by contrast, the status of common religion has come under question and, possibly, it may no longer operate." John F. Wilson, "Common Religion in American Society," in Leroy S. Rouner (ed.), *Civil Religion and Political Theology* (Notre Dame, 1986), pp. 111–112. Eventually, Wilson (ibid., p. 122) concludes: "Absent of a common religion, however, a civil religion becomes a scarcely veiled revitalization movement, perhaps intensely reactionary in its program. … Far from representing a movement that may be constructive in relationship to the whole society, civil religion in the absence of a common religion as background seems necessarily to be highly selective, prejudicial, indeed, one among other religious movements contending for control of the society in question."

238 Robert Bellah, "Public Philosophy and Public Theology in America Today," in Leroy S. Rouner (ed.), *Civil Religion and Political Theology* (Notre Dame, 1986), p. 93.

239 One of Putnam's figures—based on various sources including the POLL on-line survey archive of the Roper Center for Public Opinion Research and the *Washington Post*— shows a clear decline from 1952 to 1998. It presents answers to the question: "Do You Think People in General Today Lead as Good Lives—Honest and Moral—as They Used to Do?" Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, 2001), p. 139. Putnam (ibid., p. 67) points out that the decline in religious involvement correlates with the decline in voluntary working and philanthropy. He continues: "About 75–80 percent of church members give to charity, as compared with 55–60 percent of nonmembers, and 50–60 percent of church members volunteer, while only 30–35 percents of nonmembers do."

In a book edited by Joseph S. Nye a number of scholars have discussed the declining confidence in the government towards the end of the twentieth century. The picture is complicated—I only mention the question taken up by Nye, namely whether it matters that people do not trust government. Over 200 years ago the American colonists did not trust King George of England. And in the newly formed United States it was fiercely debated whether the people should be expected to trust a strong central government. Hence, it is far from clear that more trust in the *government* is better. Nye points out, however, that even 90 per cent of the citizens of the United States "like their *democratic system* of government" [my emphasis].[240]

When I discuss Rawls's law of peoples in 3.1, I return to the possibility that a comprehensive (religious) doctrine can serve as a source of social cohesion and trust. But clearly the question of social trust touches comprehensive considerations of the good life as well as just basic structure. Justice as fairness is not indifferent to the value of trust. I have suggested that it may be counted as one relatively common good in it. As in the case of the other relatively common goods, Rawls could have admitted that justice as fairness takes sides in such partially comprehensive questions. However, to admit this clearly and systematically would have had certain implications for his conception as a whole.

2.4 Partial Comprehensiveness and Balancing Reasonable Justice

Partial Comprehensiveness of Justice as Fairness

In *Liberalism*, Rawls attempted to formulate justice as fairness so that a great variety of comprehensive doctrines could endorse it. He intended justice as fairness not to be a comprehensive doctrine itself, but a political conception of justice.[241] However, I have pointed out that justice as fairness takes sides in many questions that are controversial among comprehensive doctrines. It is not as impartial vis-à-vis different comprehensive doctrines as Rawls hoped it would be. What kinds of problems follow? First, it remains unclear when the arguments presented from a comprehensive perspective matter for Rawls's view and when they do not. In other words, when and why is his conception sensitive to them? Another problem is related to the criterion of realism in justice as fairness. Rawls clearly aimed at a utopia that is also realistic. But because he continually tries to avoid comprehensive positions, he does not fully face many profound questions about the realism of his realistic utopia.

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240   Joseph S. Nye, Jr., "Introduction: The Decline of Confidence in Government," in Joseph S. Nye, Jr. et al. (eds), *Why People Don't Trust Government* (Cambridge, 1997), p. 3. A distinction by Onora O'Neill may be clarifying here: "Perhaps the matter is that we simply have to *rely* on institutions and persons although we *don't really trust them* (O'Neill's emphases)." Onora O'Neill, *A Question of Trust: The BBC Reith Lectures 2002* (Cambridge, 2002), p. 12.

241   In "Reply to Habermas," Rawls (*Liberalism*, p. 374) put it as follows: "I think of political liberalism as a doctrine that falls under the category of the political. It works entirely within that domain and does not rely on anything outside it."

In what follows I will first summarize certain findings made so far. I will articulate fourteen features of justice as fairness that make it partially comprehensive or, at least, raise critical questions about Rawls's claim that justice as fairness is only political. Then I will go on to show how the framework for balancing reasonable justice can provide further clarification.

In *Liberalism* Rawls defines fully and partially comprehensive doctrines as follows: "A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and virtues and is rather loosely articulated."[242] Although Rawls talks here only about values and virtues, his concept of a comprehensive doctrine is routinely meant to include all kinds of metaphysical and religious views that constitute an articulated system of thought.[243] He says that "there is a tendency for religious and philosophical conceptions to be … comprehensive."[244]

In order to be partially comprehensive, the doctrine "must extend beyond the political and include nonpolitical values and virtues."[245] Although Rawls's justice as fairness is a political doctrine for the most part, it has aspects that extend beyond the political sphere.

Begin by recalling that Rawls developed political liberalism on the basis of justice as fairness as presented in *Theory*. Rawls moved in a direction that is more accommodative of different comprehensive views, but much of the approach of *Theory* remained. (1) *The overall structure of the earlier justice as fairness remained* virtually unchanged. In his later versions of justice as fairness Rawls still applied the three viewpoints for constructing arguments for the principles of justice (as illustrated in Figure 1.1): the persons in a real society, the parties in the original position, and the citizens in the well-ordered society. In political liberalism, Rawls elaborated above all the viewpoint of the citizens. However, his conception still included the two other fundamental viewpoints. In later justice as fairness, Rawls did not expect reasonable citizens to argue exactly in the way the original position and the two principles of justice indicate. But the overall framework of justice as fairness is to guide the required adjustments.

In *Justice as Fairness*, Rawls affirmed that his political conception of justice is also based on historical political texts, such as constitutions and declarations of human rights. In order to interpret them, Rawls has looked at "courts, political parties, and statesmen" and related literature.[246] It remains unclear in which sense such a large-scale project of historical interpretation could avoid taking sides on questions that are relatively deeply philosophical, if not also metaphysical and religious. I suggest that

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242   Rawls, *Liberalism*, p. 175.

243   In *Justice as Fairness* (p. 19) Rawls writes about what it means that justice as fairness is not intended to be comprehensive: "This means that the conception of the person is not taken from metaphysics or the philosophy of mind, or from psychology; it may have little relation to conceptions of the self discussed in those disciplines."

244   Rawls, *Liberalism*, p. 175.

245   Ibid., p. 175.

246   Rawls, *Justice as Fairness*, p. 19.

Rawls's (2) *interpretation of history* extends to the area of partial comprehensiveness. The historical narrative he favors includes comprehensively liberal tones. The introduction to *Liberalism* traces a path from the evils of the Catholic regime in the Middle Ages to the wars of religion, to the *modus vivendi* peace inspired by Hobbes, and to the current liberal constitutional regime exemplified by the United States. Undoubtedly this way to see history has much truth in it, but specialists of the history of ideas have written other narratives that differ from it significantly. Charles Taylor's *Sources of the Self* is one example.[247] I do not claim that Rawls expected all reasonable persons to share more than a few main points of the overall picture of the Western history as he drafted it. But he drafted it in a characteristically liberal way. This may be counted as one partially comprehensive feature in his dominantly political conception of justice.

There also are systematic connections between justice as fairness and comprehensive liberal doctrines. Recall the three aspects in Hume's and Kant's views that Rawls affirmed.[248] The first of these was: (3) *no elite has special moral knowledge*. However, it is not clear how Rawls could avoid implying that people who regard morality in terms of universal principles constitute a kind of a moral elite. Recall the discussion of the nine-tenth, one-tenth, and the more stringent criteria for reasonableness. Even if we agreed that according to proper political justice, no elite has special moral knowledge, people in high office should be particularly capable in terms of their moral and intellectual capacities. It turns out that the concept of "special moral knowledge" is controversial. The claim that every "normally reasonable and conscientious person" knows "how we are to act" is so profound that it cannot be neatly restricted to the area of political morality.

The two other criteria in question were: (4) *morality is not rooted in God but in human nature and the requirements of living together* and (5) *morality does not require external sanctions*. Rawls says that he promotes these notions only in the area of basic political justice. However, they are more compatible with secular (Humean and Kantian) views than with a whole variety of different comprehensive views. Perhaps the criteria could be backed by extensive arguments, but I do not see how those arguments could avoid relying on at least partially comprehensive considerations as well. Does morality, including political morality, really arise from human nature only, and is it really realistic to expect that no external sanctions are needed? In Chapter 3 I will return to the topic of the religious support for reasonable political morality.

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247   When talking about the Reformation, for example, Taylor notes that ordinary life was regarded as good life: "I believe that this affirmation of ordinary life, although not uncontested and frequently appearing in secularized form, has become one of the most powerful ideas in modern civilization." Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, 1992), pp. 13–14.

248   1. Every "normally reasonable and conscientious" person, not only few (clergy or other elite), know or are aware "of how we are to act."

2. Morality is not derived from God's intellect but arises from human nature and "the requirements of our living together in society."

3. We do not need external sanctions (by God, state, or the like) for moral motivation but "we have in our nature sufficient motives." Rawls, *Liberalism*, pp. xxviii–xxix.

Rawls recognized that the fact of the burdens of judgment makes moral argumentation difficult—including arguments in fair terms. He also enumerates other factual claims as parts of justice as fairness: reasonable pluralism, the fact of oppression, moderate scarcity, gains of cooperation, etc.[249] Rawls was hardly able to avoid taking a partially comprehensive position when he (6) *included factual claims with nontrivial aspects* in justice as fairness. The question is not whether there is or is not much truth in these claims—but how much? For example, in which sense is the fact of oppression really a fact? How could this claim be tested? Or are we simply asked to accept that any other form of pluralism than Rawls's reasonable pluralism implies oppressive use of the power of the state? Rawls has also noted facts that might well be less controversial. Take F12 as an example:

F12   the fact that people are vulnerable and needy.[250]

But Rawls did not thoroughly explore the implications of such assumptions. Had he paid more attention to this fact, his conception of justice as fairness would not have been so roundly attacked by the feminist ethics of care (as I will argue in 3.3). Instead of regarding any set of reasonably acceptable factual assumptions as fixed, thoughtful persons are likely to discuss and criticize them in the light of their (partially) comprehensive perspectives as well.

In 2.2 I discussed Ackerman's view that Rawls imported Kant's philosophy into American constitutionalism. To the extent that Ackerman's claim holds, justice as fairness is partially comprehensive in this sense: it is (7) *Kantian in comparison with a more strictly constitutional approach*. In relation to democratic proceduralists, who are close to Habermas's view, Rawls's conception is in a different position. Rawls regards Habermas's discourse ethics as more comprehensive than justice as fairness. However, Rawls says that he has built (8) *more content into his political conception than democratic proceduralists* into theirs. Democratic proceduralists maintain that Rawls's conception would actually place relatively strong restrictions on free public discussion and democratic autonomy.[251] Thus, Rawls's way of balancing freedom,

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249   F5 The "fact of reasonable pluralism" (according to *Justice as Fairness*);

F6   the "fact of its permanence;"

F7   the "fact of oppression," i.e. "the fact that this pluralism can be overcome only by the oppressive use of state power;"

F8   the "fact of moderate scarcity;"

F9   the "fact of there being numerous possibilities of gains from well-ordered social cooperation, provided it can be established on fair terms;"

F10   the "fact of burdens of judgment" (according to *Justice as Fairness*); and

F13   the fact that enduring democracy "must be willingly and freely supported by at least a substantial majority of its politically active citizens."

250   Another example that I specified was:

F11   the fact that people live in defined territories.

251   Recall that Rawls required citizens to vote according to proper public reasons only when matters of basic justice and constitutional essentials are at stake. Upon closer examination, however, these questions turned out to be quite numerous.

equality, and democracy would require further backing for many who do not question these normative elements as such.

In justice as fairness Rawls uses a thin conception of good. At its core is the list of primary goods that Rawls constructed on the basis of the notion of goodness as rationality. The only item in the list of primary goods that clearly goes beyond rights, equality, and economic goods is self-respect. In a sense, it is a partially comprehensive solution to place such a high emphasis on self-respect. More generally, partially comprehensive considerations are needed in order to create (9) *a list of primary goods for certain kinds of persons*. Much adjusting and balancing is needed in order to say which elementary goods are regarded as important for a great variety of people and why.

Particularly in *Justice as Fairness*, Rawls denied that the goods of justice as fairness consist solely of the primary goods. To put it succinctly, (10) *several conceptions of good in justice as fairness* presuppose partially comprehensive considerations. There also are (11) *notions of relatively common goods* in his texts. Rawls's brief treatments of these topics leave much to do for responsible persons who aim at making the criteria of reasonableness feasible in a vaguely well-ordered society.

Rawls's concept of reasonableness contains the central criteria that he needs in order to distinguish sufficiently between his political conception of justice and comprehensive doctrines. But his (12) *ideal of the most reasonable* may be another partially comprehensive aspect of justice as fairness. This ideal implies that exceptionally high emphasis is placed on a relatively narrow set of moral criteria. Apparently Rawls thought that these are precisely the criteria that protect justice as fairness from the oppression that lurks in comprehensive elements. However, this way of excluding various comprehensive doctrines remains a controversial solution. Even if many profound conceptions of good, truth, and right should not play any role in politically reasonable arguments, why should we go very far down this road? Rawls's idea of reasonableness already includes the aspects of fair terms and the burdens of judgment. It is not clear what it might mean to put more and more emphasis on both of these criteria. Nor is it clear why we, as thoughtful persons, should try to do this.

I will take up two additional, partially comprehensive aspects of justice as fairness in Chapter 3. The first of these is Rawls's (13) *relatively specific view of distributive justice*. The other is his solution (14) *to develop the conception for one isolated society first*. One could hardly expect a broad consensus of reasonable doctrines to emerge from these solutions. But reasonable arguments that *also* rely on relatively profound understanding of the human condition might be developed to support them.

I have now enumerated fourteen features of justice as fairness which arguably include comprehensive considerations. In a sense this is not surprising. Rawls has consistently applied the method of reflective equilibrium. Once in a while he has added new elements to his view—elements that reflect his own considered judgments. In this respect it is even characteristic of justice as fairness that it includes partially comprehensive elements. However, an alternative framework could help us to deal with them more transparently.

Framework for Balancing Reasonable Justice

A close reading of Rawls's texts has shown that there are (supposedly true) factual propositions and conceptions of good in important roles in justice as fairness. Rawls intended, however, to "replace" comprehensive goods and truths with the idea of political reasonableness in the sphere of basic political justice. I have drawn attention to several difficulties in this attempt. The major criticism that I have put forward in this respect has been that justice as fairness is not as neutral in regard to a number of reasonable comprehensive doctrines as Rawls hoped it would be. Reasonable persons might well have included different factual propositions and different conceptions of good in the conception—and in different proportions.

In Figure 1.1 (in 1.3) I presented the four main parts of justice as fairness.[252] Figure 2.1 specifies a framework for balancing reasonable justice in the form in which the examined criticism has been taken into account.
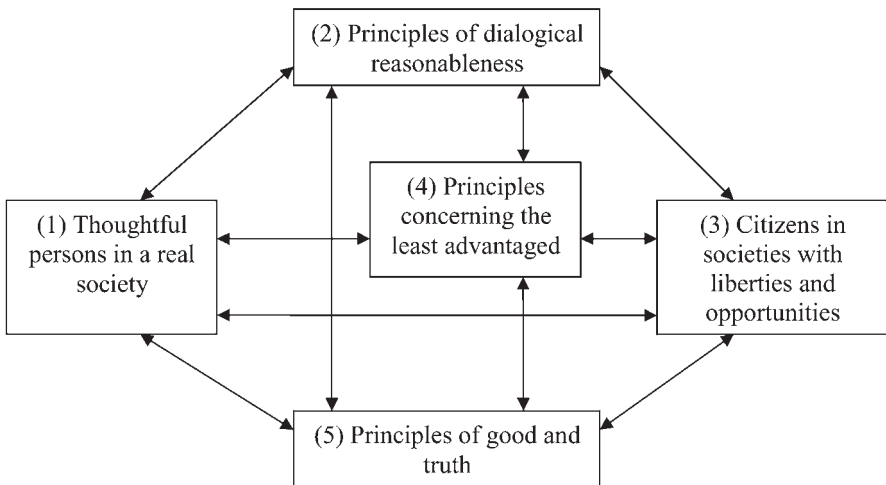
Figure 2.1   Framework for balancing reasonable justice

Compared to Figure 1.1, the new box in this figure is (5). But box (5) is not new for close readers of Rawls: Certain goods and truths are elements of justice as fairness, and box (5) assigns an explicit place for them in the conception. It provides a clear conceptual space for examining how different factual assumptions and conceptions of good might be adjusted to the view as a whole.

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252   I argued that (1) reasonable persons in a real society, (2) parties in the original position, and (3) citizens in a well-ordered society are the fundamental starting points for formulating (4) the constructed principles step by step. I argued that had Rawls presented the original position as more dialogical, it had stood up better in the face of the examined criticism.

One terminological change in comparison with Figure 1.1 is worth noting right away. In Figure 2.1 I now call the persons of box (1) "thoughtful" while in Figure 1.1 I called them "reasonable." This is because in his later justice as fairness, Rawls started to use the concept of reasonableness in a narrower sense by anchoring it to its two aspects and contrasting it to rationality. But in his search for reflective equilibrium he also retained the broad use of reason that is limited neither to the two aspects of reasonableness nor to rationality. Thoughtfulness is a handy term for this broad use of reason.

I have also made changes in the contents of boxes (2), (3) and (4). In Figure 2.1 these boxes, as well as box (5), refer to the eight principles for balancing reasonable justice. I have formulated the principles so that they allow either less or more demanding interpretations than Rawls's justice as fairness in a number of respects. The eight principles for balancing reasonable justice are:

Principles of dialogical reasonableness

P1   A person should be willing to provide reasonable, or at least not unreasonable, grounds for one's contributions to the basic social structure and related issues.

P2   A person should be willing to empathetically understand other persons' views about the basic social structure and related issues.

Principles of liberties and opportunities

P3   The basic social structure should provide basic liberties for all.

P4   The basic social structure should provide opportunities for all beyond the basic liberties and to favor the realization of these opportunities in accordance with merits.

Principles concerning the least advantaged

P5   Social and economic inequalities of the basic social structure should benefit the least advantaged in terms of primary goods.

P6   The particular contributions of persons should benefit the least advantaged in terms of the common and the relatively common goods.

Principles of good and truth

P7   The basic social structure and the particular contributions of persons should advance the common and the relatively common goods.

P8   A person should take into account relevant truths in the design of the basic social structure.

Having articulated these principles, the major parts of balancing reasonable justice are now in place.

One may wonder why none of these eight principles specifies the notion of thoughtfulness in box (1) in Figure 2.1. This is so because a central purpose of the eight principles is to clarify various ways of making the extremely broad considerations more specific. Rawls shared this intention as discussed in detail in Chapter 1 starting from principle P9, according to which a "moral judgment should be a considered judgment." Principles P1 through P8 thus specify more specific restrictions than P9, but they are not as demanding as the restrictions of justice as fairness in a number of cases.

For short, I call the conception of a person implied by the eight principles a responsible person. This concept relies strongly on Rawls's notions of responsible persons as those who seek to adjust their conceptions of good to the requirements of reasonableness. The eight principles make the concept of the responsible person more specific. In certain respects the concept connected to them is less demanding and in certain respects more demanding than Rawls's reasonableness—depending on which principle is involved.

In P1 I have used the expression "reasonable, or at least not unreasonable, grounds." The concept of reasonableness involved is that of Rawls's later justice as fairness at its core. Its two aspects are the fair terms and the burdens of judgment aspect. In a Rawlsian spirit, I would say that in reasonable views the two aspects of reasonableness have relatively central roles. In "not unreasonable" views this need not be the case. I include in them all views which do not violate the minimum requirements of the two aspects of reasonableness. Not unreasonable grounds may be deeply rooted in comprehensive doctrines, religious or moral, as far as these doctrines do not actually violate the minimum requirements of fairness and the recognition of the burdens of judgment.

P1 allows not unreasonable, reasonable, and the most reasonable grounds as specified in Table 2.1 and in the related discussion. When seeking different possibilities to balance the elements of justice as fairness and other elements, responsible persons may try any of these options. The advantage of this solution is that it can be combined with remarkably different comprehensive and partially comprehensive views. Thus the solution clearly favors a more dialogical attitude than Rawls's, in which the most reasonable arguments are basically always the preferred ones.

P2 explicates another important element in dialogical reasonableness: attempts to empathetically understand the views of the others. Rawls's justice as fairness may be said to include a corresponding requirement, but this element has had a relatively unspecified role in it. The commonsensical interpretation of the original position, especially, comes close to the dialogical reasonableness of P1 and P2. I will return to the particular concept of understanding in P2. Now I mention only that P2 as such does not exclude unreasonable or even worse than unreasonable views. Responsible, dialogically reasonable persons might well try to understand them empathetically, although they would not accept as justifiable the grounds these views provide (as P1 proposes).

The burdens of judgment seem to accompany discussions on social justice unavoidably. But if they turn out to be heavy, the terms of justice may become vague

to a worrying degree. In dialogical reasonableness the response is twofold. Not only may dialogically reasonable persons suggest more demanding terms of justice in the related dialogues, but they may also try to understand the different views more deeply.

In *Liberalism*, Rawls used a conception of a citizen of a liberal democratic regime as his basic starting point. Box (3) in Figure 2.1 and the principles of liberties and opportunities (P3 and P4) correspond to this starting point. In 2.3, I articulated P3 together with a set of alternatives to it: P3', P3'', and P3'''.[253] P3 is not the least demanding of the principles. The basic liberties of P3 are supposed to include both the basic political liberties of a democratic regime as well as the other basic liberties as listed by Rawls. P3' includes only the political liberties. P3'' and P3''', on the other hand, articulate more extensive liberties as promoted by Rawls. P3'' and P3''' belong to the possible balances of reasonable justice. P3 as such leaves these questions open.

The principle of opportunities (P4) proposes, first, "opportunities for all beyond the basic liberties." An underlying assumption is that the basic structure with secured basic liberties already provides plenty of opportunities for the people. Rawls's principle of fair equality of opportunity clearly demands more, but it is hard to say exactly how much more and what.

Second, while P4 is a more modest principle of opportunities than Rawls's principle of fair equality of opportunity, P4 clearly includes the notion of merit. In a free society, people manage to utilize their opportunities in various ways. Traditionally, not least in the Aristotelian tradition, it has been in the core of justice to ensure that people get what they deserve. P4 connects the notion of merit to the principle of opportunities so that the free nature of the provided opportunities does not disappear. It also leaves the notion of merit widely open, dependent on dialogically reasonable arguments and on considerations related to other relevant principles. Nevertheless, P4 crucially departs from Rawls's position, in which merits are not included in the core parts of the doctrine at all. I have already argued (in 1.2) that Rawls's position is highly problematic at this point. In Chapter 3, I move on to suggest that the implications of the notion of merit need not be as inegalitarian as Rawls seemed to have thought.

P5 and P6 concentrate on the position of the least advantaged people. This theme, particularly the difference principle, will be discussed in Chapter 3. But the broader framework for the analysis has already been presented. Table 2.2 provides an overall view of Rawls's conceptions of good and of the place of the primary goods in the scheme. P5 follows Rawls in using the primary goods as the measure of the position of the least advantaged. P5 does not demand the position of the least advantaged to be maximized. P6, however, complements the requirement of P5 in ways that may be seen as more demanding than those of justice as fairness. Responsible persons

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253   P3' The basic social structure should provide democratic political liberties for all.

P3''   The basic social structure should provide the most extensive system of equal basic liberties for all.

P3''' The basic social structure should provide a fully adequate (the most reasonable) scheme of equal basic liberties for all.

would seek to benefit the least advantaged in terms of the primary as well as the (relatively) common goods. And they would do it also by making various particular contributions, not only by arguing and voting on the basic structure.

In general, P5 and P6 are "principles concerning the least advantaged" and not necessarily principles for the benefit of all. Hence, if the starting point of the analysis is not strict equality, these principles allow relatively egalitarian conceptions that benefit only the least advantaged.

P7 and P8, finally, focus on the questions of goods and truths. Besides caring for the least advantaged, the contributions of the responsible persons would advance the common and the relatively common goods of the society in general. P7 might be seen as more demanding than justice as fairness in this respect. Rawls counted more on the institutional design itself: properly designed institutions would lead people to produce enough goods for the society. But as we have seen (in 1.2), Rawls did not expect reasonable people to be mutually disinterested in their actual societies. P7 straightforwardly suggests that altruistic interests should have a role there, and P8 makes the straightforwardly explicit claim that many truths matter for the conceptions of political justice.

In Table 3 I specified various alternatives for the content of the overlapping consensus. The most reasonable persons in Rawls's justice as fairness would agree— either by definition or by Rawls's argument—on all, or almost all of his proposals. In a society dominated by unreasonable or worse than unreasonable persons, serious deviations from these proposals would be expected. But after all, there are plenty of positions in between. Furthermore, it is far from clear that real reasonable persons would fit Rawls's proposals. Much would depend on their reactions to the fourteen features of justice as fairness that I propose to include partially comprehensive aspects.

Of the various balances of reasonable justice that principles P1–P8 allow, some are bound to be more strictly political and others more comprehensive. I see no need to distinguish sharply here. In real societies complex issues of realism and various asymmetries have to be faced. Peoples are different in many ways and they have different positions in the global setting. It is time to look at Rawls's attempt to extend his conception beyond one liberal democratic regime.

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Chapter 3

Extensions and Balancing

3.1 Different Peoples and Different Rights

Extensions of Liberal Ideals

In *A Theory of Justice* Rawls gave some indications of how his conception could be extended to international relationships.[1] But these few remarks left much open about the content of such extensions. In *The Law of Peoples* Rawls faced the challenge of how to extend justice as fairness to different peoples and international justice much more thoroughly.

Should all peoples establish for themselves democratic regimes with equal basic rights? A central test case for this in Rawls's law of peoples is the concept of a decent society. Rawls does not require decent societies to develop according to the ideals of liberty, equality, reasonableness, rationality, and democracy as stringently as liberal democracies. But he proposes that any decent society should respect certain liberal ideals, including respect for human rights. Once we have posited a liberal society in relation to other societies, we can more transparently examine the balancing of different criteria in the case of one liberal democracy as well.

In *Peoples* Rawls asks first how a society of *reasonable liberal peoples* is possible. He then extends his discussion to other well-ordered societies, including *decent peoples*. Rawls calls three kinds of societies that are not well ordered *outlaw states*, *burdened societies*, and *benevolent absolutisms*.[2] When using these concepts in a general way, Rawls is not strictly consistent in distinguishing between "people," "society," and "state." Accordingly, in what follows I will not make systematic distinctions between them at the outset. Rawls's main interest seems to be to outline a law of peoples, rather than a law of societies or states, but in 3.2 I point out certain difficulties in this approach.

Peoples—not individuals—are the units whose representatives are to agree on reasonable terms in the law of peoples. For modeling the reasonableness of peoples Rawls uses the "second original position." As in the case of the first original position, there is a veil of ignorance. In the case of the second original position, the parties

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1   John Rawls, *A Theory of Justice* (Cambridge, 1971/1999 rev.), pp. 377–379/331–333 rev. Here Rawls called the extension "the law of nations." It included the notion of nations as the parties of the respective original position. Rawls (ibid., p. 379/333 rev.) wrote, for example, about the possibility that a just state goes to war: "It is not moved by the desire for world power or national glory; nor does it wage war for purposes of economic gain or the acquisition of territory."

2   John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, 1999), p. 4.

representing peoples "do not know, for example, the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent. [Neither do they] know the extent of their natural resources, or the level of their economic development, or other such information."[3]

From this original position, Rawls first formulates the argument for the case of different liberal democracies. At this stage the parties know that the circumstances are favorable enough for liberal democracies to be possible.[4]

Rawls means the setting of the parties to model five features, in particular. All of them have parallels in the original position of justice as fairness, but there are also differences. The five features of the representatives of liberal peoples are the following. The parties are (1) fairly and reasonably situated as free and equal, and (2) rational. They (3) deliberate about the content of the law of peoples. Their deliberation is (4) based on right reasons (illustrated by the veil of ignorance) and (5) fundamental interests as specified by a liberal conception of justice with the first original position.[5]

Those fundamental interests, Rawls affirms, are not meant to include comprehensive conceptions of the good. Surely the citizens of liberal societies have comprehensive conceptions. But Rawls maintains that "a liberal society with a constitutional regime does not, *as a liberal society*, have a *comprehensive* conception of the good [Rawls's emphasis]."[6] The relevant fundamental interests are such as political independence, free cultural life, security, well-being, and self-respect. Such fundamental interests are also rooted in the history of a liberal people. For example, the trials of the court have their significant history. The liberal peoples are willing to respect, in this case, other liberal peoples' corresponding fundamental interests that are connected to these peoples' particular cultural and historical features.[7]

The parties of the second original position, Rawls proposes, would allow many inequalities between peoples. Actual societies of different sizes and cultures would be differently situated in the society of peoples. The parties who do not know which society they actually represent would choose it to be this way. Or so Rawls suggests. He expects a conjecture of this kind to gain further allegiance over time.[8]

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3   Ibid., pp. 32–33. Rawls also says here that the second original position is a device for the representation of what "you and I ... regard as fair conditions" as in the case of the first original position.

4   Ibid., pp. 32–33. Rawls (ibid., pp. 11–12) intends the law of peoples to be a realistic utopia. This idea is characteristic of justice as fairness as well. But once the parties of the contract are peoples and the presumed actual institutions international, a specific effort is required to articulate what it means for a conception to be realistically utopian.

5   Ibid., p. 33.

6   Ibid., p. 34.

7   Ibid., pp. 34–35.

8   Ibid., p. 35. Rawls says here: "This recognition of inequalities, rather, parallels citizens' accepting functional social and economic inequalities in their liberal society."

Rawls then formulates the eight principles of the law of peoples, which he thinks are "familiar and traditional principles of justice among free and democratic peoples."[9] These are, *verbatim*:

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.

5. Peoples have the right of self-defense but not right to instigate war for reasons other than self-defense.

6. Peoples are to honor 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 unfavorable conditions that prevent their having a just or decent political and social regime.[10]

Rawls says that "[t]hese principles constitute the basic charter of the Law of Peoples."[11] He readily admits that other principles could be added to these eight principles and that the eight principles require a lot of interpretation. The governments must also take many other responsibilities. He mentions caring for the environment and the size of the population so that conditions would remain favorable to the survival of the society.[12]

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9   Ibid., p. 37. Indeed, here is a problem of familiarity similar to that discussed (in 1.1) in the case of Rawls's first formulation of the two principles of justice in "Justice as Fairness." Now Rawls suggests that the principles are also traditional. Allen Buchanan has argued that, in a sense, Rawls's approach is too traditional. It articulates rules for a vanished world. Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics*, 110/4 (2000). Buchanan (ibid., 701) specifies the Westphalian world as follows: "States are conceived of (1) as more or less economically self-sufficient units that are also distributionally autonomous and (2) as politically homogeneous, unified actors, without internal political differentiation." His criticism, however, seems to be mainly directed towards Rawls's insufficient distinction between peoples and states, the insufficiency of applicability of the principles to individuals, and the insufficiency of the eighth principle as a principle of distributive justice—but not towards the eight principles as such.

10   Rawls, *Peoples*, p. 37.

11   Ibid., p. 37.

12   Ibid., pp. 38–39. He continues: "In this case the asset is the people's territory and its capacity to support them *in perpetuity;* and the agent is the people themselves as politically organized [Rawls's emphasis]."

Overall, the concept of responsibility appears to have a similar role here as in justice as fairness. Responsible people(s) are to adjust their ends to the reasonable requirements of justice. Rawls's notion of responsibility for the environment, in particular, recalls his requirement of just savings which he drafted already in *Theory* (and which I will discuss in 3.2).[13] But in general, the eight principles of the law of peoples leave more room for various ways of balancing different normative considerations. A major reason for this is that the difference principle is not included in the law of peoples. We can also remark that the "fundamental interests" and "environmental integrity," as Rawls discusses them here, clearly go beyond the primary goods of justice as fairness.

When discussing democratic peace in more detail, Rawls articulates further principles that have a certain resemblance to the second principle of justice in justice as fairness. Liberal democracies should arrange (1) fair opportunities to education, (2) decent distribution of income and wealth, (3) workplaces for the unemployed, (4) basic health care for all, and (5) public financing of elections.[14]

Why does this list differ from the principles 2a. (fair equality of opportunity) and 2b. (the difference principle) of justice as fairness at all? It appears that Rawls reconsidered the theme of the worth of liberty and ended up with somewhat different principles than in justice as fairness. One of the reasons for this outcome might be that he now had actively in mind that the requirements should apply to a variety of reasonable liberal societies. Considering the related particularities differently would thus have an impact on this thought. On the other hand, he presented these five principles as factors contributing to democratic peace. Justice as fairness could still be argued to specify proper principles if we aim at the most reasonable (or reasonable) democracies—not only at peaceful democracies.

Rawls explicitly recognizes that these five criteria may be very differently satisfied in different liberal democracies.[15] But he immediately goes on to point out that Western peoples have relatively often failed to meet even the basic requirements of the law of peoples. These peoples have not been properly democratic. According to Rawls's interpretation, the "great wars of the nineteenth century" were not between liberal democratic peoples. For example, the American Civil War was not, because the Southern States were still protecting slavery. In the two world wars, too, democratic regimes were allied against nondemocratic regimes.[16]

Rawls also refers to the colonial empires of Great Britain, France, and Germany in the eighteenth and the nineteenth century. His basic approach is that they had

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13   Rawls, *Theory*, pp. 284–303/251–267 rev.

14   Rawls, *Peoples*, p. 50. Here Rawls specifies the condition of decent distribution of income and wealth as follows: "[A]ll citizens must be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms. (In the absence of this condition, those with wealth and income tend to dominate those with less and increasingly control political power in their own favor.)"

15   Ibid., p. 49. Rawls emphasizes here, however, that any liberal society can clearly be distinguished from the libertarian ones. The latter affirm no principle that restricts "excessive social and economic inequalities."

16   Ibid., p. 52. Rawls here mentions "the Napoleonic wars, Bismarck's war, and the American Civil War" as the "great wars of the nineteenth century."

remarkable shortcomings as liberal democracies. Similarly, the "great shortcomings" of the United States as an actual constitutional democracy include a number of its interventions in the twentieth century:

> [T]he United States overturned the democracies of Allende in Chile, Arbenz in Guatemala, Mossadech in Iran, and, some would add, the Sandanistas in Nicaragua. Whatever the merits of these regimes, covert operations against them were carried out by a government prompted by monopolistic and oligarchic interests without the knowledge or criticism of the public.[17]

The list may appear as surprisingly long. Did Rawls mean that the United States of the recent decades should not be counted among the properly liberal democracies at all? This implication would be surprising, because otherwise he drafted his conception to conform to the constitutional arrangements and public culture of the United States better than to those of any other nation. But he did identify the mentioned interventions as serious shortcoming in the foreign policy of his country. This enforces the interpretation that he clearly aimed to distinguish his ideal reasonably liberal democracy from the actual United States.

Allen Buchanan has argued that Rawls's law of peoples provides too much protection for unreasonable regimes. In Buchanan's view, the liberal peoples could more straightforwardly assume that reasonable terms apply to every people. Those who fail to meet these terms are not entitled to noninterference. In an article published in 2000, Buchanan was particularly worried about the Taliban regime in Afghanistan.[18] If Buchanan's approach is basically right, the gap between the ideally reasonable democracy and the actual United States has narrowed (in the sense that interventions against unreasonable regimes are relatively often justified). The recent war against terrorism would require an analysis of its own. But each war has its particular features that are hard to evaluate. Apparently the military powers of the United States were of great value for the European liberal democracies in the crisis of the former Yugoslavia—and even more clearly in the two world wars and during the Cold War.

Rawls thus makes it plain that he continued to distinguish between ideal reasonable democracies and the actual Western societies. Societies in which the violations of the reasonable terms are neither too frequent nor too serious could be called some sort of decent societies—or not unreasonable societies. Much would depend on the

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17   Ibid., p. 53.

18   Allen Buchanan, "Justice, Legitimacy, and Human Rights," in Victoria Davion and Clark Wolf (eds), *The Idea of Political Liberalism: Essays on Rawls* (Lanham, 2000), pp. 75–79, 86–88. Buchanan (ibid., p. 78) suggests that the following premise is central in Rawls's argument: "A society is entitled to noninterference (and to be regarded as a member in good standing in the society of peoples) if and only if it is organized by reasonable principles." Buchanan does not give, however, clear textual evidence for this assumption. Indeed, the fourth and the fifth principle of the law of peoples restrict interventions in a way that Buchanan's formulation does not seem to recognize. The United States and the United Kingdom started to bomb Afghanistan on 7 October 2001, less than a month after the terrorist attack on 11 September. "The History of Afghanistan," in *The War Against Terror* (CNN.com, 2004).

contextual analysis and the related differing views. But if any regime violated the eight principles of the law of peoples seriously enough, it would be an outlaw state in Rawls's classification.

The Concept of a Decent Hierarchical People

In the second part of the ideal theory—in Part II of *Peoples*—Rawls extends the law of peoples to decent peoples. He concentrates only on *decent hierarchical peoples*, although there may well be other kinds of decent peoples.[19]

Rawls uses the concept of decent hierarchical people mainly to show how liberal and decent peoples could together constitute a proper society of peoples. They are to be "equal participating members in good standing of the Society of Peoples."[20] Rawls rejects the view that liberal peoples should press nonliberal—but decent—peoples to meet all the standards of liberal societies. Liberal peoples would thus fail to respect decent peoples properly. Decent hierarchical peoples have their own traditions and cultures, and they have a certain pride that is connected to these. Rawls says that liberals may require strong reasons to tolerate peoples who permit some forms of injustice according to liberal standards. Nevertheless, he thinks that respect is such a strong reason. Due toleration would include respect for those different societies which are not regarded as fully just.[21]

Rawls then figures out an imaginative example of a decent hierarchical society. He calls it Kazanistan. On the whole, it is a society guided by religious (Islamic) comprehensive ideals. The basic structure of Kazanistan includes a decent consultation hierarchy. This makes its governance representative in another way than democracies are. Its legal system grants primary representation to groups, although individuals are not without rights either. Rawls's first criterion for a decent society is that it "does not have aggressive aims" towards other proper peoples of the society of peoples.[22]

Instead of examining the first criterion and related considerations of just war, I focus on Rawls's second criterion of decency. The first of its three parts is that the consultation hierarchy of a decent society should honor human rights. Among these are rights to life, liberty, property, and formal equality. Although there are different interpretations of these, there are also clear cases of violation. In particular, Rawls mentions a system of slavery as a violation of human rights.[23] Charles Beitz

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19   Rawls, *Peoples*, p. 63.

20   Ibid., p. 59. This includes "the duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions."

21   Ibid., pp. 59–63. Patrick Hayden has argued that Rawls's law of peoples implies improper culturalism. Combined with the relativism and traditionalism that Rawls allows for decent peoples, culturalism undermines the "recognition of the importance of democratic governance." Patrick Hayden, *John Rawls: Towards Just World Order* (Cardiff, 2002), pp. 139–140. Hayden's argument does not rely on the concept of democracy only. But at this point it may be worth recalling that in *Political Liberalism* and thereafter, Rawls was well aware that his project depends on a certain cultural background (among other things).

22   Rawls, *Peoples*, p. 64.

23   Ibid., p. 65.

has pointed out that Rawls's list of human rights is relatively short. It omits, for example, the rights of freedom of expression and association that are mentioned in the 1948 *Universal Declaration of Human Rights* of the United Nations.[24] The second part of Rawls's second criterion is that the people of a decent society are to be seen as responsible beyond the human rights. They are regarded to have duties and obligations in social cooperation. These responsibilities are not imposed on them merely by force. They depend on the "common good conception of justice" of that society.[25] Third, the officials of the consultation hierarchy should be sincerely guided by that ideal. They should also be willing to defend their decisions publicly in ways that are "not unreasonable."[26]

Overall, a decent hierarchical society has a comprehensive common aim, but if it is maximized, it is only maximized consistent with restrictions featured by the above criteria. The restrictions are to be embodied in meaningful institutions of communication, "the consultation procedure."[27] Within it, different voices should be heard—and different, related values should be recognized. Individual dissenters are not forced to agree with the officials. Instead, the officials should reply to them sincerely. The usual way of dealing with public policy would be to regard individuals as parts of groups—estates or the like—and to consider the interests of the groups. In this way the society would aim at avoiding the individualist idea of the person as an atomic unit and the (assumedly related) materialist values. In these respects Rawls also had Hegel's conception in mind.[28] Rawls uses Kazanistan as his major example to illustrate the dominance of the comprehensive ideal. In this imaginary state, the church and the state are not separated. Only Muslims can have positions of authority in the consultation hierarchy. But the leaders would govern in such a way as to

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24   Beitz also mentions the rights of political participation that are included in Articles 19–21 of the *Universal Declaration of Human Rights* (1948). Charles Beitz, "Rawls's Law of Peoples," Ethics 110/4 (2000): 648. Rawls's (*Peoples*, pp. 75–76) text, however, is clear enough that the people of a decent hierarchical society should be able to participate in politics meaningfully. Hayden (*John Rawls*, p. 136) has remarked that Rawls's concept of human rights in the law of peoples only includes Articles 3 and 5 clearly—"and possibly the other rights listed between Article 3 and 18."

25   Rawls, *Peoples*, pp. 65–66. Rawls also says that the people are regarded as "decent and rational."

26   Ibid., pp. 66–67.

27   Ibid., p. 71.

28   Ibid., pp. 71–73. In a footnote Rawls mentions that Hegel defended the "spiritual order" of society, although he also defended the liberal constitution against the conservative estates. In *Lectures* Rawls wrote: "Thus for Hegel, in contrast to Kant, the aim of the account of ethics as *Sittlichkeit* is not to tell us what we *ought* to do—we know that—but to *reconcile* us to our *real* social world and to convince us not to fix our thinking and reflection on an ideal social world [Rawls's emphases]." John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Hermann (Cambridge, 2000), p. 334. Rawls basically interprets Hegel as "a moderately progressive reform-minded liberal" who thought that "the concept of freedom was actually realized *in* the social world through political and social institutions at a particular historical moment [Rawls's emphasis]." Ibid., p. 330.

permit dissenters also a meaningful role in the consultation procedure. Accordingly, dissenting minorities would remain loyal to the country if it were in danger.[29]

The eight principles of the law of peoples specify certain rights and duties that Rawls expects all peoples to endorse. In this respect there would be no different rights for different peoples. The human rights form the core of these universal rights. In Rawls's view, however, liberal peoples and decent hierarchical peoples have different basic structures that imply various rights and responsibilities beyond those included in the eight principles.

Rawls thinks that human rights should bind all peoples, but he does not include democratic political liberties among them. In this respect, it seems proper to add the principle of human rights (in a suitably modified form) to the beginning of a list of principles which articulates forms of consensus on rights and which ends up with the principle (P3''') that Rawls regarded as the most reasonable with respect to liberties.

P16   The basic social structure should provide human rights for all.

P3'   The basic social structure should provide democratic political liberties for all.

P3   The basic social structure should provide basic liberties for all.

P3''   The basic social structure should provide the most extensive scheme of equal basic liberties for all.

P3'''   The basic social structure should provide a fully adequate (the most reasonable) scheme of equal basic liberties for all.

Upon closer examination, however, democratic political liberties (P3') were already included in the *Universal Declaration of Human Rights* (1948).[30] Inclusion of human rights in this sense would not really leave room for decent hierarchical societies. If we also consider that human rights include the rights mentioned in the *International Covenant on Civil and Political Rights* (1976), it is even clearer that human rights could not work as a minimum basis that decent nondemocratic societies also could endorse.[31]

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29   Rawls, *Peoples*, pp. 75–78. Rawls (ibid., p. 76) mentions that the theologians of Kazanistan would interpret "*jihad* in a spiritual and moral sense, and not in military terms." Thus it would be possible for the nation not to seek new "empire and territory."

30   *Universal Declaration of Human Rights* (The United Nations, 1948), Article 21 especially.

31   *International Covenant on Civil and Political Rights* (Human Rights Library, Minnesota, 1976/2005), Article 25 especially. In the case of the prisoners in Guantanamo, it seems clear that the United States has violated Articles 9, 14, and 16 of the covenant at least. This case underlines the need to consider seriously and transparently which articles of this and the corresponding covenants are really meant to constitute fundamental norms that shall be violated nowhere.

As noted above, Rawls's description of the decent society implies that he really meant the concept of human rights in the law of peoples to include only certain human rights. Let us call them fundamental human rights and write the corresponding principle as follows:

> P16'   The basic social structure should provide fundamental human rights for all.

If we interpret the sixth principle of Rawls's law of peoples (the principle of human rights) in accordance with P16', we could more coherently expect Rawls's eight principles to be reasonably endorsed by both liberal and decent peoples. Fundamental human rights would serve as the minimum baseline for further considerations of justice. All the articles of the *Universal Declaration of Human Rights* (1948)—complemented by more recent declarations and treaties such as the *International Covenant on Civil and Political Rights* (1976) and the *International Covenant on Economic, Social and Cultural Rights* (1976)—would constitute an extensive conception of human rights of a more utopian kind.[32]

Brian Barry has criticized the recent language of rights propagated by the United Nations, the language which favors extensive conceptions of human rights. On Barry's preferred "conception, to say that people have a right to do something is to say that they are not prohibited from having it or doing it."[33] The questions about people's opportunities and resources to make use of their rights could thus be taken as logically separate from questions of rights as such. For example, to have a right to education, which was denied to girls under the Taliban regime, would be separate from such questions as the opportunities to education and resources for education.[34] Barry's suggestion resembles the division of labor between Rawls's first and second principle of justice and it seems to have certain advantages of clarity. On the other hand, it is convenient to talk about economic, social, and cultural rights even though most of them could also be understood as opportunities and resources for making

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32   Articles 23–25 of the *Universal Declaration of Human Rights* (1948), for instance, declare the "right to equal pay for equal work," "to rest and leisure," and "to a standard of living adequate for the health and well-being." Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (1976) states, for example, concerning education: "1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. … 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools … ."

33   Brian Barry, *Why Social Justice Matters* (Cambridge, 2005), p. 19.

34   Ibid., p. 19. Here, his other example of the relevance of a right as a separate issue from resources and opportunities is that "in the nineteenth century a number of states in the South made it a criminal offence to teach a slave to read or write."

use of liberties and other civil and political rights. In the analysis of Rawls's law of peoples, in any case, the distinction between the fundamental and the extensive concept of human rights seems unavoidable: Rawls's concept of a decent hierarchical society implies the concept of fundamental human rights, which includes the most basic political and civil rights as well as the most basic economic, social, and cultural rights.

Kok-Chor Tan has argued for a more straightforwardly liberal position than that of Rawls. For Tan it is worrying that Rawls seems to have "simply relaxed the limits of toleration" so that some nonliberal regimes could endorse the law of peoples.[35] But what is the supposed problem with Rawls's solution, exactly? On the one hand, Rawls could have required decent regimes to be more tolerant. On the other, he would then have become less tolerant towards these regimes himself. Simply to require more tolerance does not, thus, solve the problem. Unlike the more comprehensively liberal position, Rawls's solution makes this difficulty explicit. Perhaps Rawls's list of human rights was too short. For example, it might have included P3' and P3, even though P3'' and P3''' were better suited for peoples with emphatically liberal cultures. Maybe, on the balance of reasons, Rawls should have been more straightforwardly liberal, at least with respect to the issues of liberties. But to the extent that a certain degree of toleration and respect is granted to different cultures and traditions beyond the emphasis on mere individual rights, the above criticism by the comprehensive liberals does not seem to affect the structure of Rawls's argument in the law of peoples.

However, we saw that Rawls suggested that other principles should bind decent hierarchical peoples besides the eight principles of the law of peoples. We may explicate the following:

P1'   A public official should be willing to provide grounds for one's use of power that are not unreasonable.

P2'   A public official should be willing to listen to other persons' voices.

P7'   The basic social structure and the particular contributions of persons should advance the common good of the society.

The steps from these to the respective principles P1, P2, and P7 are relatively short:

P1   A person should be willing to provide reasonable, or at least not reasonable, grounds for one's contributions to the basic social structure and related issues.

P2   A person should be willing to empathetically understand other persons' views about the basic social structure and related issues.

P7   The basic social structure and the particular contributions of persons should advance the common and the relatively common goods.

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35   Kok-Chor Tan, "Liberal Toleration in Rawls's Law of Peoples," *Ethics* 108/2 (1998): 284.

In a decent hierarchical society it would be permissible for people to advance the common good of the society (P7') inconsistently with P3''' and P3'' (as well as with P3 and P3' to the degree that we interpret human rights to allow this). But would this always mean a remarkable loss in terms of liberty? The answer depends partly on the circumstances. If the circumstances do not allow a particularly extensive scheme of equal basic liberties to be realized in any case, the best the people might aspire to is simply to provide the fundamental human rights for all. Indeed, those who have defended a privileged position for one religion have often advanced this kind of argument.

Next I inquire more precisely in which respect Rawls *presumed* a particularly stringent ideal of equality in his arguments for equal liberty of religion in the case of liberal democracies. Then I examine two cases from the early United States where the Christian religion was argued to support the realization of basic liberties.

Privileged Status for a Religion?

In "Constitutional Liberty and the Concept of Justice" (1963) Rawls argued for religious liberty from the viewpoint of the original position. But if the plausibility of the original position is not simply assumed, the situation seems significantly different. I prepare the further analysis of such cases by taking a look at Rawls's argumentation in support of equal religious liberty before *Theory*.

In "Constitutional Liberty and the Concept of Justice," Rawls asked us to think of the parties of the original position as the heads of religious sects. They would not risk the freedom of religion in the future society. They would not gamble on the winner-position at all, because they take the basic liberty to practice their religion so seriously. As Rawls put it:

> [A] person under a religious obligation must regard this obligation as binding absolutely in the sense that he cannot qualify his fulfillment of it for the sake of personal advantage. In particular, the obligation to preserve the truth of one's religion and the obligation to live up to its injunctions cannot be compromised for the sake of secular interests.[36]

Rawls proceeded by assuming a rather strict adherence to certain religious beliefs. He supposed that, from the religious point of view, "no understanding among persons of different religions is permissible."[37] Rawls suggests it to be clear enough that religious people have often behaved in ways that support the realism of this assumption. He does not think that he needs to defend the assumption on empirical grounds. It should be enough to remark that "if any principle can be acknowledged, it must be that of equal religious liberty, since the concept of religion is such that each understands that he could not expect another to accept less than an equal liberty."[38]

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36   John Rawls, "Constitutional Liberty and the Concept of Justice (1963)," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, 1999), p. 87.

37   Ibid., p. 87. Rawls regards this to be so, because the "obligation to religious truth and divine law" is absolute.

38   Ibid., p. 87.

Rawls proposes that a proponent of equal religious liberty may nevertheless believe another to be in mortal error.[39] Rawls does not articulate the background assumptions exactly. But apparently he assumes that believers will agree that coerced conversion could not save others from mortal error. If they cannot agree upon this, Rawls assumes, they cannot agree on any principle of religious liberty. Assumptions akin to these are highly controversial, though. Upon closer examination, the issue is bound to be much more complicated.[40]

It seems plausible to expect that under conditions of equality similar to those of the original position, the principle of equal religious liberty would be chosen. However, a religious person who values his or her religion absolutely might refuse to take the viewpoint of the original position precisely because it demands radical detachment from his or her deeply held beliefs. The religious person would expect the freedom of religion to allow this refusal.[41] In the commonsensical interpretation of the original position I pointed out how the conceptual apparatus could be relaxed so that no radical detachment would be required. But if strict position of equality is not the starting point, the majority religion might well try to argue for privileges (the winner-position) in the communicative procedure.

A further alternative would be to set aside the restrictions of the artificial original position entirely. This would not necessarily make a radical difference: equality, freedom, and rationality are integral elements of many religions. Particularly, Rawls considered a position according to which "God prefers the worship of men in a free society."[42] He suggested that this permits equal liberty of religion. However,

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39   Ibid., p. 87.

40   Consider, for example, the articles by thirteen prominent authors—including Kent Greenawalt and Martha Nussbaum—in *Obligations of Citizenship and Demands of Faith*. Nancy L. Rosenblum, the editor of the book, reports: "[T]hey all write from within democratic theory. They all recognize the painfulness of conflict between obligations of citizenship and demands of faith for men and women, personally and individually. They all oppose absolute separation between religion and public life." Nancy L. Rosenblum, "Introduction: Pluralism, Integralism, and Political Theories of Religious Accommodation," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, 2000), p. 4.

41   According to Kenneth R. Craycraft, Jr., the US Supreme Court really protects only those selves which Sandel has described as the unencumbered ones. Craycraft maintains that this makes religious liberty in the United States a kind of a myth. Kenneth R. Craycraft, Jr., *The American Myth of Religious Liberty* (Dallas, 1999), p. 6. Craycraft (ibid., p. 7) refers to Justice John Paul Stevens in the case *Wallace v. Jaffree* about school prayer. He calls attention to Stevens' remark that "*religious beliefs worthy of respect are the product of free and voluntary choice* by the faithful [Craycraft's emphasis]." Such a statement implies, Craycraft continues, that other kinds of religions are actually excluded from legal standing.

42   Rawls, "Constitutional Liberty and the Concept of Justice," p. 87. We might also consider Thomas Jefferson's view on religion and politics as an example. Merrill D. Peterson has characterized it as follows: "Rejecting Lockean toleration as insufficient, since it implied an official or preferred religion, Jefferson demanded full religious freedom and entire separation of church and state. The tone of the argument was anticlerical, yet Jefferson, unlike his philosophical allies in Europe, professed to be a friend of true religion which had

the worship of the true God could still be seen as worth certain privileges when compared to other kinds of worship.

For example, in the papal encyclical *Pacem in Terris* (1963) John XXIII argued firmly for rights to life, culture, morality, and for political rights, among others. But the encyclical could have been clearer about *equal* rights of everyone to worship according to one's own religion, if this was actually meant. Article 14 of the encyclical emphasizes the right to serve the God of (Catholic) Christianity.[43] In fact, two years later Pope Paul VI and the Council of the Church (Vatican II) declared its firm support of religious liberty for all men.[44] This step is relevant to considerations of the compatibility of the Catholic faith with justice as fairness. Later, Rawls recognized the merits of fairness of the *Declaration on Religious Freedom* by Vatican II.[45] The World Council of Churches—to which the Catholic Church does not belong—declared already in 1948 that no more extensive religious liberties are asked to be granted to Christians than to others.[46]

In the light of these and many similar documents,[47] there seems to be no particular reason for secular liberals to worry about the mainline Christian churches. The churches endorse at least almost equal religious liberties for all. In the past this was not the general picture. As late as in the latter half of the eighteenth century,

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freedom for its element." Merrill D. Peterson, "Introduction," in Merrill D. Peterson (ed.), *The Portable Jefferson* (New York, 1975), p. xx.

43   Article 14, "The Right to Worship God According to One's Conscience," reads: "Also among man's rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public. According to the clear teaching of Lactantius, 'this is the very condition of our birth, that we render to the God who made us that just homage which is His due; that we acknowledge Him alone as God, and follow Him. …' [*Divinae Institutiones*, lib. IV, c.28.2; PL 6.535.] Hence, too, Pope Leo XIII declared that 'true freedom, freedom worthy of the sons of God, is that freedom which most truly safeguards the dignity of the human person. …' [Encyclical letter '*Libertas praestantissimum*,' *Acta Leonis XIII*, VIII, 1888, pp. 237-238.]" John XXIII, *Pacem in Terris* (1963), Article 14.

44   Article 2 of this *Declaration on Religious Freedom* starts: "This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits." It continues that this freedom is based on the dignity of the human person, which is revealed by the word of God and by reason. Paul VI, *Declaration on Religious Freedom: Dignitatis Humanae* (1965), Article 2.

45   Rawls, *Peoples*, p. 21.

46   *Declaration on Religious Liberty* (World Council of Churches, 1948), Preamble.

47   W.A. Wisser 't Hooft (ed.), *The First Assembly of the World Council of Churches: Held at Amsterdam August 22nd to September 4th*, 1948 (London, 1949); *Theological Basis of Human Rights* (World Alliance of Reformed Churches, 1976); Mark Ellingsen, *The Cutting Edge: How Churches Speak on Social Issues* (Geneva, 1993); Diane Kessler (ed.), *Together on the Way: Official Report of the Eight Assembly of the World Council of Churches* (Geneva, 1999).

according to Edwin S. Gaustad for example, the overwhelmingly dominant position was that the state endures only through the support of the Church.[48]

Indeed, Rawls used such great historical figures of Christianity as Aquinas, Luther, and Calvin as paradigmatic examples of intolerant men.[49] In a way, he tested their ideas against the common sense of the age after the Enlightenment and after World War II. Alasdair MacIntyre has said that this approach tells much about the mental distance between the contemporary liberals and the ancient thinkers.[50] Maybe MacIntyre had a point here. On the other hand, Rawls's simple purpose in these references appears to have been to indicate that the views of the mentioned authors, as such, included elements that were too intolerant to be broadly endorsed by the common sense of today. Rawls also condemned the intolerance of Rousseau, although not as severely.[51]

Historical examples have significant roles in the debates about today's moral issues. It is possible to refer to the dark past of a given tradition and to suggest by analogy that the contemporary views of that tradition may be dark in a similar way. In the past, worse than unreasonable policies have been supported by various religions and ideologies.[52] However, the setting for the further argument is very different if and

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48   Gaustad remarks that the "self-evident" truths of Jefferson and his allies (that all men are created equal, etc.) were far from self-evident for many: "On the contrary, what was self-evident to the vast majority of the colonists and their leaders (religious or political) was that society survived only as church and state worked and worshipped together, only as values were shared, only as common assumptions about human nature and the nature of God and the Universe underlay all action—or at least all rationalization." Edvin S. Gaustad, *Neither King nor Prelate: Religion and the New Nation 1776–1826* (Grand Rapids, 1993), pp. 12–13.

49   Rawls, *Theory*, pp. 215–216/189–190 rev.; *Liberalism*, pp. xxiv–xxvi; *Peoples*, pp. 21–22.

50   MacIntyre comments particularly on Rawls's notion that "to subordinate all our aims to one end ... strikes us as irrational, or more likely as mad." Rawls, *Theory*, p. 554/486 rev. As MacIntyre put it: "What Rawls says is an instructive measure of the cultural distance separating the protagonists of modernity from Aquinas. Interestingly, however, those protagonists often enough do not take Aristotle to be similarly alien or mad." Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London, 1988), p. 165. He continues: "But Aquinas too recognized the variety and heterogeneity of goods and, no more and no less than Aristotle, understood them as goods insofar as they were and in virtue of their being constituents of the kind of life directed to *the* good and *the* best [MacIntyre's emphases]."

51   Rawls, *Theory*, pp. 215–216/189–200 rev. Daniel A. Dombrowski, who regards himself as a liberal Catholic, comments on Rawls's criticism of Ignatius of Loyola (in Rawls, *Theory*, p. 553/485 rev.) as follows: "Rawls is a bit too anthropocentric in claiming that Ignatius's main reason for contributing to the greater glory of God is to save his own soul, but Rawls is surely correct to note that *if* there is a single criterion for balancing all subordinate aims it would be furthering divine aims. Ignatius thinks that there is such a single criterion that enables us to prefer health to sickness, riches to poverty, honor to dishonor, and a long life to a short one [Dombrowski's emphasis]." Daniel A. Dombrowski, *Rawls and Religion: The Case for Political Liberalism* (Albany, 2001), p. 57.

52   Max L. Stackhouse, for example, has emphasized the common features of religions and ideologies in general. For him, religion "has to do with commitments to ultimate meanings *and* with the concrete formation of ritual behaviors, loyalties, solidarities, and relationships

when the basic liberties, or at least the human rights, are already endorsed. Within that framework it can be asked which liberties should really be both extensive and fully equal and how they can be guaranteed. Indeed, Rawls proposed that it would be possible to advance a reasonable argument in favor of publicly privileged religion. However, he would not regard such arguments as the most reasonable ones.

Public Reasoning in the Early United States

In the new introduction to *Political Liberalism* (and in "Public Reason") Rawls used the debate between James Madison and Patrick Henry in 1784–1785 as an illustration of his conception of public reason.[53] As I pointed out in 2.2, basically Rawls's public reason means argumentation from reasonably acceptable assumptions to reasonably acceptable conclusions, but his texts allow more and less restrictive interpretations of public reason—for example depending on the scope of its application.

Rawls's illustration clarifies the role of religion in public reason and in the later justice as fairness in general. It also clarifies the sense in which Rawls did not intend his conception simply to depend on an existing *modus vivendi*. At the time of this debate between Madison (1751–1836) and Henry (1736–1799), there were no stable institutions of liberty that could have been simply presumed as the background. The fundamental institutions of the United States were just about to be formed.

While a student at Princeton University, Madison was a student of John Witherspoon, but he soon moved away from Witherspoon's evangelical Christianity and towards enlightened Deism. In the big picture he is frequently referred to as Thomas Jefferson's political and spiritual brother.[54] In a debate in the Virginia House of Delegates, Madison defended the Bill for Establishing Religious Freedom (written by Jefferson). The bill was accepted in 1785 with a clear margin of votes: 69–20.[55]

[Stackhouse's emphasis]." Max L. Stackhouse, *Creeds, Society, and Human Rights: A Study in Three Cultures* (Grand Rapids, 1984), p. 6. Accordingly he (ibid., pp. 9–10) says: "Communism is a world faith, having a very articulate definition of the 'human,' or 'rights,' and a concrete bonding of groups in societies to carry out its moral vision and its understanding of what is holy and inviolable. It is a doctrine that has become a creed, sustained by a remarkable body of believers."

53   Rawls, *Liberalism*, p. liv; "Public Reason," in *Papers*, pp. 601–603.

54   Robert S. Alley, "Introduction," in Robert S. Alley (ed.), *James Madison on Religious Liberty* (Buffalo, 1985), pp. 22–23. Gaustad (*Neither King nor Prelate*, p. 36) lumps Jefferson and Madison under the heading "Libertarians." John G. West classifies them as "Republicans." John G. West, *The Politics of Revelation and Reason: Religion and the Civic Life in the New Nation* (Lawrence, 1996), p. 56. According to West (ibid., p. 28), Witherspoon's "idea seems fairly clear: Churches have the best chance to prosper when the government does not interfere with their affairs. Now if Witherspoon had ended here, one could consider him a soulmate of James Madison and Thomas Jefferson. But Witherspoon went further in proposing government support for religion."

55   Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* (New York, 1971), p. 140. The bill, which is about two pages long, starts with words: "Whereas Almighty God hath created the mind free … ." Eventually, it says: "[O]ur civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." Thomas Jefferson, "Act for Establishing Religious Freedom," in *James Madison on*

A.E. Dick Howard has said that in the related debates Madison's "quiet cogent reasoning contrasted to Henry's rococo oratory."[56] Howard's wording reflects the more general sense among the liberals in the United States that Madison's arguments were better grounded. However, Rawls's main point in referring to this debate is that Henry's argument was also properly presented "almost entirely by reference to political values alone."[57] For Henry, Christianity supported the morality that he considered necessary in order for a democracy to function properly. Otherwise it would be unrealistic to expect a democratic society to be stable. Accordingly, he supported the *Bill Establishing a Provision for Teachers of Religion*, which would have granted certain privileges to the Christian Religion.[58]

In reply, Madison questioned Henry's argument. Rawls makes the following comment about Madison's response: "Madison's objections to Henry's bill turned largely on whether religious establishment was necessary to support orderly civil society—he concluded it was not. Madison's objections depended also on the historical effects of establishment on both society and on the integrity of religion itself."[59]

This passage helps us to see the sense in which historical interpretations play a significant role in Rawlsian public reasoning about the role of religion in society. Within such public reason, it is quite possible to have different conceptions about how much religious backing is needed for social order. Indeed, as John G. West has

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Religious Liberty, ed. Robert S. Alley (Buffalo, 1985), pp. 60–61. In terms of denominations, the Baptists supported the Bill, the Episcopalians were against it, and the Presbyterians were somewhere between (until they supported it). James, *Documentary History of the Struggle for Religious Liberty in Virginia*, p. 122.

56   A.E. Dick Howard, "James Madison and the Founding of the Republic," in Robert S. Alley (ed.), *James Madison on Religious Liberty* (Buffalo, 1985), p. 30. More exactly, Howard makes this comment in connection with Madison and Henry's debate on Virginia's ratification of the constitution in 1789. See the descriptions of the debate in Virginia in 1784, for example, by James (*Documentary History of the Struggle for Religious Liberty in Virginia*, pp. 122–141) and Richard R. Beeman, *Patrick Henry: A Biography* (New York, 1997), pp. 131–133, and in an early biography of Henry by William Wirt Henry, *Patrick Henry: Life Correspondence, and Speeches* (vol. 2, New York, 1891), pp. 202–112.

57   Rawls, *Liberalism*, p. liv.

58   Rawls refers to this bill as a guide to Henry's argumentation. Its preamble included the following language: "Christian knowledge hath a natural tendency to correct the moral of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers." *Bill Establishing a Provision for Teachers of Religion: A Proposal in the Virginia House of Delegates, the Committee as a Whole, on Dec. 3, 1784, Preamble*, in Charles F. James (ed.), *Documentary History of the Struggle for Religious Liberty in Virginia* (New York, 1971), p. 129. In terms of taxes, the bill would have meant—as Thomas Curry puts it—that all are "taxed for the Christian denomination of their choice, and that those taxes not designated for any specific denomination be allowed to education." Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986), p. 141. See Madison's report from the session in James Madison, "To Jefferson from Madison: January 9, 1785," in *James Madison on Religious Liberty*, ed. Robert S. Alley (Buffalo, 1985), pp. 66–67.

59   Rawls, *Liberalism*, p. liv.

noted, Madison also considered religion to be conducive to public morality.[60] But for Rawls it is significant that positions on this matter can largely be taken on the basis of experience, as both Henry and Madison did. In the light of this example, Rawls did not require public reasoning to be a conscious application of the CI-procedure or articulating postulates of pure practical reason. At least in this case it was participation in political debate with a broad arsenal of arguments for what is feasible. These arguments may include some version of the one that religion supports public virtue. Moreover, Rawls was careful enough to mention that Madison's arguments had a religious dimension. In addition to arguing on other grounds, Madison's position here was based "on the integrity of religion itself."[61]

In *A Memorial and Remonstrance* (1785) the religious elements in Madison's argumentation are explicit. Madison wrote that the right to free exercise of religion is "unalienable also, because what is here a right towards men, is a duty towards the Creator."[62] He continues that man "must be considered as a subject of the Governor of the Universe" before he "can be considered as a member of Civil Society."[63] It is an essential part of Madison's religious conception that this would not lead to the establishment of religion in the society. He argued that in past times truly religious persons had resisted established religions and they would do so in the future. To claim otherwise would be "a contradiction to the Christian religion itself."[64] For Madison, the proposed bill giving religion a certain privileged status would be such a contradiction: it would depend "on the powers of this world."[65]

The difference between Henry and Madison was not that Henry's view was religious and Madison's was not. Both views had their religious aspects. One can hardly deny that these religious aspects played a significant role in their conceptions of the necessity of religious support for public morality. Rawls's example implies that such roles are acceptable for reasonable argument. He thought that both Madison and

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60   West (*The Politics of Revelation and Reason*, p. 77) says: "[There was] nearly universal opinion during the Founding that morality is necessary to politics and that churches are either necessary or helpful in the creation of that morality: 'necessary,' according to Washington, Adams, Hamilton, Jay, Witherspoon, and perhaps even Franklin; 'helpful' according to Jefferson and Madison during their later years."

61   Rawls, *Liberalism*, liv.

62   James Madison, *A Memorial and Remonstrance: To the Honorable the General Assembly of the Commonwealth of Virginia*, in *The Mind of the Founder: Sources of the Political Thought of James Madison*, ed. Marvin Meyers (Hanover, 1973), p. 7. Just before this, Madison wrote: "[This right] is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."

63   Ibid., p. 7.

64   Ibid., p. 9.

65   Ibid., p. 9. Even if Robert A. Ruthland is right in claiming that Madison's dream was a secular republic, these quotations nevertheless provide evidence of the religious aspects in Madison's thinking. Robert A. Ruthland, "James Madison's Dream: A Secular Republic," in Robert S. Alley (ed.), *James Madison on Religious Liberty* (Buffalo, 1985).

Henry *mainly* debated on public reasons that could be reasonably acceptable to all.[66] But at some point we would expect Rawls to say that this or that went too far. For example, can the virtue of love be publicly established? Interestingly, a historically important declaration of rights in Virginia included a duty of Christian love.[67] But instead of going into it in detail, I take an example from the early United States in which religious backing for reasonable terms seems to have been important. This example is not Rawls's, but it is an extension of his use of historical examples.

In the 1830s the United States compelled five Native American tribes—often called the Five Civilized Tribes—to vacate their traditional tribal lands.[68] The situation of the Cherokees and the Creeks was most heatedly debated in the late 1820s and early 1830s. Andrew Jackson (president from 1829 to 1837), his government, and the Georgians pressed the Creek chiefs to sign the agreement on their removal in 1832.[69] It is estimated than ten thousand Creeks died between 1832 and 1838—a figure that presents about 45 per cent of the tribe. Anthony F.C. Wallace says that this estimate may be a bit too high.[70] Nevertheless, the fact remains that a large percentage of the Creek population died during their forced displacement. The Cherokees did not have to make their journey from their traditional lands to the west in such bad weather as the Creeks did. Wallace estimates that about four thousand Eastern Cherokees died on this "trail of tears." This would come to about 20 to 25 per cent of their population.[71]

I am not particularly interested here in whether Jackson's policy violated the basic liberties (or the human rights) of these Native Americans. For the purpose of

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66   As Rawls (*Liberalism*, liv) puts it: "With some care in formulation, many if not all of these arguments can be expressed in terms of political values of public reason."

67   Article 16 of the 1776 Virginia Bill of Rights is: "That religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." *Declaration of Rights: Adopted by the Virginia Convention on June 12, 1776*, in Charles F. James (ed.), *Documentary History of the Struggle for Religious Liberty in Virginia* (New York, 1971), p. 62. See also other versions of the article in James Madison, *The Papers of James Madison: 16 March 1751–16 December 1779*, vol. 1., eds William T. Hutchinson and William M. E. Rachal (Chicago, 1962), pp. 170–175.

68   The tribes were the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles. Anthony F.C. Wallace, *The Long, Bitter Trail: Andrew Jackson and the Indians: A Critical Issue* (New York, 1993), pp. 29, 73–74.

69   Ibid., p. 83.

70   Ibid., p. 88. In addition to those who were killed directly in the related battles, "undoubtedly thousands perished as victims of starvation, disease, exposure, accidents, murder, and wounds received in the military combat."

71   Ibid., p. 94. On the 1935 census of the Cherokees, as well as on the routes and the timetables of the removals, see Theda Perdue and Michael D. Green (eds), *The Cherokee Removal: A Brief History with Documents* (Boston, 1995), pp. 22–23, 48–57, 176–178. The Seminoles resisted their removal most violently. No less than 30,000 soldiers were needed to drive the five thousand Seminoles to the swamplands in Florida, until the peace was finally made with the survivors (3,500–4,000) in 1842. Wallace, *The Long, Bitter Trail*, pp. 94–101.

this research it is clear enough that it did. However, in the turbulent time of Jackson's presidency it was not clear to all that moral demands for the rights of the Native Americans—or Indians—should be taken seriously. Jackson himself was a war hero who saw the art of governing more in terms of power politics than of morals.[72] In comparison with the relatively Christian culture of the time, his morality was secular.[73] Marvin Meyers has described his politics as an attempt to reconcile "the simple yeoman virtues with the free pursuit of economic interest."[74] Among Jackson's powerful allies in the State of Georgia, particularly, were the land speculators. They hounded economic profits from the Indian lands.[75]

One of the most important critics of Jackson's Indian policy was a missionary named Jeremiah Evarts.[76] Evarts was concerned to have the souls of the Indians saved, but also to defend their rights. Apparently Jackson was concerned neither with their souls, nor with their rights. Evarts joined the evangelical line in seeing a relation between morality and religion. Morality should be backed by true Christian religion privately as well publicly, otherwise people would fall into immorality, which would not befit a respectable democratic nation. The behavior of the Georgian speculators and Jackson's policy seemed to prove Evart's conception in a harsh way.[77] What Evarts did, then, was to urge Americans to firmly acknowledge the rights of the Indians *and* to revive the vision of the United States as a Christian nation. If the Christian character of the nation were lost, as it appeared to be, it would actually

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72   Alvin Laroy Duckett called his methods even "dictatorial:" "While Jackson's accomplishments had made him popular with the American people, his dictatorial methods had placed the government of the United States in an awkward position with Spain and Great Britain." Alvin Laroy Duckett, *John Forsyth: Political Tactician* (Athens, 1962), p. 129. But expectedly, interpretations of his Indian politics vary remarkably: "Scholars have debated his motivations with arguments ranging from his history as an Indian fighter and 'hater,' to claims that his main concern was national security, to assertions that he was anxious to halt the decline and extinction of the Native peoples in the East." Perdue and Green, *The Cherokee Removal: A Brief History with Documents*, p. 92.

73   John A. Andrew III, *From Revivals to Removals: Jeremiah Evarts, the Cherokee Nation, and the Search for the Soul of America* (Athens, 1992), pp. 169–171. Joel H. Silbey, though, says that when Jackson's opponents criticized his rough manners, "all charges were discreetly counterbalanced by news that he regularly read the Bible, recited countless lines of Watt's doleful hymns, and asked blessing in the table." In spite of such news, "[s]ince his system of theology was about as nebulous as his politics, they charged him with irreligion." Joel H. Silbey, *Political Ideology and Voting Behavior in the Age of Jackson* (Englewood Cliffs, 1973), pp. 33–34, 41.

74   Marvin Meyers, *The Jacksonian Persuasion: Politics & Belief* (Stanford, 1960), p. 15. He also says about Jackson's robust character: "No man of his time was at once so widely loved and so deeply hated."

75   Wallace, *The Long, Bitter Trail*, pp. 3–6. Wallace (ibid., p. 6) notes that Jackson himself was not "the greediest of speculators," but rather "a typical man of his time" in his financial dealings.

76   Andrew III (*From Revivals to Removals*, pp. 2, 8) even counts Evarts, the corresponding secretary of the American Board of Commissioners for Foreign Missions, as the most important critic.

77   Ibid., pp. 2–10; West, *The Politics of Revelation and Reason*, pp. 175–176.

be replaced by greedy power politics rather than by civilized secularism. Without religion, morality would be too thin to oppose selfishness. But evangelical Christian morality would also support economic development in a proper way.[78]

Evarts and the Jacksonians debated in a setting that was different from that of Henry's and Madison's in an interesting way. The generation of Evarts' and Jackson's was already living within an established constitutional framework, while Henry and Madison were in a process of constructing it. At the time of Jackson's presidency the heated debate was no longer about whether the constitution should be changed to allow an officially established religion. The framework of constitution was already there. Educated as lawyer, Evarts frequently argued on the basis of specific treaties made with the Indians and the related constitutional grounds. He was not concerned with changing them. But he also argued for Christianity as a supporter of the morality of the nation.[79]

In the analysis of Rawls's position, this example specifies a situation where circumstances did not appear to be favorable enough for public morality to flourish on its own. This was so despite the fact that such champions of liberal public morality as Madison and Jefferson had so recently shaped the public morality of the nation, not only as men, but also as presidents.[80]

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78   Andrew III (*From Revivals to Removals*, p. 3) characterizes the underlying tension between the rival approaches as follows: "To many people capital expansion and economic growth indicated God's benevolence and Americans' virtue, while to others they signalled a luxury and self-centeredness that threatened the public good." For Evarts—Andrew III continues—the Jacksonian Indian politics showed that "he could no longer assume the existence of an underlying moral ethos."

79   When Evarts presented his argument for the Cherokees in the "Introduction to Speeches on the Passage of the Bill for the Removal of the Indians," he did not argue based on any explicitly Christian notions. His argument can, in this sense, be regarded as a secular one. Jeremiah Evarts, "Introduction to Speeches on the Passage of the Bill for the Removal of the Indians," in *Cherokee Removal: The "William Penn" Essays and Other Writings by Jeremiah Evarts*, ed. Francis Prucha (Knoxville, 1981). One of the few explicit Christian notions in his brief review of his famous William Penn Essays is: "And where can be the harm of letting a few of our neighbours, on a small remnant of their own territory, exercise the rights which God has given them?" Jeremiah Evarts, "William Penn [Jeremiah Evarts]: 'A Brief View of the Present Relations between the Government and People of the United States and the Indians within Our National Limits' November 1829," in *The Cherokee Removal: A Brief History with Documents*, ed. Theda Perdue and Michael D. Green (Boston, 1995), p. 100.

80   Jefferson was president from 1801 to 1809 and Madison from 1809 to 1817. Many Cherokees were suspicious of the missionaries' efforts to civilize them—and to convert them to Christianity. Nevertheless, when the pressure from Jackson's administration increased, Evarts's and other missionaries' (such as Samuel Worchester's) support for their rights was welcomed. The missionaries taught them many practical skills and helped them to publish a newspaper, the *Cherokee Phoenix*. All this was important for them especially because the Jacksonians claimed it to be unrealistic to expect them to learn the manners of the "civilized" world. Wallace, *The Long, Bitter Trail*, pp. 58–62. Many religious Americans were in favor of the removal, for example the Baptist missionaries led by Isaac MacCoy. They "concluded that removal of the tribes to lands west of the Mississippi was the only hope for their preservation." Andrew III, *From Revivals to Removals*, p. 177.

By 1827 the Cherokees had even formed their own constitution. In Evarts's view this was a perfectly legitimate action on the part of a people that had never willingly submitted itself to the Constitution of the United States. The Cherokee constitution, which included a bill of rights, starts with the following words:

> We, the Representatives of the people of the Cherokee Nation, in Convention assembled, in order to establish justice, ensure tranquillity, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty; acknowledging with humility and gratitude the goodness of the sovereign Ruler of the Universe, in offering us an opportunity so favourable to the design, and imploring His aid and direction in its accomplishment, do ordain and establish this constitution for the Government of the Cherokee Nation.[81]

There are obvious similarities between this wording and that of the Constitution of the United States. However, these did not suffice to convince the Jacksonians of the justification of Cherokees' experiment.[82]

In the early United States many reasonable ideals were broadly endorsed, but there were also serious shortcomings. The historical examples examined here do not provide sufficient basis for generalizations about the period. However, they specify arguments for certain privileges for Christian religion in ways that could be considered as reasonable in terms of justice as fairness. In retrospect, the arguments made by Henry and Evarts may not appear as the most reasonable ones in Rawlsian terms. Perhaps Henry failed to provide a firm justification for the provisions for the Christian teachers in Virginia. And perhaps Evarts's argument would have been even

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81   *Constitution of the Cherokee Nation: Convention of Delegates From Several Districts, at New Echota, July, 1827*, in Jack Gregory and Rennard Strickland (eds), *History of the Cherokee Indians and Their Legends and Folk Lore by Emmet Starr* (Oklahoma City, 1921), p. 55. Article VI, sec. 1 of the Cherokee constitution prohibited a "minister of Gospel" to be Principal Chief. The next two sections (ibid., p. 62) define the public role of the religion further in a way which recalls Rawls's concept of a decent people: "Sec .2.—No person who denies the being of God, or the future state of rewards and punishment, shall hold any office in the civil department of this Nation. Sec. 3.—The free exercise of religious worship, and serving God without distinction shall forever be allotted within this Nation; Provided, That this liberty of conscience shall not be so constructed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this Nation."

82   For example in his "State of the Union Address" from the year 1830, Jackson aimed to present the removal in a favorable light: "How many thousands of our own people would gladly embrace the opportunity of removing to the west on such conditions! ... Rightly considered, the policy of the General Government toward the red man is not only Liberal, but generous." Andrew Jackson, "State of the Union Address: December 6, 1830," in Theda Perdue and Michael D. Green (eds), *The Cherokee Removal: A Brief History with Documents* (Boston, 1995), p. 120. In the Congress, Wilson Lumpkin defended Jackson's policy by claiming that the fundamental principle in the policy of the American Colonies and the States has consistently been that the Indians have no right to their country. Lumpkin said: "In all the acts, first by the colonies, and afterwards by the State Governments, the fundamental principle, that the Indians had no right either to the soil or sovereignty of the countries they occupied, has never been abandoned either expressly or by implication." Wilson Lumpkin, "A Speech in Congress: May 17, 1830," in *Debates in Congress: Register of* (part II of vol. VI, Washington, 1830), p. 1024.

more reasonable without the appeal to the concept of the Christian nation. For the purposes of this study it is not necessary to decide these particular issues. It suffices that the examples clarify forms of reasonable argumentation in which the relevance of a particular religious view is not ignored from the outset.

As we have seen, in his law of peoples Rawls extended the liberal ideals of justice as fairness to different peoples—first to various liberal peoples and then to various decent peoples. Each step of the extension allows more variation in the basic structures and the corresponding forms of public reasoning. Eventually, the eight principles of the law of peoples articulate the limits for the acceptable variation in Rawls's view—the limits of acceptability in liberal as well as in decent societies. But there are no obvious reasons to favor the most stringent liberal egalitarian ideals over the other mediating positions. For Evarts in particular, Christian backing for the sense of justice was needed as an important counterforce to the strong economic interests of the people of that time. I next turn to the questions of economic justice in Rawls's view.

3.2 Economic Inequalities and Different Principles

Towards the Most Reasonable Democracy?

Having reviewed Rawls's law of peoples, we can confidently say that he did not expect all peoples to endorse his two principles of justice. Above all, decent hierarchical peoples would have their own ways of arranging the basic structures of their societies. Rawls anticipated that variation would also occur among liberal democracies. Nevertheless, he insisted that the two principles would properly guide the design of the basic structure of liberal democracies. We may say that he regarded them as the most reasonable principles of justice for the basic structure of a democratic society.

Rawls's second principle of justice reaches beyond human rights and even beyond a fully adequate system of equal basic rights. According to *Justice as Fairness*, Rawls's second principle is:

> The social and economic inequalities are to satisfy two conditions: first, [2a.] they are to be attached to offices and positions open to all under conditions of fair equality of opportunity, and second, [2b.] they are to be to the greatest benefit of the least advantaged members of the society (the difference principle).[83]

Of these two principles, the *principle of fair equality of opportunity* (2a.) provides less specific guidance for the design of the basic structure of a society. This principle cannot be interpreted to recommend a strictly egalitarian basic structure if we assume that only some persons manage to aspire to higher offices and positions. But how deep are the inequalities that it allows and by what measure? Rawls's texts give no specific answers. In this respect, the content of the *difference principle* (2b.) is more precise. I will start with it, before returning to the other principles that may imply revisions to its recommendations. The principle of fair equality of opportunity is one of them. The

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83   Rawls, *Justice as Fairness*, pp. 42–43.

principle of assistance—the eighth principle of the law of peoples—is another. It could also be accompanied by some *principle of global distributive justice* and a *principle of just savings*. Finally, different formulations and interpretations of the *principle of liberty* are likely to have impact on the related questions of distributive justice.

The difference principle itself has been broadly discussed.[84] One of the intriguing themes in the discussion has been whether the principle only applies to the basic structure or whether it also applies to the persons within the basic structure. G. A. Cohen, for example, has pointed out that the principle may allow remarkable inequalities if egalitarian (Marxist or Christian) virtues of the citizens do not accompany it.[85] In the following analysis I focus on questions of this kind. In particular, I articulate conceptual tools that may bridge the gaps between more or less idealized well-ordered societies and actual societies.

Actual societies are characterized by very unequal distributions of income and wealth. Recently, economic inequalities have even grown in the Nordic countries. My approach is not, however, to compare the statistics between different countries.[86] Instead, I have chosen the United States of recent decades as an example of an actual society in an analysis of Rawlsian justice. I have already specified degrees of reasonableness (Table 2.1), thicker and thinner conceptions of goods as common goods (Table 2.2), and various possible extensions for the overlapping consensus (Table 2.3). Although much has been written about the difference principle, a conceptual framework that explicates balances in which all the mentioned elements have been taken into account can help to clarify justice as fairness and possibilities to move beyond it.

Recall the definition for reasonable democracy that I introduced in 2.1:

D6   Reasonable democracies are well-ordered societies that are outcomes of functioning democratic procedures and reasonable communication.

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84   As Philippe van Parijs put it: "Few components of John Rawls's political philosophy have proven so epoch-making as what he somewhat oddly called the 'difference principle.' None has exercised as great an influence outside the circle of academic philosophers. And hardly any has given rise to so many misunderstandings or generated so heated controversies." Philippe van Parijs, "Difference Principles," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), p. 200.

85   G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge, 1995); *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, 2001). Having formalized both Rawls's and Cohen's positions, John E. Roemer summarizes: "For Cohen, self-regarding behavior is inconsistent with Rawlsian justice, for justice requires a (Rawlsian) fraternity among citizens that cannot exist if the talented willingly choose to be well off in the face of poverty of others that is owing to morally arbitrary features." John E. Roemer, *Theories of Distributive Justice* (Cambridge, 1996), p. 185.

86   This has been done by many others. See, for example, Mikko Kautto, *Diversity Among Welfare States: Comparative Studies on Welfare State Adjustment in Nordic Countries* (Helsinki, 2001); Mikko Kautto et al. (eds), *Nordic Welfare States in the European Context* (London, 2001); Christopher Pierson and Francis G. Castles (eds), *The Welfare State: A Reader* (Cambridge, 2000), and the *Luxemburg Income Study* (Luxemburg, 2004).

The existence of democratic institutions and reasonable communication are assumed in D6—these assumptions immediately distinguish a reasonable democracy from decent hierarchical societies. However, the assumptions of democratic institutions and reasonable communication do not imply as stringent an antecedent equality as the original position does. By varying D6 and its hypothetical outcomes we can specify more and less reasonable arguments for more and less egalitarian distributions of goods in democratic societies.

If we add to the assumption of reasonable communication that it is *the most reasonable* communication according to justice as fairness, we have taken an important step closer to the original position. In Table 3.1 below I have assumed that thoughtful persons in a real democracy form the background for the procedure of reasonable democracy. The table illustrates the standard case of Rawls's argument. According to it, thoughtful persons in a real democracy end up to endorsing the two principles of justice through the most reasonable communication.

Table 3.1   The most reasonable communication leading to the two principles of justice

Background assumption	*Procedure*	*Outcome*
Thoughtful persons in a real democracy	The most reasonable communication within democratic institutions	The two principles of justice are endorsed

This way of representing the process leaves implicit almost everything about why the outcome—the two principles of justice—is what it is. But such elements could be added there in various forms one by one (in theory). This would involve explication of the decisions of thoughtful persons.

If the communication were not the most reasonable right away, the two principles might be only vaguely endorsed as the preliminary principles for the reform. But once the reform were underway, the citizens could check their convictions and approximate the two principles during the next round. In terms of Figure 1.1, going back and forth between boxes (2), (3), and (4)—or their variants—they might reach the reflective equilibrium that Rawls intended. For the purposes of illustrating the ideal Rawlsian reform it is useful to present the procedure as in Table 3.1. It is handy to add economic indicators to this picture and then reconsider the ideal as well as the related criticism.

Backgrounds, Procedures, and Economic Outcomes

Rawls's difference principle is abstract enough that it may be combined with relatively egalitarian as well as nonegalitarian conceptions of the distribution of income and wealth. Much depends on the interpretations of particular knowledge: just how great are the inequalities that work for the best of the least advantaged? Shapiro, for example, has recently discussed the reasons that have often made politicians think that radical downwardly redistributive politics do not actually improve the position of the

least advantaged.[87] Rawls's difference principle consciously leaves the reasons for politicians (and other citizens) to consider. Nevertheless, his graphical presentations of the principle do not really help us relate the principle's recommendations to actual inequalities. Rawls did not connect his presentations to any statistical data.

I illustrate certain relevant connections between the difference principle and the economic inequalities in a real society by using the example of five imaginary discussants. Let their positions be called *libertarian* (L), *structural Rawlsian* (R_S), *cultural Rawlsian* (R_C), *structural egalitarian* (E_S), and *cultural egalitarian* (E_C). The discussants argue about the distribution of income in the United States in 1979, 2001, and between. They use data provided by the Current Population Survey (CPS) of the Census Bureau of the United States—their disagreements are not about the data itself. Nor do they disagree about what might have been feasible in certain imaginary circumstances. They disagree about principles of justice and the sphere of their application.

The libertarian is the only one of the five who thinks that if the society (the United States) had been more just, the inequalities of income would probably have been greater by 2001 than they actually were. The structural Rawlsian proposes that more justice would have led to slightly more egalitarian incomes than the actual ones in 2001. The rest are more egalitarian than she. Not one of them, however, has anything like strict equality in mind. The discussion is not about entirely different scenarios of history during the twenty-two year period.[88]

I use the distinction between the structurally and the culturally Rawlsian position as follows. The former assumes a consensus on the two principles in matters of structural changes that characteristically depend on politicians' decisions. The politics of taxes and transfers are centrally included in the case of the difference principle. The latter assumes a consensus that reaches somewhat deeper into the culture of the society and into the attitudes of each citizen. Christian Arnsperger, for example, has specified certain requirements that the endorsement of the difference principle might imply for individual citizens.[89]

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87   These reasons include fears that campaign contributors will withdraw their support and that the capital will flee the country. They also include structural limitations for high taxes, the pressure of various interests groups, and various expenditures in terms of economical efficiency. Ian Shapiro, *The State of Democratic Theory* (Princeton, 2003), p. 106. Shapiro (ibid., pp. 104–105) points out that such reasons are needed to explain not only how universal franchise can coexist with vast inequalities, but also, "which factors are likely to be alterable by democratic political reform."

88   Ross Zucker has pointed out that the recently growing economic differences are surely problematic from the viewpoint of the model of "democratic distributive justice" that he has developed. He also remarks, however, that the issues of democracy and distributive justice retain their relevance regardless of the episodic changes in the distributive schemes of actual societies. Ross Zucker, *Democratic Distributive Justice* (Cambridge, 2001), pp. 20–21. Zucker (ibid., p. 27) present his model as more egalitarian than "most of the important liberal theories," including that of Rawls.

89   Arnsperger has articulated the following two limitations to the maximin behavior of the people who live in a Rawlsian well-ordered society (if we accept the reading that it implies maximin behavior): "[1.] Knowing that the maximin institutions need various pieces

In *Theory*, Rawls's definition of the well-ordered society may be said to suggest the culturally Rawlsian position. Not only do the members of the society know that the two principles are in force, but they also adjust their life plans to them.[90] The structurally Rawlsian position, on the other hand, might be most explicit in Rawls's article "The Basic Structure as Subject" (1977). There, the contrast between the structural framework and individual decisions is sharp.[91] In *Liberalism* Rawls continued to emphasize that the basic structure is the primary subject of justice as fairness, but he remarked that various attitudes of the individual citizens are also relevant.[92] After all, Rawls probably was closer to the culturally Rawlsian position. But if we follow this reading of justice as fairness, we might expect ordinary citizens to put relatively much effort into efficient realization of the difference principle. The relevant viewpoints would not only be those of the politicians who design the system of taxes and transfers but also those of each citizen.

Some readers who regard themselves as libertarians, structural Rawlsians, etc., may not be able to identify with the positions as I use them here. For example, some structural Rawlsians may think that the inequalities of income should have been greater than they actually were in 2001, because this would have improved the absolute position of the least advantaged. I call this position *Rawlsian with a libertarian tendency*. Similarly, various more specific positions could be related to the conceptual framework to be drafted. S.L. Hurley, for instance, has put more emphasis on individual responsibilities than Rawls. She has not connected the responsibilities to egalitarianism as closely as Cohen and Roemer have. Nevertheless, she has ended up supporting the maximin principle of distribution.[93] I start with positions L, R_S, R_C, E_S, and E_C—then I return to the more specific positions and related discussion.

Current Population Survey (CPS) statistics typically divide income receivers in the United States into five groups. The average income of the lowest fifth was

of *individual information* in order to make optimal distributive decisions, the agent chooses to *truthfully reveal* his part of the information, even if he could have better satisfied his self-interests by some misinterpretation. [2.] Knowing that the degree to which the maximin institutions can attain a 'good' allocation depends on everyone's *individual actions*, the agent chooses to take whatever action is *socially optimal*, even if he could have satisfied his self-interests by taking some other action [Arnsperger's emphases]." Christian Arnsperger, *Incentives, Social Commitment, and the Economics of Rawls's "Well-Ordered Society"* (Louvain, 1994), p. 6.

90   Rawls, *Theory*, pp. 4–5/4 rev.

91   Rawls said: "By the basic structure is meant the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation." John Rawls, "The Basic Structure as Subject," in *American Philosophy Quarterly* 14/2 (1977): 159. He (ibid., 160) also said that the basic structure is to secure "conditions against which the actions of individuals and associations take place."

92   In *Liberalism* (pp. 11–12) Rawls says that political liberalism focuses on "the framework of basic institutions" and the related norms "as well as how those norms are to be expressed in the character and attitudes of the members of society who realize its ideals."

93   S.L. Hurley, *Justice, Luck, and Knowledge* (Cambridge, 2003), pp. 146–280. For Hurley (ibid., p. 280), "responsibility enters into an argument for a maximin principle of distribution based on the idea of neutralizing bias rather than luck."

$11,342 per year in 1979—after taxes and transfers and adjusted by a relevant consumer price index. The average income of the highest fifth was $84,597. The positions of the least and the most advantaged in this sense were (11.3, 84.6). In 2001 the respective figures were (13.0, 128.3).[94]

Let the discussants agree that an imaginary distribution (17.0, 109.9) would have provided the highest feasible position for the least advantaged in 2001. This would have been possible had the citizens in general endorsed the difference principle during the twenty-two-year period and contributed to its realization. The difference principle would have been deeply rooted in the culture as the normative view of the *culturally Rawlsian* discussant suggests. The most advantaged as well as the middle classes would have adjusted their life plans for the greatest benefit of the least advantaged. As the result of this consensus, in 2001 the position of the least advantaged would have been quite high (17.0) and that of the most advantaged would have been as high as it actually was in 1994 (109.9). We may neatly add the suitable economic indicators in the table as follows.

Table 3.2   The most reasonable culturally Rawlsian reform leading to a well-ordered society

Background assumptions	*Procedure*	*Outcome*
Thoughtful persons in a real democracy Income positions: 11.3, 84.6	The most reasonable communication within democratic institutions The two principles of justice endorsed	The basic structure reformed according to the two principles Income positions: 17.0, 109.9

The *structurally Rawlsian* would contend that this culturally Rawlsian scenario extends the requirements of the two principles to the lives of the citizens too straightforwardly and comprehensively. Many people could reasonably argue against the requirement of adjusting their life plans for the greatest benefit of the least advantaged. Instead, the difference principle serves well only as a guide for

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94   "Historical Income Tables, Table RDI-8 Mean Income Received by Each Fifth of Households, by Selected Definition of Income: 1979 to 2001," Definition 15, CPI-U-RS Adjusted Dollars of 2001 (U.S. Census Bureau, 2005). For a broader look at the income inequalities in the United States after World War II, see for example Daniel H. Weinberg 1996, *A Brief Look at Postwar U.S. Income Development* (U.S. Census Bureau, 1996) and Paul Ryscavage, *Income Inequality in America: An Analysis of Trends* (Armonk, 1999). On the advantages of referring to the elaborate definition 15, see for example Robert W. Cleveland, *Alternative Income Estimates in the United States: 2003* (U.S. Census Bureau, 2005). Table RDI-6, which also provides us with definition 15 and which is updated until 2003, indicates that at the upper limit of the least advantaged quintile the annual income decreased slightly from $22,609 to $22,044 between 2001 and 2003 and that at the lower limit of the most advantaged quintile it increased from $78,354 to $80,230. "Historical Income Tables, Table RDI-6 Income Limits for Each Fifth of Households, by Selected Definition of Income: 1979 to 2003" (U.S. Census Bureau, 2005).

the politicians who decide about taxes and transfers. Compared to the culturally Rawlsian scenario, the structurally Rawlsian difference principle would have had similar, but not as striking effects on the distribution of income. While in the actual society the positions of the rich and the poor were (13.0, 128.3) in 2001, they could have been (14.5, 120.8) in 2001, assuming the structurally Rawlsian consensus. Actually, the most advantaged reached the level of (120.8) in 1998.

In Figure 3.1, R_C and R_S denote the recommendation of the difference principle according to the culturally Rawlsian scenario and the structurally Rawlsian scenario, respectively.

Curve E_C–L illustrates the feasible alternatives for the positions in 2001, assuming cultural consensus. The highest point of this curve is the difference principle in the culturally Rawlsian view. Curve E_S–L illustrates the feasible alternatives if only structural changes are allowed. The highest point of this curve is the difference principle in the structurally Rawlsian view. Because in this scenario the life plans of the citizens are otherwise taken as they were, it makes sense to assume that the income positions could not have differed from the actual ones as much as in the culturally Rawlsian scenario.

Any point that is to the northeast of point 2001 would have provided better incomes for both the wealthy and the poor than they actually had in 2001. Curve E_C–L and curve E_S–L both include such points. This illustrates the agreement among the five discussants of the example that somewhat more efficient alternatives to actual development in terms of income might have been feasible.

The *libertarian* would argue that the requirements of Rawlsian reasonableness would have been too heavy for the most advantaged between 1979 and 2001. They imply a concept of common assets that is flawed from the start. Instead of equality, the dominant element in justice should be freedom. In the United States, there should have been more economic liberty. Probably this would have produced even greater economic inequalities than there actually were in 2001. In accordance with Figure 3.1, the libertarian would suggest that something like (12.0, 150.0) would have been an acceptable distribution in 2001.

The fourth of the discussants of this example is a *cultural egalitarian*. She would not deny anyone the basic liberties, but would argue that beyond them economic equality should be a very important element of justice. She would suggest that a just reform from 1979 on would have led to positions (15.0, 91.1). She would regard this as the most egalitarian of the feasible alternatives, given that an egalitarian culture had been successfully promoted. She would hold that there are moral grounds for relatively equal distribution, even though this would not maximize the position of the least advantaged in absolute terms. The *structural egalitarian*—the fifth discussant—would refrain from arguing that the culture in general should support the economically egalitarian developments. She would think she avoids excessively comprehensive egalitarianism, but she would admit that egalitarian politics as such would probably have allowed only modest economic growth. This would have sufficed for positions (14.0, 106.2) or the like.[95]

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95   The level of the most advantaged was (91.1) in 1983 and (106.2) in 1993.

y = the representative of the poor, $1,000 per year
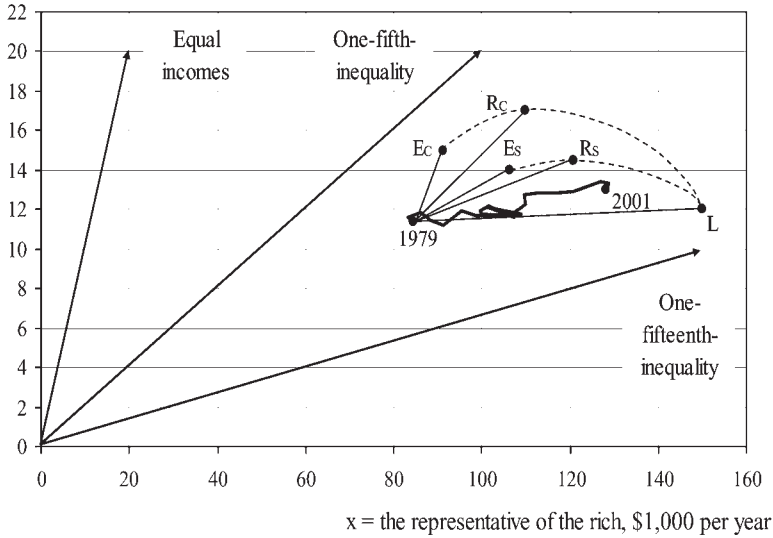
Figure 3.1 Economic inequalities in the United States and in idealized societies

Explanations:

Curve 1979–2001	Positions of the poor and the rich: mean incomes of the lowest and the highest fifths of households in the United States after taxes and transfers from 1979 to 2001, for example 1979: (11.3, 84.6); 1990: (12.2, 101.6); 2001: (13.0, 128.3).*
Line 1979–E_C	Hypothetical positions of the poor and the rich from 1979 to 2001, a culturally egalitarian scenario.
Line 1979–E_S	Hypothetical positions of the poor and the rich from 1979 to 2001, a structurally egalitarian scenario.
Line 1979–R_C	Hypothetical positions of the poor and the rich from 1979 to 2001, a culturally Rawlsian scenario.
Line 1979–R_S	Hypothetical positions of the poor and the rich from 1979 to 2001, a structurally Rawlsian scenario.
Line 1979–L	Hypothetical positions of the poor and the rich from 1979 to 2001, a libertarian scenario.
Curve E_C–L	Hypothetically feasible positions of the rich and the poor in 2001, assuming consensus on the relevant principles in the politics of economic structures and assuming support of cultural life.
Curve E_S–L	Hypothetically feasible positions of the rich and the poor in 2001, assuming consensus on the relevant principles in the politics of economic structures.

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* U.S. Census Bureau, "Historical Income Tables 2004, Table RDI-8 Mean Income Received by Each Fifth of Households, by Selected Definition of Income," Definition 15.

Of course one might imagine that an even more egalitarian distribution than E_C might have been feasible by 2001. One would only need to relax the requirements of realism suitably. However, I have assumed that the discussants agree about the limits of feasibility according to either curve: if one or the other degree of consensus is assumed, the corresponding distributions could have been feasible. This assumption helps us to focus on the differences in their normative views.

Now that positions L, R_S, R_C, E_S and E_C are specified, we may think of the mediating alternatives. In Rawls's figure the *utilitarian* point is located on the curve southeast from the difference principle point.[96] Let us accept this and assume that the utility point would be similarly located in relation to difference principle points in Figure 3.1. Thus, Figure 3.1 needs at least two utility points, one in the higher curve in which the support of the cultural consensus is assumed, and the other in the lower curve that only allows the means of politics.

Given that there is actually slippage between the spheres of politics and culture, we might speak of areas rather than points. The *difference principle area* would be the surroundings of R_C and R_S. The *utilitarian area* would be to the southeast of that. Further to the southeast would be the *libertarian area*.[97] The *egalitarian area* would be to the southwest of R_C. There are, in any case, various mediating positions between the alternatives specified as L, R_S, R_C, E_S and E_C.

One of the mediating alternatives is the principle of maximizing the average income with the floor constraint for the least advantaged. Recall that 77.8 per cent of the test subjects in the experiment by Norman Frohlich and Joe A. Oppenheimer chose it, while only 1.23 per cent chose the difference principle.[98] This suggests that it would be unrealistic to expect consensus on the difference principle as such. Broader support might be possible for some point in the utilitarian area—somewhat southeast of the difference principle area. This direction would be compatible with the criticism of Rawls by John Harsanyi. Harsanyi has argued that the parties of the original position would not choose the difference principle because it is a kind of a maximin criterion and there are serious weaknesses in the maximin criterion as a rule of rational choice.[99] Zucker has presented a table that clarifies similar

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96   Rawls, *Justice as Fairness*, p. 62.

97   In Rawls's figure (*Justice as Fairness*, p. 62), there is a Nash point between the utilitarian (Bentham) point and the difference principle point. To the southeast of the Bentham point would eventually come the focal point after which the most advantaged could not have done any better regardless of the position of the least advantaged.

98   Norman Frohlich and Joe A. Oppenheimer, *Choosing Justice: An Experimental Approach to Ethical Theory* (Berkeley, 1993) (discussed in 2.3).

99   Harsanyi illustrates the weakness of the maximin rule as a guide for individuals in the following example. In Chicago there would be a good job available for the person in question but not in New York. Nevertheless, because there is the normal risk of dying in a flight accident, the maximin rule would recommend that the person stay in New York. Concerning Rawls's difference principle Harsanyi says: "Therefore, he [a party in the original position] must consider the possibility that he might end up as the worst-off individual in the society. Indeed, according to the maximin principle, he has to evaluate any particular institutional framework *as if* he were *sure* that this was exactly what happened to him [Harsanyi's emphases]." John Harsanyi, *Essays on Ethics, Social Behavior, and Scientific*

(well-recognized) problems that may follow if extreme emphasis is attached to the improvement of the position of the least advantaged.[100]

However, connecting the considerations of the difference principle to the data about actual inequalities may have significant impacts. From the egalitarian viewpoint a disturbing fact is that the starting point in 1979 is already highly unequal. Rawls's figure, which starts from the theoretical position of equality, does not make this explicit. But reforms have to be started from the midst of history. In Figure 3.1 this is made explicit. According to it, all the distributions that might have been feasible by 2001 are to the southeast of the one-fifth-inequality line. Broad empirical studies could tell us much about what really might have been feasible, but they would not solve the normative aspects of the problem. Indeed, making actual inequalities explicit may guide our normative considerations in an egalitarian direction. At least in Kevin P. Phillips's argument for more egalitarian politics in the United States, the details about the actual (increasing) inequalities have an important role.[101] He clearly assumes that an assessment of the magnitude of the economic inequalities is likely to matter for our considered judgments.

Greater inequalities come into play when one looks at the wealth data. CPS uses a concept of median household net worth: in 2000 it was $7,396 for the lowest income quintile and $185,500 for the highest.[102] Since 1989 a relatively fixed methodology for measuring wealth has been used in the statistics provided by the Survey of Consumer Finances (SCF).[103] In that year, the richest 1 per cent of families had a

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Explanation (Dordrecht, 1976), p. 39. Jukka Mäkinen has criticized Harsanyi for not paying enough attention to the very specific role of the difference principle in Rawls's conception as a whole. Jukka Mäkinen, *John Rawlsin oikeudenmukaisuuskäsityksen merkitys normatiiviselle taloustieteelle* (Helsinki, 2004).

100   Zucker, *Democratic Distributive Justice*, p. 78.

101   Phillips points out that especially during the 1980s the economic elite of the United States became overwhelmingly powerful. He reports how it gained support in magazines as well as in the media more generally. States, too, had to prove their competence as "business climates." Moreover, "[c]olleges were ranked by their endowments, law firms by their net partnership profits, corporations by virtually every device imaginable. … America was turning into a hierarchy of wealth." Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* (New York, 1990), p. 44. My analysis in the text is neither sociological nor historical: it does not tell whether Phillips's relatively leftist analysis of this actual society is sound. But this kind of criticism could well be relevant in the framework developed.

102   Shawna Orzechowski and Peter Sepielli, *Net Worth and Asset Ownership of Households: 1998 and 2000* (U.S. Census Bureau, 2003), pp. 2, 7–8. In their report, net worth is "based on the sum of the market value of assets owned by every member of the household minus liabilities (secured or unsecured) owned by household members. … The median net worth is the amount which divides households into two equal groups, one having net worth less than that amount and the other having net worth above that amount." Ibid., p. 3. Orzechowski and Sepielli (ibid., p. 2–4) prefer using the median rather than average as the measure, because the extremely wealthy households do not affect the medians as strongly as the averages.

103   Arthur B. Kennickell, *A Rolling Tide: Changes in the Distribution of Wealth in the U.S., 1989–2001* (The Federal Reserve Board, 2003), p. 5. The survey excludes the 400

30.3 per cent share of the total net worth held by the families of the United States. The second wealthiest 9 per cent had a 37.1 per cent share and the lowest 90 per cent had a 32.6 per cent share. By 2001 the inequalities had increased slightly. Starting from the richest 1 per cent again, the corresponding percentages were 32.7, 37.1, and 30.2.[104] At the same time, however, overall wealth increased. As a result, the net worth held by most of the lower groups also rose.[105]

There are certain similarities between income trends and trends related to the distribution of wealth. But it has sufficed for me to refer primarily to income (after taxes and transfers) as a measure of economic positions. Figure 3.1 already served to clarify the basic differences between the positions L, R_S, R_C, E_S and E_C. Nevertheless, one can safely assume that the inequalities in terms of income *and* wealth are greater than those of income alone.[106] This may shift the balance of normative considerations of reasonable persons in an egalitarian direction.

An important normative principle that is likely to shift the balance of considerations further towards the egalitarian area is the principle of fair equality of opportunity. Rawls refers to it in *Justice as Fairness* when he discusses certain challenges that accompany notably flat curves for the difference principle. (Curves E_C–L and E_S–L are flat in the relevant sense: in order to improve the position of the least advantaged slightly, the discussants assume—in the name of realism—that remarkable improvements for the most advantaged are needed.) According to Rawls, there should be broad educational opportunities for the citizens "to develop their natural endowments and to acquire socially productive skills."[107] He assumes that the presence of such opportunities and open competition helps to keep inequalities within an acceptable range. Moreover, the difference principle is likely to be more effectively realized when it works in tandem with the principle of fair equality of opportunity.[108]

Rawls's principle of fair equality of opportunity can be compared with an approach to equality of opportunity presented by Ian Shapiro. In Shapiro's approach,

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wealthiest households, whose position Kennickell (ibid., pp. 2–4) discusses separately based on data collected by *Forbes Magazine*.

104   Ibid., p. 9.

105   Kennickell (ibid., p. 1) suggests that "household wealth at the end of 2001 ... was almost 50 percent higher" than in 1989 when adjusted for inflation. It is difficult to estimate the changes in the very lowest income groups: The measures showed negative net worth for about 7 per cent of the families in 2001. This group includes students with various kinds of loans. Ibid., p. 48. According to Kennickell (ibid., pp. 5, 7), "the proportion of families with negative net worth fell only slightly." Nevertheless, "the group at the very bottom on net had greater negative net worth in absolute terms."

106   See also Kennickell*, Consistent Weight Design for the 1989, 1992 and 1995 CSFs, and the Distribution of Wealth: Revision II (August 1997)* (The Federal Reserve Board, 1997); *Using Income Data to Predict Wealth* (The Federal Reserve Board, 1999); and Ryscavage, *Income Inequality in America*.

107   Rawls, *Justice as Fairness*, p. 67.

108   Ibid., pp. 66–69. Under conditions of fair opportunities, as Rawls (ibid., p. 67) puts it, "the more advantaged cannot unite as a group and then exploit their market power to force increases in their income."

one kind of principle for opportunities, or "structured competition of power," plays a fundamental role. For the purpose of limiting domination, Shapiro even regards it as superior to "deliberation or liberal constitutionalism."[109] His point is not to undermine these, but he argues that as such they do not provide proper guarantees against various forms of domination. With respect to distributive justice he shares the goal of improving the position of the lowest quintile. But this "is likely conditional on also reducing relative inequalities."[110] We might say that Shapiro's approach offers one way of placing more emphasis to fair competition while still remaining well within the limits of reasonable liberalism. Shapiro's studies also support the view that fair opportunities are likely to push the interpretations of the difference principle toward egalitarianism.

Detailed contextual studies would be required in order to analyze how the difference principle and the principle of fair equality of opportunity might support each other. But if one household is, say, ten times as wealthy as another, it seems obvious that the opportunities of the members of the poorer household are much more limited. Various public institutions, such as public schools and public health care, soften the contrast. Views differ about the division of responsibilities between public institutions and nonpublic contributions. But in general, it seems proper to expect that the principle of fair *equality* of opportunity would shift the balance of reasonable considerations—in the case of economic distribution—in the direction of egalitarianism.

In balancing reasonable justice, equality of opportunity is not necessarily emphasized because it seems democratically legitimate and unavoidable that in free societies the children of each generation cannot have fully equal opportunities. However, it is stressed that all should have broader opportunities than those guaranteed by the liberal basic opportunities (including formally equal opportunities before the law) and that merits should be taken into account in the realization of these opportunities:

P4   The basic social structure should provide opportunities for all beyond the basic liberties and to favor the realization of these opportunities in accordance with merits.

For example, a relatively libertarian position would be allowed by P4 if the merits of the most advantaged sufficiently corresponded to their advantageous position and if it were convincingly argued that there will be enough opportunities remaining for the least advantaged—especially for the least advantaged children. It seems inevitable that such arguments would fail to be broadly convincing intuitively.[111]

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109   Shapiro, *The State of Democratic Theory*, p. 148. He says here: "[D]eliberative processes can be manipulated by people with ulterior motives, they can marginalize the inarticulate (who may be most vulnerable to domination), and they can result in stonewalling by the powerful in the face of needed changes."

110   Ibid., p. 141. Shapiro (ibid., pp. 115–116) wishes, however, to find many other ways of reducing the inequalities than mere progressive taxation.

111   Barry (*Why Social Justice Matters*, p. 44) has pointed out that "if we are ever to employ the concept of equal opportunity, there has to be a limit to the amount of fine-grained

The intuitions on relevant merits vary widely and their impacts on the arguments concerning economic distributive justice are difficult to predict. Nevertheless, as I argued in Chapter 1, theories of justice are defective if they disregard the arguments based on merit altogether. At least, there may be clear cases of demerit that have to be taken into account. Let us now turn to Rawls's discussion of the second original position (introduced in 3.1), to his principle of assistance in *Peoples*, and to the possibility of exploitative industriousness.

Is the Principle of Assistance Enough?

In the second original position, the representatives of peoples are to choose the principles of the law of peoples. Rawls expected the representatives of both liberal and decent peoples to be reasonable at this level.[112] But once the eight principles of the law of peoples (or some variant of them) have been agreed upon, it is enough for decent peoples to lay down their domestic policies in terms that are not unreasonable. Rawls even rejects the idea that liberal societies should set major economic incentives for the decent societies to become more liberal. "Decent societies should have the opportunity to decide their future for themselves."[113]

The whole apparatus of the second original position provides one kind of global extension of the ideals that Rawls first developed for liberal democracies. Nevertheless, he argues that his approach avoids the problems entailed by more straightforward extensions of the liberal ideals beyond liberal democracies. In particular, Rawls mentions the cosmopolitan conceptions advanced by Brian Barry, Charles Beitz, and Thomas Pogge. According to them the requirements of a global original position (or equivalent considerations) lead to relatively radical global redistributive politics.[114] Rawls pointed out that the cosmopolitan conception of justice would assume that only liberal democratic societies are acceptable. This implies that liberal democratic and decent hierarchical peoples would not agree on principles in an equal position.[115]

In this discussion, one crucial difference appears to be that Rawls depicts the parties of the global original position as representatives of peoples, while in the cosmopolitan conception they represent individuals. For two reasons, however, this

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detail we consider relevant[.]" In any case, he argues against straightforward meritocracies in which the merits can accumulate without sufficient correctives of fair opportunities: "Initial advantages cumulate, then. Those with the best school results will tend to go to the best universities and to go to the most desirable jobs. The same cumulative process operates for disadvantage as well as for advantage." Ibid., p. 45.

112   Rawls (*Peoples*, p. 40) recognizes that "there is an even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples" than in one liberal democracy. But Rawls does not think this to imply that well-ordered peoples would be less reluctant to "insist on an *equality* among themselves as peoples [Rawls's emphasis]."

113   Ibid., pp. 84–85.

114   Ibid., pp. 82–84, 115–120; Charles Beitz, *Political Theory and International Relations* (Princeton, 1979); Thomas Pogge, *Realizing Rawls* (Ithaca, 1989); Brian Barry, *Theories of Justice* (London, 1989).

115   Rawls, *Peoples*, pp. 82–83.

difference may not be as crucial as it appears. First, if the parties are regarded as representatives of individuals, it does not necessarily follow that they would only allow liberal societies. They could well agree that both liberal and decent societies are acceptable. Beitz has similarly noted that a basically individualist approach does leave room for intermediate units.[116] And in domestic justice Rawls suggested that the parties of the first original position would not require the religious and other associations to be internally democratic.[117] The global situation is analogous. Rawls expected that at any level—associational, national, and global—at least human rights are endorsed. But one may add that not even the representatives of the individuals might require all peoples to organize their societies in a way that is empathically liberal democratic. Many individuals might prefer to live in a society with a relatively thick conception of common good and a sense of nationality, even if they reasonably considered the emphatically liberal societies as alternatives, too.[118]

Second, the representatives of peoples could require policies of redistribution that were as radical as those required by individuals. Barry noted this already in his *Theories of Justice*.[119] But in his law of peoples Rawls connects his considerations of economic distributive justice to the non-ideal theory and its concept of a burdened society. At this point his argument in the law of peoples clearly differs from his argument for domestic justice. In a way, he omits the questions of global distributive justice in the ideal theory.

Burdened societies, Rawls says, are not aggressive.[120] However, they "lack the political and cultural traditions, the human capital and know-how, and, often, the

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116   Beitz says: "[J]ust as the liberal theory of the state makes room for secondary associations, so too, a theory of international relations could make room for intermediate units without holding that they or their interests are in any way ultimate or take precedence over the interests of individuals." Charles Beitz, "Rawls's Law of Peoples," *Ethics* 110/4 (2000): 680.

117   Rawls, *Justice as Fairness*, pp. 163–164.

118   One might argue that it is most important to have liberalism at the level of states because they have such overwhelming resources of coercive power. However, in the contemporary world the particular importance of states and related basic structures seems to have weakened significantly compared to the past centuries. This also comes up in Buchanan's ("Rawls's Law of Peoples," 720–721) criticism of Rawls: Rawls relies on the old-fashioned Westphalian paradigm. But as Anthony D. Smith has argued at length, collective national identities are persistently important for peoples. Anthony D. Smith, *Chosen Peoples* (Oxford, 2003).

119   In his discussion of international justice in *Theories of Justice*, Barry builds on Rawls's corresponding short account in *Theory*, in which nations were depicted as the parties. Barry (*Theories of Justice*, pp. 188–189) assumes that all these nations strive towards full Rawlsian (domestic) justice and wonders why their representatives would not agree on relatively radical global redistributive polities—indeed, a global difference principle. Buchanan ("Rawls's Law of Peoples," 708) has asked virtually the same question.

120   Rawls, *Peoples*, p. 106. Actually Rawls (ibid., pp. 89–105) starts his discussion of a non-ideal theory with considerations on the doctrine of just war. I leave this broad theme aside because the details are not able to clarify those aspects of Rawls's conception that I am mainly interested in. Certainly, it would be preferable if no people had to use its right to go to war. Accordingly, there is a certain urgency in examining the possibilities of peaceful inter-societal

material and technological resources needed to be well-ordered."[121] The well-ordered societies have a duty to assist burdened societies enough for them to become decent or liberal. The eighth principle of the law of peoples reads: "Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."[122]

Rawls specifies three guidelines for this duty of assistance. The first of them is that "a well-ordered society need not be a wealthy society."[123] At this point Rawls returns to his account of savings in *Theory*. A society should save enough to maintain a just basic structure. This need not be much—and to save more is not a duty. But well-ordered societies have no duty to assist burdened societies more than what is needed to establish an enduring basic structure, liberal or decent.[124]

The second guideline is that when assisting, the political and social culture should be taken into account in complex ways. There is no easy way through this. Part of the challenge, Rawls suggests, is that the nation's social and political culture makes crucial difference to its success in relevant respects. The nation's population policy is important as well. Often a proper way of assistance is to help the women of the burdened countries to be better represented in positions of power. In any case, in Rawls's view we should realize that "merely dispending funds will not suffice."[125]

The third guideline states that the aim of assistance is to help the burdened societies "to be able to manage their own affairs" so that they might "eventually become members of the Society of well-ordered Peoples."[126]

The first guideline supports the interpretation that the law of peoples allows highly unequal economic distribution among peoples. The absence of the second principle of justice as fairness—including the principle of fair equality of opportunity (2a.) and the difference principle (2b.)—from the list of the eight principles of the law of peoples anticipated that already. In contrast, Beitz has argued for a redistributive principle that takes into account the variations of natural resources available to peoples. Redistribution is needed in order to give poor countries fair chances of success in a global economy—according to him this would imply global application

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and inter-cultural modes of living together. In Rawls's non-ideal theory the questions about burdened societies relate to peaceful interaction.

121   Ibid., p. 106.

122   Ibid., p. 37.

123   Ibid., p. 106.

124   Ibid., pp. 106–107. In *Theory* (p. 292/258 rev.) Rawls articulated the relationship between the principle of just savings and the difference principle as follows: "In any generation their [the least advantaged] expectations are to be maximized subject to the condition of putting aside the savings that would be acknowledged." However, he does not try to conjecture specifically about the willingness of the parties of the original position (according to "the present time entry interpretation") to save in each generation.

125   Rawls, *Peoples*, pp. 108–111. Rawls (ibid., p. 109) stresses—with reference to Sen's studies on famines—that progress in terms of human rights is often needed to accompany direct aid in terms of material resources such as food.

126   Ibid., p. 111.

of the difference principle or the like.[127] In reply, Rawls says that cultural factors have important influence on a country's success. His principle of assistance asks for enough redistribution so that all peoples could be well ordered. Apparently Rawls thinks that to require the wealthy countries to aid the poor beyond this would not be fair to the wealthy.[128] The following two examples that he uses to explain his position, however, are mainly directed against an even more egalitarian principle of distribution than the difference principle.

Rawls asks us to imagine two countries at the same level of wealth. In the first example the people of one country are industrious and they save. Those of another prefer "a more pastoral and leisurely society."[129] Consequently, the first country becomes wealthier. The related question Rawls asks is: should the wealthier country be taxed continually as long as it is wealthier? This seems unfair. Thus, a straightforward application of the egalitarian principle is rejected.[130]

In Rawls's second example one of two societies grows wealthier because its women take part in political and economic life broadly and successfully. The women of the other society have an opportunity to achieve similar success, but they have different values and, accordingly, they choose more traditional roles. Rawls thinks that this might be one reason why the first society becomes wealthier—in a way which would not justify redistribution.[131]

Plenty of room remains for considering how steep the inequalities would have to be in order that they not be explained by these and similar mechanisms. Beitz notes that Rawls's two examples ignore people's dependency on international capital markets.[132] In addition, the force of the second example, particularly, may be much reduced by its hypothetical character. There are plenty of reasons to think that in real societies women often do not choose traditional values voluntarily.[133] But in addition to the sharp controversies related to the contextual aspects of these examples,

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127 Actually, Beitz's (*Political Theory and International Relations*, p. 141) first formulation of his "resource distribution principle" only grants "each society a fair chance to develop just political institutions and an economy capable of satisfying its members' basic needs." His other wording on the same page is more extensive: "The underlying principle is that each person has an equal prima facie claim to a share of the total available resources, but departures from this initial standard could be justified (analogously to the operation of the difference principle) if the resulting inequalities were to the greatest benefit of those least advantaged by the inequality."

128 Rawls, *Peoples*, p. 117.

129 Ibid., p. 117.

130 Ibid., p. 117. As Rawls puts it here, "with a global egalitarian principle without target, there would be a flow of taxes as long as the wealth of one people was less than that of another."

131 Ibid., pp. 117–118.

132 Beitz, "Rawls's Law of Peoples," 691. Buchanan ("Rawls's Law of Peoples," 702, 704–705) has made the same point in reference to the global basic structure: "[If there is] a global basic structure—the international analog of the basic structure of a single society as Rawls understands it—then being well-governed does not ensure either economic self-sufficiency or distributional autonomy."

133 See, for example, Martha Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development: A Study on Human Capabilities* (New York, 1995).

a theoretically fundamental remark about them is that they are directed against strict outcome-egalitarianism. One might well support a more egalitarian global distributive principle than Rawls's principle of assistance despite admitting that economic inequalities between societies arise legitimately from cultural differences to some degree.

Both examples focus on differences in people's economic industriousness. Many of these differences arise from cultural factors. Rawls mentioned Japan as an economically successful country with relatively scarce natural resources.[134] Francis Fukuyama and Robert Putnam, for instance, have studied the related questions of the accumulation of trust and other forms of social capital in detail.[135] We might even go back to Max Weber's classical claims in *Protestant Ethics and Spirit of Capitalism*. If Weber's claims hold, reformed Christianity explains much of the economic success of the areas where it has been influential.[136]

If we admit that such factors cause legitimate differences to a degree, this also enforces the status of the related nonmaterial resources as common or relatively common goods. But it is peculiar that Rawls did not really discuss the possibility that the best position of the least advantaged peoples (or people) is the goal of global redistributive policies. In which sense did Rawls consider the case of global distributive justice to be different from domestic distributive justice? Recall that Rawls's second original position is very reminiscent of the first one. None of the parties of the second original position knows which are the natural resources and the culturally particular features of its own country—analogously to the parties of the first original position, who know neither their particular abilities nor their conceptions of good. Analogously to justice as fairness, we might expect that if the parties of the original position of the law of peoples could agree on anything, they would guarantee a relatively high measure of wealth to the least advantaged peoples. The parties would not prohibit some peoples becoming richer than others by their natural and cultural resources. But it would be somewhat surprising if they considered Rawls's principle of assistance strong enough to achieve global distributive justice. It must be kept in mind that the current global inequalities are vast.[137] As A.P. Rao

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134   Rawls, *Peoples*, p. 108. Rawls mentioned Argentina as an example of a resource-rich country with serious economic difficulties. Unfortunately he did not discuss other possible reasons for the economic difficulties in Argentina.

135   Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London, 1995); Robert Putnam et al., *Making Democracy Work: Civic Traditions in Modern Italy*; Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, 2001); Robert Putnam (ed.), *Democracies in Flux: The Evolution of Social Capital in Contemporary Society* (New York, 2002).

136   In his analysis of Benjamin Franklin's writings, Weber put the relation between aquisition and the meaning of life as follows: "Der Mensch ist auf das Erwerben als Zweck seines Lebens, nicht mehr das Erwerben auf den Menschen als Mittel zum Zweck der Befriedigung seiner materiellen Lebensbedürfnisse bezogen." Max Weber, *Die Protestantische Ethik 1: Eine Aufsatzsammlung* (Gütersloh, 1981), p. 44.

137   Globally, the ratio of the incomes of the lowest and the highest income quintiles increased from 60:1 to 74:1 during the 1990s. And since the early 1980s, development aid decreased significantly (as the percentage of the GDP of the advanced industrialized

has pointed out, the whole notion of equality in liberal theories loses its point in the third-world perspective if it is not accompanied by relatively radical redistributive politics.[138]

In *Justice as Fairness* Rawls illustrates his idea of the just basic domestic structure with an example of a basketball league. At the end of the season, when the teams draft new players, the championship team is required to draft last. This procedure has an equalizing effect to the league year after year.[139] Rawls's law of peoples does not provide any practice or principle that would guarantee equalizing effects such as these. We may say that freedom is emphasized there relatively more than equality. The wealthy are regarded to be free to keep their wealth, even though there may be strong arguments that they have taken advantage of structural inequalities for a long time. The system does not balance the exploitative aspects in the history of the current huge inequalities. Beitz says that Rawls writes as if many actual liberal regimes of our time were almost ideal.[140]

In addition to the global distributive justice as such, Rawls could have assigned more emphasis on the principle of just savings. In *Peoples* he connected it to consumption as follows: "Thus, the savings rate as a constraint on current consumption is to be expressed in terms of aggregate capital accumulated, resource use forgone, and technology developed to conserve and regenerate the capacity of the natural world to sustain its human population."[141]

Rawls's text implies, however, that the principle of just savings might imply a particular challenge to burdened societies rather than to wealthy ones. But in fact the wealthy societies consume natural resources more than the others. In this

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countries). Daniel Little, *The Paradox of Income and Wealth: Mapping the Ethical Dilemmas of Global Development* (Boulder, 2003), p. xiv. The official development assistance provided by the United States was 15,791 millions of dollars (0.14 per cent of GNP) in 2003. The respective figures were 556 and 0.34 for Finland, and 2,043 and 0.92 for Norway. "Global Issues That Affect Everyone" (The US and Foreign Aid Assistance, 2004). As in the case of one society, the inclusion of unofficial contributions and different (relatively) common goods beyond income and wealth would change the picture. Nevertheless, it is clear enough that the opportunities are narrower for the poor than for the wealthy in many ways. Little (ibid., pp. 1–23) has provided one instructive discussion about the relations of income, wealth, primary goods, and capabilities as the measures in the context of global distributive justice. His (ibid., p. 30) "poverty first dictum" is: "Economic development policies, both domestic and international, should be structured in such a way as to give highest priority to improving the well-being of the poor in developing countries."

138   Rao wonders why Rawls does not place more emphasis on the equality of income and wealth as a requirement of justice. Too often the Western concept of equality, Rao says, seems to allow that "anything can be smuggled under its cover." A.P. Rao, *Distributive Justice: A Third-World Response to Rawls and Nozick*, (San Francisco, 1998), p. 89. He continues: "We have heard of equality of equals, equality of rights, equality of opportunities, equality of persons, equality of wages, sexes, races, and of talents. If we could be foolish enough to be carried away by words, sweet and short, fragrant and facile, we may as well believe that Rawls is an egalitarian."

139   Rawls, *Justice as Fairness*, p. 51.

140   Beitz, "Rawls's Law of Peoples," 680.

141   Rawls, *Peoples*, p. 107.

respect industriousness also becomes a less innocent virtue. Rawls's examples of industriousness as the proper source of wealth are weakened if industrious persons consume natural resources heavily. Pogge and many others have developed this line of thought.[142] But generally, one might only say that if the source of wealth were *exploitative industriousness*, the resulting distribution could not be considered as reasonable. Exploitation would count as a demerit in the arguments at stake. Assumedly both people and nature can be exploited in many ways, both direct and indirect. Had Rawls included in his examples cases of exploitative industriousness— as one source of wealth—this would probably have shifted the balance of reasons towards more egalitarian distribution between peoples.[143]

Claims about the roots of global inequalities in the exploitative industriousness of all Western countries have been heatedly discussed in various forums. In different reasonable views their weight would be balanced differently. Much would depend on detailed contextual studies.[144] Inasmuch as capitals and cultural influences are in flux, one should not put too much emphasis on the borders between countries. But in the search for reasonable balances, this need not weaken the arguments for relatively egalitarian distribution at different societal levels.

Support for Economic Justice from (Christian) Religions?

Even if the principle of fair opportunity, the principle of (just) assistance, and the principle of just savings shifted the balance towards the egalitarian area in terms of Figure 3.1, further questions have to be faced when considerations are extended beyond the measures of income and wealth. A straightforward assumption would

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142 Pogge has formulated a model of a "global resources tax" in response to Rawls's framework: "The basic idea [of a global resource tax] is that, while each people owns and fully controls all resources within its national territory, it must pay a tax on any resources it chooses to extract." Thomas Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23/3 (1994): 200. Roger Crisp and Dale Jamieson comment on Pogge's proposal and argue that we should go further: "Instead of thinking of duties and obligations as linking only governments, we should think of them as joining people at all levels of social organization." Roger Crisp and Dale Jamieson, "Egalitarianism and Global Resources Tax: Pogge on Rawls," in Victoria Davion and Clark Wolf (eds), *The Idea of Political Liberalism* (Lanham, 2000), p. 101.

143 Arguing for a basically cosmopolitan view, Derek Heater writes: "World civic responsibility must therefore incorporate a willingness on the part of the privileged to forgo the enjoyment of some of those privileges … for the sake of improving the condition both of their most disadvantaged co-world citizens and of the planet as a unitary ecological system." Derek Heater, *World Citizenship: Cosmopolitan Thinking and Its Opponents* (London, 2002), p. 128. He points out that the changes in the lifestyles of the privileged should go far beyond recycling newspapers.

144 Additional questions have been asked, for example, about the great inequalities within many non-Western countries. To which degree do they depend on internal and to which degree on external factors in the country in question? Why are the inequalities in Brazil much steeper than in India? Little's (*The Paradox of Income and Wealth*, pp. 52–59) discussion sheds some light on such matters. He ends up with the remark that economic growth as such does not improve the position of the poor at all obviously.

be that if more emphasis is given to other goods, the emphasis on economic goods would be reduced. The situation could be illustrated by moving the two curves of Figure 3.1 (E_C–L and E_S–L) somewhat southwest. Because there would be less income (and wealth) overall, the positions of both the most and the least advantaged would be lower.

If the economic goods and the other goods in question are normatively incommensurable, the changes in their factual proportions have no impacts on the considerations of justice between the spheres in question. The questions of what constitutes just distribution of economic goods are entirely separated from the questions about what constitutes just distributions of other goods. Gerald F. Gaus has examined the possibilities that the values of liberty (L), equality (E), justice (J), and beauty (B) are either commensurable or incommensurable with each other. If radical incommensurability holds, no ranking among these values can be made. For instance, the ranking L & E & J > B cannot be affirmed. Gaus used the example to criticize those who wish to defend liberty, equality, and justice based on assumptions of the incommensurable diversity of values. If L & E & J > B is affirmed, the assumptions of diversity and incommensurability are no longer radical. If the ranking is rejected, the view can hardly count as a defense of liberty, equality, and justice.[145]

It is clear enough that Rawls assumed that a great variety of incommensurable values (of beauty, religion, etc.) flourishes. He also assigned a certain practical priority to liberal political values in comparison with other values. But beyond the clearest cases of injustice, much remains open for further balancing in justice as fairness. Indeed, precisely the cases of balancing are the hard ones. Then one has to ask, for example, whether the most extensive scheme of liberties should be slightly narrowed in order to improve the position of the poor in terms of economic goods. Or should their position be somewhat lower in economic terms if society (and people in general) could provide them more noneconomic goods instead. In easier situations it is possible to have improvements in various measures.[146] One such happy case could be that religious values support economic justice in a society. But religious values are complex and some of them tend to conflict with liberal values.

Marx, de Tocqueville, Weber, Troeltsch, and the other pioneers of sociology have shown that religious traditions have numerous impacts on economic life. This remains true despite the secularization of Western societies. For example, the Nordic model of the welfare state clearly has its connections to the Lutheran tradition. Relatively egalitarian distribution is still characteristic of the Nordic countries despite the recent growth of economic inequalities.[147] If economic distribution should be

145 Gerald F. Gaus, *Contemporary Theories of Liberalism: Public Reason as a Post Enlightenment Project* (London, 2003), pp. 47–49. He interprets Isaiah Berlin's approach as an attempt to argue for liberty, equality, and justice based on diversity and incommensurability.

146 If Pareto improvements are possible, no one loses. Cf. the discussion of rationality in 1.2.

147 Johan Fritzell has noted that "Finland, Sweden, and Norway (mostly in that order)" have had "the lowest inequality levels among the OECD countries." Johan Fritzell, "Still Different? Income Distribution in the Nordic Countries in a European Comparison," in Mikko Kautto et al. (eds), *Nordic Welfare States in the European Context* (London, 2001), p. 18. Having compared the Luxembourg Income Study data from the Nordic countries to the data

relatively egalitarian, we might suggest that promoting the Lutheran tradition is conductive to economic justice.

Finland's Lutheran bishops expressed their support for the welfare state in response to the pressures of economic globalization in *Towards the Common Good* (1999).[148] A few years earlier, the Lutheran bishops of Sweden published their support for the welfare state—and improving the lot of the poor everywhere—in *Rika och Fattiga*.[149] Churches elsewhere have also been promoting economic justice in recent decades. The Catholic bishops in the United States, for example, have published *Towards Economic Justice for All* and *A Place at the Table*,[150] and the World Council of Churches has also spoken out for economic justice. The argument has been for the more egalitarian distribution within Western countries as well as globally.[151] All this suggests that in the contemporary Western democracies Christian churches can move the balance of distributive justice in a more egalitarian direction. A separate study would be needed to clarify the details in the (theological) arguments presented in these documents. But intriguing questions follow for the Rawlsian conceptual framework if we assume that some religions are able to speak out effectively for economic justice.

Often religious people have no difficulties in supplementing their religious views with reasons that accord with Rawlsian reasonableness.[152] For purposes of clarification,

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from Germany, the Netherlands, and the United Kingdom, Fritzell (ibid., pp. 39–40) argued that it was still possible to recognize the distinctively outcome-egalitarian Nordic model in the mid-1990s. He pointed out here that the pressures of the global economy are not likely to remove this tendency in the near future.

148   *Towards the Common Good: Statement on the Future of the Welfare Society by the Bishops of the Evangelical Lutheran Church of Finland* (1999).

149   *Rika och Fattiga: Ett brev från Svenska kyrkans biskopar om rättfärdighet och moral i global economi* (1993).

150   *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (U.S. Catholic Bishops, 1986); *A Place at the Table: A Catholic Recommitment to Overcome Poverty and to Respect the Dignity of All God's Children* (A Pastoral Letter of the U.S. Catholic Bishops, 2002).

151   *Justice, Peace and Integrity of Creation: A Statement by the World Council of Churches in Seoul, 1990* (1990) may serve as an example. Its first affirmation says: "We affirm that all exercise of power is accountable to God." The second is quite emphatic: "We affirm God's option for the poor[.] The poor are the exploited and oppressed. Their poverty is not accidental. It is very often a result of deliberate policies which result in the constantly increasing accumulation of wealth and power in the hands of a few. The existence of poverty is a scandal and a crime. It is blasphemy to say that it is the will of God. Jesus came that we should have 'life in all its fullness' (John 10:10). In his death and resurrection, Christ exposed and thereby conquered the powers that deny the poor their right to abundant life (Luke 4:16-21). God shows a preferential option for the poor. 'The glory of God is reflected in the poor person fully alive' (Archbishop Romero). In the cries of the poor we hear the challenging voice of God."

152   Those currents of Christian thought that Hans Küng posits in the paradigm of modernity ("Das vernuft- und fortschrittsorientierte Paradigma der Moderne") have much in common with Rawls's starting points in the affirmation of the guiding ideals of the Enlightenment. Hans Küng, *Das Christentum: Wesen und Geschichte* (Munich, 1994), pp 14–16. But because Rawls did not argue that religious people should endorse any comprehensive doctrine of the enlightenment, we might expect that many of the more traditional Christian

however, let us assume a religious view that supports relatively egalitarian economic politics and culture but does not endorse the liberal way of public reasoning. They regard their reasons for supporting the egalitarian economic development as internal to their religion—and they do not expect that all people could reasonably endorse these grounds. Nevertheless, they would argue on the basis of the golden rule, natural law, common sense, empirical arguments, etc. sufficiently that the view is not unreasonable from the Rawlsian perspective.[153] Table 3.3 depicts the outlines of one such scenario:

Table 3.3   A not unreasonable reform leading to relatively egalitarian positions

Background Assumptions	Procedure	Outcome
Thoughtful persons in a real democracy Income positions: 11.3, 84.6	Not unreasonable communication within democratic institutions Particular contributions of persons to economic positions	The basic structure reformed on grounds that are not unreasonable Income positions: 15.5, 105

In terms of Figure 3.1, the point for the resulting income positions (15.5, 105) would be between the culturally Rawlsian (17.0, 109.9), the culturally egalitarian (15.0, 91.1), and the structurally egalitarian (14.0, 106.2) points.

In terms of Figure 1.1, a representative of this religion would be a thoughtful person in accordance with box (1), but she would find boxes (2) and (4) mainly irrelevant. Such a person would endorse neither the original position nor the two

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approaches could count as reasonable according to justice as fairness as well. For example, the overall tone of the authors of George Weigel and Robert Royal (eds), *Building the Free Society: Democracy, Capitalism, and Catholic Social Teaching* (Grand Rapids, 1993) is that the papal social encyclicals since *Rerum Novarum*, from the year 1981, are not premodern in a sense that contemporary reasonable people should be worried about.

153   I use an imaginary example, because I only intend to concentrate on certain features of the case. But real examples are not hard to find. In recent decades the combination of criticism of liberalism and radical support for economic equality has been common in liberation theology, which originated in Latin America. As Philip J. Wogaman remarks, the movement has been largely inspired by the biblical story of exodus as well as by Marxist social thought. Philip J. Wogaman, *Christian Perspectives on Politics* (Philadelphia, 1998), pp. 54–55. Ulrich Duchrow's argument against private property may serve as a particular example. He criticizes the whole institution of private property and provides an alternative that is primarily biblically grounded. But he also provides reasons that could be acceptable for all on the basis of empirical analysis and common sense. Ulrich Duchrow, "Property for People, Not for Profit: Alternatives to Global Tyranny of Capital" (a presentation in Helsinki, 2004). For instance, Duchrow (ibid., pp. 3–4) argues that neoliberal politicians have broken their promises about improving the position of the poor in Argentina: 60 per cent of the people used to be middle class there, but now 60 per cent live under the poverty line. See also Duchrow's analysis of the possibilities of economic justice in Europe: Ulrich Duchrow, *Europe in the World System 1492–1992: Is Justice Possible?* (Geneva, 1992).

principles of justice. Her contributions to the basic structure and to the economic positions would have a different rationale. From box (3) she would endorse the basic rights at least, but not as extensive a principle of liberty as Rawls's first principle of justice.

A Rawlsian would be disturbed by the fact that the religious person would not be willing to provide assumedly "right reasons" to complement the religious reasons. One response could be that the Rawlsian attempted to construct the assumedly right reasons for the religious view, although the religious person herself would not regard these reasons as relevant. If such reasons could not be constructed, based on politically liberal public reasons, the Rawlsian could affirm the existence of a consensus at the level of political outcomes. But the consensus would be unstable. If the religious person were not willing to consciously adjust her view to the terms of reasonableness, the consensus about the outcomes might disappear during the next period of time.[154]

Another response of the Rawlsian could be to reconsider her own view. This would involve the recognition that all the argumentative steps along the path from one Rawlsian fundamental to another might not be steadfast. Other thoughtful ways to articulate the requirements of reasonableness could have been possible. What seemed to be vaguely reasonable might turn out to be reasonable—or even the most reasonable— view after more thorough analysis and balancing. Under the non-ideal circumstances of our contemporary world the religious arguments for, and contributions to, a more egalitarian society might be more valuable than Rawlsian theoreticians have often recognized. The egalitarian elements of justice as fairness may not become reality simply by themselves. But a need for religious support in one part of the theory may imply a need for balancing in others.

The minimum requirements that the eight principles of balancing reasonable justice include are relatively modest. For example, the principles concerning the least advantaged (P5 and P6) are not particularly demanding as such:

P5   Social and economic inequalities of the basic social structure should benefit the least advantaged in terms of primary goods.

P6   The particular contributions of persons should benefit the least advantaged in terms of the common and the relatively common goods.

These principles do not say how much the least advantaged should benefit from the structural reforms and the particular contributions. This indeterminacy makes the principles flexible tools in the search for reasonable balances of different views. One could also attach to them different balances of common or relatively common goods. Nevertheless, the principles specify two routes for the continual improvement of the position of the least advantaged. Several considerations might lead thoughtful

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154   As Dombrowski (*Rawls and Religion*, p. 112) notes, Rawls aims at "*partial* avoidance [Dombrowski's emphasis]" of conflicting religious views in his account of public reason. Dombrowski stresses that "citizens *are* allowed to introduce their comprehensive religious (or philosophical) doctrines [Dombrowski's emphasis]" according to justice as fairness. But he carefully continues that this only holds "so long as they are also articulated in properly political terms."

persons to propose that these improvements should be remarkable in comparison with the status quo in many contemporary societies. I have particularly referred to the reasons related to the concept of equality itself, fair equality of opportunity, global distributive justice, and just savings.[155]

Beyond P5, one could go on to argue for the difference principle in a very Rawlsian fashion. But the journey could be long in terms of justification as well as feasibility. Meanwhile, the path of P6 could be elaborated: the value of particular contributions could be recognized. While some comprehensive views might favor demanding interpretations of P5, others could do so in the case of P6. Both of the routes would benefit the least advantaged.

I have pointed out that a number of contemporary Christian views do express firm support for addressing poverty. I have also noted that the religious supporters of the poor may not be willing to ground their programs on politically liberal public reasoning. In the search for balances of reasonable justice, a Rawlsian could ask whether reasonable arguments for these religious positions could be constructed, nevertheless. But she could also ask whether the particular terms that Rawls presented as the most reasonable ones really stand up to criticism. Asking such questions sincerely would accord with the dialogically reasonable approach depicted in principles P1 and P2 of balancing reasonable justice.

3.3 Caring at Different Levels

Caring in Families and Associations

One of the relatively common goods of justice as fairness (see Table 2.2) is care in families. Rawls's passages on care are worth close reading—particularly because ethicists of care have generally been critical of justice as fairness. Eventually, in seeking different balances of reasonable justice compared to justice as fairness, we may consider possibilities to place additional emphasis on the virtues and values of care.

In her pioneering *In a Different Voice* (first published in 1982), Carol Gilligan argued that theorists who work in a Kantian framework should pay more attention to the ethics of care. The main target of Gilligan's criticism was Kohlberg's theory of moral development. While Kohlberg described mature moral thinking in terms of universal principles, Gilligan maintained that thinking in terms of contextual care and conflicting responsibilities is no less mature.[156] Ethicists of care have frequently

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155   In *Theory* (pp. 34–40/30–36 rev.) Rawls compared justice as fairness to a form of intuitionism in which the balance between relevant principles—for example those of equality and total welfare—is simply struck by intuition. Although balancing reasonable justice admittedly allows certain steps in this direction, its content encourages the use of reason in the further balancing.

156   As Gilligan put it: "In this conception, the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract." Carol Gilligan, *In a*

placed Rawls in the same camp of Kantian liberals with Kohlberg.[157] Indeed, Rawls's account of moral development in *Theory* has much in common with Kohlberg's theory, as Rawls himself noted. But in *Theory* he remarked that the content of the principles is genuinely a matter of moral philosophy, not of developmental psychology.[158]

The three forms of morality that Rawls mainly used in his account of moral development in *Theory* are morality of authority, morality of association, and morality of principles. Rawls starts by describing the *morality of authority* of parents. Parents, he says, are in a legitimate position of authority over their children.[159] Rawls assumes that if parents love their children, the children come to love their parents and to trust in them. Rawls regards here—as usual—love and care to mean roughly the same. The parents' love or care for their child means basically "to do for him as his rational self-love would incline."[160] This includes supporting the child's self-respect.[161]

In Rawls's view, the *morality of association* comes after the morality of authority in a person's moral development. There are overlaps, though. A family is already a small unit of association. Schools and neighborhoods are other units of association that have their own moral standards. In the morality of association the child comes to understand these standards and learns to take part meaningfully in the associations. Rawls emphasizes that an important part of the morality of association is that one learns to relate oneself to others who are in different positions in the association. Persons learn intellectual skills that make it possible for them to see things from "different points of view."[162] But he also describes the morality of association as a kind of art in which intellectual skills of understanding the other mix with feelings of fellowship.[163]

Feelings that are appropriate to the morality of association include the feeling of guilt when one member fails to regard the concerns of the other members properly.

Different Voice: Psychological Theory and Women's Moral Development (Cambridge, 1982), p. 19.

157 Daryl Koehn, *Rethinking Feminist Ethics of Care: Care, Trust and Empathy* (London, 1998), pp. 21–22; Diana Tietjens Meyers, *Subjection and Subjectivity: Psychoanalytic Feminism & Moral Philosophy* (New York, 1994), pp. 20–26; Robin West, *Caring For Justice* (New York, 1997), pp. 62–69.

158 Rawls, *Theory*, pp. 461–462/404–405 rev.

159 Ibid., pp. 462–463/405 rev. Rawls also assumes here that "the basic structure of a well-ordered society includes the family in some form."

160 Ibid., pp. 463/405–406 rev.

161 As Rawls (ibid., p. 464/406 rev.) put it: "In general, to love another means not only to be concerned for his wants and needs, but to affirm his sense of the worth of his own person."

162 Ibid., pp. 567–470/409–412 rev. Rawls (ibid., pp. 468–469/410 rev.) states what such skills include: "First of all, we must recognize that these different points of view exist, that the perspectives of others are not the same as ours. But we must not only learn that things look different to them, but that they have different wants and ends, and different plans and motives; and we must learn how to gather these facts from their speech, conduct, and countenance."

163 Ibid., pp. 469–470/411 rev.

Fulfilling one's part in the cooperative scheme includes fulfilling one's duties and obligations as well as maintaining the emotional ties of confidence between the associates.[164] Hence, Rawls maintains that there are elements of fairness in the proper morality of association, but these elements are closely related to the corresponding attitudes of fellowship and the like: "Thus just as in the first stage certain natural attitudes develop toward the parents, so here the ties of friendship and confidence grow up among associates. In each case certain natural attitudes underlie the corresponding moral feelings: a lack of these feelings would manifest the absence of these attitudes."[165]

Nel Noddings is among the care ethicists who have examined in depth what should be said about the naturalness of the attitudes of care and the related virtues. Noddings's overall position seems to be that these virtues are not as natural as Rawls's quotation above suggests. However, Noddings also argues for their natural basis.[166] While these two authors approach the theme from different perspectives, they both affirm a certain natural as well as ethical basis for the care-related virtues of associations.

Rawls mentions that usually some members of associations are skilled or virtuous in ways that make them admirable within the association. Above all, it is the newer members who are likely to see them as authorities. Rawls thinks that it is expected psychologically that the ideals of the more admired persons contribute much to the development of the association. He approves of this as long as the members also have an overall intention to advance the good of each other.[167]

For Rawls, a nation (or society) as a whole can be regarded as one kind of association. But the morality of a society should essentially overlap the *morality of principles* and related virtues.[168] Later, Rawls added a fourth kind of morality that goes beyond the morality of principles. In *conception-dependent morality*, a person

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164   Ibid., pp. 469–471/411–412 rev. Rawls (ibid., p. 471/412 rev.) says: "A person without these feelings of guilt has no qualms about the burdens that fall on others, nor is he troubled by the breaches of confidence by which they are deceived."

165   Ibid., p. 471/412 rev.

166   Noddings speaks of "premoral" goodness, which is a kind of combination of natural feeling and caring response. She writes: "The most intimate situations of care are, thus, natural. I do not feel that taking care of my own child is 'moral' but, rather, natural. A woman who allows her own child to die of neglect is often considered sick rather than immoral." Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Philosophy* (Berkeley, 1984), pp. 83–84.

167   Rawls, *Theory*, pp. 471–472/412–413 rev. This is in line, Rawls remarks here, with what he calls the Aristotelian principle. According to it people tend to enjoy complex activities more than simple ones. In associations members who are capable of complex activities are characteristically admired. In another passage Rawls (ibid., p. 426/374 rev.) articulated the Aristotelian principle as follows: "other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity." Rawls notes that although Aristotle did not use this particular formulation, it is in keeping with his *Nicomachean Ethics*, bk. VII, chs 11–14 and bk. X, chs 1–5.

168   Rawls, *Theory*, pp. 467/409 rev., 472–473/413–414 rev.

participates in the construction of proper moral principles as a part of a broader moral conception.[169]

In *Justice, Gender, and the Family*, Susan Okin argued that Rawls is basically correct in his way of seeing the continuity between caring in families and the morality of principled justice. Unlike most feminist ethicists of care, Okin also sees empathy as an important virtue in Rawls's original position. Only when we are able to empathize deeply with very different people can we properly ask what kind of a society might be acceptable from everyone's perspective. Thus, a proper approach of justice requires caring empathy as well as a firm sense of the equality of all persons.[170]

These two capabilities or virtues do not appear out of the blue—they develop slowly over the years. Okin maintains that for most persons, childhood experiences in the family are central. Therefore it is of primary importance that the virtues of empathy and the sense of equality flourish in families. An important aspect of this is that the parents share equally in caring for their children. Then the parents not only develop the virtues of equality and empathy in themselves, but exemplify them to their children. Analogously, the basic structure of the society should be reformed so that it supports equal and empathetic care in families.[171]

Compared to Rawls, Okin has been more insistent on the requirement that caring should be equal within families. To manage this would require changes in legislation: work done at home should be compensated.[172] In a more recent article Okin expressed her disappointment that Rawls had not developed justice as fairness in this direction. In her opinion, when Rawls restricted his view more specifically to the area of political justice, he did not take the common inequalities related to caring within families into account.[173]

Rawls responded to Okin in *Justice as Fairness*. He said that in justice as fairness "the principles of justice apply to the family, but they do not indicate in any detail what those principles require."[174] Rawls pointed out that reproductive labor is necessary

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169   Rawls introduced the idea of conception-dependent morality when he discussed desires in *Liberalism* (pp. 82–86). His classification includes (1) object-dependent desires, (2a) principle-dependent desires of rationality, (2b) principle-dependent desires of reasonableness, and (3) conception-dependent desires. He (ibid., p. 84) says that in order to have conception-dependent desires that go beyond principle-dependent desires, "we must be able to form the corresponding conception and to see how the principles belong to and help to articulate it."

170   Susan Okin, *Justice, Gender, and Family* (USA, 1989), p. 15.

171   Ibid., pp. 16–24, 97–101.

172   Okin (ibid., pp. 180–181) formulated the proposal as follows: "Such dependence can be avoided only if both partners have *equal legal entitlement* to all earnings coming into the household. The clearest and simplest way of doing this would be to have employers make out wage checks equally divided between the earner and the partner who provides all or most of his or her unpaid domestic services [Okin's emphasis]."

173   Okin wrote: "I think Rawls was completely right in *Theory* to stress the significance of the family as the first 'school of justice' (to use Mill's term), and I regret the absence of this emphasis in *Political Liberalism*." Susan Okin, "*Political Liberalism*, Justice, and Gender," *Ethics*, 105/1 (1994): 34.

174   Rawls, *Justice as Fairness*, p. 162.

for a society to carry on from one generation to another. The institution of the family in some form has an important role in this regard. On the other hand, Rawls compares families to (other) associations which are to be guaranteed an opportunity to enjoy a rich internal life. For example, Rawls does not require churches to be democratic—they have their own ways of organizing their governance. Yet churches should not exercise "effective intolerance." Similarly, Rawls maintains that the principles of justice should apply to families to a degree.[175]

A closer look shows that this degree is considerable. Rawls says that as equal citizens, husbands and wives should "have all the same basic liberties and fair opportunities."[176] Justice as fairness "aims for full equality" of women and men. In line with this, Rawls supports Okin's claim that legislation should contribute towards compensation for care-work in the family. It is not merely an internal matter of the family.[177] However, "at some point society has to trust to the natural affection and goodwill of parents."[178] Rawls finally points out that a conception of justice cannot solve many of the problems related to gendered structures. Part of the problem is that it is not at all easy to describe gender-structured institutions in a precise way. Different conceptions on "social theory and human psychology" make a remarkable difference here.[179] In other words we might say that the burdens of judgment are relatively heavy in such matters. Reasonable and responsible persons should try to take them into account, although their solutions are likely to be quite different.[180]

In an article entitled "Rawls and Feminism," Martha Nussbaum has called attention to several tensions that remain in Rawls's discussion on families. First, Nussbaum points out that the analogy Rawls draws between families and voluntary associations, such as churches and universities, is weak. For children, at least, families are not voluntary associations. Rawls did regard families as a part of the basic structure, which implies that families differ significantly from the characteristically voluntary associations. But this analogy confuses his argumentation. Second, Rawls appeared to assign to the family "a quasi-natural status."[181] Children could also be raised in "[v]illage groups, extended families, women's collectives, kibbutzim"

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175 Ibid., pp. 162–165.

176 Ibid., p. 164. Rawls affirms here that he does count the family as part of the basic structure.

177 Ibid., p. 167. Rawls continues: "Should there be a divorce, she [the wife] should have an equal share in the increased value of the family's assets during that time."

178 Ibid., p. 165.

179 Ibid., p. 167–168. Rawls lists the following examples of the "values of public reason" at this point: "the equality of women, the equality of children as future citizens, and finally, the value of the family in securing the orderly production and reproduction [of a just and democratic] society and of its culture from one generation to the next." One way to continue Rawlsian public reasoning would be to argue that the actual societies are remarkably far from the proper ideals of public reason in such matters. Okin (*Justice, Gender, and Family*, pp. 3–8) clearly thinks that they are far. Rawls's texts are not so clear about this.

180 Rawls, *Liberalism*, pp. 56–57. Recall the list of the burdens of judgment in 2.1.

181 Martha Nussbaum, "Rawls and Feminism," in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge, 2003), p. 504.

and the like.[182] Third, Rawls did not call enough attention to the fact that families are controlled by the state more closely than churches or universities. According to Nussbaum, Rawls was probably too willing to grant a form of "group rights" to families.[183] But despite her criticism, Nussbaum suggests that further revisions to justice as fairness could be made in a basically Rawlsian spirit.[184]

Although Nussbaum's critical remarks might be appropriate, the burdens of judgment remain heavy in such matters. The impacts of nature, culture, and the state are intertwined in the lives of families in very many ways. Even if family matters were treated more emphatically as public issues, the natural and cultural aspects would continue to remain strongly involved—in caring as well as in loving.[185] And to ensure the survival of a society from one generation to another, care in families continues to be a very valuable good. Reasonable persons would hardly question these claims, although much would remain open in the more detailed balancing of the values involved.

Caring in the Public Sphere

In *Theory*, Rawls mentions "justice and fairness, fidelity, trust, integrity and impartiality" as characteristic virtues of a societal cooperative scheme.[186] These virtues are not isolated from the corresponding feelings. Often the feelings provide important *motivation*. At times, a person's motive to comply with principles "springs largely from his ties of friendship and fellow feeling for others."[187] Hence for Rawls, complying with the proper principles need not imply being motivated by them only. We may say that in this passage Rawls specifies one kind of overlap between various sources of motivation.

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182   Ibid., p. 504. She leans on the reading of the original position according to which the parties, "not knowing where they are in time and place, should not give preference to a particular Western, predominantly bourgeois, form [of rearing children] over other possible forms."

183   Ibid., pp. 505–506.

184   Ibid., pp. 514–515. In her *Upheavals of Thought*, Nussbaum discussed the questions of family, love, and democracy, for example, with reference to Emily Brontë's romanticism and to Walt Whitman's egalitarian poetry. Martha Nussbaum, *Upheavals of Thought: The Intelligence and Emotions* (Cambridge, 2001), pp. 591–613, 645–678. She is surely aware of the deep cultural differences related to family values. Nussbaum (ibid., p. 402) affirms Rawls's attempt to present a "reasonable moral psychology." Compared to Rawls, Nussbaum (ibid., pp. 342, 580) proposes that more attention should be paid to compassion, desert, and responsibility, and to the fact that human beings "have periods of profound neediness and dependency" in their life.

185   Because serious injustices take place within families, there are strong reasons to try to overcome at least some of the related burdens of judgment. However, Rawls was reluctant to make the liberal argumentation too rigid—as many ethicists of care have been.

186   Rawls, *Theory*, p. 472/413 rev.

187   Ibid., p. 473/414 rev.

Rawls also pointed out that to *interpret* the principles is by no means isolated from the forms of morality that are typical of close associations. Rawls characterizes the citizens who participate in political affairs as follows:

> They often have to take up the point of view of others, not simply with the aim of working out what they will want and probably would do, but for the purpose of striking a reasonable balance between competing claims and for adjusting the various subordinate ideals of the morality of association.[188]

In *Theory*, hence, Rawls did not attempt to describe proper political life as somehow detached from feelings, understanding, and consideration of various values. He did emphasize that as far as the society as a whole is regarded as an association, it is an association of a special kind. Rawls remarks: "[N]o citizen is a friend to all."[189] Accordingly, a society cannot rest on ideals of friendships (or similar ideals) in a way that close associations characteristically do. The morality of principles is meant to provide a point of view that takes distance from the conceptions of good of various close associations. Rawls even formulated three psychological laws about how the feelings of love, trust, and the like could realistically enforce the sense of justice that he promotes.[190] But what form would caring, in particular, take as a common good in the public sphere?

In *Moral Boundaries* (subtitled *A Political Argument for an Ethic of Care*), Joan Tronto problematizes certain boundaries of morality and politics, of private and public life, and the boundary of the moral point of view.[191] Tronto argues that virtues and values—and also practices—of care should clearly make their way into the public sphere. This would make us see the boundaries between private and public in a different way: caring would be an important connecting factor between the spheres.[192] Tronto's approach would include, for example, criticism of Rawls's thin theory of good.[193] Moreover, people's needs would be properly recognized. Tronto

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188 Ibid., p. 473/414 rev.

189 Ibid., p. 474/415 rev. Rawls (ibid., p. 473/414 rev.) presupposes the four-stage sequence that starts from the choice of the principles for the basic structure itself.

190 Ibid., pp. 490–491/429–430 rev. The first and the second law summarize the development of the morality of authority and the morality of association. According to the third law, "given that a person's capacity for fellow feeling has been realized by his forming attachments in accordance with the first two laws, and given that a society's institutions are just and are publicly known by all to be just, then this person acquires the corresponding sense of justice as he recognizes that he and those for whom he cares are the beneficiaries of these arrangements."

191 Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, 1993), pp. 6–11.

192 When preparing the readers for her positive account of care, Tronto (ibid., pp. 96–97) writes: "I submit that rather than viewing the effect of political values upon moral practices as a problem, we should make the intersection between morality and politics a starting point for thinking about morality."

193 Ibid., pp. 92–93.

argues that too often needs are regarded as interests and this has hidden their true relevance in the public discussion.[194]

Tronto did not, however, reject the boundary between public and private altogether. Above all, at the end of her book, she stated surprisingly clearly that she was not "advocating an abolition of the split between public and private life."[195] In tackling the dangers of paternalism/maternalism and parochialism in caring, she wrote: "The only solution I see to these two problems is to insist that care needs to be connected to a theory of justice and to be relentlessly democratic in its disposition. It would be very easy for nondemocratic forms of care to emerge."[196] Tronto would thus recommend that we look at public moral issues from the viewpoint of care as well as from that of justice. She calls many traditional liberal boundaries into question. But this—from the viewpoint of justice as fairness—did not lead her to an unreasonable position. A Rawlsian liberal could well hold that there are many reasonable ways to draw the lines between the private and the public, even though Rawls may not have managed draw them very well himself.

Daryl Koehn and Robin West have also contributed to the discussion of care in the public sphere. Koehn has criticized Noddings's and Gilligan's early forms of care ethics: she thinks they imply that principled attention to another human being is pretty straightforwardly worse than caring attention. But already professional nurses face a difficulty here. To some degree they are supposed to commit themselves to the practices of care. These practices are principled, at least loosely understood, in terms of their aims. It is also part of such practices that nurses are regularly paid for their caring.[197] Koehn's discussion reminds us that even within the particular practices of care there are important roles for principled ethics.

West's analysis is, on the one hand, critical. She proposes that our Western ideals and practices fail to meet the central criteria of both care and justice. On the other hand, West is optimistic. She suggests that there is a way to improve our ideals and practices in these two respects. If we make our ideals and practices more caring in

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194   Ibid., p. 178. For Tronto (ibid., pp. 166–167) the problem is partly rooted in the common dichotomy between justice and care that "care is particular, justice is universal; that care draws out of compassion, justice out of rationality." She finds this dichotomic understanding too simple.

195   Ibid., p. 168.

196   Ibid., p. 171.

197   Koehn, *Rethinking Feminist Ethic*s, pp. 24–25. In Gilligan's as well as Noddings's later views the contrast between the viewpoints is not as sharp as before. Gilligan writes that the "distinction between justice and care ... calls attention to the fact that all human relationships, public and private, can be characterized *both* in terms of equality and in terms of attachment, and both equality and detachment constitute grounds for moral concern [Gilligan's emphasis]." Carol Gilligan, "Moral Orientation and Moral Development," in Virginia Held (ed.), *Justice and Care: Essential Readings in Feminist Ethics* (Boulder, 1995), p. 32. Broadly speaking, this solution differs little from that of Kohlberg, Charles Levine, and Alexandra Hewer in Lawrence Kohlberg et al., *Moral Stages: A Current Formulation and a Response to Critics* (vol. 10, Basel, 1983), p. 137. When Noddings discussed religious education later, she argued for "pedagogical neutrality," but not for "moral neutrality." Nel Noddings, *Educating for Intelligent Belief or Unbelief* (New York, 1993), pp. xv–xvi.

the proper way, they do not become less just, and if we make them more just in the proper way, they do not become less caring.[198] Indeed, if such improvements could be made, the hardest questions of balancing would be avoided. We could have more of both.

Tronto, Koehn, and West would assign more emphasis to the virtues and values of care in the public sphere than Rawls did. However, we may recall Rawls's four-stage sequence. At the legislative stage the agents are not to think of themselves as if they were in the original position behind the veil of ignorance.[199] Rawls's solution here leaves plenty of room for considerations of care in the public forums of legislation that do not appeal to public reasons in the most stringent sense. When discussing with Okin about care in families, Rawls applied the public reasons of equality pretty straightforwardly at the legislative stage. But he did not claim that all legislation should be dominated by public reasons.[200]

Leaving the door to the public sphere democratically open for care would be too modest for care ethicists like Tronto. For Tronto the public sphere should not only be democratically open to the values of care, but these values should also actually make their way there. She requires reform because the value of care has been underestimated in public life.[201]

One way to advance this aim is to explicate the idea of public reason, or the viewpoint of justice, so that the values of care have a significant role in it. Another way is to familiarize politicians and policymakers more deeply with the struggles of actual caring. This would help us understand ourselves as needy, and the related problems of responding to our needs. It seems that this approach could well be connected to Rawls's difference principle as well. Concern for the welfare of the least advantaged might remain the dominant concern; however, their welfare would be assessed in a more complex way that explicitly relies on empathy and compassion—for example on the kind of broad empathy that Meyers has depicted:

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198   As West (*Caring for Justice*, p. 9) puts it: "Our ideals as well as our practices, of justice have been uncaring, and our ideals as well as practices, of care have been unjust, and the consequence has been a deflation of *both* virtues [West's emphasis]."

199   Rawls, *Justice as Fairness*, pp. 170–176. Rawls (ibid., p. 173) says: "This matter [of medical and health care needs] is to be decided at the legislative stage (*Theory*, §31) and not in the original position or constitutional convention, since the practicable application of the two principles to this case depends in part on information about the prevalence of various illnesses and their severity, the frequency of accidents and their causes, and much else."

200   Rawls (ibid., p. 91) clearly denies that he intends the most stringent use of the public reason to dominate the legislation: "Most legislative questions do not concern these matters [the constitutional essentials and the questions of basic justice], although they often touch them, for example, tax legislation and laws regulating property; legislation protecting the environment and controlling pollution; laws establishing national parks and voting funds for museums and the arts."

201   Tronto, *Moral Boundaries*, p. 157.

> To empathize with another's subjectivity is not only to draw on one's past emotional life to conjecture up that person's experiences in one's own mind, but it is also to grasp the circumstances of that person's life along with the beliefs, desires, abilities, vulnerabilities, limitations, and traits of character that give rise to these experiences.[202]

Politicians who develop their virtues of care are able to make finer judgments about the other things that people really need besides the primary goods. As a result, the related inflexibility of primary goods would become softened. No one really seems to deny that empathetic assessments should also be connected to broad and open discussions in the public sphere. By the kind of equality and flexibility they entail, democratic procedures would balance further the care given and received.

Understanding a Different View

Recall what Rawls basically meant by caring: to do for another as his or her rational self-love would incline. The content of any person's rational self-love may be remarkably difficult to specify. In 1.2 above I discussed various challenges to the use of empirical concepts of rationality (as contrasted to theoretically rigorous ones), but precisely because the challenges are so complex, no mechanistic approach to the theme is likely to be sufficient.

Gilligan, Noddings, and many other ethicists of care have emphasized the value of empathetic understanding. In this approach it is important that the object of our empathy is understood not essentially as similar to oneself, but as different. The other person often comes from a very different context with different life experiences, different perspectives of what it means to be an ethical person, and with his or her moral convictions intertwined with feelings and narratives in a different way. Abstract universalist ethics tends to lead people to dismiss the significance of such differences—at least, ethicists of care have so argued. I have pointed out that Rawls recognized the value of taking different points of view, listening attentively to different voices, and understanding the conceptions related to these. But he did not elaborate on this aspect of justice as fairness at length.

Rawls's account of reasonable moral development, particularly according to *Theory*, is probably the most illuminating part of justice as fairness in respect of care. In caring families and in other close associations young citizens learn the skills of understanding the different views empathetically. Eventually, these skills are needed in fair reasoning about the basic structure as well as in thoughtful balancing of different values in ordinary political matters.

Certain passages of Rawls's later texts clarify this theme further. In *Liberalism*, Rawls explicitly supported the requirement of "willingness to listen to what others have to say."[203] One interesting similar notion appears in his discussion of decent

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202   Meyers, *Subjection and Subjectivity*, pp. 35–36. She stresses here that this kind of "broad empathy engages complex intellectual capacities along with affective ones." See also the discussions by Meyers (ibid., pp. 20–41) and Nussbaum (*Upheavals of Thought*, pp. 297–454).

203   Rawls, *Liberalism*, pp. 217, 253. Rawls adds here the willingness "to accept reasonable accommodations or alterations in one's own view."

hierarchical societies in *Peoples*. In 3.1 I compactly explicated the principle as follows:

P2'   A public official should be willing to listen to other persons' voices.

Rawls's related discussion suggests that in liberal democracies different voices are primarily listened to individually while in decent societies the concerns of the groups dominate.[204] What kind of listening and understanding did he possibly mean?

In *Liberalism*, when Rawls explains the capabilities of persons with conception-dependent desires, he uses the term understanding as follows: "Capable of reason and judgment, we can understand complex religious and philosophical, moral and political doctrines of right and justice, as well as doctrines of the good."[205] Persons who exercise understanding do not simply apply principles once justified. Instead their efforts to understand different religious, philosophical, moral, and political doctrines challenge their views again and again. The persons continue to have object-dependent and principle-dependent desires. But in order to have conception-dependent desires as well, Rawls expects them to be able to form a broad conception of which the proper principles are a part.[206] Among other things, this conception connects the principles to the enduring society with the past and the future. The citizens are also educated in the matters of "the public culture and its historical traditions of interpretation" so that proper conception-dependent desires are developed.[207]

In another passage of *Liberalism* Rawls says that he expects the citizens of a well-ordered society to have a common "public understanding" of the core content of the overlapping consensus.[208] In a sense, this appears to be almost equivalent to saying that the citizens endorse, or reasonably accept, the content. Nevertheless, Rawls also distinguished clearly between understanding and reasonable acceptance. This is particularly clear in his reference to Calvin and Servetus. It was not enough that Calvin provided Servetus reasons that "Servetus could understand." Servetus should also have been able to reasonably accept these reasons. But Rawls implies that Servetus could not have reasonably accepted the reasons that were meant to justify his execution as a heretic.[209]

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204   Rawls, *Peoples*, p. 72. He says here: "In political decisions a decent consultation hierarchy allows an opportunity for the different voices to be heard—not, to be sure, in a way allowed by democratic institutions, but appropriately in view of the religious and the philosophical values of the society as expressed in its idea of the common good."

205   Rawls, *Liberalism*, p. 85.

206   Ibid., p. 84. In Rawls's words, we are "to see how the principles belong to and help to articulate it [the conception in question]."

207   Ibid., pp. 84–86. Rawls states that he expects suitable emotions to flourish in the well-ordered society. In particular he mentions "trust and confidence."

208   "[T]here is a public understanding not only about the kind of claims it is appropriate for citizens to make when questions of political justice arise, but also a public understanding about how such claims are supported." Ibid., p. 176. See also ibid., p. 169.

209   Ibid., p. li. In *Liberalism* (ibid., lxii) Rawls says that for a reasonably just society "to be possible, human beings must have a moral nature, not of course a perfect such nature,

In the light of Rawls's account of reasonable moral development and the other passages referred to above, justice as fairness seems to include the following elementary notions. First, to understand another person's different view is more than merely listening to that person. Second, to understand a different view does not yet imply the acceptance of it. Third, the core content of justice as fairness is meant to provide a basis for a common understanding of what is reasonably acceptable in the political issues it applies to. And fourth, reasonable persons who continually reflect on the contents of their political conceptions characteristically attempt to understand different views.

Maybe Rawls did not use the term "understanding" more often because his idea of reflective equilibrium already implies an extremely broad use of reason. Rationality and reasonableness then specify two ways to narrow the broadest use of reason for the purpose of constructing a practicable conception. However, it seems that Rawls could well have emphasized more, and elaborated further, his scattered remarks on understanding different views.

In balancing reasonable justice I have explicated a particular principle that holds the place for empathetic understanding.

> P2   A person should be willing to empathetically understand other persons' views about the basic social structure and related issues.

In brief, I define the concept of empathetic understanding in P2 as follows:

> D7   To be willing to empathetically understand another person's relevant moral or political view includes an attempt to see the relevant contextual, emotional, religious, rational, reasonable, or other elements in it favorably for her or him.

The concept of empathetic understanding plays an important role in balancing reasonable justice and responds to the criticism directed against justice as fairness by the ethicists of care. If additional criticism from different traditions needed to be taken into account, the concept of empathetic understanding can be modified accordingly. In what follows, I take up discussions in the literature in which a similar concept of understanding has been used in similar contexts.

Iris Marion Young emphasized the value of empathetic understanding for democracy in *Inclusion and Democracy*. Her point is not to undermine attempts to justify political claims for all. But she calls attention to certain challenging preconditions for orderly political debates. To have an orderly, argumentatively proceeding political debate, "[w]e must share a description of the problem, share an idiom in which to express alternative proposals, share rules of evidence and

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yet one that can understand, and act on, and be sufficiently motivated by a reasonable political conception." Rawls (ibid., p. 220) contrasts reasons and rhetoric in the following way: "Now all ways of reasoning—whether individual, associational, or political—must acknowledge certain common elements: the concept of judgment, principles of inference, and rules of evidence, and much else, otherwise they would not be ways of reasoning but perhaps rhetoric or means of persuasion. We are concerned with reason, not simply with discourse."

prediction, and share some normative principles which can serve as premises in our arguments about what ought to be done."[210]

Young suggests that narratives can be used to communicate aspects of person's situations even when the sufficient conditions for meaningful argumentation do not appear to prevail. Various forms of narrative, rhetoric, and situated knowledge could put forward the debate significantly. But the participants in the political discourse should also try to understand what is said through these forms of communication.[211] The discussants should not limit their attempts to understand the views expressed "according to culturally specific norms of tone, grammar, and diction."[212] If they do, the process is not internally inclusive, although it may be externally inclusive. In other words, it is not enough that there are sufficient numbers of representatives in various committees from different classes, races, sexes, etc. Their views should be carefully listened to and understood as well.[213]

Young's analysis seems to suggest that it is a more or less normal situation that the conditions for reasonable argumentation are not favorable. The required consensus underlying it is often vague. Empathetic understanding is one means for supporting communication, without which it would otherwise too frequently fail. Principles of dialogical reasonableness in balancing reasonable justice may be used to explicate the sort of dynamics. At times persons may only provide not unreasonable grounds for their views (P1). But attempts to understand the vaguely reasonable views, and even the unreasonable views, keep the dialogue internally inclusive (P2). A simple way to express this guarantee in D7 is to say that the other points of view should be seen favorably for the person (or persons) in question. For example, Nussbaum's conception of compassion seems to reach somewhat beyond this. The element of emotional engagement is more straightforwardly emphasized in it.[214] But as usual,

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210   Iris Marion Young, *Inclusion and Democracy* (Oxford, 2000), p. 72. She continues that "in most political disputes these conditions are met in some respect and to some degree, but for many political disputes they are not met in other respects and degrees."

211   For example, Young (ibid., pp. 66–70) articulates three positive functions for rhetoric in political communication as follows: "*Rhetorical moves often help to get an issue on the agenda for deliberation. … Rhetoric fashions claims and arguments in ways appropriate to a particular public in a particular situation. … Rhetoric motivates the move from reason to judgment* [Young's emphases]." See also her discussion of positive uses of greetings (public acknowledgements), narratives, and situated knowledge (ibid., pp. 57–62, 70–77).

212   Ibid., p. 39.

213   For Young (ibid., p. 38), "[b]eing reasonable in a discussion means being open to listening to others and having them influence one's views, and expressing one's own claims upon them in ways that aim to reach their assent or understanding." Stephen L. Carter has proposed that in American public debates there is not much genuine dialogue. Stephen L. Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge, 1995), p. x. He continues: "I do not mean that nobody speaks—*everybody* speaks—but rather that nobody listens [Carter's emphasis]."

214   Nussbaum (*Upheavals of Thought*, pp. 301–302) specifies the narrower meaning of empathy as "imaginary reconstruction of another person's experience, without any particular evaluation of that experience." In the same passage she defines compassion as "a painful emotion occasioned by the awareness of another person's undeserved misfortune." She points out that psychologists sometimes use the term empathy so that it includes aspects of

views that go beyond the principles of balancing reasonable justice are explicitly anticipated.

The requirement of empathetic understanding of P2 and D7 leads neither to mechanistic aggregation of preferences nor to uncritical acceptance of any particular view. Indeed, Robert Goodin has spoken of the "democratic aggregation" that takes place inside the head of the person who internalizes the perspectives of others. The process includes "balancing them [the perspectives] with her own."[215] Goodin proposes that one's reflective preferences could be a proper starting point for democratic aggregation. Compared to the preferences as such, reflective preferences would be more empathetic, more considered, and more far-reaching.[216] This conception would not favor "communities of interests" arbitrarily. Goodin also discusses "communities of generation" (particularly families), "communities of meaning," "communities of experience," "communities of regard," and "communities of subsumption."[217] Only the communities of subsumbtion would be undemocratic enough that the preferences of their members would not count as reflective ones. But otherwise, Goodin argues that this democratic approach is accommodative to the communitarian perspectives.[218]

In line with Goodin's proposals, dialogically reasonable persons avoid forming their views simply by aggregating preferences (or interests). Some of these persons might apply democratic aggregation as advocated by Goodin, but others would regard the process of balancing more or less differently.

The principles of dialogical reasonableness (P1 and P2) and D7 maintain a distinction between understanding and acceptability. A person may be able to understand another person's view favorably for her or him, but reject it nevertheless. For example, person A may reject person B's view of certain social disturbances. Person B proposes that it is proper to interpret certain events as a revolution that was reasonably justified, for the conditions of the oppressed were so harsh that one could not reasonably expect them to comply with the social system. Person A would empathetically reconstruct the grievances of the oppressed as vividly as possible.[219] She would come to agree with B that the social system was unreasonable and that it is better to understand the events as a revolution instead of as a rebellion.[220] However,

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compassion. Similarly, D7 might be said to include aspects of compassion. These aspects may help one to see the controversial conceptual elements favorably for the person in question.

215   Robert Goodin, *Reflective Democracy* (Oxford, 2003), p. 10.

216   Ibid., p. 7. Goodin does not give a neat definition of empathy. Nevertheless, his "suggestion is that we ease the burdens of deliberative democracy in mass society by altering our focus from the 'external-collective' to the 'internal-reflective' mode, shifting much of the work of democratic deliberation back inside the head of each individual." Ibid., pp. 170–171.

217   Ibid., pp. 26–39.

218   Ibid., pp. 38–43.

219   In order to do this, she or he would try to understand, for example, the kinds of situated knowledge that Young referred to (as discussed above).

220   Georg Henrik von Wright has used similar terms in his discussion of the distinction between understanding events and explaining them. He points out that the occurrence of "demonstrations, riots, strikes, terrorism, *etc*." may be understood as "a 'civil war' or a

she would still reject B's view that the revolution was reasonably justified. In A's view peaceful means could have been found in order to improve the conditions sufficiently. Thus, A comes to see the events in a new way, but the changes are not radical enough to make her accept B's normative position.[221] Indeed, in discussions of complex events it may often be hard to balance the reasons one way or the other. But if there are no sincere attempts to understand different views empathetically, many weighty reasons for the normative positions might not be thoroughly considered.

Persons who try to understand each other and who are willing to provide reasonable, or at least not unreasonable, grounds for their contributions to the basic structure remain separate persons with their particular features. Their different, limited perspectives are not lost. But if they remain dialogically reasonable, they also keep their views open to further perspectives with the criticism and insights these provide.[222]

The perspectives taken in this study have also been limited. In particular, the starting point in Rawls's justice as fairness has restricted them. I have pointed out, however, that justice as fairness already implies one kind of inclusive thoughtfulness. Among other things, I have examined certain possibilities to further elaborate this aspect of Rawls's justice as fairness.

'revolution'." The question at this stage is not yet about explaining the events. Instead, "[i]t is a question of interpretation, of understanding the meaning of what is going on." Georg Henrik von Wright, *Explanation and Understanding* (London, 1971), pp. 133–134. The particular change in person A's view is to understand the social disturbances in question as a revolution rather than a rebellion. In a broader sense, I assume that a favorable understanding of a person's view usually includes the recognition of such explanations that are favorable to the person in question and the assumption of another person's truthfulness. Recall also the related requirement in P8 that one "should take into account relevant truths in the design of the basic social structure."

221   In their further discussions they could consider the particular features of the case also in terms of principles of liberties and opportunities (P3 and P4), principles concerning the least advantaged (P5 and P6), and principles of good and truth (P7 and P8). Little by little they might arrive at some kind of a thoughtful consensus about the events in question. Or at least they might recognize better where their intuitions differ.

222   Georgia Warnke has proposed that a similar feature is important in both Hans-Georg Gadamer's and MacIntyre's projects: "Both MacIntyre and Gadamer define rationality, then, as a willingness to admit the existence of better options. The awareness that one's knowledge is always open to refutation or modification from the vantage point of another perspective is not a basis for suspending confidence in the idea of reason but rather represents the very possibility of rational progress." Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (Cambridge, 1987), p. 173.

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Between Traditions, Theories, and Intuitions

In a lifetime of work on his theory of justice, John Rawls joined the traditions of social contract and constitutional liberal democracy. These traditions include a commitment to take seriously the basically intuitive, but considered judgments of reasonable people from a broad variety of backgrounds. In *A Theory of Justice*, Rawls expressed his hope that once reasonable people reflected upon his theory they would give it enough support to allow it to fulfil its purposes. In *Political Liberalism*, Rawls modified the theory suitably so that people representing different comprehensive doctrines would be able to endorse its politically liberal core. In *The Law of Peoples*, he affirmed the contractualist and liberal democratic background of his project. He extended his conception to the international sphere in a spirit of modesty, suggesting that peoples with different traditions, either liberal or decent, could reasonably agree on certain fundamental principles of international justice and order.

Here, I have presented a conceptual framework for reasonable balancing of the elements of Rawlsian justice internally, critically, and inclusively. I have seen no reason to depart from Rawls in his commitments to the political basics of contractualism, liberal democracy, and reasonableness. I have also followed his method of reflective equilibrium, a method that aims at achieving broad recognition of people's considered moral judgments as well as coherence of theory. Indeed, I have pointed out that Rawls could have followed the method of reflective equilibrium even more courageously. He could have integrated into his theory a wider variety of norms, values, and virtues that people intuitively regard as moral. I have argued that, in addition to the politically liberal norms he advocated as moral notions, such notions as merits, goodness, truthfulness, care, and neighborly love are relevant to the main subject of his study, the justice of the basic structure of a democratic society. Rawls's perspective of political constructivism did not keep him from taking sides in several moral questions that are at least partially comprehensive. The Kantian twist in his contractualist political constructivism is one example of the features of his project that will divide politically responsible persons.

Rawls was probably concerned that a more profound integration of moral notions would have compromised the coherence of the theory. However, I have explored several possibilities to elaborate his theory coherently. In some cases additional moral notions can be integrated into Rawls's theory by relaxing its unnecessarily demanding requirements. In particular, as I showed in Chapter 1, his original position can be given a commonsensical interpretation that exemplifies a kind of dialogical reasonableness rather than the reasoning of idealized and identical rational personages. This account of dialogical reasonableness can help people to organize

their considered judgments at a suitable level of abstraction in which both differences and common features between various doctrines can be recognized.

Unless a theory is coherent enough, it cannot serve as a theory for balancing various moral notions. Nevertheless, some kind of balancing is unavoidable under circumstances of conflicting claims, scarce resources, and diversity of beliefs and ideals. At the beginning of Chapter 2, I started to construct a suitably tight theoretical framework for balancing reasonable justice proceeding from the definition of a reasonable democracy (D6), in which the notions of reasonable communication and democratic procedures are fundamental.

As the two main aspects of reasonableness, Rawls specified its fair terms aspect and its burdens of judgment aspect. In Table 2.1 I related these aspects to five degrees of reasonableness (the most reasonable, reasonable, not unreasonable, unreasonable, and worse than unreasonable). In Table 2.2 I specified conceptions of common, plural, and relatively common goods in justice as fairness. In Table 2.3 I then articulated varying contents of the reasonably supported consensus in a broader sense, including constitutional consensus and consensus on the relevant principles of justice. Along the way, I discussed several possibilities to balance the elements specified in these tables.

I remarked that Rawls's justice as fairness includes a conception of a person as responsible. Rawls expected responsible persons to adjust their comprehensive views to reasonable terms in complex ways. With reference to certain relatively marginal elements in justice as fairness—such as health, trust, and the rejection of hypocrisy—I clarified the possibilities of what Rawlsian responsible adjusting might mean. The related discussions supported the assumption that, upon closer examination, aspects of justice as fairness are partially comprehensive.

Although the conceptions of truth (or factual claims) and good are not among the main parts of justice as fairness, they have important roles in it, and in the process of reasonable balancing one could well assign greater emphasis to them. In Figure 2.1, which specifies the framework for balancing reasonable justice, they are explicitly included. The eight principles of the framework are the principles of dialogical reasonableness (P1 and P2), the principles of liberties and opportunities (P3 and P4), the principles concerning the least advantaged (P5 and P6), and the principles of good and truth (P7 and P8). In addition to these pairs of principles, the fifth main part of balancing reasonable justice is thoughtful persons in a real society. This part corresponds closely to the thoughtful persons who, in Rawls's view, consider the conception at all levels of generality.

The intuitive considered judgments of thoughtful persons are the fundamental building blocks by which Rawlsian reasonable justice can be balanced. It is also fundamental to my proposal for balancing reasonable justice that the considered judgments are elaborated in a constructive and dialogical manner. This is exemplified by principles P1–P8 as well as by the presented figures, tables, definitions, factual assumptions, and the explicated principles from P9 on. Furthermore, I have affirmed throughout that the background of the project is in the traditions of social contract and constitutional liberal democracy as recently elaborated by Rawls. This recognition is fundamental to my effort to elaborate Rawls. It is also fundamental to my effort to reach beyond these traditions inclusively in several issues. The framework I elaborate

thus recommends balancing between traditions, theories, and intuitions. Balancing reasonable justice starts with Rawls's account of certain traditions, theories, and intuitions, and then it takes crucial steps beyond it.

My framework for balancing reasonable justice provides no algorithm for balancing between traditions, theories, and intuitions. It provides a conceptual framework for balancing moral notions to people who represent different traditions, who have partly different moral intuitions, and who are willing to consider the traditions and intuitions in question theoretically at various levels. The dialogical nature of my proposal implies its openness to further criticism. In any case, balancing reasonable justice arguably has certain advantages compared to Rawls's justice as fairness. Some of the advantages are clearly discernible only when considered against a set of particular issues related to global justice, freedom of religion, distributive justice, and care. This is done in Chapter 3.

Rawls's theory was developed against the background of American liberalism, and he did not extend his ideas developed in the context of the United States to different liberal and decent societies straightforwardly. He only expected all peoples to endorse relatively modestly interpreted human rights and certain other traditional principles of international justice, order, and assistance, and to be willing to agree on a reasonable law of peoples. In addition, however, he imposed some interesting requirements on decent societies akin to his imaginary Kazanistan. These include a willingness to listen to the opinions of other dissenting persons (P2') and a willingness to contribute to the common good of the society (P7'). Indeed, Rawls could have discussed the role of the related principles and virtues in liberal societies in greater detail as well. These may be significant for example in circumstances where there are serious disagreements about extensive norms of liberty and equality (beyond the basic liberties for all) and about their feasibility.

It is a relatively stringent demand of equality imposed by Rawls upon liberal democracies that one should not seek a publicly privileged position for one's religion. Major violations of this requirement litter the history of Western civilization. Interestingly, however, Rawls referred to Patrick Henry's argumentation in favor of granting public privileges to Christianity in Virginia as an example of basically proper public reasoning. This example supports the reading of Rawls that reasonableness does not by definition exclude the presentation of arguments in favor of privileges for a religion. The most reasonable arguments might do so—or rigorous readings of the original position. But this throws the question of balancing back to what it means to be a thoughtful person. On what grounds should the requirement of the *most* reasonable argumentation necessarily dominate over one's firmest convictions of truth and good? Is not reasonableness enough, particularly if it is combined with the respect for democratic procedures? The burdens of judgment are heavy in such questions. The kind of neutrality of aim that Rawls promoted may not be fully feasible vis-à-vis doctrines that are either comprehensive or partially comprehensive and that are intertwined with political doctrines at different levels. But this does not imply that the search for reasonable terms and deeper understandings of different views should be given up.

In another historical example, I examined Jeremiah Evarts's defense of the rights of Native Americans in the early nineteenth century. He argued that a proper

public morality includes respect for the rights of the Native Americans and that Christianity is needed to support the proper public morality. Even if a Rawlsian liberal might prefer to have this proper public morality without religious backing, a different view might be worth considering under such demanding circumstances. A Rawlsian might well recognize the value of religious support for the public morality if reasonable morality on its own turns out to be deficiently represented in the society in question.

In my example of distributive justice I returned to the context of justice as fairness in the United States of the late twentieth century. I showed how judgments about reasonable (or the most reasonable) principles *and* about the distribution itself might be added to the framework of balancing reasonable justice. In an imaginary discussion, a libertarian, a structural Rawlsian, a cultural Rawlsian, a structural egalitarian, and a cultural egalitarian person all accept the same statistical data provided by the Current Population Survey on the distribution of incomes in the United States. Although the five positions are highly hypothetical, they allow us to see different ways of ordering and balancing assumptions regarding equality, liberty, feasibility, efficiency, and the scope of application of related principles. For example, the two Rawlsians promoted different distributions because they disagreed as to whether the difference principle should apply only to the basic institutional structures or more broadly to culture as well.

References to the differences in terms of income and wealth instead of mere income (after taxes and transfers) would probably have an egalitarian impact on the reasonable considerations of many persons. The principle of fair equality of opportunity would also have weight, at least in the considerations of Rawlsians. Major steps further are implied by the principles of just savings and the assistance of the burdened peoples. After discussing Pogge's and Beitz's criticisms that Rawls's proposals are too modest for global justice, I pointed out that all of these further considerations tend to support relatively egalitarian considerations. I also referred to certain recent statements issued by the Christian churches because they show that a culturally Rawlsian (or even culturally egalitarian) approach might be supported by this branch of today's culture.

The last of my major examples of extension and balancing focuses on the public value of care. In Rawls's account of reasonable psychology, the proper sense of justice usually develops in caring families and in various voluntary associations. On the one hand, critical ethicists of care may not have paid enough attention to the fact that Rawls did recognize the value of many virtues of care—not only in families but also in the public sphere. On the other hand, more value might be attached to these virtues. Okin has remarked that Rawls's approach also implies a continuity of equality-based reasonableness in the families, in voluntary associations, and in the public sphere. One conclusion of this discussion is that the burdens of judgment related to it are heavy. Another is that the criticism by the ethicists of care supports modifying justice as fairness so that it pays more attention to the virtues of empathetic understanding. A major challenge to this norm may simply be that it is difficult to fulfil. But this is often true of morality.

Although balancing reasonable justice affirms several fundamental starting points which Rawls used as well, it also specifies clear steps beyond Rawls. I have

called five of these steps crucial. Balancing reasonable justice is (1) more dialogical in the issues of justification and (2) more egalitarian in the issues of distribution than Rawls's justice as fairness. It (3) gives more recognition to the merits of beneficence, (4) encourages more comprehensive considerations in terms of good and truth, and (5) it advocates more thorough global responsibilities than Rawls's view. All of these have been suggested in the literature as crucial improvements to Rawls's conception, taken separately, but I hope to have contributed the discussion by drafting a conceptual framework which takes them into account together. This approach can help us evaluate the prospects of Rawls's project broadly and discuss which aspects of it might be confidently endorsed in the twenty-first century.

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