

The London School of Economics and Political Science

A Critique of Pure Public Reason

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A thesis submitted to the Department of Philosophy,
Logic and Scientific Method of the London School of
Economics for the degree of Doctor of Philosophy,
London, December 2, 2011

Declaration

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Abstract

Contemporary political liberalism defends the view that any legitimate law ought to be justified to those reasonable citizens subject to it. A standard way in which to accomplish this task is to construct a set of public reasons, comprised of constitutional essentials and public democratic values, which are then used to justify all political mandates. The dissertation begins with a criticism of this process of justification for outcomes of legitimate procedures of public decision-making. It argues that given how reasons contribute to judgment formation, it is highly optimistic to assume that reasonable consent on procedures of collective decision-making correspond to the justifiability of procedural outcomes. Instead, I argue for an ideal of legitimate decision-making which enables each citizen to assume a threshold level of personal responsibility for all political decisions made by the political collective.

Integrating responsibility into a theory of liberal legitimacy requires a reformulation of the rules of public justification. I argue that citizens concerned with making responsible political decisions must be allowed to justify their political positions through both reasonable judgments as well as sympathetic judgments such as compassion for those who live with disability and mercy towards the criminally motivated. The notion of sympathy, as formulated by David Hume and expanded by Adam Smith, provides an account of how individuals' ethical evaluations are affected by their ability to be in fellow-feeling with other people. A substantial portion of my doctoral thesis considers the situations in which a private judgment couched in sympathetic terms can meet political liberalism's demands of publicity and reciprocity.

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Dedication and Acknowledgements

When I decided to leave my job to pursue graduate studies, one of my colleagues conveyed to me the echoes of a once popular New England blessing: ‘May Reason always be your Guide, and never your Tyrant.’ In the years that followed, such a blessing took on special significance. Reason became a guide, a sparring partner, a muse and even a tease. It played the dual role of agitator and illuminator in every project I pursued. It kept me up several nights; it kept me inside on bright days. Despite its demands, however, it never became the tyrant that I supposed it would be. I have several people to thank for this alone:

First and foremost I would like to thank my parents, who have never failed in their support, their understanding, their generosity and their encouragement. I have only this dissertation to offer to them, but I dedicate it to them with eternal love and gratitude.

Secondly, I would like to thank Susan Powell and Ed Ross for their kindness and hospitality throughout the years. I benefited immensely from Susan’s willingness to share the wisdom and anecdotes that came from decades of supervising LSE doctoral students, and thank her for the time she took guiding me through the emotional ups and downs of doing a PhD.

Third, I would like to thank my supervisors Alex Voorhoeve and Chandran Kukathas, for all their help and guidance. The level of detailed feedback Alex gave me on my work over the years was incredibly helpful in transforming my ideas from forceful convictions to defensible arguments. I am also grateful to him for introducing me to the moral theory of Adam Smith, which has become one of my foremost philosophical interests.

Chandran’s willingness to share his vast knowledge of political theory, legal theory and moral theory made supervisions with him incredible learning experiences, and some of the most fun I have ever had while doing philosophy. Through discussions with him, I became far more aware of the evolution of political

ideas and the connections between scholarly traditions. He made me see that contemporary liberalism is a part of a much larger tradition of political philosophy, and reassured me that one could do focused work while reading not just widely but incredibly widely.

Lastly, I would like to thank Yash Senchaudhuri for his patience with me and 'all my books, spread everywhere, over everything,' Ekua Ewool and Zsu Chappell for their friendly encouragement, and all my fellow students at the LSE Philosophy and Political Theory Departments for their friendship, support and cheerful commiseration over the years.

Introduction

'You all did love him once, not without cause;
What cause withholds you then to mourn for him?
O judgement, thou art fled to brutish beasts,
And men have lost their reason.'¹

Shakespeare has Antony direct these words to the Roman public, from a forum in which they have gathered to hear the senator Brutus explain the reasons for Julius Caesar's assassination by the Roman senate. Brutus, like Antony, was a close friend of Caesar's. Unlike Antony, he was complicit in Caesar's murder. In the public outrage that follows Caesar's assassination, Brutus promises his fellow citizens that *'public reasons shall be rendered for Caesar's death.'*²

In offering such public reasons, Brutus stays remarkably close to what contemporary political liberals would have considered public reasons suitable for political justification. He begins with an account of his private love and friendship for Caesar the man. However, Brutus quickly turns to defending the murder, claiming that his love for his country, his Roman pride and his firm belief that all Roman citizens ought to be free, compelled him to curtail the life of an ambitious man who sought to become an emperor and place all Romans in a position of

¹ William Shakespeare, *Julius Caesar* (III.ii.110 – 113).

² *Ibid.* (III.ii.8).

servitude.³ Although privately facing a divided conscience, he acted by separating his private affections for Caesar from the political commitments shared by all Romans. Which Roman citizen would prefer slavery with Caesar on the throne, to the freedom promised by Caesar's death?⁴ In Brutus' view, Caesar died for the freedom of his country, a death Brutus himself is willing to die.⁵

Brutus offers a justification which at first appears to appease the Roman public. Minutes thereafter, Brutus is forced to flee the capital. Antony takes the pulpit and reminds the Roman citizens how Caesar's conquests had filled the Roman treasury,⁶ and how Caesar loved his fellow Romans.⁷ He tells them that in his final testament, Caesar wrote that all his abundant lands should be used upon his death, for the common enjoyment of the Roman populace.⁸ Holding up Caesar's blood-stained mantle, Antony describes in grisly detail the event of Caesar's murder. He shows the citizens where each of the noble senators had stabbed the dying Caesar⁹ and coming upon the cut made by Brutus, Antony declares that it was Caesar's pain at his friend's betrayal, more so than any physical submission to the will of his killers, which finally 'burst his mighty heart.'¹⁰ The once pacified public, now moved to pity, is quickly incited to anger.

Many modern day defenders of public reason would doubtless be moved to pity at *Brutus'* plight. These defenders uphold the view that when justifying one's

³ Ibid. (III.ii.30 – 34).

⁴ Ibid. (III.ii.30).

⁵ Ibid. (III.ii.46 – 48).

⁶ Ibid. (III.ii.97).

⁷ Ibid. (III.ii.151).

⁸ Ibid. (III.ii.258 – 261).

⁹ Ibid. (III.ii.180 – 200).

¹⁰ Ibid. (III.ii.196).

political positions to one's fellow citizens, one must only appeal to those reasons that he or she believes one's fellow citizens will accept given their status as reasonable and rational citizens of a polity in which all citizens are free and equal.¹¹ Public reasons are those which appeal to political values and constitutional essentials, (e.g. to principles of justice, civil rights or processes of democratic institutions),¹² as well as those that derive from common sense and the findings of modern science.¹³ In essence they are the shared reason of all citizens *qua* citizen.

The '*qua* citizen' highlights the fact that public reasons are not exhaustive of all the reasons a citizen might have for supporting a particular policy. In addition to public reasons, a citizen might consider private reasons such as self-interest, and non-public reasons such as those found within his or her religious, philosophical or moral outlook, or taught by associations to which he or she belongs. However, it is understood that the actual process of justifying one's political position should exclude reasons which are not public.¹⁴

In the scene from *Julius Caesar* just described, Brutus uses public reasons and only public reasons to defend his deeds as a Roman senator. Patriotism, Roman pride, and commitment to freedom ought to be public values that all Romans can embrace *qua* Roman citizen. From the liberal perspective, Antony appears to use all the wrong sorts of reasons. He appeals to the citizens' self-interest by reminding them that Caesar filled the Roman treasury with his conquests. He then appeals to

¹¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 217; John Rawls, 'The Idea of Public Reason Revisited,' *The University of Chicago Law Review* 64 (1997): 765-807, at p. 770; Samuel Freeman, 'Public Reason and Political Justifications,' *Fordham Law Review* 72 (2003):2021-2072, at pp. 2031-2032 and p. 2054.

¹² Rawls, *Political Liberalism*, p.223.

¹³ Rawls, *Political Liberalism*, p. 224.

¹⁴ *Ibid.* pp. 217-218.

their vanity and their admiration, hoping that Caesar's love and generosity will win their affections. Finally, by flourishing the mantle and painting a horrific picture of Caesar's death, he carefully goads and provokes them until they are inflamed by rage. In short, Antony is effective in persuading the Roman populace precisely because he does not use public reasons in justifying his position.

This dissertation is by no means a defence of Antony's use of emotional and rhetorical devices in the public forum. However, it takes seriously an observation of Antony's that Brutus fails to recognize. Antony tells the Roman citizens, 'You are not wood, you are not stones, but men,' and it is in their capacity as men that the Roman citizens are moved to anger and rage on Caesar's behalf.¹⁵ Similarly, this dissertation argues that when justifying political positions in accordance with public reasons, individuals as well as political institutions do not fully appreciate the fact that the conscientious, sympathetic and responsible features of liberal citizenship ought to be built into a liberal account of public justification. The standard view of liberal public justification focuses on citizens as reasonable and rational agents who are unwilling to force fellow citizens to be subject to political powers regulated by other people's private beliefs.¹⁶ Although conscientious, sympathetic and responsible agents would also hesitate to subject their fellow citizens in this way, they are individuals who wish to see the immense power of their political institutions directed towards ends which they not only find 'reasonable', but also noble, compassionate and indeed, right and good. They will be moved by such considerations in addition to concerns

¹⁵ Shakespeare, *Julius Caesar*, (III.ii.152).

¹⁶ Rawls, *Political Liberalism*, pp. 48 – 51, 54 – 66.

of the reasonableness of public justification. This dissertation argues that they ought to be so moved.

This dissertation offers a critique of *pure* public reason, but does so while defending the view that some form of public reason ought to serve as the normative criterion of political legitimacy. By 'pure public reason,' I refer to a structure of public reason that is reflected in the standard Rawlsian account, along with some basic variations of liberal public justification which may be said to fall within the Rawlsian paradigm. In this paradigm, public reasons are those reasons which are in accordance with a political conception of justice that all citizens can endorse in their capacity as free and equal, reasonable and rational agents, engaged in fair social cooperation.¹⁷ The political conception of justice is informed by the values inherent in the public democratic culture of a liberal society.¹⁸ They include values like the liberty and equality of all citizens, toleration of an array of reasonable religious beliefs, and certain views on substantive justice (e.g. the wrongness of slavery.)¹⁹ Public reasons include these public values, and in addition include appeals to the constitutional essentials and ideas of basic justice which a political conception of justice specifies as legitimate sources of collective power.²⁰

This dissertation argues that public reason, so conceived, is not sufficiently demanding. Far too many political positions become justifiable when public reasons are limited to those that stem from a political conception of justice. This leads to high levels of reasonable disagreement within political society. Reasonable disagreement

¹⁷ Ibid. pp. 137, 217.

¹⁸ Ibid. pp. 8, 14.

¹⁹ Ibid.

²⁰ Ibid. pp. 137, 217.

occurs when reasonable individuals disagree on certain political positions, but accept that those who disagree with them maintain a reasonable viewpoint.²¹ Since a reasonable position with which a citizen disagrees is still 'reasonably justifiable' to the citizen, many citizens become subject to laws with which they disagree on reasonable terms. By making public reason more demanding, there will exist fewer reasonable disagreements in the public sphere, thereby ensuring that fewer individuals are subject to laws with which they reasonably disagree.

For example, consider a reasonable and rational citizen who is opposed to the death penalty on grounds that it is wrong to take a human life. By the standards of pure public reason, although it may be reasonable to oppose the death penalty, it is not a requirement of reason to be opposed to it. Reasonable individuals can disagree about the merits of capital punishment. Therefore, if an opponent of the death penalty lives in a polity where the death penalty is legitimate law, and yet she is offered public reasons as to why some reasonable individuals support the death penalty, then as far as pure public reason is concerned the death penalty has been reasonably justified to her.

In order to make public reason more demanding, I will propose an alternate account of liberal citizenship. In this account citizens are free and equal, reasonable, rational, *and sympathetic* agents, engaged in fair social cooperation. This will make public reason more demanding because political positions which may be justifiable on traditional Rawlsian grounds may not be justifiable if citizens were to invoke other standards of evaluation. Suppose, for example, that the citizen opposed to the

²¹ Ibid. p. 55.

death penalty feels a kind of moral indignation when she learns of an instance of capital punishment. If liberal citizens are conceived as merely free and equal, reasonable and rational agents, then the moral indignation felt at the time of the execution will not contribute to concerns regarding its justifiability. If public reason could somehow demand that all citizens feel such moral indignation, even to a small degree, then citizens would have a publicly justifiable reason to oppose the death penalty on grounds of their moral indignation. This does not mean that they would agree with it. It simply means that they would understand why a reasonable person *qua citizen* could be strongly opposed to it on moral grounds. Furthermore, if supporters of the death penalty could be required to respond to such indignation in their public justifications, and reassure citizens who feel this indignation that their positions as free and equal, moral agents was respected while legitimating such a practice, then it would become far more difficult to offer public justifications in defence of the death penalty. In essence, this is what the faculty of sympathy contributes to processes of public decision-making.

The view of sympathy I defend was developed by Adam Smith in *'The Theory of Moral Sentiments'*.²² The faculty of sympathy enables a person to imaginatively project himself or herself into the shoes of another, to determine the appropriateness of the other person's response to a given situation.²³ This means that if a person is feeling moral indignation, his or her fellows can imaginatively project themselves into the situation of the person feeling indignation, to determine whether this is an appropriate response. While the measure of 'appropriateness' can still be informed

²² Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge, UK: Cambridge University Press; 2002).

²³ *Ibid.* I.i.1.2.

by whether such feelings are reasonable or rational, they can also be measured along other domains, such as whether a person is justified in feeling such a response given his or her personal struggle in reaching a reflectively stable moral view point.

Therefore, in lieu of pure public reason, I offer sympathetic public reason as the normative criterion of justification in the public sphere. However, I share several of Rawls' moral commitments, such as the idea of political society as a fair system of cooperation, and the view that fair terms of cooperation reflect relations of reciprocity between citizens.²⁴ By adding the assumption that liberal citizens are essentially sympathetic agents, I aim to show that the Rawlsian paradigm is equipped to support a criterion of public justification that is more sensitive to citizens' moral sensibilities. My account of sympathetic public reason is meant to revise the Rawlsian paradigm of public reason from within a Rawlsian perspective. Therefore, I will begin by explaining the moral foundations of pure public reason and then go on to outline the nature of my revisions.

0.1: The Moral Foundations of Pure Public Reason

This Rawlsian paradigm which supports pure public reason is characterized by a contractualist moral grounding of public justification,²⁵ a cognitive account of public justification,²⁶ and what may be called a non-cognitive account of political

²⁴ Rawls, *Political Liberalism*, pp. 16-17.

²⁵ Rawls, *Political Liberalism*, p. 49; Samuel Freeman, 'The Burdens of Public Justification,' *Politics, Philosophy and Economics* 6 (2007): 5-43, at pp. 9 and 11.

²⁶ Fred D'Agostino, 'Some Modes of Public Justification,' *Australasian Journal of Philosophy* 69 (1991): 390-414, at pp. 391 – 393; Freeman, 'Public Reason and Political Justifications,' pp. 2029 – 2033 and pp. 2035 – 2045.

reasonableness.²⁷ (I will describe these features of public justification in the following section.)

The need for public justification arises from the fact that liberal citizens are committed to ensuring that coercive political power reflects the collective power of the citizenry.²⁸ They uphold a principle of legitimacy that requires that the fundamental principles of justice, along with the constitution and the institutions of government, are justifiable to every reasonable citizen.²⁹ In Rawls' well-known formulation, the liberal principle of legitimacy states that: 'our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'³⁰

The following is the standard argument against allowing non-public reasons, such as those from private morality, into processes of public justification. When citizens face complex ethical or metaphysical questions, they are required to form judgments by interpreting vague concepts, assessing complex evidence and making difficult practical decisions about the relative weights placed on conflicting reasons.³¹ Given the complexity of coming to such judgments, reasonable individuals are likely to form judgments which conflict. Such conflict will occur even if reasonable citizens are asked to assess the same set of evidence, since each will weigh and interpret it

²⁷ Freeman, 'Public Reason and Political Justifications,' p. 2049; John Rawls, 'Reply to Habermas,' *The Journal of Philosophy*, 92 (1995): 132- 180 at pp. 142 – 145.

²⁸ Rawls, 'Reply to Habermas,' p. 136.

²⁹ Ibid. p. 136, 217.

³⁰ Ibid. p. 217.

³¹ Ibid. pp. 55 – 56.

differently. Given the diversity of personal experience found amongst those who live in liberal democracies, the 'evidence' on metaphysical and moral questions will also be diverse, indicating even less possibility for agreement. Therefore, it must be accepted that reasonable people will disagree on questions regarding the requirements of morality. A reasonable citizen is someone who acknowledges these 'burdens of judgment' placed on his or her fellows, and will be open to reasonable disagreement.³²

Citizens of a liberal polity must determine a way to enable justification despite such disagreement. Given the burdens of judgment, however, such justification will not succeed if citizens only use their non-public reasons when offering justifications. In consequence, reasonable citizens are those who take it as a part of their duty as citizens to justify their political positions not only by appealing to their own reasons, but also by appealing to public reasons that they believe others can accept. This duty is known as political liberalism's 'duty of civility.'³³ One way citizens may fulfil their duty of civility is by adopting public reason as a common framework of justification.

The duty of civility requires citizens 'to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.'³⁴ Citizens accomplish this task when they (i) are ready to adopt and explain a criterion of justification which they believe other free and equal citizens can accept as a standard by which to

³² Ibid. pp. 61 – 63.

³³ Rawls, *Political Liberalism*, pp. 217 and 226.

³⁴ Ibid. pp. 217, 226, and 253.

justify all political positions;³⁵ and (ii) when they appeal to values which they believe 'in good faith' are acceptable to reasonable and rational citizens.³⁶ This does not mean that all reasonable citizens must agree with the content of the justification in order for it to fulfil the demands of civility. However, it does require the belief that other citizens will be able to see why the view is reasonable.³⁷

The duty of civility is a moral duty, not a legal duty.³⁸ Its defence requires a five step argument, which takes us across a broad spectrum of Rawls' moral commitments for political liberalism. However, it is important to understand this defence of the duty of civility, as it illustrates the moral framework in which pure public reason is anchored.

The first step is the idea of political society as a system of fair social cooperation amongst free and equal agents. Such cooperation consists in the set of rules and procedures that establish the terms of cooperation (i.e. what Rawls would call an articulation of the political conception of justice),³⁹ as well as an ideal of reciprocity according to which all are willing to follow the rules of cooperation, if they believe others will as well.⁴⁰ Such an ideal is a necessary condition for cooperation to take place. Without it, members of a liberal society would not be able to engage in cooperation since in every instance of cooperation, rational citizens could face an unfair system of free-riding.

³⁵ Ibid. p. 226.

³⁶ Ibid. p. 236.

³⁷ Ibid. p. 253.

³⁸ Ibid. p. 217.

³⁹ Ibid. p. 16.

⁴⁰ Ibid. pp. 16, 49-50.

In order to see why this is the case, suppose that establishing a practice of taxation within a polity requires at least eighty per cent of citizens to be willing to pay taxes at any given time. The trouble comes in determining which of the twenty per cent of citizens could successfully evade taxation without harming political cooperation so far that a revenue system would not be established. If it were left to each citizen to determine whether he or she should evade taxes, then presumably all citizens would evade taxes knowing that everyone else was likely to do the same. However, if some political authority determined which citizens would be excused from tax payments, then those citizens forced to pay taxes would feel unfairly treated. Those not paying taxes could be said to be free-riding upon those who are. Due to these beliefs of unfair treatment, reasonable and rational agents would not freely enter into such cooperative enterprises. Therefore, given Rawls' view of political society, every citizen must be committed to adopting the requirements of reciprocity, which include offering fair terms and following them if all others do.

The second step establishes the two moral powers as preconditions for reciprocity. The two moral powers are a sense of justice which restrains individuals from free-riding upon others' willingness to follow the rules, and a rational capacity to form, revise and pursue a conception of the good.⁴¹ Both powers are necessary for social cooperation. If a person were rational, but did not possess a sense of justice, then she would certainly have incentives not to follow the terms of cooperation and not to fulfil the demands of reciprocity. As we have seen, the purpose of reciprocity is to enable citizens to overcome problems they would face if they were purely

⁴¹ Ibid. p. 19.

rational. This requires a sense of justice as fairness (i.e. the thought, ‘if others have to follow the rules, then so must I.’) On the other hand, if citizens possessed a sense of justice but no rational conception of the good, their political conception of justice would be marked by impartiality, not reciprocity. Reciprocity differs from impartiality in that it promises citizens at least some degree of mutual advantage.⁴² If the conception of the liberal citizen were of individuals without the rational moral powers, then the promise of mutual advantage would be unnecessary.

Step three reflects the idea that political institutions must show restraint when subjecting citizens to coercive powers, in light of the two moral powers which reasonable citizens possess. Having moral powers gives citizens a status which Rawls maintains is analogous to the status of having natural rights.⁴³ There are different accounts of why moral personhood grants such status. Rawls’ own explanation is that having the moral powers is sufficient to affirm the principles of justice, and enter the original position.⁴⁴ The original position is a hypothetical situation that reflects conditions for fair political bargaining.⁴⁵ Those who possess the moral powers must therefore be treated like those who formed the initial agreement on the political conception of justice. It is in light of their hypothetical participation in the hypothetical agreement which requires treatment as equal citizens.⁴⁶ Moreover,

⁴² Ibid. p. 16.

⁴³ John Rawls, *Theory of Justice* (Oxford, UK: Oxford University Press, 1972), p. 505fn.

⁴⁴ Ibid p. 505.

⁴⁵ Ibid. pp. 118 – 119.

⁴⁶ Ibid. pp. 505; Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Belknap Press of Harvard University), p. 20.

citizens must be free in order to exercise their rational powers of pursuing a conception of the good.⁴⁷

One might find such an explanation problematic insofar as the necessary preconditions for forming an agreement (even a hypothetical one) in a pre-political setting, does not explain why these features ought to translate into *political* freedom and *political* equality as understood by civil rights and democratic values. After all, there are many theories of social contracts in which citizens alienate their natural liberty in order to reap the benefits of political society. Hobbes,⁴⁸ Spinoza⁴⁹ and some interpreters of Rousseau,⁵⁰ see citizens as being free in the state of nature, but subject to sovereign authority within the public sphere, without an account of civil rights as Rawls would imagine. Further explanation is required to complete the Rawlsian story as to why those who choose to engage in free and equal cooperation would expect to maintain this status during the cooperative enterprise. Other liberals have tried to supply such explanations. Charles Larmore, for example, offers one such explanation by utilizing a neo-Kantian interpretation of the Rawlsian framework.⁵¹ He argues that the requirement of political restraint comes from respecting the capacity for reasoning found in those with the two moral powers. Using coercive

⁴⁷ Rawls, *Justice as Fairness: A Restatement*, pp. 21-22.

⁴⁸ Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge, UK: Cambridge University Press), Chapter 28.

⁴⁹ Benedictus de Spinoza, *Political Treatise*, ed. R.H.M. Elwes (New York, NY: Cosimo Inc., 2005). On p. 302 Spinoza writes, 'We see then, that every citizen depends not on himself, but on the commonwealth, all whose commands he is bound to execute, and has no right to decide, what is equitable or iniquitous, just or unjust. But, on the contrary, as the body of the dominion should, so to speak, be guided by one mind, and consequently the will of the commonwealth must be taken to be the will of all; what the state decides to be just and good must be held to be so decided by every individual. And so, however iniquitous the subject may think the commonwealth's decisions, he is none the less bound to execute them.'

⁵⁰ J. W. Chapman, *Rousseau: Totalitarian or Liberal* (New York, NY: AMS Print, 1968).

⁵¹ Charles Larmore, *The Autonomy of Morality* (Cambridge, UK: Cambridge University Press, 2008), pp. 146-149.

force upon reasonable and rational agents without their consent would be treating them 'merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons.'⁵² However, employing a Kantian argument is not necessary. The idea that citizens must all have civil liberties and political equality is so fundamental to political liberalism, that we may simply take it as a starting position.

Step four of the defence of civility aims to determine a conception of the legitimate uses of coercive power that is compatible with the restraints that political institutions are required to show towards reasonable citizens, in light of their moral status. One way to do this would be to require that all legitimate uses of political power must emanate from the reasonable consensus of the citizenry. However, given that liberals acknowledge the burdens of judgment, they must also acknowledge the existence of a plurality of reasonable comprehensive doctrines, where a comprehensive doctrine articulates all the values (public, non-public and private) which a citizen might adopt.⁵³ It is consistent with liberalism to think of reasonable pluralism as a 'fact' that must be accommodated in theories of legitimacy, in order to show respect for the free and equal status of all citizens of a liberal polity.⁵⁴

Reasonable philosophical and moral pluralism is a 'fact' of liberal society in at least two ways. From the perspective of the individual, they reflect the 'burdens of judgment' which individuals face when coming to reflectively stable attitudes on

⁵² Larmore, *The Autonomy of Morality*, p. 149.

⁵³ Rawls, *Political Liberalism*, p. 13.

⁵⁴ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA and London, England: Belknap Press of Harvard University Press, 1997), p. 79; Larmore, *The Autonomy of Morality*, pp. 145 and 148-149.

their moral and philosophical views.⁵⁵ However, reasonable pluralism may also be seen as a fact of free human reason itself.⁵⁶ When citizens are free to reflect and deliberate on their views, they will be able to accept that many different sorts of beliefs can be supported by common human reason. In this second view, pluralism demonstrates that the political institutions of liberal society are indeed the institutions of a free society, not 'an unfortunate condition of human life.'⁵⁷ The more moral disagreement a liberal polity can accommodate while maintaining political stability and a general level of respect for the views of each citizen, the more liberals can be certain that citizens are free to 'form, revise and pursue their own conceptions of the good,' and equal to all other citizens in such a pursuit.⁵⁸ Therefore, it is important to have a conception of legitimacy which is consonant with institutions that can nurture and sustain a plurality of moral and ethical viewpoints within their society.

The way political liberals reconcile the conflicting objectives of reasonable consensus with reasonable disagreement is to mandate that all uses of political power are at least justifiable to all reasonable citizens.⁵⁹ This forms the essence of the liberal principle of legitimacy. It offers citizens a platform by which to subject their fellows to the coercive powers of institutions they support, while respecting their fellows as free and equal, reasonable and rational. One of the core concerns of Chapter 2 of this dissertation is the extent to which pure public reason achieves the

⁵⁵ Rawls, *Political Liberalism*, Lecture 2, sec. 2.

⁵⁶ *Ibid.* p. 37.

⁵⁷ *Ibid.* p. 37.

⁵⁸ *Ibid.* pp. 18 – 19.

⁵⁹ *Ibid.* p. 216-217.

reconciliation of pluralism and consensus sought by the liberal principle of legitimacy.

Finally, it is only when one accepts the necessity of the liberal principle of legitimacy that the moral force of the duty of civility becomes apparent. If citizens must seek to justify the coercive power of their political society on reasonable terms, they must be willing to justify their own positions to others, and they must do so on terms that other reasonable citizens can identify as good reasons for action. These terms serve as the content of pure public reasoning. They include constitutional essentials, the principles of justice and the political conception of justice.⁶⁰ The political conception of justice in turn, includes the basic institutions of political society and the correlative ethical principles and norms by which they are governed.⁶¹ These principles and norms secure their normative force from the fact that public political culture already has at its disposal several democratic ideas and values that are shared by all citizens.⁶²

Rawls writes that his account of public reason (what I am calling 'pure public reason') is public in three ways. It is public insofar as all citizens can access its content by appeal to a shared conception of justice (which includes democratic values and constitutional procedures). It is public insofar as its subject is the content of constitutional essentials and political justice. Finally it is public insofar as it is the reasoning which has normative authority in the public sphere.⁶³ Ultimately, then, the content of pure public reason will always be the values of public democratic culture.

⁶⁰ Ibid. p. 227.

⁶¹ Ibid. p. 11.

⁶² Ibid. p. 14.

⁶³ Rawls, 'The Idea of Public Reason Revisited,' p. 767.

This once again highlights the fact that public justification is justification to a citizen *qua* citizen and not to a citizen *qua* individual. An individual may or may not fully agree with every value of public democratic culture. A public value like ‘freedom of expression’ or ‘the right not to testify against one’s spouse’ might be something that a citizen takes for granted as having normative force. Although a citizen may find these values reasonable, she may not have actually gone through the process of determining how precisely these rules fit into her private moral or philosophical views.

This also means, however, that when a public value conflicts with a private belief, a reasonable justification will only be couched in terms of public values. For example, if a person were opposed to abortion on grounds that her moral beliefs led her to believe that abortion was murder,⁶⁴ then if there was public deliberation on whether or not to prohibit abortion, she could not appeal to her moral commitments as a reason to prohibit abortion. In fact, from the perspective of pure public reason, it would be unreasonable for this citizen to reject any justification supported by public reason, on grounds that it did not take into account the possibility that abortion was murder. She could argue that the practice of abortion showed a miserable lack of

⁶⁴ I borrow the specific formulation of this example from Joseph Raz, ‘Disagreement in Politics,’ *The American Journal of Jurisprudence* 24 (1998): 25-52, at p. 28. A similar formulation can be found in Gutmann and Thompson, *Democracy and Disagreement*, p. 74. In other variations of the problem, the pro-life position can be characterized in terms of respect for human life, (see Rawls, *Political Liberalism*, p. 243fn.) as well as in terms of the constitutionally protected rights and interests of the foetus (see Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford, UK: Oxford University Press), p. 85). The Rawlsian interpretation of the pro-life position invokes public reasons (such as respect for human life), while Dworkin’s interpretation situates the abortion debate very naturally within the jurisdiction of non-cognitive political reasonableness, since the subject of governmental protections can only be examined from a suitably public perspective. Raz’s formulation, however, tries to illustrate what sorts of *non-public* reasons are disqualified from public justification in accordance with pure public reason. This highlights the degree to which pure public reason is non-cognitivist.

respect for human life,⁶⁵ but the moral claim of the murderous nature of abortion would not be a suitable concern for public reason.

In a critique of this view of public justification, Raz writes that 'reasonableness, or its absence, is measured by the content of the views held, not the rationality of holding them.'⁶⁶ It is a critique in the sense that one is left to wonder whether the justificatory requirement has actually been fulfilled. In the case of our citizen with strong moral views against abortion, even if all she had been taught and had experienced in life made her believe that abortion was murderous, she would have to accept abortion as justifiable if it were sufficiently supported by public reasons.⁶⁷ This in short, is what is meant by political reasonableness being non-cognitive.⁶⁸ No citizen needs to believe that a politically reasonable justification is justified from the perspective of his or her own psychology or capacity for rational evaluation. It is not reasonableness from the perspective of any given citizen. Rather, just as economists might conceptualize homo economicus to be a rational, utility-maximizing agent, political liberals understand reasonable citizens as possessing political reasonableness; a kind of reasonableness that is reflected in the pure public reason of their particular polity. This derives from their conception as free and equal agents participating in social cooperation.⁶⁹

However, Rawlsians avoid this problem by offering a cognitive account of public justification itself. In a cognitive account of justification, a particular

⁶⁵ Rawls, *Political Liberalism*, p. 243fn.

⁶⁶ Raz, 'Democracy and Disagreement,' p. 35.

⁶⁷ Ibid. pp. 35-36.

⁶⁸ Freeman, 'Public Reason and Political Justifications,' p. 2059.

⁶⁹ Rawls, *Political Liberalism*, p.18.

proposition is justifiable because an individual has reasons that necessitate her acceptance of the reasons given for justification. More precisely a public justification is cognitive when we hold that given a proposition P: '[P] is publicly justified for A and for B when we have identified beliefs which mandate the acceptance of [P]. (A and B accept [P] because doing so is demanded by their belief(s)).'⁷⁰ If P is in accord with political reasonableness, and the duty of civility demands that citizens be politically reasonable, and all reasonable and rational citizens have private reasons by which they can accept the duty of civility, then P must be publicly justified.

This conveys a cognitive account of political reasonableness from the Rawlsian conception of a liberal citizen. Rawls can also guarantee that pure public reason meets the criteria of a cognitive account of public justification, given the beliefs of *actual* citizens. This is because a political conception of justice must be justified in accordance with three forms of justification, only one of which is public justification in accordance with political reasonableness. In addition, a conception of justice must be 'freestanding' such that anyone who possesses common human reason can find it justifiable. The idea is that citizens of any liberal polity should be able to understand why the political conception of justice *in all other* liberal polities is reasonable, even if such conceptions are different from the conception of justice which they have experienced growing up. For example, although the constitution of the United States grants residual powers to states, while the constitution of Canada grants residual powers to the federal government, the citizens of the United States should be able to recognize the reasonableness of the Canadian constitution from the

⁷⁰ D'Agostino, 'Some Modes of Public Justification,' p. 392.

perspective of common human reason, in a way that they would not be able to recognize the reasonableness of the justificatory criterion of say, the Spanish Inquisition. Rawls calls this sort of justification *pro tanto* justification.⁷¹

In addition to political reasonableness and *pro tanto* justification from the perspective of common human reason, Rawls declares that political conceptions of justice must also undergo *full* justification. This occurs when all reasonable citizens can situate a political conception of justice within their reasonable comprehensive doctrine.⁷² This does not mean that a political conception of justice must be acceptable from every reasonable perspective. Sometimes a citizen may be required to revise her private beliefs in order to accommodate the political conception of justice. If a political conception of justice has undergone full justification, then all citizens really do possess beliefs that cognitively justify any politically reasonable justification. This is because citizens have justified the political conception of justice, and pure public reason is embedded within this political conception.

Therefore, in the case of the citizen who finds the practice of abortion murderous, a Rawlsian would argue that since this citizen (as a liberal citizen) believes in reasonable disagreement, and since she anchors political legitimacy in an ideal of reciprocity and fair social cooperation, and because the political conception of justice is fully justified, this citizen must also be committed to pure public reason as a shared *criterion* of justification.⁷³ When weighing her reasons for accepting a public justification against her private reasons for not accepting it, the citizen might

⁷¹ Rawls, 'Reply to Habermas,' p. 142.

⁷² Ibid. p. 143.

⁷³ Rawls, *Political Liberalism*, p. 226.

privately (and cognitively) believe the content of public justification is unjustified. However she is aware that the criterion used in this evaluation is her private moral perspective. At the same time, she is aware that there is another evaluative criterion which finds abortion justifiable, namely pure public reason. As a reasonable citizen who affirms a public conception of justice, she also believes that when weighing the two criteria against each other, it ought to be public reason which has normative authority in the public sphere and not her private moral doctrine. Moreover, she believes this both as a reasonable citizen and as a private citizen with the two moral powers.

Rawlsians believe that this is what gives public reason its normative authority over non-public reasons when reasonable citizens are making political decisions.

Samuel Freeman explains this authority of public reason as follows:

‘[N]ot all reasonable people or reasonable comprehensive doctrines are always capable of accepting the politically reasonable resolution to constitutional disputes provided by public reason as informed by a political conception of justice. Is this a problem for Rawls? It will be a problem only if, as a result of their inability to accept the political resolution by public reason for one or more constitutional issues (e.g. regarding abortion), they are led to reject public reason itself in all other cases.’⁷⁴

⁷⁴ Freeman, ‘Public Reason and Political Justifications,’ p. 2053.

Finally acting in accordance with pure public reason reflects a contractualist account of moral motivation. Scanlon's well-known contractualist criterion of wrongness claims that 'an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced general agreement.'⁷⁵ According to Rawls, his account of political reasonableness shares the same psychological motivation as Scanlon's contractualist criterion.⁷⁶ This is the motivation that the individuals in question have a desire 'to live with others on terms that they could not reasonably reject insofar as they also are motivated by this ideal.'⁷⁷

The five-step Rawlsian defence of the duty of civility establishes precisely this, although Rawls believes liberals can also build this desire into the psychology of a reasonable citizen.⁷⁸ The five step procedure shows that liberal legitimacy and the duty of civility are generated by citizens' common objective of engaging in a cooperative enterprise with fellow citizens, while treating them as free and equal, reasonable and rational agents. The willingness to justify uses of political power to each other on reasonable terms and the willingness to resolve their political differences in a manner consonant with an ideal of reciprocity also reflects the mutual recognition by citizens of their free and equal status and their united cooperative enterprise of constructing a political society regulated by a public

⁷⁵ T.M. Scanlon, *What We Owe To Each Other* (Cambridge, MA and London, UK: The Belknap Press of Harvard University, 1999), p. 153; T.M. Scanlon, 'Utilitarianism and Contractualism,' in *Utilitarianism and Beyond* eds. Amartya Sen and Bernard Williams (Cambridge, UK: Cambridge University Press, 1982).

⁷⁶ Rawls, *Political Liberalism*, p. 49fn.

⁷⁷ Scanlon, *What We Owe To Each Other*, p. 154.

⁷⁸ Rawls, *Political Liberalism*, p. 49fn.

conception of justice. I will say more about this relationship in Chapter 6 of this dissertation.

0.2: An Overview of the Argument of the Dissertation

In this dissertation, I argue that public reason in its standard Rawlsian form is *too weak* a criterion for justification. It holds positions justifiable that ought not to be publicly justified. It does so by not offering citizens engaged in public reasoning enough ‘defeaters’ in their public deliberations. If someone holds the view P on grounds R_A , a ‘defeater’ is a reason R_B which gives that person a reason not to hold P.⁷⁹ In order for R_B to defeat R_A , it must be the case that the person who holds R_A actually also holds R_B , that R_A and R_B are logically consistent with each other, and that the conjunction of R_A and R_B provide reason not to believe P.⁸⁰

The abortion example utilized by Rawls and Raz can show how such ‘defeaters’ are meant to work in public reasoning. If a person is pro-choice on grounds that in the first trimester the equality of women is clearly a more significant concern than respect for the life of the foetus and the continuity of the political population,⁸¹ then we could call the pro-choice stance P, and R_A would be the greater weight placed on equality for women, than on respect for life and intergenerational political continuity. However, suppose modern science were to discover that foetuses have psychological capacities or biological functions much more akin to infants than we at first realized. Suppose this discovery suggests that foetuses might have interests that we originally would not have ascribed to them, and that it is reasonable

⁷⁹ Gerald Gaus, *The Order of Public Reason* (Cambridge, UK: Cambridge University Press, 2010), p. 245.

⁸⁰ Gaus, *The Order of Public Reason*, pp. 245.

⁸¹ This is the argument Rawls provides in defence of abortion (Rawls, *Political Liberalism*, p. 243fn).

to believe that the government ought to protect these interests. For some people, this new evidence could serve as a reason R_B which would 'defeat' R_A by becoming the more serious consideration in their views regarding abortion.

In this dissertation, I aim to show that there exist many reasons that are consistent with the Rawlsian justificatory framework and that would operate as defeaters in several instances, which cannot do so because their normative authority in the public sphere is not properly recognized. Although compatible with the Rawlsian justificatory framework, they are mistakenly considered non-public. The sorts of reasons that I have in mind are those that derive from the sympathetic imagination of liberal citizens. These reasons include the moral outlook of individual citizens as considered from the perspective of other citizens. I will argue that these reasons can be sufficiently public in the Rawlsian sense described above.

Chapter 1 begins with the observation that citizens of a liberal polity feel responsible for the legitimate actions of their own political institutions in a way that they do not feel responsible for the legitimate actions of other political institutions. I argue that if the legitimacy of a government's action is merely determined by justification in accordance with pure public reason, then this sense of responsibility is unwarranted. However, the wording of the liberal principle of legitimacy makes pure public reason a necessary but insufficient condition for political legitimacy (i.e. an exercise of power is justified '*only if*', but not '*if*', it is in accord with public reason.)⁸² Since pure public reason is not a sufficient condition for legitimacy, there may be reasons independent of pure public reason which warrant beliefs regarding

⁸² Rawls, *Political Liberalism*, pp. 137 and 217.

citizens' responsibility. My strategy for determining whether such responsibility is in fact warranted is to examine different candidates for responsibility and determine if any are consistent with those felt by citizens of a liberal polity. If one conception of responsibility is consistent with liberal legitimacy and follows from the moral foundations of political liberalism (i.e. reciprocity, legitimacy, fairness, etc.), then we can be certain that feelings of such responsibility are warranted. After all, in such a case, reasons for feeling responsibility would derive from the same preconditions as the content of political reasonableness, indicating that responsibility would exist whenever political reasonableness did.

I identify the kind of responsibility felt by liberal citizens as a form of outcome-responsibility. This means that citizens believe themselves to be responsible for the actions of their political institutions on grounds that they have somehow contributed to the state of affairs in which their government has legitimately pursued a particular course of action. There are three conceptions of outcome-responsibility which could be suitable candidates for liberal responsibility: *collective* outcome-responsibility, in which citizens are responsible for the legitimate actions of their government by virtue of being members of a particular collective; *hierarchical* outcome-responsibility in which citizens are responsible for the legitimate actions of their government by virtue of being representatives of the liberal polity or representatives of a subgroup of the polity; and *personal* outcome-responsibility, in which citizens are responsible for the legitimate actions of their government as a consequence of their own agency.

I show that politically reasonable, liberal citizens cannot believe themselves to have collective outcome-responsibility or hierarchical outcome-responsibility. I then argue that there exists an account of personal outcome responsibility which is not only consistent with political liberalism, but logically derives from the ideal of reciprocity and the liberal principle of legitimacy. According to this derivation, it is necessarily the case that *every* reasonable and rational citizen who is a free and equal member of a liberal political society *must* be held personally responsible for the legitimacy of every legitimate use of political power. In well-regulated liberal societies where a government only pursues a course of action if it is legitimate, this derivation would make every reasonable and rational citizen responsible for every legitimate use of political power.

This indicates that not only is it warranted that liberal citizens feel a sense of responsibility for the legitimate actions of their political institutions, but moreover, anyone committed to the values of reciprocity and the liberal principle of legitimacy must therefore accept that citizens have this form of responsibility. Certainly every reasonable citizen should recognize this kind personal responsibility. Since pure public reason derives from these same conceptions of reciprocity and liberal legitimacy, whenever the preconditions for pure public reason hold, the account of liberal responsibility I propose must also hold.

In the final section of Chapter 1, I argue that this leads to what I call the Problem of Conscience. The Problem of Conscience arises when an individual's moral judgment is at odds with what the individual finds politically reasonable and publicly justifiable. Given my argument in Chapter 1, although pure public reason

can justify actions which are contrary to some citizens' nonpublic moral views, such citizens are still asked to take responsibility for the legitimacy of these actions. It is no longer the case that those who find abortion or just wars or high tax rates immoral are simply required to determine their political reasonableness. My argument in Chapter 1 shows that they are also required to take personal responsibility for the political legitimacy of these practices.

There are three variations of the Problem of Conscience: the Tragic Conscience, the Brutish Conscience and the Clear Conscience. The Problem of the Tragic Conscience arises when citizens accept responsibility for the legitimacy of the actions of their political institutions, and in consequence confront a moral dilemma about affirming these same institutions' legitimacy. If citizens believe that political institutions are committing morally abhorrent acts in the form of allowing abortion, fighting just wars, or creating big government, they may feel the need to cope with their guilt by being unreasonable and not accepting that justification in accordance with pure public reason ought to have normative value in the public sphere. By being politically unreasonable, they no longer need to accept responsibility for the legitimate actions of legitimate institutions.

In doing so they will no longer have the contractualist moral motivation Rawls ascribes to them. They will be unwilling to offer fair terms of cooperation, since they know that these terms will lead to the legitimacy of practices that defy their conscience. However, in becoming unreasonable citizens, they will defy another feature of their own conscience, namely their sense of justice. Their consciences are thereby divided. I term this state of conscience 'Tragic' in the sense that a citizen

must make a tragic choice between affirming politically reasonable courses of actions along with the institutions that execute them, and the commitments of their own private morality.

The Problem of the Brutish Conscience arises when citizens' private moralities contradict the legitimate actions of their political institutions, and yet these citizens do not feel the guilt, regret or moral confusion faced by those with the Tragic Conscience. Consider again the citizen who was privately anti-abortion on the grounds that abortion was murder. Suppose she found the practice of abortion politically reasonable, and therefore did not feel any guilt at taking responsibility for the legitimacy of such practices. Other citizens who also believe that abortion is murderous are then left to wonder how this citizen can be willing to take responsibility for its legitimacy. Their alarm is not just based on their own belief that abortion is wrong. They believe that the citizen in question must be a brute because she recognizes a practice as murder, and yet has no qualms about taking responsibility for its legitimacy.

Finally, the Problem of the Clear Conscience arises when a liberal citizen has to make several sacrifices in order to reconcile her private conscience with the acceptance of public responsibility. For example, suppose our pro-life advocate who affirms pure public reason can no longer accept herself as a true Churchgoer. She leaves her church, and in doing so alienates her family, friends and neighbors, and has to pursue a completely new life independently of many things she values and holds dear. She has a clear conscience in the sense that she has been able to reconcile her religious beliefs with the duty of civility. However, given the level of her

sacrifice, her fellow citizens might rightly question whether it is right to burden her so. The clear conscience of this one citizen burdens the consciences of all her fellow citizens.

Chapters 2 – 5 of my dissertation are devoted to determining an appropriate solution to these Problems of Conscience. Liberals have often tried to resolve disparities between citizens' public and private reasoning by appealing to 'higher-order' frameworks of impartiality to achieve reconciliation between reasonable disagreements.⁸³ In Chapter 2, I consider procedural legitimacy as a reasonable and publicly justifiable 'higher-order' framework by which to impose obligations on others in a fair manner. The existence of weighty moral obligations to follow the law could potentially solve the Problem of Conscience, by making it clear that in most cases of discrepancy between private and public reasoning, private morality would require deference to public reason.

This strategy does not always circumvent the Problem of Conscience but at first sight, serves to diminish it considerably. One can see this by considering a simple case: Suppose that individuals who have disagreed on a particular course of action all agree to flip a fair coin in order to determine a course that all could accept as fair. This coin flip now serves as a procedure of fair decision-making. Given a particular outcome of the coin flip, we could say that by virtue of having agreed to the coin flip, all concerned are causally responsible for the fact that the outcome has normative authority. There is a reason why every member of the collective ought to follow the procedure's dictates. However, in assigning responsibility for the

⁸³ Thomas Nagel, 'Moral Conflict & Political Legitimacy,' *Philosophy & Public Affairs*, 16 (1987): 215-240, at pp. 216-217.

normative authority of the outcome, we would say that each individual was personally responsible for the normative authority of the collective decision-making procedure, not the normative authority of the collective decision itself. The normative authority of the collective decision stems from the 'pure procedural legitimacy' of the legitimate procedures. This means that collective decisions are authorized only because they are the result of legitimate procedures.

This diminishes the Problem of Conscience in the sense that those with tragic or brutish consciences are no longer taking responsibility for the legitimacy of abortions or just wars or large governments. They are simply taking responsibility for the constitutional essentials and democratic procedures which generated these outcomes, and recognizing a moral duty to abide by them. As for the Problem of the Clear Conscience, although reasonable pluralism requires citizens to impose burdens on their fellow citizens, and makes each citizen responsible for any problems of conscience which arise, citizens might take some comfort in knowing that they at least treated their fellow citizens in a manner that was fair from the perspective of every reasonable citizen, including the citizen suffering from a burden of conscience. This sense of fairness arises from the fact that the procedures by which citizens choose to resolve conflicting claims are 'legitimate procedures' that they have reason to believe could be reasonably justified to all citizens subject to them.

In Chapter 2, I argue that invoking pure procedural legitimacy raises several problems and does not sufficiently solve the Problem of Conscience. I show that a justificatory framework of public decision-making cannot simultaneously respect all of the following: (i) individuals' burdens of judgment; (ii) the moral duty to obey

legitimate procedural outcomes; and (iii) the rights associated with questioning legitimate authority (e.g. civil disobedience or conscientious refusal). Accepting all three elements into a framework of legitimacy makes it ambiguous when there is a moral requirement to follow the law and when this requirement can be permissibly undermined by competing claims. I argue that liberals must give up a strong commitment to (ii), the duty to obey legitimate procedural outcomes.

Therefore, Rawlsians must resolve the Problem of Conscience without appealing to pure procedural legitimacy. A second way to solve the Problem of Conscience is to add conditions to pure public reason that do not legitimate so many practices that are contrary to conscience. The problem with pure public reason, as I see it, is that it is not sufficiently demanding for a criterion of justification. Pure public reason is weak. Further conditions must be added to a criterion of justification in order to make it stronger. By placing further conditions on pure public reason, we ensure that some of the views standardly considered politically reasonable are not publicly reasonable in a framework of fair cooperation. We strengthen pure public reason by making it more demanding. This, in turn, enables us to go much farther towards solving the Problem of Conscience.

Consider once more the issue of abortion. The traditional formulation of the problem of abortion is that it is publicly justifiable and politically reasonable, despite the fact that the practice conflicts with individuals' consciences. I will argue that there exists a normative theory of justification that is consistent with reciprocity, fairness and publicity, which also takes the aforementioned burdens on individuals' consciences into account. Reasonable and rational citizens with the two moral

powers can affirm this second criterion of justifiability as easily and conscientiously as they can affirm pure public reason. This alternative criterion of justification meets all of the moral demands of pure public reason. However, it has the additional benefit that it does not legitimate all practices without taking due consideration for individual conscience. This means it has all the virtues of pure public reason, plus resolves the Problem of Conscience.

The alternative to pure public reason which I offer is ‘sympathetic public reason.’ I develop the idea of a sympathetic liberalism in Chapter 3. After giving a brief overview of Adam Smith’s theory of sympathy, I draw three parallels between Smith’s account of sympathy and Rawls’ account of fairness. The purpose of drawing these parallels is to show Rawlsians that their basic moral and political commitments will be respected if they adopt sympathetic public reason as their criterion of justifiability. As sympathetic public reason is a restriction of pure public reason, all of the moral foundations of pure public reason must be respected in the sympathetic account.

The first of these parallels involves Smith and Rawls’ conceptions of justice. I argue that Rawlsian justice as fairness shares an important feature with Smith’s moral theory, namely that both are meant to supply rules that regulate fair social cooperation. The second and third parallels involve Smith’s impartial spectator, a heuristic by which Smith explains the impartiality of moral judgment in human psychology, as well as in the nature of human conscience.⁸⁴ I first show that the normative status of Smith’s impartial spectator meets the demands of justice based in

⁸⁴ Adam Smith, *The Theory of Moral Sentiments*, III.i.4.

reciprocity. Then I argue that the standpoint of public reason (whether pure or impure) can be interpreted as a kind of spectator theory.

In the Rawlsian paradigm, political reasonableness and public justification operate at two levels. Firstly, during public deliberation on particular collective decisions (e.g. the decision to make abortions legally permissible or to wage a just war) reasonable citizens appeal to others' political reasonableness when trying to justify their political positions to each other. This is what enables citizens to fulfil their duty of civility in accordance with reciprocity.⁸⁵ At another level, political reasonableness and public justification are meant to affirm the conception of justice itself, along with its derivative democratic values and constitutional procedures.⁸⁶ In this regard, Rawls separates public justification from *pro tanto* justification (from the perspective of common human reason) and full justification (from the perspective of individuals' comprehensive moral doctrines). Public justification is strictly from the political perspective.⁸⁷

I take the sympathetic public reason I propose to be one form of empathetic judgment-formation. In Chapter 4 I follow Martha Nussbaum and Robert Goodin in arguing that individuals' capacity for empathy can serve as the basis of reasonable judgments. However, I argue that if a Citizen A comes to an empathetic judgment whose subject is a Citizen B, then in order for such a judgment to be publicly justifiable, it must be the case that a third citizen, Citizen C, is required on politically reasonable grounds, to consider the situation of B, *merely because* of A's empathy for

⁸⁵ Rawls, 'The Idea of Public Reason Revisited,' p. 769.

⁸⁶ Rawls, 'Reply to Habermas,' pp. 143 – 144.

⁸⁷ *Ibid.* pp. 142 – 144.

B. I then show that this condition of public justifiability is met when an empathetic judgment is shown to respond to the demands of liberal ideals of publicity and reciprocity.

In Chapters 4 and 5, I argue that sympathetic public reason also enables justification at these two distinct levels. In Chapter 4, I consider the publicity of sympathetic justification during political deliberation. In particular, I consider two ways in which sympathetic judgments might fail to satisfy the criterion of public justification which I defend in Chapter 3. I call these two types of failures, failures of judgment and failures of publicity. Failures of judgment occur when Citizen C believes that the sympathetic judgment formed by Citizen A is unreasonable or inappropriate. Failures of publicity occur when Citizen A forms a reasonable and appropriate sympathetic judgment, but cannot actually make it public because the judgment is based on a subjective emotional experience.

I address these issues in Chapter 4 and conclude by showing what sorts of considerations must be taken into account in justifications that are in accord with sympathetic public reason. I argue that the imaginative capacity built into sympathetic public reason enables much greater weight to be placed on the reasons generated by individuals' personal narratives. In particular, the deliberative struggles that lead to the formation of stable moral comprehensive doctrines become public with the introduction of sympathy into public reasoning. In effect, this expands the pool of reasons which may be said to be shared by reasonable citizens.

Finally, in Chapter 5, I consider the moral obligations that would inform a conception of justice, were it to be justified in accordance with sympathetic public reason as opposed to pure public reason. I argue that two obligations would be generated by what I call a 'sympathetic liberalism.' The first obligation I defend ensures that an account of political reasonableness is consistent with those aspects of an individual's personal narrative that are identifiable as experiences common to and appropriate for free and equal reasonable citizens. The second obligation requires citizens to show each other a form of respect consonant with the self-worth each citizen would need to bring to the cooperative enterprise, if the citizen were to be viewed as an equal partner.

After defending these obligations, I show how sympathetic public reason within the framework of the sympathetic liberalism I propound resolves the Problem of Conscience. I show that while sympathetic liberalism requires the collective to give individuals liberty in matters of personal morality, it also requires individual choices regarding issues like abortion to be the subject of intense public deliberation. The purpose of such deliberation is not to badger individuals towards making particular choices, but to make certain that individuals understand and respect the sorts of moral concerns that reasonable fellow citizens have about the choices that they make.

Furthermore, sympathetic liberalism aspires to justify collective decisions to individuals *qua individuals* and not merely *qua citizens*; but it also spells out the sorts of obligations a collective might have towards an individual who cannot accept the justification offered. For example, a Pacifist may not receive justification for just

wars, but sympathy-based respect for the Pacifist requires the collective to accommodate pacifism in other aspects of legitimate decision-making. There is more room for negotiation within justification in accordance with sympathetic public reason, but the negotiation is undertaken on grounds of respect for citizens, an understanding of their private moral views, concern that these views are expressed in collective decisions to the greatest degree possible, and an attitude of sympathy towards the life narratives that generated such views. Overall, I argue that sympathetic public reason moves closer to a respectful convergence of beliefs that citizens can accept as individuals, and not just as citizens.

Chapter 1: Legitimacy and Responsibility⁸⁸

Let us begin to look at the question of citizens' responsibility by considering a case in which reasonable citizens of a liberal polity respond with feelings of pride, guilt or shame at the legitimate conduct of their political institutions. The case I would like to consider is that of civilian attitudes towards legitimate humanitarian intervention in just wars. The case I will be considering is an idealized case, since in any actual military enterprise there may always be some reasonable disagreement about the justness of participation. However, the case is meant to reflect attitudes and beliefs that we might reasonably expect reasonable citizens of a liberal polity to possess towards wars they all agree are just. I will describe the case in some detail, as I intend to refer to this particular case in later chapters of the thesis. I will call the case, 'The Humanitarian and the Pacifist.'

Imagine a liberal polity with at least two reasonable citizens. The polity decides to engage in a military effort that is widely regarded as a humanitarian intervention. Prior to making the decision to go to war, there is public deliberation in which public reasons are offered by both reasonable advocates and reasonable opponents of the war. The decision to go to war is made through all the legitimate institutional channels, as described by the polity's constitution. Furthermore, every assurance is given to citizens that the war can and will be fought with appropriate regard for the rules of the Geneva Convention and other military codes which pure

⁸⁸ An earlier version of this chapter was presented at the LSE Choice Group Seminar in January 2011. I would like to thank members of the LSE Choice Group for their comments; in particular I would like to thank Katie Steele for her helpful discussion. I would also like to thank Chandran Kukathas and Alex Voorhoeve for their detailed comments on this chapter.

public reason maintains are acceptable standards for intervention. Finally, all reasonable citizens agree that the war is a just war.

From the perspective of pure public reason, the war is politically reasonable and therefore the decision to fight the war is legitimate. Reasonable citizens can still disagree on whether or not the polity ought to go to war since some reasonable comprehensive doctrines may judge all wars to be unethical (e.g. Quakerism or Pacifism). All reasonable citizens must agree, however, that under the circumstances going to war is *politically reasonable*. This means that such an action would be justifiable from the perspective of citizens who accept the fact of reasonable pluralism and the need to offer fair terms of cooperation to their fellow citizens.

Suppose that one of the reasonable citizens is a Humanitarian. This citizen believes that it is not only politically reasonable to fight the war, but also morally required, since without engaging in the war, innocent people will suffer dehumanizing treatment. One of the Humanitarian's fellow citizens is a Pacifist. From the Pacifist's non-public moral perspective, fighting any war is morally impermissible. Grounding the Pacifist's view is the belief that intentionally performing actions which can take away a human life is morally impermissible. When it is pointed out to the Pacifist that people will necessarily die if there is no humanitarian intervention, the Pacifist replies that causing human casualties is much worse than allowing casualties to occur.⁸⁹ However, even the Pacifist agrees that it is politically reasonable to fight such a war.

⁸⁹Here the Pacifist may be said to be applying the metaethical 'Doctrine of Doing and Allowing' in which a moral distinction is made between actions which cause harm and acts of omission which do

Given the above scenario, let us make one further assumption for the purpose of analysing civic responsibility. Let us imagine that while the Humanitarian takes pride in the actions of the polity (call it Polity A), the Pacifist feels guilty at the prospect of her country inflicting casualties on other people. However, when the Humanitarian and the Pacifist each learn that citizens of another polity, Polity B, have reached the same collective decision on similar grounds, they do not feel similar levels of pride or guilt.

What is noteworthy is that in both Polity A and Polity B, the reasoning which justified the legitimacy of humanitarian intervention was the result of pure public reasons embedded in a political conception of justice. Such conceptions of justice are freestanding,⁹⁰ which means they are accessible from the perspective of common human reason.⁹¹ Therefore, the Humanitarian and the Pacifist can recognize the reasonableness of intervention from the perspective of both Polity A and Polity B. If they are acquainted with the political culture of Polity B, they can also assess the reasoning from the perspective of Polity B's public democratic culture. Once they do this, they realize that the reasoning which justified the legitimacy of war in both Polity A and Polity B is not the actual reasoning of either the Humanitarian or the

not interfere with harms that are already in the process of being generated. (See Warren Quinn, 'Actions, Intentions and Consequences: The Doctrine of Doing and Allowing,' *The Philosophical Review*, 98 (1989): 287 – 312).

⁹⁰John Rawls, 'Reply to Habermas,' *The Journal of Philosophy*, 92 (1995): 132- 180 at pp. 142 – 143.

⁹¹In order to understand why every liberal can recognize the reasonableness of a foreign freestanding conception of justice, consider the constitutions of Anglo-American countries like Great Britain, Canada and the United States. All of these liberal democracies have somewhat different pure public reasons. For example, the Tenth Amendment of the U.S. Constitution grants residual powers to states, while the Canadian constitution reserves such powers for the federal government. However, according to the Rawlsian paradigm, American and Canadian citizens should be able to find each other's constitutions reasonable in a way in which they would not find the justificatory criterion of the Spanish Inquisition reasonable. Both constitutions are reasonable from the perspective of common human reason, in addition to being politically reasonable only from the perspective of their own democratic cultures (Rawls, 'Reply to Habermas,' pp. 142 – 143).

Pacifist. The Humanitarian believes that both polities ought to go to war because military intervention is morally required. The Pacifist accepts that the polities ought to go to war because fairness and the duty of civility demand intervention. However, she believes that all war is morally wrong.

If a reasonable liberal citizen can have an emotional response to the legitimacy of a public decision in her own country and not the legitimacy of the same decision in a foreign country, then we are left with a puzzle. When the Humanitarian and the Pacifist were offered public reasons justifying intervention in Policy A, the reasons they were offered were reasons which stemmed from a political conception of justice that they could reasonably be expected to endorse.⁹² While they recognized the normative force of the public reasons to guide decisions in the public sphere, they each had non-public, moral reasons which they considered far weightier than the public reasons offered. We would therefore assume that the Humanitarian and the Pacifist would have similar attitudes towards the war effort, regardless of whether it was Polity A or Polity B that chose to go to war. Why then should they have an emotional response in one case and not the other? Could such a discrepancy between emotional responses be warranted by the beliefs that citizens feel responsible for the legitimate decisions of their own polity, in a way which they would not feel responsible for the decisions of foreign polities?

No doubt there could be myriad explanations as to why such emotions might exist. A citizen may feel guilty or proud because she has influenced the process which led to intervention. She may believe that her association with those who made

⁹² John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 137.

the decision makes her culpable or liable by association. A third explanation for such feelings is what Joel Feinberg would call a kind of ‘vicarious liability.’ He claims that if we are close enough to a person who is the object of shame or contempt, we feel ‘for him’ even if he is unaware of our attitudes.⁹³ Feinberg claims, for example, that the foolish actions of a stranger might generate contempt, even though those same actions performed by a friend would affect us with a level of vicarious shame.⁹⁴ In this view, it is possible to have such feelings towards one’s compatriots.⁹⁵ This would explain the asymmetry in the Humanitarian and Pacifist’s responses by the fact that they simply do not have the requisite association with the citizens of Polity B to respond emotionally to their decision.

My concern, however, is that emotions like pride and guilt can be interpreted as forms of self-appraisal.⁹⁶ Such appraisal could either be caused by the direct involvement with a particular act, or belief that one is associated with an action in a particular way. The question before us is not whether in the case of the Humanitarian or the Pacifist, such feelings are *necessarily* ‘emotions by association,’ but rather whether they could reasonably be reflections of feelings of responsibility felt by liberal citizens. On what grounds would it make sense to feel responsible or

⁹³ Joel Feinberg, ‘Collective Responsibility,’ *The Journal of Philosophy* 65 (1968):674 – 688 at pp. 677 – 678.

⁹⁴ Feinberg, ‘Collective Responsibility,’ p. 677.

⁹⁵ Feinberg, ‘Collective Responsibility,’ p. 679.

⁹⁶ To give one example of such a theory of emotions, consider Martha Nussbaum’s cognitive-evaluative theory. In this theory, emotions are cognitive in the standard sense that they consist of cognitions (i.e. beliefs, unconscious awareness, etc.), and that the cognitions have intentionality (i.e. are directed towards an object.) What separates Nussbaum’s cognitive-evaluative theory from other cognitive theories of emotion is that the cognition is an evaluative judgment directed at a particular object. Therefore, feelings of guilt or shame may be judgments of value or moral standing, directed at oneself. (See Martha Nussbaum *Upheavals of Thought* 2001 p. 23; and for a general description of cognitive theories of emotion, see Robert Solomon ‘Philosophy of Emotion’ in Michael Lewis, Jeanette Haviland-Jones and Lisa Feldman Barret (eds.) *Handbook of Emotions* (New York, NY: The Guildford Press, 2008) p. 12).

partially responsible for the legitimate decisions made by one's own polity, in a way one would not feel responsible for those of another polity?

If we can identify any form of responsibility that citizens can consistently see themselves as having while maintaining that pure public reason is the source of legitimacy, and if this account of responsibility explains the discrepancy in emotional response and attitude between the legitimate actions of one's own polity and that of another, then we can answer the question above in the affirmative. My strategy for determining whether there exists any such account of responsibility will proceed in two steps. First I will try to eliminate broad classes of responsibility that are clearly incompatible with the emotional responses of liberal citizens. Then I will argue that of the remaining kind of responsibility, there is one which would be compatible with pure public reason, and which explains the discrepancy in attitude between the actions of one's own government and that of foreign governments.

In the third section of the chapter, I will also show that the account of responsibility that I have in mind derives from the relations of reciprocity amongst liberal citizens. This means that not only is such an account consistent with pure public reason, but that whenever pure public reason is the criterion of justification used for purposes of determining legitimate public policy, such responsibility exists. The account of responsibility that I have in mind is a form of personal outcome responsibility. In essence, my argument shows that every reasonable citizen of a liberal polity can take personal responsibility for the legitimacy of a particular use of power. This is what warrants feelings of pride and guilt, not just by association, but as a direct consequence on citizens' actions.

1.1: Taxonomies of Responsibility

Suppose the actions of one or more agents brought about a state of affairs *S*. In determining who is responsible for this state of affairs, we may have several moral concerns in mind. If *S* caused harm to an individual *A*, we might want to assign responsibility to someone in order to determine who should compensate *A*. If no one has been harmed, we might still want to assign moral or legal responsibility to someone if we believe that *S* was brought about by breaching a law or moral principle. Such responsibility would be assigned to stipulate that someone has reason to feel regret at the consequences of *S*. While the first account of responsibility is called 'remedial responsibility', and responds to the question of who ought to remedy a bad state of affairs,⁹⁷ the latter form of responsibility correlate more closely with the concept of 'outcome responsibility' which responds to the question of who is to blame for the fact that a certain outcome *S* has arisen.⁹⁸

Once we have determined that we are concerned with the problem of remedial or outcome responsibility, there remains the further question of whom to attribute such responsibility. If *S* has been brought about by the joint actions of individuals $X_1, X_2 \dots X_n$ we might want to assign responsibility to the entire collective of *N* individuals, without inculpating any individual member of the collective in particular. Alternatively, we might assign responsibility to one representative member of the collective, say the head of a bureau or institute. In the political sphere, the first type of ascription is called 'collective responsibility' while the second is

⁹⁷ David Miller, *National Responsibility and Global Justice*, (Oxford, UK: Oxford University Press, 2007) p.84.

⁹⁸ *Ibid.* pp. 83-84.

called 'hierarchical responsibility.'⁹⁹ It may also be the case that those to whom we assign outcome responsibility are not those to whom we assign remedial responsibility. For example, if the N individuals whose actions jointly created state S are all members of a single political bureau, we might assign hierarchical outcome responsibility to the head of the bureau, but remedial collective responsibility by insisting that the bureau pays for the harm caused. This means that the head takes the blame for what has happened, but the entire bureau compensates for it.

Who ought to be assigned responsibility when many individual agents were jointly involved in bringing about an outcome? This problem has relevance for liberal legitimacy, firstly because the liberal principle of legitimacy requires all reasonable citizens to find political institutions and procedures justifiable in order for them to have legitimacy, and secondly because the way in which particular legitimate outcomes arise is the consequence of several different reasonable and rational agents deliberating, lobbying and voting on a host of issues. Neither collective nor hierarchical responsibility necessarily tells us whose actions contributed to the ensuing outcome, or whether those actions were done with proper intent.

We can see this when we consider a state of affairs S which was brought about by the joint actions of only two members of a large bureau. In assigning either collective or hierarchical outcome responsibility, both of these individuals could potentially avoid responsibility. If collective outcome responsibility is ascribed then

⁹⁹ Dennis Thompson, *Restoring Responsibility: Ethics in Government, Business and Healthcare*, (Cambridge, UK: The Cambridge University Press, 2005) p. 11.

the bureau at large is collectively responsible for bringing about the given outcome. Any particular member avoids responsibility. By contrast, if hierarchical outcome responsibility is ascribed, then the two members who brought about the state of affairs also avoid blame unless one of them is actually the head of the bureau or the representative chosen to take blame. In ascribing responsibility to those who actually brought about the event, what we seek is an account of *personal* responsibility.

We are left to decide whether hierarchical responsibility, collective responsibility or personal responsibility, are conceptions of outcome responsibility that are warranted in the public sphere. It is important to note that in theory it is possible to assign all three forms of responsibility simultaneously, and that they may be assigned to the same group or to different subsets of the population. However, hierarchical responsibility seems unsuitable for the purposes of ascribing the legitimacy of collective decisions to particular citizens. We are presupposing that all citizens are free and equal, as a consequence of which there is no formal political hierarchy. We might choose to assign hierarchical responsibility to representatives of citizens or other elected officials, but since they represent the voters who voted for them, any responsibility attributed to them could also be attributed to their constituents or their constituencies, as long as they are truly representing their constituents' views and not utilizing their position for their own private objectives.

Rawls seems to advocate for the collective account of responsibility. Not only does he characterize the institutions of justice as requiring a 'collective notion of

responsibility,¹⁰⁰ he also writes that the type of reasoning that guides the legitimate exercises of political power is ‘the reason of equal citizens as a collective body.’¹⁰¹ However, in *Political Ethics & Public Office*, Dennis Thompson cautions against the inquisition-like nature of ascribing responsibility to anyone remotely affiliated with a collective that is responsible for causing a blameworthy state of affairs.¹⁰² One way to characterize Thompson’s worry is to say that when a collective brings about an outcome through the agency of individual members, it should not be the case that every member of the collective is held responsible merely as a consequence of their membership. Individuals ought to be held responsible insofar as they contributed to the outcome brought about by a particular collective. Such contributions might include acts of omission, informal influence and so forth, but the contribution itself should form the basis of the responsibility.

Consider, for example, a bureau which employs five government officials, who share ten advisers and two interns. Suppose one of the officials is handed jurisdiction over a project to which five advisers contribute formal statements. One of the other officials has an informal chat with a sixth adviser and sends a note to the official with jurisdiction, encouraging a particular course of action. Thompson’s concern is firstly that the official with jurisdiction should not be handed full responsibility for the ensuing decision, simply by virtue of her formal capacity. Secondly, Thompson would not want all seventeen employees of the bureau to be given responsibility simply because they are members of the bureau. There is

¹⁰⁰ John Rawls, *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999) pp. 241, 261, 369.

¹⁰¹ *Ibid.* pp. 214, 236.

¹⁰² Dennis Thompson, *Political Ethics & Public Office*, (Cambridge, MA: Harvard University Press, 1987) p.40.

ambiguity in Thompson's framework about the degree to which non-advisory staff ought to be given personal responsibility for the outcome. The intern who delivered the letter from one official to the other may have contributed to the outcome, yet, practical judgment tells us that placing a high degree of responsibility on the intern would be superficial for such cursory involvement. In order to gain a better sense of who is personally responsible for which features of an outcome, I will try to develop an account of the sufficiency conditions for personal responsibility.

I will follow Thompson in viewing personal responsibility as a kind of outcome responsibility that results from a conjunction of *causal* responsibility and *volitional* responsibility.¹⁰³ That is, a particular agent X_i is personally responsible for a state of affairs S_1 when X_i performs an action which causes a state of affairs S_1 to come about, and does so free of compulsion and without culpable ignorance.¹⁰⁴ Thompson offers this account of personal responsibility as a solution to what he calls the Many Hands Problem.¹⁰⁵

In the Many Hands formulation, several agents' actions taken jointly cause a state of affairs S to come into being. According to Thompson, 'Because many different officials contribute in many ways to decisions and policies of government, it is difficult even in principle to identify who is morally responsible for political outcomes.'¹⁰⁶ Some of the agents involved may have performed actions which, when taken alone, are insufficient to bring about state of affairs S_1 ; others may have

¹⁰³ Dennis Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare*, p. 18.

¹⁰⁴ *Ibid.* p.18.

¹⁰⁵ *Ibid.* p.11; Thompson, *Political Ethics & Public Office*, p. 40.

¹⁰⁶ Thompson, *Restoring Responsibility*, p. 11.

performed actions which were not necessary for S_1 to come about; and still others may have performed actions which were neither necessary nor sufficient for S_1 to come about. However, in telling a causal story about how S_1 came about, each agent's actions and volitions played some role. How is personal responsibility to be determined?

Thompson provides a theory of personal responsibility by applying causal and volitional concepts of responsibility to the public sphere. Thompson's theory says little about his causal criterion of responsibility, save that its aim is merely to connect the wilful agency of an agent to the end state for which the agent is responsible.¹⁰⁷ Thompson writes that in his view of causality, an action causes a state of affairs '*if the action would have been necessary to produce the outcome, had no other action sufficient to produce the outcome been present.*'¹⁰⁸ This formulation of causality is a akin to a more widely held notion of causality in which a cause is defined as a necessary element of a sufficient set of conditions (or a NESS-condition) required to bring about the resulting state of affairs.¹⁰⁹ However, in Thompson's view the cause need not be a necessary condition; it is only necessary if and when there are not other sufficient conditions to bring about the state of affairs.¹¹⁰

We can see the intuition behind this in terms of assigning responsibility for a collective decision made by a majority vote. Suppose our state of affairs S_1 is the

¹⁰⁷ Ibid. 47

¹⁰⁸ Thompson *Political Ethics and Public Office* p. 48

¹⁰⁹ HLA Hart and AM Honoré *Causation in the Law* (Oxford, UK: Clarendon Press, 1959) pp. 103 – 122.

¹¹⁰ One further criterion which is implied but needs to be added is that the event whose causes are being assessed actually occurred. We would not want to say that a person who aimed to commit a crime, but was somehow forestalled, is responsible for the uncommitted crime simply because there would not have been any other sufficient set of conditions which caused the crime to occur.

consequence of a policy affirmed by such a majority vote. An action would be sufficient for securing such a majority, as long as voters were evenly split between the options at hand, and the action in question served as the 'deciding vote.' However, in the absence of any other voter providing the 'deciding vote' it would be *necessary* for any given proponent of the policy to vote in its favour in order to bring about S_1 . Therefore, every voter who voted in favour of the policy would in fact be held personally responsible for S_1 under Thompson's condition.

Thompson is quick to point out that this definition of cause is a sufficient condition for ascribing responsibility, as opposed to a necessary one. He writes that actions which meet the criteria above 'qualify' as causal responsibility, but that other factors may also require consideration.¹¹¹ Thompson also acknowledges that his notion of causality is mainly formulated to 'connect' the action of the agent to the outcome under some causal description.¹¹² Once such a connection is made, he relies on causal excuses (such as those of Joel Feinberg or HLA Hart and Tony Honoré¹¹³) to determine whether the cause merits any kind of responsibility.

While the purpose of ascertaining causal responsibility is to establish a connection between a person's action and the harmful outcome of the action, it is Thompson's criterion of volitional responsibility which determines the degree of responsibility.¹¹⁴ Thompson points out that traditionally, there are two broad cases in which an agent, having deliberated on an action, is still not considered responsible for the outcomes it generates. Firstly, if the person acted in ignorance, and did not

¹¹¹ Thompson *Political Ethics and Public Office* p. 48.

¹¹² Thompson *Restoring Responsibility* p. 18.

¹¹³ *Ibid.* p.12n.

¹¹⁴ *Ibid.* p. 48.

have a responsibility to know the relevant information of which she was ignorant¹¹⁵, then despite choosing to act in the way that she did, she ought not to be held responsible. Secondly, if the person was compelled to act by an external force (say he acted under threat or duress) then he is also not volitionally responsible for the action.¹¹⁶

For the Many Hands Problem, two difficulties arise out of this understanding of volitional responsibility. The first difficulty reflects the old Aristotelian problem of deliberation serving as grounds for responsibility, regardless of the practical realities faced by the decision-maker in question. In the *Nicomachean Ethics*, Aristotle gives an example of a ship's captain, who decides to throw the ship's cargo overboard during a thunder storm, in order to save the ship from sinking and the passenger's from drowning.¹¹⁷ According to a strict reading of volitional responsibility, the captain may be said to be responsible because he could have done otherwise. He willed to bring about the state of affairs in which the cargo had been thrown overboard.

While this may seem like an extreme example, Thompson argues that it is relevant to public life insofar as institutionalized norms and practices often restrict the choices available to public officials when making difficult decisions. He offers the example of Abe Beame, the Mayor of New York City during the fiscal crisis of 1975.¹¹⁸ Beame was accused of contributing to the city's financial woes by his refusal

¹¹⁵ In political matters Thompson writes that it is particularly important that this clause is identified as precluding exculpation, as officials often instruct their staff not to provide information on matters that could ultimately dirty their hands (*Political Ethics and Public Office*, p. 60).

¹¹⁶ Thompson, *Restoring Responsibility*, p. 19.

¹¹⁷ Aristotle, *Nicomachean Ethics*, ed. Terence Irwin (Indianapolis, Indiana: Hackett Publishing, 1999), p.30.

¹¹⁸ Thompson, *Restoring Responsibility*, p. 27.

to publicize the faulty accounting practices which eventually led to fiscal disaster. The practices had been in place at the time Beame took office, and Beame argued that had he publicized them, or even attempted to reform them, it would have risked bankruptcy.¹¹⁹ However, prior to becoming Mayor, Beame had spent several years working on New York City's finances – first as a Budget Director and then as City Comptroller.¹²⁰ He had contributed to shaping the financial practices, although he had not imposed the practices singlehandedly.

Thompson claims that although Beame volitionally brought about a state of affairs which eventually led to financial disaster, we might limit the degree of responsibility that we place on him for the ultimate decision not to publicize the faulty accounting, in light of the fact that the practices were already in place when he took office. However, we must still place responsibility on Mayor Beame for shaping the practices to be what they are. He must be held accountable for contributing to the institutionalization of such norms, but not for acting in response to them.¹²¹

The second concern with volitional responsibility is that in evaluating volitions, we include those whose participation really has been too minuscule or tangential to assign proper responsibility. Imagine for example that two public officials are in the process of making a deal, which requires a young intern at one of their offices to deliver a parcel to the office of the other. It would seem rather harsh to assign this young intern the same level of personal responsibility for the deal as the two officials simply because her action, freely chosen, made a volitional contribution

¹¹⁹ Thompson, *Restoring Responsibility*, p. 27.

¹²⁰ Ibid.

¹²¹ Ibid.

to bringing about the particular outcome. As far as our common sense intuitions go, we assign the intern less responsibility for the outcome of the deal, not because of the scale or importance of her participation, but because we imagine that her role is to function as the parcel-deliverer, not to reflectively determine whether the parcel ought to be delivered. In this respect, the real agent is the person whose public role offered the capacity to decide *with authority*, whether or not the parcel delivery should take place. It is this authority as the original decision-maker, not authority as jurisdiction, upon which Thompson's sense of personal responsibility lies. This becomes clear when we consider the fact that had the intern chosen *NOT* to deliver the parcel, but instead to dispose of it in another fashion, she would be held responsible for the state of affairs in which the deal did not go through.

How is it that in defying authority, the intern becomes the new authority? One consideration is that she is taking on a capacity not offered by her role as intern. According to Thompson one must take into account the official role played by the agent when making judgments on responsibility.¹²² While as an intern she was operating on someone else's behalf the moment that she chooses to act upon her own judgment and not deliver the parcel, she becomes the agent rather than the pawn of another agent. Yet surely the choice to become an intern, to go to work on the given day, to feel a sense of commitment or even excitement for her job would sufficiently characterize causal and volitional responsibility for the ensuing state of affairs? Nor should we take into account the fact that another intern could have done the same

¹²² Thompson, *Restoring Responsibility*, p. 18.

job and that her role was substitutable. Our condition for causal responsibility is that the action was necessary in the absence of another sufficient act.

A more likely explanation of our intuition lies in the description of the precise objective that constitutes the intern's will. Although the intern is causally and volitionally leading to the making of a deal, her objective is not to make the deal but to do her job well. Therefore, although we recognize causal responsibility, we do not attribute any personal responsibility for the outcome. Thompson declares, however, that making officials responsible for nothing more than the content of their will relieves them of the responsibility of taking adequate precaution that the outcomes of their will are not exploited by others towards harmful ends.¹²³ If this consideration applies to officials, it is not at all clear why it should not apply to interns who work for them.

Upon reflection, it is not the case that we believe that the intern did not contribute to bringing about the state of affairs or that she could not have reflected upon her duty and done otherwise. What is missing from an account of the intern's actions is not agency but authorship. Her action does not reflect an earnest attempt to shape the world in accordance with a vision of what she wishes it to be. While she is freely and voluntarily bringing about a state of affairs, her action is not a creative act. By contrast, those who are drafting legislation or bargaining over them are not just willing a state of affairs into existence. They are attempting to mold a particular state of affairs into existence. Therefore, they are far more responsible for the

¹²³ Thompson, *Restoring Responsibility*, p. 24.

resulting state of affairs than the intern, for in addition to causal and volitional responsibility, they take responsibility of authorship for the ensuing state of affairs.

1.3: Argument for Personal Responsibility

In order to defend the view that every reasonable citizen is personally responsible for a state of affairs in which a particular use of power is legitimate, I will begin with the following four premises:

Premise 1: Reciprocity as the source of fair terms of cooperation:

Rawls begins with the idea that reasonable and rational citizens find themselves situated in societies with other reasonable and rational individuals, who are mutually self-interested but not purely egoistical.¹²⁴ These societies already have practices that are meant to adjudicate between the conflicting claims of self-interested citizens. However, there are times when citizens gather to decide whether or not they wish to reform the rules of the practices, according to which their conflicts are adjudicated. The terms to which all reasonable citizens agree in such situations are 'fair terms,' but only if they agree as individuals who are free, equal and willing to engage in fair social cooperation.¹²⁵ When citizens views conflict, these terms are then used as the reasons which justify which course of action to take.

Premise 2: The Duty of Civility:

¹²⁴ John Rawls, 'Justice as Reciprocity' in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999) p.198.

¹²⁵ Ibid. pp. 198 -199.

As written in the Introduction, the moral duty of civility derives from the liberal principle of legitimacy and the ideal of reciprocity. The ideal of reciprocity refers to the foundational assumption of Rawlsian political liberalism, which is that all reasonable and rational citizens are situated towards each other as free and equal citizens engaged in fair terms of cooperation.¹²⁶ The Duty of Civility requires each citizen to justify her political position to all others by (i) specifying a criterion of justification which she believes can be reasonably endorsed by all citizens; (ii) sincerely believing that the values to which she appeals during public justification are those which all reasonable citizens could find reasonable; and (iii) showing the willingness to accommodate other people's reasonable moral views when they conflict with the one propounded in her own public justification.¹²⁷

Premise 3: The Liberal Principle of Legitimacy:

Rawls states this principle as follows: 'our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'¹²⁸

Premise 4: The conjunction of causal and volitional responsibility is sufficient for the existence of personal responsibility:

¹²⁶ Rawls, *Political Liberalism*, pp. 16-17, 48-54.

¹²⁷ Ibid. pp. 217, 226, 253.

¹²⁸ Ibid. pp. 217.

An individual is *personally* responsible for a state of affairs S_1 , if she is causally responsible and volitionally responsible for bringing about S_1 , where 'causal responsibility' indicates that she performed an action which is a causal predecessor for S_1 , and 'volitional responsibility' indicates that the action was performed freely and not in ignorance.

Premise 5: Thompson's Account of Causal Responsibility

An individual is causally responsible for a state of affairs S_1 , if she performed an action such that had there not been a sufficient set of factors that brought about state of affairs S_1 , would have been sufficient to bring about state of affairs S_1 .

Given these premises, I now proceed to show why the reasonable citizen is personally responsible for the legitimacy of all legitimate uses of power.

Let us begin by considering what follows from the conjunction of Premise 1, Premise 2 and Premise 3. If a set of fair terms of cooperation have been agreed upon by all citizens as stipulated in Premise 1, then they meet the requirements of the Liberal Principle of Legitimacy. Since reasonable citizens *have* actually accepted those terms of cooperation, we can expect them to find those terms reasonable and rational. Therefore, the fair terms of cooperation are suitable candidates for constitutional essentials, and acceptable grounds for justifying courses of action.

For example, if citizens decide that in the event of widespread disagreement on whether or not to engage in a just war, the conflict will be resolved by a majority vote, then the fact that military intervention is the outcome of the majority vote

justifies going to war. All citizens, whether or not they agree with military intervention, can agree that the fair terms of cooperation justify intervention.

Furthermore, since every citizen already knows that all other reasonable citizens agree with the fair terms of cooperation, using these terms to justify their political positions (i) specifies a criterion of justification with which all citizens can agree, (ii) justifies political positions in accordance with reasons that all other reasonable citizens can be expected to endorse, and (iii) shows a willingness to accommodate other people's reasonable moral views, insofar as the fair terms of cooperation would be considered reasonable by individuals who had reasonably endorsed them as means to overcome conflicts of interest. Therefore, justifying one's political position by appeal to fair terms of cooperation meets the demands for the Duty of Civility.

This shows that if F_1 is a fair term of cooperation, then F_1 is suitable grounds for public justification. This means that it is appropriate for politically reasonable citizens to offer F_1 as a reason to support their political position. Unfortunately, it is not the case that if a reason, F_2 , meets the conditions for legitimacy and civility, then it is a fair term of cooperation. This is because legitimacy and civility are only necessary conditions for public justification, not sufficient ones. It may be that there are certain constitutional essentials that everyone *could* reasonably be expected to endorse, but which are not reasonably endorsed because they conflict with other reasonable constitutional essentials. As mentioned previously, it is just as reasonable to grant residual powers to states or provinces within a nation, as it is to grant residual powers to the nation itself. Whether or not granting such powers to a

province is legitimate depends entirely on whether one is in a country such as the United States, which observes the right to grant residual powers to states; or one is in a country like Canada where residual powers are not granted to states.

However, individuals within the United States and Canada can still reflectively determine whether or not granting residual powers to states is a term to which they would agree. If they refuse to agree with such a term, then it would not be a fair term of cooperation. This in turn, reflects back on the Duty of Civility. Is it civil to use justifications based on terms that others *could agree with*, but have refused to do? The answer to this question generally lies in the political and legal context in which such justification is offered: if citizens are engaged in the process of trying to amend the constitution, or motivate an amendment, then it certainly would seem reasonable to offer terms that others could, but have not endorsed. On the other hand, if a federal judge refuses to recognize a law because another law could have existed which trumps the ones actually in existence, we would clearly find the justification uncivil.

In general, changing the terms of cooperation ought to come from reasonable citizens *qua citizen*, and not from reasonable citizens *qua institutional representatives*. Aside from the insidiousness of institutions changing terms of cooperation on grounds that citizens could have agreed with them, but did not, there is a straightforward reason why changes in fair terms of cooperation *must* come from the people. The political conception of justice is said to be regulated by an ideal of

reciprocity.¹²⁹ This means that the procedure of choosing fair terms, as described in Premise 1, is meant to regulate the very conception of justice, and not simply its applications for law and policy. If the authority to regulate a just political order is found within reciprocity, and reciprocity is defined as agreements between free and equal citizens engaged in fair social cooperation, then using institutional power to interpret and apply laws that could have been accepted, but were not, goes against the political conception of justice. On these grounds, it must defy both civility and legitimacy.

I conclude that the conjunction of Premise 1, Premise 2 and Premise 3 requires that F_1 serves as a fair term of cooperation if and only if it meets the requirements of legitimacy and civility, *unless political society is heading for constitutional reform motivated by reasonable and rational citizens*. Call this Proposition 6.

Now consider the conjunction of Premise 1 and Premise 4. If we assume that every citizen is a free and equal partner in social cooperation and that in order to engage in such cooperation they must accept terms to which they will reasonably disagree, then they freely choose to accept those terms. However, these terms serve as causal preconditions for legitimate outcomes of public decision-making, with which citizens reasonably disagree from their non-public perspective. Reasonable citizens accept fair terms of cooperation, *because* they need to be able to reconcile their differences, if political society is to succeed as a cooperative enterprise.¹³⁰ Therefore, they agree to fair terms of cooperation in a way which satisfies Thompson's conditions for volitional responsibility. Therefore, from Premise 1 and

¹²⁹ Rawls, *Political Liberalism*, pp. 16-17.

¹³⁰ Rawls, 'Justice as Reciprocity,' pp.199 – 201.

Premise 3, we see that each reasonable citizen is volitionally responsible for the fair terms of social cooperation. Call this Proposition 7.

Now let us examine the conjunction of Premise 1 and Premise 5. Suppose F refers to the set of fair terms of cooperation. Consider what would have happened if reasonable citizens had not chosen to accept F_1 , which is an element of F . If only one citizen had chosen not to accept F_1 then F would not have been the set of fair terms of cooperation. Therefore, every citizen is personally responsible for the set of fair terms of cooperation. Call this Proposition 8.

From the conjunction of Proposition 6 and Proposition 8, we find that every reasonable citizen is causally responsible for the legitimacy of every legitimate use of power: As we have seen, the liberal principle of legitimacy requires *every* citizen to be able to find the terms reasonable and rational in order for institutions and constitutions to secure legitimacy. Therefore, if only one citizen had not agreed upon the terms then by Thompson's account of causal responsibility, the terms would never have been agreed upon and the powers of the constitution never given any legitimacy. More precisely, Thompson's account of causal responsibility indicates that *every* reasonable citizen is causally responsible for a state of affairs in which it is *not* the case that the constitutional essentials are *not* legitimate. If a term X were proposed, and a citizen's action A_x was the act of rejecting that term as reasonable, then X would not be accepted as a term of cooperation. That in turn would indicate that a particular public policy could not be publicly justified only on ground X if it were to meet the criteria of the duty of civility. From Proposition 6 we find that all legitimate policies are those which do meet the criteria that have been accepted as

fair terms by reasonable citizens. This entails that every reasonable citizen is also causally responsible for a state of affairs in which the grounds for justification are legitimate. Call this Proposition 9.

Furthermore, the conjunction of Proposition 6 with Proposition 7 shows that citizens are also volitionally responsible for the legitimacy of the constitutional essentials which grant political institutions their legitimate powers. Since Rawls' ideal of reciprocity situates all citizens on free and equal terms, none are forced to agree to the terms of cooperation against their will. Rather, it is because equal citizens freely choose to engage in social cooperation, despite foreseeing reasonable disagreement, that they are willing to accommodate reasonable disagreement into their political frameworks. Furthermore, it is because each citizen is willing to accommodate such terms of disagreement that they agree to terms knowing that they will legitimate uses of power, some with which they will reasonably disagree. Therefore, they are volitionally responsible for the legitimacy of all such uses of power, even if they reasonably disagree with it. Call this Proposition 10.

From the conjunction of Proposition 9 and Proposition 10, we find that all reasonable citizens are personally responsible for the legitimacy of all legitimate uses of political power.

Finally, if we assume that a government only uses its powers in a legitimate way then each reasonable citizen is also causally responsible for every use of power. Each legitimate use of power is only legitimate because each citizen has contributed to its legitimacy. Since all free and equal citizens engaged in social cooperation actually *want* the government to use powers in this way, they are also volitionally

responsible for every legitimate use of power. Therefore, regardless of whether a reasonable citizen agrees or disagrees with how a government is using the powers, as long as the government is doing so legitimately, the reasonable citizens are responsible for such uses of power.

One factor to consider, however, is that in reality, citizens are not free and equal agents engaged in social cooperation. They are conceived to be so as liberal citizens, but in fact are typically born into liberal societies. However, they do make the choice to act like reasonable citizens by taking up the perspective of pure public reason. Arguably, if they did not uphold the values of reasonable citizenship when engaging with each other in the political sphere, we might not hold them responsible for the legitimate actions of government (although we arguably would hold them responsible for not fulfilling the duty of civility, or merely for being unreasonable.) What this shows is that the choice to be a reasonable citizen comes at a heavier price than originally believed. It requires a willingness to take upon oneself a degree of personal responsibility which originally which unreasonable or uncooperative citizens would not need to undertake.

Going back to our original example of the Humanitarian and the Pacifist, this would indicate that both are personally responsible for the legitimate uses of power by the government, regardless of whether such legitimate powers are those with which they reasonably agree from their private perspective. They are responsible insofar as we conceive them as free and equal citizens engaged in social cooperation which lends legitimacy to the legitimate uses of power. Even if the Pacifist is wholly against any sort of militaristic involvement or use of force, the fact that she can

recognize it as politically reasonable and is willing to accept this as grounds for the legitimacy of intervention, is sufficient to make her personally responsible for the action.

Rawlsians do grant those whose private moral doctrines are opposed to public reason the chance to engage in a practice of 'witnessing.' Witnessing indicates that although a citizen finds a course of action legitimate, she is unable to accept that the justification offered by pure public reason as justifiable.¹³¹ If a polity chooses not to engage in militaristic action, which goes against a Humanitarian's sense of justice, the Humanitarian may choose not to accept the justification afforded by public reason. However, this does not in any way undermine the legitimacy of the course of action, because the criterion of justification granting normative authority to a legitimate course of action is pure public reason, and when engaged in witnessing, citizens are voluntarily choosing not to adopt the perspective of pure public reason.

It may be thought that by not taking the perspective of pure public reason they are absolved of responsibility. However, this is not what I meant when I said that the choice to be politically reasonable is the deciding factor in responsibility. Those engaged in witnessing still affirm the normative authority of pure public reason in the public sphere. They still engage in political cooperation most of the time, and as a result are still responsible for accepting the terms of cooperation, and the legitimacy of actions which stem from it. It is only on particular issues that they do not accept the justification offered by political reasonableness. They do this as a form of private expression, which in no way affects the legitimacy of the outcome.

¹³¹ Rawls, *The Idea of Public Reason Revisited*, p. 787n.

The digression of witnessing is meant to highlight that ultimately the personal responsibility each citizen bears for the legitimacy of all legitimate uses of power, comes from engaging in fair social cooperation as a free and equal citizen. The willingness to take up the perspective of the public is the way we identify which citizens are engaged in social cooperation. If on a handful of issues citizens cannot, for private reasons, accept political reasonableness as privately justifiable, this does not alter the fact that their general willingness to take the perspective of public reason, their general willingness to be reasonable citizens and engage in cooperation, is what offers pure public reason its justificatory force.

The situation of witnesses is very much like the situation of Mayor Beame, who was not personally responsible for the faulty accounting practices under his administration, but was responsible for the development of the normativity of such practices throughout his career. What witnesses have done is to contribute to pure public reason having normative authority to determine which uses of power are in fact legitimate. They have therefore causally and volitionally contributed to the legitimacy of those very acts to which they are bearing witness.

We can see this by invoking the causal and volitional criteria described above. If every reasonable citizen were to engage in witnessing on every political issue that arose, it would be sufficient to lend pure public reason its normative force as long as one citizen often (though not always) was willing to take up the perspective of pure public reason and affirm its political reasonableness. According to Thompson's causal criterion, this means that any citizen who generally takes up the perspective of pure public reason is causally responsible. The volitional argument looks much like

the original volitional argument, with the caveat that the citizen is generally willing to take up the public perspective (although not always). This means that even a witnessing citizen is personally responsible for the legitimacy of all legitimate uses of political power.

1.4: The Problem of Conscience

The argument of the previous section concluded that any citizen who chooses to take up the perspective of public reason and recognize the legitimacy of a particular course of action from that perspective, may be said to be personally responsible for the legitimacy of that course of action. I now wish to outline a problem which such responsibility generates. I call this the Problem of Conscience, and spend Chapters 2 through 5 of this dissertation attempting to resolve it.

The Problem of Consciences arises when a reasonable citizen recognizes the legitimacy of a particular use of political power, but also finds that particular use of power unjustifiable from the perspective of her private reason. It is possible, for example, to recognize the right to have abortions as politically reasonable, but privately believe that the practice is murderous. A reasonable citizen who holds such beliefs is called upon to bear personal responsibility for the legitimacy of the practice of abortion, despite the fact that the practice is murderous from her moral point of view.

However, calling someone personally responsible for the legitimacy of a practice is quite different from calling someone responsible for the act itself. This

indicates that holding a citizen responsible for the legitimacy of abortion, when she believes abortion to be murder, does not necessarily entail calling her a murderer. A woman may succeed in having an abortion, regardless of whether or not she is given the right to have one by law. Therefore, reasonable citizens cannot be said to bear causal responsibility for all abortions that occur in polities where such a right exists. They may bear volitional responsibility for an increase in the number of abortions, but not for particular abortions, unless they know prior to recognizing a law that a given abortion would only occur in circumstances where the practice is legitimate. Rather, responsibility for legitimacy means that the person is willing to align the force of law against anyone who denies a fellow citizen the right to an abortion.

Additionally, in a liberal political society, the legitimacy of a given law or statute imposes a pro tanto moral obligation upon others to live in accordance with the law. In the standard Rawlsian characterization, the duty to obey the law is not only a political duty but a moral duty deriving from the moral duty of fair play.¹³² If one assumes that political society is a cooperative enterprise amongst free and equal persons, then fairness requires that each reasonable person only offer terms of cooperation to others which he or she believes that others could reasonably accept.¹³³ Legitimate procedures are those which reflect these terms. Hence, fair play requires citizens to abide by political obligations created through legitimate procedures, on grounds that legitimate procedures are rules of collective decision-making to which everyone has subscribed while giving due consideration to their free and equal status

¹³²John Rawls, 'Legal Obligation and the Duty of Fair Play,' 'The Justification of Civil Disobedience' and 'Justice as Reciprocity,' in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999).

¹³³Ibid.

relative to each other. In effect, legitimating a particular political statute implies that a citizen accepts that every citizen is morally required to abide by the law or stipulation in question, as a matter of fair play.

Therefore, if a reasonable citizen believes that abortion is murderous, but recognizes the political reasonableness of abortion, then she also imposes a pro tanto moral obligation on every other citizen to live in accordance with such a practice. Such an obligation is imposed not only from the perspective of pure public reason, but also from a non-public moral perspective. It follows that the reasonable supporter of the pro-life standpoint is not only accepting fair terms of cooperation in choosing to be responsible for the legitimacy of the right to abortion. She is also accepting personal responsibility for aligning the force of law against any other citizen who wishes to interfere with a woman's right to choose, and for imposing a pro tanto moral obligation upon each citizen to obey the law. If she finds either of these responsibilities too burdensome to bear, then her only alternative is to be an unreasonable citizen.

This situation gives rise to three ways in which conscience might become a problem for a liberal citizen. The first version of the Problem of Conscience is the Problem of the Tragic Conscience. Given that the duty of fair play and the duty of civility are moral duties, when a Humanitarian is forced not to engage in intervention, or a pro-life advocate is obliged not to interfere with practices that she considers murderous, they are in fact confronted with a deep-seated moral dilemma. On the other hand, if a citizen were somehow able to break the law and prevent others from having abortions to which they have a legal right, this interference with

the law would strain upon her own conscience, as it means that she would not be fulfilling the duties of civility and fair play. This means that citizens either have to leave their moral duties of civility and fair play unfulfilled, or they have to allow immoral courses of action to occur. The Problem of the Tragic Conscience refers to the fact that in cases where the law does not reflect a citizen's non-public beliefs, the choice to observe the law and the choice to break the law will both be burdensome upon the citizen's private conscience, as both will require some moral duties to go unfulfilled.

The second version of the Problem of Conscience I call the Problem of the Brutish Conscience. This occurs because there is a reasonable expectation on the part of all citizens that if someone believes that grievous harm will be the result of undertaking a particular course of action, then she ought not to behave in such a way that makes her responsible for such events occurring. However, the responsibility assigned to reasonable citizens who have moral commitments means that they are at once identifying abortions as murder, or humanitarian intervention as morally required for the respectful treatment of human life, and yet are willing to accept personal responsibility for legitimating practices that are murderous and dehumanizing. Others who subscribe to their non-public moral views can rightly ask how they can be so abhorrent as to recognize a practice as murderous and dehumanizing, and yet not hesitate to take responsibility for it. The Brutish Conscience is also reprimand from within a person's moral community, for the choice to be politically reasonable when values such as respect for human life are at stake. The reprimand comes from within a moral community in the sense that those

outside of it may not know or may not believe that what they are doing is morally harmful. The brutishness arises because someone claims to know about the serious harms a policy causes, and still feels perfectly at ease taking responsibility for them.

Finally, there is what I call the Problem of the Clear Conscience. This occurs when an individual has to make incredible sacrifices in order to reconcile the problems which arise from the Tragic Conscience. If a citizen who was originally Catholic felt the need to leave her Church in order to accommodate the personal responsibility for the practice of abortion, and in doing so were to alienate herself from a moral community which included her family, lifelong friends and other peers, we might argue that the burdens of conscience were imposed upon her too heavily. Similarly, if a Humanitarian felt despicable at having to stand by and witness the heinous crimes inflicted upon others, and the negative consequences of such feelings had unbearable effects upon her self-respect and sense of personal dignity, her state of affairs might seem incredibly burdensome to her fellow citizens.

In general, burdening people's consciences with blameworthy acts for which they are responsible hardly seems problematic. Why should we trouble ourselves with the burdens of conscience placed upon members of a reasonable citizenry who contribute to legitimate uses of political power which harm the environment, diminish health and educational benefits, or limit economic opportunities? The argument that some of these citizens have attempted every course of action possible to prevent such states of affairs from occurring is clearly incorrect. Simply by calling into question the justifiability of said procedures, the citizens could have undermined the legitimacy of such acts. Calling into question the legitimacy of the

procedures is far simpler than the practices of activism or civil disobedience, initially justified by liberalism. Rather than marching, demonstrating or campaigning against a repugnant state of affairs, all a citizen is called upon to do in such a scenario is conclude that he or she could not reasonably accept procedures of public decision-making that could lead to such outcomes. As citizens' faith in procedures diminish, so do those procedures' legitimacy.¹³⁴

Take for example a legislative or judicial procedure that seems to systematically discriminate against those of a particular race, class or gender. This particular procedural imperfection may not have been obvious when the procedure was at first held to be legitimate, but at some point may seem beyond doubt. Although this imperfection in procedure is a *substantive* evaluation, that is, an evaluation from within a private comprehensive doctrine rather than from the perspective of public political culture, such substantive evaluations are permitted given that political society is a cooperative enterprise towards the security of justice, and the procedures considered above go against justice.¹³⁵

Rawls and other liberals would argue that justice is a shared purpose of human reason, and hence a political system that discriminates arbitrarily against those of a certain class goes against the shared enterprise which united political society from the start. Yet, liberty of conscience embodied in the freedom to 'form, pursue and revise' one's own conception of the good is the foremost of rights chosen behind the veil of ignorance and fundamental to any liberal creed. No liberal would

¹³⁴ John Rawls, 'Reply to Habermas,' p. 428.

¹³⁵ Ibid.

argue that a political society which restrained an individual from expressing their moral choices was a liberal one. Why then are all liberals compelled to accept political procedures that violate moral ideals other than justice?

Chapter 2: A Critique of Procedural Legitimacy¹³⁶

Although citizens may be responsible for the legitimacy of all legitimate uses of political power, we may be able to argue that their responsibility is minimized due to how legitimacy is determined. A common method of achieving legitimacy is through the use of procedures that all reasonable citizens can accept as a reasonable way to engage in collective decision-making. These procedures are those embodied in the institutes of governance (i.e. the legislature, the judiciary, etc.) By using these procedures to aggregate collective outcomes, citizens can distance themselves from assuming a high level of responsibility for any given outcome. To take a simple case, suppose that the decision to engage in humanitarian intervention is determined by a majority vote. Since the democratic procedure is chosen not just for this one case, but for a whole range of policies, citizens can argue that they found the procedure of majority voting reasonably justifiable because of the positive outcomes it tends to generate. Although they may accept causal responsibility for this particular outcome of the procedure, they can limit their volitional responsibility to reasonably endorsing a procedure that generally produces outcomes that they can reasonably endorse.

In this chapter I will argue that procedural legitimacy is not a justifiable way of determining the legitimacy of political positions in the liberal public sphere. In section 2.1, I will give an account of legitimacy as justification and then explain what

¹³⁶ Earlier versions of this chapter were presented at the LSE Choice Group in March 2010, the Brave New World Conference at the University of Manchester in June 2011, the Graduate Conference in Political Theory at the University of Warwick in July 2011, and the Association for Legal and Social Philosophy Annual Conference at the University of Warwick in July 2011. I would like to thank those present at these meetings for their comments and questions, especially to Wulf Gaertner and Joseph Raz for their helpful discussion. I would also like to thank Alex Voorhoeve and Chandran Kukathas for their detailed comments on this chapter.

makes democratic decisions procedurally legitimate. In section 2.2, I will consider the relationship between procedural legitimacy and the obligation to obey a law. Should a reasonable agent feel obligated to obey the dictates of a legislative or judicial process, simply because it was determined through a procedure that all reasonable individuals find politically reasonable? I will offer Rawls' account of legitimate law as a *pro tanto* duty, and argue that the requirement for the performance of such duties lies with the duty of civility and the concept of justice as fairness. I will further argue that both civility and justice as fairness are achieved when reasonable citizens recognize that particular exercises of political power are justifiable.

Finally, it remains to be seen whether the outcomes of legitimate procedures are in fact justifiable. In Section 2.3, I will examine whether the reasonableness of a procedure of decision-making serves to justify the outcomes of said procedures. By the 'reasonableness of a procedure' I mean to indicate that reasonable citizens believe that a given procedure is a reasonable way to aggregate individual judgments in order to determine what the collective ought to do. There are two ways in which the reasonableness of the procedure might indicate the justifiability of the procedural outcome. First, it could be the case that a reasonable person ought to feel bound by the outcomes of a legitimate procedure simply because she herself found the procedure reasonable. For example, if a procedural outcome logically follows from a given procedure then it might be the case that the reasonableness of a procedure indicates the reasonableness of a procedural outcome, and that the reasonableness of the outcome provides sufficient normative force for each reasonable citizen to be bound by the procedural outcome. In section 2.3.1 I use a variation of Wollheim's

Paradox to show that this is not the case. A person who finds the procedure reasonable is not also required to find procedural outcomes reasonable, much less justifiable due to this reasonableness.

Alternatively, it could be the case that the fact that the procedure was collectively chosen is a strong pro-tanto reason for each individual to abide by a procedural outcome. This is the Rawlsian account of justice as fairness applied to procedural legitimacy. In section 2.3.2 I show that this account is undermined by Rawls' own defense of the normative weight of public reason and the space he affords in the public sphere for reasonable pluralism.

2.1: Political and Procedural Legitimacy

The liberal principle of legitimacy is often cited as the paradigm expression of political liberalism's appeal to reasonable justification as a source of legitimacy.¹³⁷

This is the principle which states that states that: *'our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'*¹³⁸ As we saw in the Introduction, it is from this notion of legitimacy that Rawls derives the duty of civility, which requires all uses of political power to be justified to reasonable citizens subject to it.¹³⁹

¹³⁷ Charles Larmore, 'Political Liberalism' *Political Theory* 18 (1990): 339-360, at p. 349; *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford, UK: Clarendon Press, 1991), p.78.

¹³⁸ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 217.

¹³⁹ *Ibid.*

When John Rawls first introduced the idea of public reason as an element of a political conception of justice,¹⁴⁰ he did so by defending his resolution to what he called the 'Paradox of Public Reason'. The paradox asks: 'How can it be either reasonable or rational, when basic matters [of justice] are at stake, for citizens to appeal only to a public conception of justice and not to the whole truth as they see it. Surely, the most fundamental questions should be settled by appealing to the most important truths, yet these may far transcend public reason!'¹⁴¹

After nearly twenty years of debate and discussion on the scope, uses and normative force of public reason, the concerns stated in the paradox hardly seem paradoxical at all. Reasonable citizens will not attempt to settle questions of basic justice by appealing to 'the most important truths' because they know that by pursuing such a strategy, questions of basic justice will never be settled. A reasonable citizen, according to Rawls, recognizes the burdens of judgments placed on all reasonable citizens when trying to come up with good answers to complex moral, metaphysical and philosophical questions. Recognition of the burdens of judgment means that a citizen understands the difficulty of forming judgments on matters requiring the consideration of abstract principles and their application to complex empirical circumstances.¹⁴² The complex nature of the judgments formed means that reasonable citizens are likely to disagree on them. Reasonable citizens know that a cooperative relationship must be forged in spite of this. In recognition of these burdens of judgment, Rawls believes reasonable citizens will demonstrate a

¹⁴⁰ Rawls, *Political Liberalism*, p.214. Rawls traces the genealogy of his account to Kant, although makes it clear that the Rawlsian account of public reason is quite distinct from the original Kantian one (*Political Liberalism*, p. 213).

¹⁴¹ *Ibid.* p. 216.

¹⁴² *Ibid.* p. 56 – 57.

willingness to offer fair terms of cooperation to other citizens despite the fact that other citizens disagree with them.¹⁴³ They will do so as long as they believe that other citizens are willing to do the same for them (i.e. as long as other citizens are willing to cooperate.)¹⁴⁴

Cooperation, as far as Rawls is concerned, has both a pragmatic function and a moral impetus. Its pragmatic function is to ensure political stability by securing consensus on a political conception of justice as the legitimate source of political power. The consensus in question is the overlapping consensus of moral comprehensive doctrines, from which collective uses of power can be justified from within individual comprehensive doctrines. According to Rawls, '*All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides.*'¹⁴⁵ At the same time, the political conception of justice is also justified from the perspective of public democratic culture reflecting '*fundamental ideas viewed as latent in the public political culture of a democratic society.*'¹⁴⁶

When speaking of justification as opposed to justice, Rawls demarcates three modes of justification: pro tanto justification from the perspective of common human reason, full justification from within reasonable individuals' comprehensive doctrines, and public justification from the perspective of public political culture. Pro tanto justification of a conception of justice is from the perspective of common human reason. It specifies that justice is amongst other things well-ordered and

¹⁴³ Ibid. p. 54.

¹⁴⁴ Ibid. pp. 49 - 50.

¹⁴⁵ Ibid. 147

¹⁴⁶ Ibid. 175

complete, and can answer almost all basic political questions.¹⁴⁷ Full justification proceeds from individuals' ability to embed pro tanto justification into their private comprehensive doctrines.¹⁴⁸ Finally, public justification by political society (or political justification) occurs when citizens realize that they along with all other reasonable citizens have engaged in full justification, and can therefore collectively engage in social cooperation regulated by the conception of justice.¹⁴⁹ While the first two forms of justification ensure stability (i.e. enable each reasonable citizen to see why a particular use of power is justifiable), all three are necessary to determine legitimacy.

One of the tasks Rawls sets himself in *Political Liberalism* is to establish legitimate political authority in liberal political associations in such a way that the uses of political authority can be reasonably justified to those subject to it. Political legitimacy embodied in such authority reflects each citizen's participation in the exercise of collective political power and in doing so, secures every citizen's status as free and equal to every other.¹⁵⁰ It ensures that the use of coercive power is always that of the collective body of the people, and that each individual has an equal share in this collective power.¹⁵¹ The objective for Rawls then is to situate legitimate political authority in the collective body of the people, while acknowledging that securing consensus every time political authority is exercised is precluded by reasonable pluralism.

¹⁴⁷ Reply to Habermas: 386

¹⁴⁸ Reply to Habermas: 386

¹⁴⁹ Reply to Habermas: 387-88

¹⁵⁰ *Political Liberalism*: 216

¹⁵¹ *Political Liberalism*: 216, 217

Reasonable pluralism refers to the inevitable emergence and co-existence of conflicting religious, moral and philosophical comprehensive doctrines amongst citizens living under free institutions.¹⁵² Reasonable pluralism also reflects what Rawls calls 'the burdens of judgment' placed on all reasonable individuals.¹⁵³ This means that given the complexity of weighing evidence, coming to terms with vague moral concepts and making inferences, it is likely that reasonable people will often disagree given the same set of information. As a result, liberal legitimacy cannot obtain if it equates legitimate uses of political power with the reasonable consensus of every citizen in every instance. Rawls believes it is sufficient, however, to secure agreement on the procedures of public decision-making in order to meet the requirements of liberal legitimacy. The legitimate status of procedural outcomes, or procedural legitimacy, is the concept under investigation in this chapter.

The idea of substituting consensus on procedures for consensus on outcomes is a familiar one in situations of collective decision-making. We are all familiar with the practice of flipping a coin or taking a majority vote when members of a group presented with a variety of options cannot find bases of substantive agreement on any. Rawls appeals to a similar intuition regarding reasonable public decision-making. The constitution referred to in his principle of legitimacy reflects the values of public political culture, such as basic rights or ideas of justice on which all citizens agree, but it also outlines the basic structure of political institutions which wield political authority. These institutional structures, which have the reasonable

¹⁵² Rawls, *Political Liberalism*, p. 441.

¹⁵³ *Ibid.* p. 55.

endorsement of all citizens, are then given the legitimate authority to use coercive power on behalf of the collective body of citizens.

When Rawls says that legitimate exercises of power are in accord with constitutional essentials, and that these in turn are supported by reasonable and rational principles and ideals, this is a type of justification. If a particular policy results from constitutional procedures that were constructed in accordance with constitutional values, and those procedures and values were reasonable and rational, then justification for implementing the policy could stem from the fact that it was generated by a reasonable procedure.

However, this is not the sort of justification to which Rawls alludes when he says legitimate power is 'proper and hence justifiable.' The policy described above only meets the necessary conditions for legitimacy, whereas the 'proper and hence justifiable' clause suggests that justifiable policies are those which follow from the appropriate uses of power.

In addition to justification through appeal to universally justifiable constitutional essentials, a policy is justified only if it is justifiable in relation to the relevant constitution. As mentioned in Chapter 1, we can see this easily if we compare the legitimate uses of power in two different liberal democratic societies. Consider stipulations of residual powers in the constitutions of the United States and Canada. Both the Canadian constitution and the constitution of the United States are reasonably justifiable from the perspective of common human reason. However, according to the Tenth Amendment of the United States' Constitution, powers not expressly delegated to the federal government are automatically retained by the

states. In Canada, by contrast, the federal government commands all powers unless they are granted to the provinces by the constitution. Although both constitutions are supported by reason and rationality, and are therefore justifiable from the perspective of common human reason, in the case of residual powers they also contradict each other. The legitimacy of state powers cannot be determined independently of the particular constitution which specifies the law of the land in which state power is being exercised. This goes beyond the condition that exercises of power accord with a constitution supported by reasonable and rational principles. They must also be in accordance with the relevant constitution. Only justification from the public political culture of a democratic society corresponds with the idea that a use of power is 'proper and hence justifiable'. In addition to being in line with reasonable and rational ideals found in Rawls' statement of the principle, legitimacy requires justifiability in terms of the appropriate normative framework of justification.

In general then, the logical structure of the liberal principle of legitimacy can be split into two parts. First, the principle stipulates that if a particular use of power is proper (i.e. legitimate), it follows that it is justifiable. Secondly, the constitutional essentials supported by rational principles and ideals are necessary (not sufficient) conditions for the proper use of power. The wording of the liberal principle of legitimacy says very little about the connection between constitutional essentials and the justifiability of particular exercises of power. The most we can glean from the statement of the principle is that accordance with reasonable and rational

constitutional essentials is necessary for legitimacy, and quite independently, the absence of justifiability is sufficient to determine lack of legitimacy.

Procedural legitimacy derives this more general idea of liberal legitimacy. The fact that the procedures in question are validated by the constitution, which is itself justified from both the perspective of common human reason and the perspective of public democratic culture, means that it is legitimate to use these procedures as a way to determine legitimate law. However, the outcomes of these procedures may not be justifiable, from either of the two shared perspectives. This is because procedures of decision-making can be impure and imperfect. They are impure in the sense that public procedures of decision-making can often be manipulated. When a jury is weighing complex evidence for or against a conviction, they are allowed to weigh different subjective weights to different pieces of evidence, as long as they can do so on justifiable grounds. Hence, although one jury might find a defendant guilty, another might find the same defendant innocent. Similarly, an innocent person may still be convicted of a crime after a trial of due process. This means that procedures are imperfect. It cannot always promise to generate the correct result.¹⁵⁴

There is a further problem with the purity of procedures. Even when procedural virtues succeed in being pure, their very purity can conflict with other reasons embedded in public democratic culture and common human reason. For example, if the innocent convict were truly convicted after a procedure of due process, then punishing said convict would be fair although it would not just. It would be fair in the sense that as a defendant, she was given the same rights as all

¹⁵⁴John Rawls, *A Theory of Justice, revised edition*, (Oxford, UK: Oxford University Press, 1999), Chapter II, Section 14.

other citizens in her position, and subject to the same restrictions. A further aspect of the fairness of punishing this convict would lie in the fact that procedures have been previously agreed upon by all reasonable citizens (including the convict if the convict were reasonable), and each of those reasonable citizens had found the procedures justifiable. However, the claim that it would be just to punish said convict on these grounds would be abhorrent. This means that at times, in Rawls' theory of legitimacy, if legitimate laws are meant to be put in place, justice has to be sacrificed.

Rawls agrees with this general claim, but is optimistic about how pernicious such a state of affairs might be for a liberal political regulated by the liberal principle of legitimacy. *'Democratic decisions and laws are legitimate, not because they are just,' writes Rawls, 'but because they are legitimately enacted in accordance with an accepted legitimate democratic procedure.'*¹⁵⁵ The legitimacy of the democratic procedure derives from it being specified in a legitimate constitution as the legitimate procedure of public decision-making. Rawls continues to say that: *'At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice, even granting that justice is not specified procedurally.'*¹⁵⁶

In the Rawlsian framework, determining whether a law is democratic and legitimate is a purely procedural matter. The legitimacy of democratic laws derives

¹⁵⁵ John Rawls, 'Reply to Habermas,' *The Journal of Philosophy* 92(1995): 132 – 180 at p. 175.

¹⁵⁶ *Ibid.* p. 175 – 176.

from the fact that they are the result of legitimate democratic procedures. Similarly, Rawls believes that the conditions under which the procedures of legislative and judicial decision-making are enacted is sufficient to ascribe legitimacy to the outcome. These conditions are specified in Rawls' defence of the legal obligation to obey the law. They are based on moral requirements deriving from reciprocity and fairness. In the next section I will state these requirements more precisely, and explain why Rawls believes that legitimate law is justifiable law.

2.2: The Legal Obligation to Obey the Law

In his early work, Rawls defends the view that there exists a pro tanto obligation to obey the law.¹⁵⁷ Two features of pro tanto obligations play an integral role in Rawls' account of legal obligation. Firstly, pro tanto obligations are conditional obligations rather than universal obligations. They are conditional upon the practical circumstances in which individuals find themselves.¹⁵⁸ While an obligation like mutual respect might be universal in the sense of being binding on all people on any occasion,¹⁵⁹ duties like promise keeping or fair cooperation are conditional upon an agent having voluntarily made a promise to someone else.¹⁶⁰

Secondly, due to the fact that pro tanto obligations are not universal, they can be overridden by weightier obligations that are demanded by practical circumstances. This does not mean that pro tanto obligations cease to exist in the face

¹⁵⁷ For purposes of simplicity, I will follow contemporary usage and refer to both 'prima facie duties' and 'pro tanto obligations' as pro tanto obligations, though will keep the original phrasing in quotes, etc.

¹⁵⁸ Ross: *The Right & The Good* *17-18?

¹⁵⁹ Rawls terms such universal obligations natural duties (*Theory of Justice* p.114), and at one point defends mutual respect as a natural duty by arguing that it would be chosen by all agents behind a veil of ignorance (*Theory of Justice*, p. 338)

¹⁶⁰ *Ibid.* p. 346.

of a weighty obligation. It simply means that in the case of conflict, the weightier obligation overrides the less weighty one. This second characteristic is formalized in MBE Smith's definition of pro tanto, or prima facie duties as: '*a person S has a prima facie obligation to do an act X if, and only if, there is a moral reason for S to do X which is such that, unless he has a moral reason not to do X at least as strong as his reason to do X, S's failure to do X is wrong.*'¹⁶¹

When pro tanto obligations are weighed against each other to determine the actual obligation given the practical situation, that obligation is termed the '*all things considered duty.*'¹⁶² In Rawls' view, when there exists a duty to obey the law, it is a moral obligation of the all things considered variety. It does not exist unless the pro tanto obligation to obey the law is the weightiest moral concern identifiable in a practical situation. It is for this reason that Rawls believes it is justifiable to disobey the law and engage in civil disobedience when the constitutional process produces a decision that is in violation of justice, equality, liberty or another weighty public value.¹⁶³

Rawls offers three arguments in defence of the existence of a pro tanto obligation to obey the law. All depend on moral laws which he believes to be acceptable to anyone capable of practical reason. In his early work, Rawls defends the pro tanto obligation to obey the law in terms of the principle of reciprocity and

¹⁶¹ MBE Smith, 'Is there a prima facie obligation to obey the law?' *Yale Law Journal* 950(1972-1973): 950 – 976 at 951.

¹⁶² Rawls, *Theory of Justice*, p. 341.

¹⁶³ *Ibid.* p. 372.

the duty of fair play.¹⁶⁴ The principle of reciprocity defends the view that there is a pro tanto obligation to obey the law when citizens of a constitutional democracy see their relation to each other as mutually self-interested agents.¹⁶⁵ This is slightly different from the prima facie obligation generated by the duty of fair play, which understands free and equal citizens to be engaged in a cooperative enterprise.¹⁶⁶ Then in *A Theory of Justice*, Rawls' defence relies on what he calls the moral principle of fairness.¹⁶⁷ The weight of this defence relies on viewing agents as reasonable moral agents engaged in a convention or practice they all deem justifiable.

For Rawls, self-interested individuals with competing interests who are willing to engage in only those common practices deemed acceptable from 'the general point of view' are willing to view each other on the basis of reciprocity¹⁶⁸. In an account of justice where the principles of justice are developed through mutual agreement, reciprocity places the constraints of 'having a morality' upon the agreed rules of justice.¹⁶⁹ This constraint is specified as '*the acknowledgement of principles as impartially applying to one's own claims as well as to others, and the consequent constraint upon the pursuit of one's own needs.*'¹⁷⁰ In essence then, reciprocity is the moral impetus for the impartial application of rules that are agreed upon as general.

Given that the terms of the agreement has been chosen by free, self-interested individuals who have accepted the principle of reciprocity, and that all who have

¹⁶⁴ See 'Legal Obligation and the Duty of Fair Play' 'The Justification of Civil Disobedience' and 'Justice as Reciprocity' (1971), all of which are in *John Rawls: Collected Papers*, edited by Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999).

¹⁶⁵ Rawls, 'Justice as Reciprocity,' p. 205.

¹⁶⁶ Rawls, 'Legal Obligation and the Duty of Fair Play,' p. 122.

¹⁶⁷ Rawls, *Theory of Justice*, pp. 342- 344.

¹⁶⁸ Rawls, 'Justice as Reciprocity,' p. 196.

¹⁶⁹ *Ibid.* p. 201.

¹⁷⁰ *Ibid.* p. 202.

agreed upon it have agreed that it is just or fair, Rawls points out that they have no reasonable complaint against the chosen principles¹⁷¹. Rawls then claims that a prima facie obligation has been generated insofar as the terms of the agreement were voluntarily agreed upon¹⁷².

While the argument from reciprocity requires each citizen to view others as equal and therefore rules as impartial to all citizens, fair social cooperation requires citizens to see each other as agents pursuing a mutually advantageous course of action. The two views are meant to be consistent when determining the duties of citizens given the coercive power of legitimate law. Rawls' principle of fairness states that, *'a person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests.'*¹⁷³ The preconditions required for this principle to become operative are twofold. Firstly, it must be the case that voluntary actions of an individual generated the obligation. Secondly, the institution which determines the rules must be a just institution.¹⁷⁴

Rawls illustrates the principle of fairness using the rule of promise keeping. If there exists a just institution of promise keeping, then a person generates a pro tanto obligation to keep a promise when he or she freely makes a promise to another person.¹⁷⁵ In order for an institution like that of promise keeping to be just, it would require the publicity of the rules of promise keeping (i.e. common knowledge of

¹⁷¹ Ibid. p. 209.

¹⁷² Ibid. p. 210.

¹⁷³ Rawls, *Theory of Justice*, p. 343.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid. p. 346.

when promises arise, such as through the speech act 'I promise to X') and the freedom of individuals to invoke the rules voluntarily.¹⁷⁶ The obligation to keep one's promise is generated from the autonomous choice to make the promise as well as the fact that one either has or intends to benefit from the institution. Importantly, Rawls follows Ross in stating that this does not make promise-keeping a perfect duty.¹⁷⁷ That is, individuals are sometimes justified in breaking promises when weightier concerns are at stake. If A agrees to meet B for coffee at 3 o'clock, but by being fifteen minutes late she will have time to take her ill neighbour to the hospital, then she may be justified in not keeping her promise. This does not erase her pro tanto obligation to keep her promise, it just indicates that there are more serious concerns at stake.

This parallels the second sense of the pro tanto obligation to obey the law is also pro tanto in second important sense. Namely, when it conflicts with a more stringent duty (say the prevention of injustice) the duty to obey the law can be overridden. Just like in the case of promises, it does not indicate that the strength of the law diminishes in certain circumstances. Rather, it indicates that weightier considerations make refusing to obey the law justifiable.

The obligation to obey the law is therefore a pro tanto or prima facie obligation in the sense that it is conditional upon certain preconditions being realized. Unlike overriding obligations which hold generally and universally, a pro tanto obligation is conditional upon certain states of the world being realized.¹⁷⁸ The justness condition

¹⁷⁶ Ibid. p. 345.

¹⁷⁷ W.D. Ross, *The Right and the Good*, (Oxford, UK: The Clarendon Press, 1930) p.19.

¹⁷⁸ Ibid.

is particularly important as it indicates that individuals cannot be bound by obligations created when they voluntarily participate in unjust institutions.¹⁷⁹

Rawls offers a third defence of the pro tanto duty to obey the law based on the moral principle of fairness. This is similar to the notion of fairness discussed when Rawls advanced the defence from fair social cooperation. However, it utilizes the idea of fairness from within a practice or convention that is not chosen but certainly justifiable. It is meant to reflect the idea that people do not choose to be born into political associations regulated by conventions of justice, but that they can recognize the value of such conventions.

Rawls argues that certain conventions exist because their general observance promotes benefits for society. However, it does not follow that their observance in particular circumstances will also promote any benefit for society. Promise-keeping is one such convention. It may be the case that in some instances, keeping one's promises generates results that benefit nobody. However, given that the convention of promise-keeping promotes general welfare, fairness requires that each person follow the requirements of the rules of the convention.

The convention-based account of law as a pro tanto obligation builds upon the other two accounts, because it demonstrates that at times a person will have an all things considered duty to obey unjust laws. Just as promises must sometimes be kept out of respect for the institution, regardless of the fact that no one will benefit from the promise or that the promise seems immoral on some other grounds, laws may sometimes require obedience regardless of the fact that they are unjust. Unlike in the

¹⁷⁹ Rawls, *Theory of Justice*, p. 112.

case of fair terms of cooperation where a law's injustice was sufficient reason not follow it, the convention-based account indicates that even when all agree that a particular use of political power is unjust, this is not sufficient grounds to question its legitimacy.

Rawls gives the example of several minority groups who have been suffering from unjust laws despite the overarching authority of a just constitution. Rawls write: *'...other things being equal, two minorities are similarly justified in resorting to civil disobedience if they have suffered for the same length of time from the same degree of injustice and if their equally sincere and normal political appeals have likewise been to no avail.'*¹⁸⁰ However, in the example offered by Rawls, if all minority groups were to engage in civil disobedience at once, *'Serious disorder would follow which might well undermine the efficacy of the just constitution.'*¹⁸¹ In this instance, Rawls argues that civil disobedience would not be appropriate for some minority groups as it is a requirement of the natural duty of justice that those who wish to see justice done sometimes show restraint in its implementation.¹⁸²

Put in terms of the convention-based account, the just constitution indicates the existence of a convention through which political society is generally well-ordered and just. However, this does not indicate that procedures of legislation and judicial decision-making are perfect procedures. There will always be unjust laws, and if every unjust law were undermined simultaneously then the well-ordered political society could also be undermined. This does not mean that citizens should never

¹⁸⁰ Rawls, *Theory of Justice*, p. 374.

¹⁸¹ *Ibid.* 374.

¹⁸² *Ibid.* 372.

engage in civil disobedience, but that they must consider the practical consequences of this engagement so as not to overturn the entire convention.

Rawls seems more willing to concede that legitimate institutions could themselves evolve to align with general concerns about injustice. He writes in his later debates with Habermas that: *'...with well-framed and decent democratic institutions, reasonable and rational citizens will enact laws and policies that would almost always be legitimate, though not of course just. Yet this assurance of legitimacy would gradually weaken to the extent that the society ceased to be well ordered...the greater [the constitution's] deviation from justice, the more likely the injustice of outcomes. Laws cannot be too unjust if they are to be legitimate.'*¹⁸³

The gradual weakening of legitimacy essentially means that reasonable citizens will eventually lose faith in the institutionalized procedure's ability to perform its task (e.g. to determine guilt or innocence). After several instances of witnessing the procedure's failure, such citizens might conclude that it would be more reasonable to invoke some manner of institutional reform. It also indicates that it is the constitution itself eventually becomes unjustifiable without reform, rather than a particular instantiation of it. The change of the constitution signifies changes to the convention regulating justice.

Yet the possibility of institutional reform hardly exhausts the problem, given that all actual procedures of justice are imperfect. The problem is that reasonable citizens can never hope that the judicial or legislative procedures in place will always generate outcomes that reasonable individuals would consider just. Such faith in

¹⁸³ Rawls, 'Reply to Habermas,' p. 176.

procedures would amount to the claim that the procedures were perfect procedures of justice that always generated the just outcome and could never be called into question. Rawls on the other hand encourages citizens to question procedural outcomes as they legislate and adjudicate on behalf of each citizen . He claims: *'the enactments and legislation of all institutional procedures should always be regarded by citizens as open to question. It is part of citizens' sense of themselves, not only collectively but also individually, to recognize political authority as deriving from them and that they are responsible for what it does in their name.'*¹⁸⁴

We must therefore determine the circumstances in which reasonable citizens would be willing to concede to the procedure's authority at all, knowing that they will inevitably be bound to the authority of unjust procedural outcomes.

2.3: Procedural Legitimacy and Justification

It might be helpful at the outset to distinguish between what makes a coercive act reasonable, and what makes it justifiable. In the last section I introduced the idea of reasonable pluralism, the notion that reasonable people can disagree on judgments that require complex calculations and interpretations of abstract principles. In common parlance, it seems acceptable to say that all these reasonable positions are justifiable in the sense that a justification can be offered as to why a given act should be the act undertaken through the coercive use of power. In political liberalism, however, a justification is limited by the criterion of reciprocity.¹⁸⁵

¹⁸⁴ Rawls, Reply to Habermas,' p. 178.

¹⁸⁵ Rawls, 'The Idea of Public Reason Revisited,' pp. 137-138.

The criterion of reciprocity demands that reasonable citizens trying to justify their positions offer only those reasons they reasonably believe others could reasonably accept as sufficient for a justification¹⁸⁶. For example, we might expect the victim of a robbery to understand the reasons a thief had for committing the robbery, but not reasonably accept those reasons. If the thief were to try to justify the crime by telling her victim, 'I stole your wallet because I wanted to access the money inside of it,' the criterion of reciprocity would point out that this perfectly good explanatory reason does not justify the crime because the thief could not reasonably believe that the victim would accept this explanation on reasonable grounds.

In the political sphere, the criterion of reciprocity is satisfied '*when those terms are proposed as the most reasonable terms of fair co-operation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.*'¹⁸⁷

The question before us now is whether disobeying an outcome of a legitimate procedure could ever be justifiable when our reasoning is constrained by the criterion of reciprocity. If not, then the obligation to obey legitimate law is a requirement of the criterion of reciprocity.

I first show why it is the case that given perfect or imperfect procedures of justice, a reasonable citizen may find the outcomes of legitimate procedures unjustifiable. The conclusions of this analysis are relatively similar to the one offered

¹⁸⁶ The criterion of reciprocity is closely related to the principle of reciprocity discussed in section 2. However, while the principle of reciprocity is a moral principle generated from the duty of fair play, the criterion of reciprocity is more directly associated with the duty of civility. Common to both is the idea of reciprocity, the idea that the individuals involved are members of a collective situated with respect to each other as free and equal.

¹⁸⁷ Rawls, 'The Idea of Public Reason Revisited,' pp. 136-137.

by Rawls in his defence of civil disobedience in light of legal obligation. However, the analysis itself aims to present the logical structure of weighing reasons which underlies Rawls' own defence. This structure becomes important when I move on to assess procedural outcomes of collective decisions for which public democratic culture does not identify a procedure independent correct answer. Here it is demonstrated that in a good many cases upon which citizens rely on legitimate procedures to produce justifiable outcomes to which citizens must be bound as matters of fair cooperation, are indeed not justifiable.

2.3.1 Perfect and Imperfect Procedures of Justice

The idea that there can be tension between an individual's endorsement of a procedure and her disapproval of an outcome is a well-known problem. Perhaps the best-known formulation is Richard Wollheim's Paradox in the Theory of Democracy.¹⁸⁸As there are remarkable similarities between Wollheim's democrat and our liberal, I will use his formulation as a springboard off which to build my analysis. However, there are two important distinctions between Wollheim's democrat and the Rawlsian liberal that are also worthy of consideration. The first is the reasonable citizenship of the liberal which is the basis of the reasonable endorsement of a procedure. The second is the nature of the commitment attributed to the procedural endorsement in light of the demands of reasonable citizenship, and the derivative obligations of said commitment.

Wollheim constructs his paradox of democracy by asking us to imagine the relationship between a democrat and a democracy machine. The democracy machine

¹⁸⁸ Richard Wollheim, 'A Paradox in the Theory of Democracy,' in eds. Peter Laslett and Walter Garrison Runciman *Philosophy, Politics and Society* (New York, NY: Basil Blackwell, 1962).

is set up to take a series of inputs (the choices of citizens in a democracy) and generate an output in accordance with a democratic rule. Wollheim characterizes the output of the machine as a 'choice of its own,' that reflects democratic principles like aggregation and majority-voting.¹⁸⁹ The democrat in question is a particular citizen in whose judgment the democracy machine ought to be the mode of collective decision-making. In Wollheim's account this is an evaluative judgment of the democrat's and not simply a judgment of his preference¹⁹⁰. The paradox arises when in a particular instance the democrat offers an input into the democracy machine of a choice of Policy A over Policy B. This too is an evaluative judgment and not a judgment solely based on personal desire. The democracy machine, however, chooses Policy B over Policy A. Wollheim's paradox results from that fact that the democrat in question now seems to hold that Policy A should be enacted instead of Policy B, and that Policy B should be enacted instead of Policy A. This is in effect the situation of all counter-majoritarians who also consider themselves democrats.

The parallel with the case of the liberal should be apparent. The liberal has accepted the reasonableness of a particular procedure by which to come to collective decisions. In reasonably endorsing said procedure, he or she has formed a judgment based on the fact that there is justifiable reason to endorse the procedure given the demands of reciprocity and political reasonableness. The inputs of the liberal machine are not choices A and B, but sets of reasonable grounds R_A or R_B which correspond to particular choices. These reasonable grounds are salient insofar as they are relevant to the circumstances under which the policy alternatives are considered,

¹⁸⁹ Ibid. p.76.

¹⁹⁰ Ibid. p. 77.

and also insofar as they are constrained by the requirements of reasonable citizenship. Note that the set of reasonable grounds R_A which justify policy A to the individual in question can also contain reasons for why the collective ought not to undertake policy B. Note also that these sets of reasonable grounds are person-specific; different individuals may have different sets R_A and R_B which yield justifications for policies A or B.

So the liberal uses her capacity for reasonable citizenship in evaluating what the procedural outcome ought to be, but constructs her inputs as a set of reasonable grounds corresponding with a particular policy choice. This evaluation is put into the procedural apparatus. However, instead of a set of reasons being the output of the liberal machine, a policy decision is the output. So for example, the liberal puts R_A into the procedure (believing outcome A ought to be the collective outcome) and instead the machine generates B. The procedural outcome differs from that outcome corresponding to the liberal's input. The grounds R_B for the liberal to adopt the procedural outcome are the reasons for which the liberal endorses the procedure (e.g. on grounds of political reasonableness). However, if R_A includes reasons for dismissing B, the liberal now has reasons for both finding the procedural outcome B justifiable and reasonably disagreeing with it.

The coherence of this position comes from the fact that the legitimate procedure 'is a process of social decision that does not produce a statement to be believed...but a rule to be followed.'¹⁹¹ Following the dictates of the procedure is one of the terms of social cooperation. In this sense, the liberal's case hardly seems as

¹⁹¹ Rawls, 'Legal Obligation and the Duty of Fair Play,' p. 122.

paradoxical as the democrat's. The liberal has a set of reasonable grounds R_B which cause him or her to believe that the procedural outcome is grounded in justifiable claims. He or she also has a set of grounds R_A which make her believe that it is unreasonable to support the procedural outcome. While the democrat is being asked to make a judgment on the output (Policy A or Policy B) and ends up in a paradoxical situation, the liberal is asked to evaluate the inputs (reasons for the procedural outcome or reasons against it) and can coherently outline different sets of reasons for doing either. Clearly, the democrat can also offer reasons for why he supports A instead of B and vice versa. The key difference is that offering reasons is not the democrat's job. The democrat is simply asked to evaluate which policy is better. By contrast the inputs of the liberal machine are not policy choices but a set of grounds which justify a policy choice. As these grounds need not be the same in the two sets, the liberal can simply seek an over-riding reason to arbitrate between these two justifications if at all necessary.

However, supposing that the procedural outcome is B and the liberal's input reasons are R_A , the liberal is declaring well-reasoned support for the statements 'yes to policy B' and 'no to policy B' because 'yes' and 'no' explicitly refer to whether or not policy B can be reasonably justified. R_B of course provides reasons justifying B, and I have already stated that R_A must include reasons not to adopt B in order to determine that A is the better option. Given that the democrat's reasons for supporting A and B are different, there is a paradox regarding which policy to support but no inconsistency in reasoning. The democrat simply does not know how to weigh his support for the procedural outcome against his support for the input he

placed into the procedure. By contrast there appears to be a genuine inconsistency in the reasoning of the liberal. If R_A includes reasons not to support B which make B unjustifiable, then the liberal is at once declaring Policy B to be the legitimate outcome on reasonable terms, and Policy B to be completely unreasonable. There is no paradox in the liberal case, because the problem is obvious: the liberal is at some level being inconsistent.

Rawls, however, construes such a situation as a conflict of prima facie duties: acting in accordance with the reasonable and acting in accordance with the law¹⁹². He writes of the liberal: *'In this situation he simply has to balance his obligation to oppose an unjust statute against his obligation to abide by a just outcome.'* While acknowledging that sometimes this may lead to civil disobedience Rawls writes that, *'Normally, it is hoped that the obligation to the constitution is clearly the decisive one.'*¹⁹³

In other words, Rawls' conceives of the liberal's dilemma as similar to that of Wollheim's democrat; the belief that the policy not adopted is superior and yet must be accepted because it is the result of fair terms of cooperation¹⁹⁴. Rawls' way out of the paradox is to claim that a belief in the superiority of the adopted policy is not required. Yet the problem of the liberal is not that the policy not adopted is merely superior; it is the more complex belief that the adopted policy is not justifiable.

Within the liberal framework of legitimacy, it seems that the liberal is committed to the procedural outcome in virtue of the fact that there is reasonable consensus on said procedure despite reasonable pluralism and recognition of the

¹⁹² Ibid. 120

¹⁹³ Ibid.

¹⁹⁴ Ibid. 121

burdens of judgment placed on reasonable citizens. Implicit in all this is the idea that any reasonable disagreement with the procedural outcome cannot be sustained by way of political reasonableness. This is because political reasonableness includes recognizing the burdens of judgment, and accepting that there will never be consensus on procedural outcomes.

However, I am assuming that the liberal cannot find the outcome justifiable from the perspective of public democratic culture. The liberal has already taken the public perspective into consideration when forming the disapproving evaluation. More precisely, a liberal claiming she cannot deem the procedural outcome justifiable is in fact claiming that R_B is a subset of some set of reasonable grounds R_{A2} which still leads the liberal to believe that A is the correct answer. Prior to the liberal machine generating outcome B, the liberal's reasons for supporting policy A were represented by R_A . When the liberal claims that she continues to find only policy A reasonable despite the procedural outcome, it can no longer be on grounds R_A because there is another reason to consider now, namely that B is the procedural outcome. In fact what she is claiming is that R_A and R_B (which I claimed corresponded to the reasons for adopting a procedure) are both subsets of some different set of reasonable grounds R_{A2} which still lead the liberal to find only A reasonable and B unjustifiable. (Remember, the liberal cannot find B justifiable because R_A must have reasons not to adopt B; it is the very fact that B cannot be justifiable which gives A politically reasonable support post-procedurally). Since each particular reason in a set of reasons can represent a different claim, concern or value, it is no longer inconsistent that some of the reasons our liberal is considering

might justify one policy or another, but taken as a whole the salient reasons point directly to the reasonability of one and only one outcome.

Consider again the case of our innocent convict. Suppose a liberal knew the convict to be innocent, and found herself in a situation where she could help the convict avoid punishment by evading the demands of authority. In trying to determine whether or not to help an innocent convict escape punishment, if the individual's reasons were simply (i) due process was used, (ii) due process typically generates the correct outcome, (iii) due process found the individual guilty, and (iv) the punishment suits those who are guilty, then the reasons would presumably justify letting the convict be punished. These four reasons are in effect what I was referring to as R_B . Note that (i) represents fair terms of cooperation, (ii) reflects the grounds for the reasonable endorsement of the procedure, and (iii) expresses what reciprocity would require in this situation. Now, in addition to reasons (i) – (iv) the individual has to consider reason (v) the convict is innocent. Considering all five of these reasons together still generates a justification of the procedure and no overriding justification for the outcome.

It might be intuitive to think that this fifth reason alone is the primary reason which the liberal uses in determining the procedural outcome to be unjustified. However this is not what the individual is claiming when she finds the procedural outcome unjustifiable. An individual who claimed that the reason (v) is sufficient to overpower R_B is not respecting fairness, political reasonableness or reciprocity. She would in effect be saying given the set of reasons to adopt the procedural outcome R_B , which consists of reasons $\{(i), (ii), (iii), (iv)\}$, and the set of reasons not to do so,

{(v)} which is equal to R_A , R_A outweighed R_B . By contrast someone could appeal to set of reasons R_{A2} which is the set of all five reasons taken together, i.e. {(i), (ii), (iii), (iv), (v)}. It is absolutely integral that all the reasons in R_B are taken into account in order for the reasonable disagreement to be justifiable. We can also now see that there is no inconsistency in holding policy B justifiable on grounds R_B and not on grounds R_{A2} . The confusion is that R_A and R_{A2} are both justifications given by an individual for not adopting the procedural outcome. However, only the latter is a justification for not complying with procedural authority since it takes into account fairness, political reasonableness and reciprocity.

It is in this sense that there is no inconsistency in the reasoning of the liberal who believes the procedure is justifiable but not the procedural outcome. It is possible that the set of reasonable grounds justifying the procedure is a subset of the reasonable grounds for finding the procedural outcome unjustifiable. This is what our construction of justified reasonable disagreement amounts to. The liberal, when motivated by the objectives of reasonable citizenship (i.e. political reasonableness and reciprocity) cannot justify the procedural outcome. However, it is also the objectives of reasonable citizenship that prompt him or her to endorse the procedure.

A natural question which now arises is whether a reasonable citizen has 'truly' endorsed a procedure if she can find the procedural outcomes unjustifiable from the general point of view of public democratic culture (i.e. holding R_{A2}). Reasonably endorsing a procedure means ratifying a constitution and coming to an agreement on legislative and judicial processes of decision-making on grounds that all find reasonable. What, one might ask, is the purpose and function of this ratification

process if the outcomes of constitutional procedures may ultimately be viewed as unacceptable with the addition of one or more other considerations?

I would answer that in reasonably agreeing to a particular procedure of decision-making, a reasonable citizen is merely accepting that the outcomes generated by said procedure meet the demands of political reasonableness and reciprocity. Compare the reason (v) from the above example, that the convict is innocent, with a reason (v*) which says that although guilty, those convicted of crimes ought to be shown mercy, because it is God and not man who punishes the wicked. Now (v*) is a completely reasonable position, but it is not politically reasonable. It is the reason of a private comprehensive doctrine.

Another way to think of this is that if people took (v*) seriously then the procedure would either not be legitimate (since those individuals who accept (v*) cannot accept (iv) and hence the criterion of reciprocity would not be met) or the judicial procedure would depend on a higher level procedure for its legitimacy (say the procedure by which the legislature determines acceptable punishment). In either case, we would not have to confront a scenario in which a liberal found the procedure reasonable and the outcome unjustifiable. What (v) contributes to the set R_{A2} which (v*) could not, is the argument that although the punishment does suit those who are guilty, this consideration is not applicable in this instance because the individual convicted is not guilty.

In short the demands of reasonable citizenship are necessary conditions for justifiability, but not sufficient ones. In the example given, the conditions of reasonable citizenship are met regardless of whether an innocent convict is punished

or not. The conditions of justice, however, are met only when no individual is punished for a crime he or she did not commit. Such a judgment, of course, is one of substantive justice and exactly the sort of judgment that typically violates the recognition of the burdens of judgment. (Recall that the need for procedural legitimacy arises out of reasonable pluralism, the claim that there will be inevitable disagreement on substantive claims.) However, in this case, this is a substantive claim made while respecting the demands of reasonable citizenship. The person who deems it unjustifiable to punish an innocent on substantive grounds cannot be accused of failing to offer reasons that she could reasonably expect other to find acceptable from a general point of view. Anyone with a sense of justice can see that it would be unjust to carry out punishment when the person about to be punished is in fact innocent.

The argument above rested on the fact that the conjunction of the demands of reasonable citizenship and (v*) would not be sufficient to question the justifiability of a procedural outcome, since (v*) is located exclusively within a reasonable individual's private comprehensive doctrine. However, there is a third class of concerns on par with (v), but which may be the subject of reasonable disagreement. That is, they may be viewed as reasonably acceptable by all reasonable citizens but in conflict with other reasonably acceptable values. The sort of concern I am thinking of involves arguments from public values like 'inhumanity' or 'respect for persons'. Suppose that a reasonable citizen believed that although the convict was guilty, the punishment was far too harsh, too inhuman, to fit the crime. This too would be an attack on (iv), the argument that from the perspective of public democratic culture,

the punishment does not fit the crime. The difference between the claim regarding inhumanity and the argument from religious conviction, however, is that the former claim is one that the public democratic culture must respect. Treating all individuals with humanity is a public value in the sense that it is required by both the criterion and principle of reciprocity.

Therefore, even when the necessary demands of reasonable citizenship are met, there are still two types of private judgments which may make the procedural outcome unjustifiable. The first are judgments regarding the relevance of the reasons reflected in the procedure to the situation at hand. This includes judgments like a convict's innocence in cases where we are concerned with punishing the guilty. These judgments contend that although there is nothing wrong with the procedure in general, it does not come to the intended conclusion in the situation at hand. The second sort of judgment notes that although the procedure and the values it reflects are publicly justifiable, there are other public values that make the procedural outcome unacceptable.

2.3.2 Fairness – burdens of judgment, the strength of a pro tanto obligation

Thus far, my analysis has centered on the situation of a liberal who finds a procedure of public collective decision-making reasonably justifiable, but who is hesitant to defer to its authority in a particular case because she believes that the procedural outcome in the particular case is unjust. I have pointed out that although Rawls may be correct in claiming that there are several reasons for her to defer to the procedure's dictates, there may also be additional reasons for her to disobey its authority. One of the limitations of my argument thus far, has been that the main

example I have offered has provided procedure independent reasons for questioning the authority of the procedural outcome. Regardless of private judgment, there must be a fact of the matter with regards to a person's guilt and the justness of punishment depends entirely on this fact.

What about cases in which there is no procedure-independent fact of the matter with regards to justice? There are two sorts of cases that I have in mind. In the first, individuals' beliefs regarding the justness of the procedural outcome depend entirely on the procedure by which the outcome is generated. For example, whether or not the toss of a die is fair depends on nothing more than whether or not a fair die is used. Similarly, whether or not the outcome of a gamble freely taken is fair simply depends on whether or not the gamble itself is fair, not on the distribution of wealth in the aftermath of the gamble.¹⁹⁵ These cases of 'pure procedural justice' translate into the political framework when all agree that there is no 'correct' outcome except that designated by the decision-framework. The most familiar application of pure procedure justice to the distribution of goods when legal and economic institutions are just, and in being just the outcomes of economic transactions are perfectly competitive.¹⁹⁶ However, pure procedural justice can also apply in the political sphere, for example when determining the winners of election in which all candidates were legally eligible to run.

The second sort of example I have in mind is one in which individuals' comprehensive doctrines have clear views on what a just outcome ought to look like, but political society as a whole cannot deliberate between the two in a way that

¹⁹⁵ Rawls, 'Distributive Justice,' p. 149.

¹⁹⁶ Ibid. pp. 149-150.

generates a definitive outcome as to what is just. I have in mind deeply divisive political issues like the debate on abortion in the United States, or the 2004 decision in France to disallow the wearing of religious insignia on the grounds of state schools. Proponents of the decision in France cited secularism, gender equality and nationalism in defense of the ban¹⁹⁷. Those opposed also cited an important political value, namely that the decision was appallingly intolerant of individuals' liberty of conscience. While political society can identify both secularism and liberty of conscience as reasonable values, it cannot provide an account of how citizens ought to weigh the two against each other in practical deliberation. Those weights are informed by individual citizens' comprehensive moral and religious doctrines, and subjective deliberation.

What this case has in common with cases of pure procedural justice is dependence on the procedure in question to determine both the legitimacy and the justifiability of a political position. In the case of distributive justice, Rawls writes: *'Given a just constitution and the smooth working of the four branches of government, and so on, there exists a procedure such that the actual distribution of wealth, whatever it turns out to be, is just. It will have come about as a consequence of a just system of institutions satisfying the principles to which everyone would agree and against which no one can complain... There are indefinitely many outcomes, and what makes one of these just is that it has been achieved by actually carrying out a just scheme of cooperation as it is publicly understood.'*¹⁹⁸ In cases of pure procedural justice it seems impossible to agree with

¹⁹⁷ Cecile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools,' *Journal of Political Philosophy*, 13(3): 305-329 at p. 306.

¹⁹⁸ John Rawls 'Distributive Justice,' in *John Rawls: Collected Papers*, edited by Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999) p. 149.

the procedure and not the procedural outcome, because the reasons by which individuals evaluate the justness of a procedural outcome are the features of the procedure itself. The wealth distribution after a series of fair bets made by a free, rational agent is fair, regardless of how inequitable the distribution is¹⁹⁹. Similarly, the wealth distribution in a market economy is fair as long as the economy consists of free rational agents operating in an economic framework supported by just institutions²⁰⁰. The just institutions in fact, serve as the 'just scheme of cooperation'.

There is an analogy here between fair institutions supporting a free market economy, and those legislative and judicial institutions through which legitimate procedural decisions are made. The legitimate procedures constitute a just scheme of cooperation as well, insofar as they can be justified by reasons that all find justifiable. Recall that according to Rawls, individuals recognizing the burdens of judgment and willing to offer fair terms of cooperation will relinquish the objective of realizing 'truth' in the political sphere and will settle for realizing the reasonable. This is because, *'Our individual and associative points of view, intellectual affinities, and affective attachments, are too diverse, especially in a free society, to enable those doctrines to serve as the basis of lasting and reasoned political argument.'*²⁰¹ A reasonable individual therefore has to recognize the possibility of reasonable disagreement amongst reasonable comprehensive doctrines.²⁰² The purpose of constructing procedures of decision-making is to adjudicate between these disagreements.²⁰³

¹⁹⁹ Ibid. p. 149.

²⁰⁰ Ibid. p. 150.

²⁰¹ Rawls, *Political Liberalism*, p. 58.

²⁰² Ibid. p. 60.

²⁰³ Rawls, 'Legal Obligation and the Duty of Fair Play,' p. 122.

In the case of evaluating political outcomes, this means that despite the fact that reasonable citizens may hold private substantive beliefs regarding the justness of certain procedural outcomes, from the public political sphere the justness is purely procedural. From the perspective of public pure procedural justice, R_{A2} would include the fact that the outcome was generated by a fair procedure, but also that the outcome is fair in and of itself from the public perspective. Yet this does not mean that holding R_{A2} requires an individual to consider the outcome politically reasonable. Those who find the decision in France intolerant want to argue that it is not a politically reasonable outcome. This means that if by fairness we mean recognizing divergent reasonable viewpoints and upholding some semblance of a justificatory requirement, it is not automatically apparent that the outcome of a pure procedure of justice is also just. The sort of fairness public pure procedural justice generates is neutrality between competing reasonable comprehensive doctrines. It ensures that there is no bias in favor of any comprehensive doctrine in the public sphere, and hence is fair. However, this is a far cry from calling the outcome just.

Now, we have already established that the set of reasons for adopting the procedure constitute those set of reasons we have for believing a particular outcome unjustified. However, in our previous assessments the operative assumption was that in addition to the reasons for adopting the given procedure, we have other reasons explaining why the procedure fails in a particular circumstance. Now if these reasons relate simply to the circumstances in which the procedure is applied (i.e. in the case of the criminal trial in which an innocent individual is found guilty) we can see that the reasons for upholding the procedure in general are still sufficient to

justify it. In a criminal trial following due process we assume that regardless of the outcome and without any systematic defect of the procedure, the trial still reflects the best feasible process. As a result, the sorts of reasons we use in determining whether or not there are justifiable grounds for adopting a particular procedure are compatible with the existence of reasons for holding the outcome of a procedure to be unjustifiable in a given instance.

This is not the case when reasonable individuals have divergent views on the weighting of public values. When the French Parliament decided to ban religious insignia from its state schools, it was not simply upholding the reasonableness of solidarity as a source of public justification, it was denying that justificatory role to religious expression. This means it is possible to make that claim that a particular outcome, despite being just, still may not be justifiable to the individual when all grounds are considered. The individual, after all, has substantive views of justice quite independent of the fact that from the public perspective, the procedure is the best determination of fairness. We can quite coherently say that having taken into account the constraint of offering fair terms to each person (a criterion that the procedure meets) we may still question the legitimacy of the procedural outcome on grounds of extra-procedural reasons. We may see this as follows:

In our working example of religious insignia in French schools, suppose that after the legislation is passed, and religious insignia are outlawed on school grounds, one reasonable citizen finds the consequences to be appallingly intolerant. Hence the individual's R_{A2} essentially considers: (i) the claim that the procedure recognizes fair terms of cooperation and the burdens of judgment; (ii) the claim that the outcome is

fair insofar as it reflects a fair scheme of cooperation which respects the burdens of judgment; (iii) the claim that the outcome does not respect religious expression; and (iv) the claim that the outcome is just from the perspective of democratic culture because the procedure is one of public pure procedural justice. Due to the priority of (ii) it seems that the citizen must accept the procedural outcome if motivated by reasonable terms. The situation of this person is slightly different from that of the person in the imperfect procedural case. This person not only recognizes that the outcome is the result of a fair procedure, but also intrinsically fair in and of itself due to its generation from a pure procedure of justice (for which there is no independent criterion of just evaluation). If this citizen is to recognize both fair terms of cooperation and the burdens of judgment on others, it seems she must recognize the fact that the procedural outcome is justifiable. What happens then, if she thinks the fairness is outweighed by the need for religious expression?

It seems odd, of course, to say that a procedural outcome is both just and intolerant. Presumably our public conception of justice (particularly substantive justice) includes considerations of tolerance, equity, freedom, rights, opportunity and so forth. Therefore, it would be more accurate to say that reasonable individuals agree that the procedural outcome is just at the level of being fair (i.e. procedurally just), and disagree about the level at which it is intolerant or unjust.

A final question is whether a reasonable advocate of a public value that is in the common good but not shared could find similar reasons for not deferring to the procedural outcome. Suppose the value in question is something more akin to solidarity, temperance or matters of public health. All of these are in the 'public

interest' as far as the individual is concerned, and therefore it is reasonable for her to expect others to endorse it. Temperance and other matters of public health could be of critical importance to groups of people like families, neighbourhoods and municipal associations, without having strong consequences for the polity at large; and yet reasonable individuals may not support such initiatives at the political level.

As a result of all this, there is sufficient difficulty in obtaining liberal legitimacy, with its justificatory requirement, in the pure procedural case. An appeal to pure procedures simply claims that there is one aspect of substantive justice that all reasonable citizens agree is characteristic of the procedural outcome (namely fair cooperation). Yet with other aspects of substantive justice advocating for different outcomes, a person could reasonably find the outcome of a pure procedure of justice unjustifiable.

A common feature of all cases in which different aspects of substantive justice are in conflict is that they all require individuals to form a private judgment regarding how to apply general rules or principles of justice to a variety of situations. Any justification without appeal to procedure or shared values is essentially a private judgment; including the attachment of weights to different public values. Hence, the judgment that the outcome of a pure procedure of justice is just is still substantive. This means, however, that when individuals have non-procedural reasons for disagreeing with the outcomes of fair schemes of cooperation, they can defend their disagreement on grounds that the fair scheme of cooperation is a pure procedure of justice, and in their substantive view of justice, the outcomes is unjustifiable.

Hence, Rawls' expressed faith in the idea that when choosing between an unjust statute and a just constitution, *'it is hoped that the obligation to the constitution is clearly the decisive one,'*²⁰⁴ is untenable. The constitution reflects a fair scheme of cooperation, which in turn is a pure procedure of justice for the public sphere. The reason to choose the constitution over the statute is therefore expressed in the duty of fair play. *'If one thinks of the constitution as a fundamental part of the scheme of social cooperation, then one can say that if the constitution is just, and if one has accepted the benefits of its working and intends to continue doing so, and if the rule enacted is within certain limits, then one has an obligation, based on the principle of fair play, to obey it when it is one's turn.'*²⁰⁵ What I have tried to show is that the clause 'within certain limits' is wide enough to include any reason that can be traced back to a public value denied by a legal statute. This is true just long as individuals privately give said public value a lot of weight compared to other public values. The logical structure of such weighting, and the ensuing judgment to oppose the statute in question, is exactly that of a reasonable citizen refusing to punish an innocent convict for a crime not committed. In this regard, the normative strength of any pro tanto obligation to obey the law is greatly diminished.

2.4: Conclusion

This paper has defended the following three related arguments:

- (i) The outcomes of legitimate democratic procedures derive their legitimacy from the fact that such procedures are stipulated by a legitimate constitution. When stipulated by a legitimate constitution, the

²⁰⁴Rawls, 'Legal Obligation and the Duty of Fair Play,' p. 120.

²⁰⁵ Ibid. p. 122.

procedures align with the demands of the liberal principle of legitimacy.²⁰⁶ This means that the outcomes of such procedures reflect fair terms of cooperation and reciprocity. As a result, the outcomes of such procedures are subject to the moral requirements of fairness and reciprocity, from which are generated a pro tanto obligation to obey the law.

(ii) It is not the case that an outcome following from a legitimate procedure supported by principles of reason and rationality is ever publicly justifiable. Although there might be some public reasons that support the outcome, there may be suitably public reasons that deem the outcome of a legitimate procedure unjustifiable. This is due to the fact that although public democratic culture determines which reasons are suitably public, individuals determine the weight placed on balancing these reasons against each other.

(iii) It follows from (i) and (ii) that in Rawls' view, reasonable citizens need not obey any law unless they believe from their non-public perspective that they ought to obey a given law. Even if we understand the duty to obey the law as a weighty pro tanto duty based in fairness and reciprocity, there could always be publicly justified reasons overriding citizens' concerns for fairness and reciprocity. Moreover, they could see it

²⁰⁶ Rawls, *Political Liberalism*, p. 217; Rawls, *Reply to Habermas*, p. 175.

as instrumental to fairness or reciprocity to not obey the law given that their reasons are suitably public.

Taken together, the three lines of argument characterize pure procedurally legitimate laws as neither publicly justifiable nor requiring obedience. While legitimate law continues to reflect fair terms of cooperation, citizens can also argue that disobeying legitimate law reflects fair terms of cooperation if the law undermines collective or common goods like right to life, toleration, temperance, public health or other significantly weighty public concerns. Coercively enforcing procedurally legitimate law can also violate the duty of civility and the criterion of reciprocity, given that citizens are offering public justifications for why certain laws need not be obeyed.

What do procedures then contribute to liberal legitimacy? They do little more than form an initial working agreement amongst reasonable citizens. This working agreement is then subject to public scrutiny, after which reasonable citizens are free to disregard the procedural outcome on grounds of fairness, reciprocity, publicity and other liberal values. There are no legitimate or justifiable grounds on which coercive power may be used to limit the disobedience of reasonable citizens at this stage. The disobedience is anchored in public democratic culture, and supported by liberal democratic values.

Chapter 3: Sympathy and Liberalism

The arguments of Chapters 1 and 2 revealed that taking pure public reason as our criterion of public justification is problematic at the level of individual judgment formation, as well as at the level of aggregation through procedural decision-making. Chapter 1 showed that by acknowledging the political reasonableness of legitimate political practices, reasonable citizens must bear moral responsibility for the legitimacy of the practices in question. In cases of deep-seated disagreement, I argued that having such responsibilities placed upon reasonable citizens leads them to struggle with the Problem of Conscience. This problem occurs when reasonable citizens cannot properly reconcile their moral responsibility for legitimate uses of political power with their other moral commitments.

I ended Chapter 1 by outlining three versions of the Problem of Conscience. In the Problem of the Tragic Conscience, citizens face a tragic choice between taking moral responsibility for the legitimacy of practices that go against their private moral commitments, and avoiding such responsibility by refusing to be politically unreasonable. I argued that being politically unreasonable also requires reasonable citizens to violate moral principles, such as the moral duties of civility and fair play. Therefore, regardless of whether a citizen accepts or avoids responsibility, she faces a guilty conscience by her own standards. By contrast, the Problem of the British Conscience arises when the citizen in question can accept moral responsibility for the legitimacy of a practice, and does not feel any guilt despite the fact that it violates her private moral commitments. In accepting moral responsibility without hesitation for the legitimacy of an immoral practice, the citizen in question presents herself as

rather brutish in her moral attitude. Finally the Problem of the Clear Conscience arises when a citizen makes changes in her private lifestyle in order to be able to reconcile her moral responsibility for legitimate uses of political power with her other moral commitments. The problem occurs when the changes appear to be too demanding on the citizen. If a citizen has to leave her Church, or alienate her family and friends in order to be a reasonable citizen, her fellow citizens might think that the citizen has undertaken too great a sacrifice to accept moral responsibility for a legitimate law.

In Chapter 2 I considered the argument that a reasonable citizen can minimize her sense of responsibility for a particular use of political power by acknowledging that she has reasonably endorsed the procedures by which collective decisions are made, as opposed to endorsing each collective decision. Although this does not eradicate causal and volitional responsibility for the legitimacy of a given law, it diminishes such responsibility because the procedures were chosen for general application. A citizen can reasonably argue that the procedures generate many good results, and her choice to reasonably endorse the procedures was to make certain that those worthwhile procedural outcomes became legitimate. In order to ensure that these worthwhile results would be generated, she had to accept the fact that some procedural outcomes would go against her moral views.

I argued in Chapter 2 that procedural legitimacy is itself a problematic mode of determining justifiable grounds for legitimate courses of action. Procedures only generate pro tanto obligations to follow the dictates of their outcomes. This means

that a citizen can still find procedural outcomes unjustifiable post-procedurally, and thereby question the outcome's legitimacy.

Given the problems that arise with using pure public reason as the criterion by which political positions are justified, I would like to propose an alternative account of public reason that addresses these issues of responsibility and conscience. I call this account sympathetic public reason. Sympathetic public reason differs from pure public reason in the sense that it conceives of liberal citizens as reasonable, rational *and sympathetic* agents. This means that the duties of liberal citizenship, which previously arose from the view of free and equal, reasonable and rational citizens engaged in fair cooperation,²⁰⁷ must now be re-evaluated to determine which terms agents would agree upon were they also sympathetic.

The notion of sympathy that I will incorporate into the Rawlsian justificatory framework is the view of sympathy presented by Adam Smith in his *Theory of Moral Sentiments*. Before I do so, however, I must justify why it is possible to use Smith's account of sympathy within a Rawlsian framework. Philosophical concepts cannot always be uprooted from one theory and easily planted into another. For example, we would not expect to be able to assimilate Plato's Form of the Good into an account of utilitarian justice, without giving some account of how this would affect the basic assumptions of the utilitarian conceptual framework. Similarly, why should we believe that Smith's account of sympathy and its accompanying views on moral psychology can easily fit into a Rawlsian account of political liberalism?

²⁰⁷ John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), p. 18.

The purpose of this chapter is to reassure Rawlsian liberals that they can maintain their general beliefs regarding justice, impartiality and equality, while embracing the concept of sympathy into their analysis. Regarding views on justice and impartiality, I show that Smith's moral theory makes claims about how we understand justice and impartiality in a manner analogous with Rawls' account. In the case of equality, I show that at least one interpretation of sympathy is compatible with Rawlsian views on equality, although this interpretation differs substantially from other accounts of emotions in political liberalism.

3.1: Adam Smith's Theory of Sympathy

Adam Smith begins his Theory of Moral Sentiments with the observation, '*How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.*'²⁰⁸ These characteristics of human beings make up the psychological capacity for sympathy. Sympathy occurs in individuals capable of great selfishness, who require the happiness of others for their own happiness, but who feel this sense of happiness so 'instantaneously' that its realization cannot correctly be described as a self-serving, calculated pursuit of self-interest.²⁰⁹ Moreover, sympathy occurs in individuals whose senses limit their experience of pleasure and pain to their own selves.²¹⁰ They cannot feel the pleasure or pain of others without some further intellectual capacity: the faculty of

²⁰⁸ Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge, UK: Cambridge University Press; 2002), 1.i.1.1.

²⁰⁹ *Ibid.* 1.i.2.1.

²¹⁰ *Ibid.* 1.i.1.2.

imagination.²¹¹ Sympathy occurs when an individual witnesses another individual experiencing a particular event, and imagines how she would feel were she in the same situation.²¹² This process of imagination is not necessarily a purposeful placing of oneself into another person's shoes, but is often the result of an instantaneous projection of oneself into another's position that occurs naturally within a human being's psychological make-up.²¹³

In Smith's account, pleasure and pain play a dual role in experiencing the emotion of sympathy. Like in most hedonic accounts, pleasure is understood as the positive response to those things individuals find desirable or agreeable, while pain is a negative response to that which is undesirable or disagreeable. Additionally, Smith assumes that *mutual* sympathy is inherently pleasurable for all individuals.²¹⁴ In situations of distress, for example, having another person sympathize with the distress makes the distressful situation easier to bear. Smith writes that sympathy '*enlivens joy and alleviates grief. It enlivens joy by presenting another source of satisfaction; and it alleviates grief by insinuating into the heart almost the only agreeable sensation which it is at that time capable of receiving.*'²¹⁵ Smith believes that this is why individuals confide their sorrows to their friends. They do not aim to spread sorrow by relating their own personal tragedies to their friends. Rather, such confidences are beneficial, according to Smith, because the state of *mutual sympathy* is itself a source of pleasure.²¹⁶

²¹¹ Ibid. 1.i.1.2.

²¹² Ibid. 1.i.1.2 to 1.i.1.6.

²¹³ Stephen Darwall 'Empathy, Sympathy, Care' *Philosophical Studies* 89 (1998): 261 - 282 at p. 268.

²¹⁴ Smith, *Theory of Moral Sentiments*, 1.i.2.1 - 1.i.2.6.

²¹⁵ Ibid. 1.i.2.2.

²¹⁶ Ibid. 1.i.2.1 - 1.i.2.6.

Given two individuals, an agent experiencing a certain emotion in a certain situation, and a spectator witnessing the agent's experience, *mutual* sympathy requires three things: (i) it requires the spectator to correctly identify the passions felt by the agent through the agent's expression of the passion²¹⁷; (ii) it requires the spectator to judge that if she were in the agent's situation, she would be experiencing the same passions to a comparable degree (the spectator rarely feels the passions to the same extent as the agent)²¹⁸; and (iii) it requires the spectator to feel pleasure at the fact that she and the agent would experience the same passions to a comparable degree were either of them in the agent's current situation.²¹⁹ If the spectator has imagined the agent to feel a passion that the agent does not actually feel or if the spectator is indifferent to the agent's plight despite understanding and empathizing with the agent's situation, then the spectator would not be experiencing any kind of sympathy with the agent.

Note that the spectator can still feel sympathy *for* the agent by imaginatively projecting herself into the situation of the agent, and evaluating how she (the spectator) would feel in the agent's situation. However, this can be done independently of witnessing the agent's reaction. If we are told of a complete stranger who enters her damp and dimly lit office on a Monday morning, and is greeted with a two foot pile of paperwork, we do not need to see her reaction to imagine how she might feel. Our projection of ourselves into her situation instantly conveys a feeling of despondence. However, it might be the case that the woman in question is actually a cheerful Pollyanna who tries to always look on the bright side,

²¹⁷ Ibid.

²¹⁸ Ibid. Introduction 1.ii.

²¹⁹ Ibid. I.i.2.6.

or a dutiful drudge who gets a perverse sense of satisfaction at the prospect of her own martyrdom. In this instance, we can sympathize for her and the situation with which she is confronted, but we are not *in sympathy* with her insofar as we do not feel the much desired mutual sympathy.

Smith contends that the desire for mutual sympathy encourages agents to curb the expression of their passions so that they align with what spectators believe they would feel if they were in the agent's position. By expressing a passion too forcefully, agents make it impossible for spectators to judge it comparable to the passion that they themselves would have felt.²²⁰ This is because spectators cannot feel precisely what it is the agent is feeling, when the agent experiences an emotion. A prime example of this occurs with the 'passions which take their origin in the body,' (e.g. hunger, thirst, etc.,) which are difficult for spectators to experience to the same degree as those who are actually hungry or thirsty.²²¹ Since spectators cannot be called upon to feel hungry or thirsty, just because they witness the expression of hunger or thirst in an agent, Smith claims that all human beings curb their expression of these passions out of a sense of propriety.²²² They wish to be in mutual sympathy with the spectator. Generalizing this phenomenon, the desire for mutual sympathy evokes a sense of the spectator's propriety in each agent, and it is this awareness that enables agents to understand the rules of propriety. Eventually these rules are internalized.²²³

²²⁰ Ibid. Introduction 1.ii.

²²¹ Ibid. I.ii.1.1.

²²² Ibid. I.ii.1.1.

²²³ Ibid. III.i.3 and III.i.4 has an extended discussion of the particulars of Smith's moral psychology.

Desire for mutual sympathy is further reinforced by an individual's desire for praiseworthiness. The account of this desire for praiseworthiness is complex. According to Smith, just as a concordance of one's opinions with that of another is simply what it means to approve of the other's opinion, concordance of one's sentiments with those of another is simply what it means to approve of their sentiments.²²⁴ Therefore, mutual sympathy simply is the state of a spectator approving of the sentiments of an agent in a particular situation. However, there are times when a spectator not only approves of the agent's sentiments, but finds that an agent's sentiments have taken into account aspects of a scenario that the spectator could not properly grasp. In such situations the spectator not only discovers a concordance, but views the concordance as the result of an agent being able to 'lead and direct' the spectator's views.²²⁵ In such cases, the spectator knows that how she would have responded to a situation differs from how the agent responded, but feels that how the agent responded was in fact superior. When we view others in situations where it would be quite natural to respond with fear, and instead we see them respond with courage, then we the spectators might feel that although our fearful response would have been appropriate, the others' response was far superior. Smith labels this particular sympathetic response, admiration.²²⁶

A desire for praiseworthiness is the result of this admiration. Smith writes, '*The love and admiration which we naturally conceive for those whose character and conduct we approve of, necessarily dispose us to desire to become ourselves the objects of the like agreeable sentiments, and to be as amiable and as admirable as those whom we love and admire the*

²²⁴ Ibid. 1.i.3.2.

²²⁵ Ibid. 1.i.4.3.

²²⁶ Ibid. 1.i.4.3.

*most.*²²⁷ In this respect, we might try to cultivate the bravery and strength to act heroically in the next difficult situation, because we too wish to be admirable. Note, however, that Smith does not claim that spectators actively seek the admiration of others. Rather, when we the spectators feel love for those we admire, we determine to become more like them. The desire to be admirable in the same respect as those we admire leads agents to curb their behaviour even further.

Propriety also becomes an important feature of Smith's moral framework in those cases when an individual determines that were she in the situation of another agent, her response would be quite different from the feelings most naturally felt by the agent, the sense of propriety is generated by the thought that her own feelings in such situations might actually be *inappropriate*. This encourages individuals to take a third-person view of themselves to determine what others would find appropriate in their behavior.²²⁸ The sense of propriety is founded on the belief that one should use one's self-command to express only those passions that others can find appropriate. The motivation to utilize such self-command is the pleasure found in mutual sympathy. The agent must be able to imagine how a spectator is imagining the agent's own situation, in order to ensure that her own actions are actually generating sympathy from the spectator. Smith describes this capacity for a single individual to be both agent and spectator of her own actions, as a 'mirror' by which individuals can engage in self-approbation or self-disapprobation.²²⁹

²²⁷ Ibid. 1.iii.2.3.

²²⁸ Ibid. 1.i.5.5.

²²⁹ Ibid. 3.i.1.3.

It would seem that once people have the capacity to use their own imagination as a guide for which behaviors would earn a spectator's sympathy, they no longer require actual spectators to measure the propriety of their actions. They can evaluate the propriety of their own actions from their own perspective. Problems arise, however, because individuals are partial and capable of self-deceit. In fact, *'Our views...are apt to be most partial when it is of most importance they should be otherwise.'*²³⁰ As Smith states at the outset, human beings are naturally self-interested creatures, and self-love is always a strong passion. It is difficult for them to judge their own actions as those which fall below that of expectable standards.

Moral capacities, according to Smith, make up for this weakness by abstracting general rules or principles of morality from experiences of judging the actions of others.²³¹ What we find abhorrent in others, we determine not to do ourselves, even if our self-love would allow us to approve of ourselves were we to perform such acts. Scholars read Smith as suggesting that in ordinary cases, self-love will be a stronger motive than other altruistic virtues in determining the course of human action.²³² In this way, sympathy allows individuals to look beyond their own self-interest to that of others, without appeal to the altruistic emotions of beneficence, humanity or Christian love.²³³ As far as Smith is concerned, these traditional explanations for individuals regard for others are only witnessed in rare cases of extreme virtue.²³⁴ They do not explain the common cases of individuals attending to the interests of

²³⁰ Ibid. 3.i.4.2.

²³¹ Theory of Moral Sentiments 3.i.4.7 – 3.i.4.8.

²³² D.D. Raphael, Chapter 6:

²³³ Raphael points out that beneficence is the other-regarding attitude favoured by Hutcheson, while humanity that of Hume. By claiming that sympathy does not require these attributes, Smith is consciously distinguishing his moral project from those of his predecessors (D.D. Raphael, 'The Impartial Spectator', page 40.)

²³⁴ Smith, *Theory of Moral Sentiments*, 1.i.V.6.

others. Therefore, the general sensitivity most humans show to the interests and fortunes of others cannot be explained by appeal to such virtues. Smith's view of sympathy offers an alternative explanation based on the notions of pleasure, propriety and self-approbation.

However, the process of curbing the expression of one's emotion through a desire for mutual sympathy, followed by approbation, can be generalized to construct a Smithian form of moral development. Smith says that as a part of a child's development, the child tries to win approbation from each person he or she encounters. It is only through this process that children first become aware of conflicting interests, and the fact that due to conflicting interests, it is impossible to please everyone.²³⁵ They then determine that they should regulate their conduct in accordance with the sympathies of someone whose interests are not at stake given the consequences of their actions, and from this develop the heuristic of an Impartial Spectator.²³⁶ The Impartial Spectator is a hypothetical person capable of approving or disapproving of behaviour from a disinterested and indifferent perspective. Individuals' need for approbation is no longer expressed in terms of pleasing others, but by maintaining a sense of propriety in accordance with this impartial standard.²³⁷

When we realize that everyone develops a similar sense of propriety, our own sense of propriety combined with our desire for mutual sympathy, encourages us to view ourselves as others view us. This too is problematic given that we have to

²³⁵ Ibid. 1.iii.2.32n.

²³⁶ Ibid. 1.iii.2.32n.

²³⁷ Ibid. 1.iii.2.32n.

contend with others who have interests that conflict with our own.²³⁸ Smith suggests that although we place greater weight on our personal interests than those of others, we at this point also realize that from the impartial perspective of the world at large, our interests, preferences or general happiness are neither of greater nor lesser importance than that of others.²³⁹ Of this realization Smith writes:

*'When he views himself in the light in which he is conscious that others will view him, he sees that to them he is but one of the multitude in no respect better than any other in it. If he would act so as that the impartial spectator may enter into the principles of his conduct, which is what of all things he has the greatest desire to do, he must, upon this, as upon all other occasions, humble the arrogance of his self-love, and bring it down to something which other men can go along with.'*²⁴⁰

3.2: Smith and Rawls

In a politically liberal society marked by reasonable pluralism, the final stage in Smith's account of moral development is only undertaken part way. In political liberalism, it is not assumed that everyone cultivates the same moral code as a result of having a sense of propriety. Rather, the conclusion that a person who views himself (or herself) as others do can cultivate interests that others may endorse, and thereby engage on terms of mutual sympathy with them, echoes the sort of social cooperation in which Rawls grounds his defence of political liberalism. By extending this analogy

²³⁸ Ibid. II.ii.2.1.

²³⁹ Ibid. II.ii.2.1.

²⁴⁰ Ibid. II.ii.2.1.

we will come to see that the cornerstone to liberal 'propriety' is behaving with one's fellow citizens in a politically reasonable manner.

There are three parallels between Smith's account of sympathy and Rawls' account of justice as fairness that carve a niche for the possibility of legitimating liberal authority through an exchange of sympathetic judgments. (I will henceforth refer to this as a possibility for a sympathetic liberalism.) In the remainder of this chapter I will provide evidence for all three of these parallels, and then consider two objections. Firstly, I will argue that the idea of justice as fairness as a means of social cooperation is inherent in Smith's thought, although Smith uses a different set of terminology to defend the same basic idea which Rawls eventually does (3.2.1). Secondly, I will show that the idea of reciprocity can be equated with cultivating an impartial viewpoint on par with Smith's impartial spectator (3.2.2). Finally, I will show that Rawlsian public reason can be interpreted as a type of impartial spectator for political liberalism (2.3). Therefore, Smith and Rawls can comfortably accommodate each other's views on justice, reciprocity and publicity.

Then I will consider the objection that Smith's account of sympathy does not succeed in achieving the requirements of liberal impartiality (3.2.4). Finally, I will consider the fact that Smith's account of sympathy is more demanding than the Rawlsian view of political reasonableness.

3.2.1 Justice

Rawls argues that all individuals are subject to a natural duty of justice which requires them to comply with the rules of just institutions.²⁴¹ Individuals assume the natural duty of justice involuntarily.²⁴² For example, being born into a just political system suffices to require submission to the constitution of the just polity.²⁴³ In this sense, the natural duty arises independently of any political or social arrangements in which an individual might choose to participate.²⁴⁴ According to Rawls, natural duties 'hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons.'²⁴⁵ However, Rawls justifies the natural duty of justice by invoking the concept of justice as fairness. That is, the duty to obey just constitutions is natural insofar as agents beyond a veil of ignorance would adopt it as a natural duty.²⁴⁶

In addition to natural duties, Rawls argues that many individuals must also comply with just institutions through obligations that arise from the Rawlsian Principle of Fairness. According to the Principle of Fairness, 'A person is required to do his part as defined by the rules of an institution when two conditions are met: first the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests.'²⁴⁷ Unlike political duties which arise naturally (i.e. from being born into a particular just political

²⁴¹ John Rawls, *Theory of Justice*, p. 115

²⁴² *Ibid.* pp. 343-344.

²⁴³ *Ibid.* p. 344.

²⁴⁴ *Ibid.* pp. 114 – 115.

²⁴⁵ *Ibid.* p. 115.

²⁴⁶ *Ibid.* p. 116.

²⁴⁷ *Ibid.* pp. 111 – 112.

society), political obligations arise through a citizen's voluntary actions (e.g. by accepting a political office or joining the military.)²⁴⁸

When Smith speaks of complying with the demands of justice, however, he does not mean to imply any duty to comply with just institutions, nor any obligation to follow the rules of a social practice voluntarily entered into. For Smith, justice is a 'negative virtue.'²⁴⁹ It is satisfied whenever individuals restrain themselves from inflicting hurt or harm upon others.²⁵⁰ In Smith's moral framework, if justice is violated then a person has suffered an injury as a consequence of an action that warrants sympathetic disapproval.²⁵¹ Moreover, violations of justice correspond with those actions whose motivations not only fail to elicit sympathetic approbation in impartial spectators, but which evoke resentment in spectators due to the callous nature of the actions.²⁵² Rather than an account of justice as fairness, Smith's account of justice designates constraints on moral harm like theft, broken promises and murder.

In this sense, Smith's account of justice corresponds much more closely with the Rawlsian natural duty not to injure or harm,²⁵³ not the Rawlsian natural duty of justice. Like Smith's account of justice as a negative virtue, Rawls identifies the natural duty not to cause injury as a negative duty.²⁵⁴ Both agree, moreover, that the duty in question is pre-civil. For example, Smith considers it a pre-civil, natural right, to prevent injury through self-defence, and seek to punish any injury already

²⁴⁸ Ibid. p. 344.

²⁴⁹ Smith, *A Theory of Moral Sentiments*, II.ii.1.9.

²⁵⁰ Rawls, *Theory of Justice*, p. 114.

²⁵¹ Smith, *A Theory of Moral Sentiments*, II.ii.1.5.

²⁵² Ibid. II.i.1.5.

²⁵³ Rawls, *Theory of Justice*, pp. 109, 114.

²⁵⁴ Ibid. p. 114.

inflicted upon oneself.²⁵⁵ Rawls adds that natural duties are duties to persons in general, rather than through specific social or institutional relations that exist between individuals.²⁵⁶

Rawlsian conceptions of justice align more closely with Smith's notion of duties of gratitude. Smith writes of these duties in connection with the virtue of beneficence, a virtue defined as motivating actions which elicit a sympathetic response of gratitude in a spectator.²⁵⁷ However, feelings of gratitude can also inspire duties of beneficence in an individual.²⁵⁸ For example, if an individual asks another for a favour, there exists a special reason for this person to acquiesce to the request, if at some former time she herself was the recipient of some favour from the individual. In this case the duty of gratitude (to return the favour) supports the duty of beneficence (to do the favour). In Smith's view, motives of beneficence inspired by feelings of gratitude come closest to simulating the existence of obligations.²⁵⁹

However, Smith also insists that while such duties of gratitude may exist, there can be no *obligation* imposed from an external source to see that an unwilling agent performs a duty of beneficence. In our example with the recipient of the favour, if the recipient refuses the favour, spectators determine the act to be 'improper' and thereby not deserving of sympathy. However, they cannot determine the act to be 'hurtful' merely on grounds of ingratitude, and only hurtful actions warrant resentment. It would seem then that Smith's account of gratitude and beneficence

²⁵⁵ Smith, *A Theory of Moral Sentiments*, II.ii.1.7.

²⁵⁶ Rawls, *Theory of Justice*, 115.

²⁵⁷ Smith, *A Theory of Moral Sentiments*, II.ii.1.1.

²⁵⁸ *Ibid.* II.ii.1.3.

²⁵⁹ *Ibid.* II.ii.1.3.

departs thereby from Rawls' views of justice based in reciprocity. According to Rawls, the Principle of Fairness requires that if an individual has benefitted from an institutionalized social practice, then as a matter of justice, he or she must allow others to benefit in their turn, even if it means a sacrifice on the part of the individual in question. In the case of the neighbour unwilling to perform a favour, if a practice of returning favours has been institutionalized, then Rawls would argue that as a matter of justice, the neighbour ought to return the favour.

It may seem, therefore, that given how differently Smith and Rawls conceive the very content of justice, that their views on the matter cannot be reconcilable. Interestingly, while the content of justice differs in Rawls and Smith, the *function* of justice in political society play the same role in the views of both thinkers. Both Smith and Rawls use their theories of justice to posit the capacity for stable social cooperation amongst individuals with diverging self-interests. In important respects, they use the same strategy to construct their resolutions. Justice resolves antagonisms between individuals, not through legal adjudication, utilitarian calculation or appeal to any other codified set of principles, but by determining the evaluations of a person with the capacity to take a general point of view.

Given a situation where individuals with competing interests are asked to form a political community, justice ensures that such communities maintain stability in a way which has the approval or endorsement of all individuals who possess a sense of impartiality or fairness. Moreover, the motivations to be just in Smith and in Rawls have analogous bases. In Smith, justice arises out of a willingness to view oneself as others do in order to avoid being seen as giving oneself a privileged

position in relation to others.²⁶⁰ In Rawls, both justice and fairness arise out of a sense of reciprocity, the idea that fair and just rules of social cooperation are those chosen by free and equal individuals willing to offer fair terms to each other.²⁶¹ Both Smith and Rawls consider it an aspect of justice that individuals who might naturally seek advantages for themselves at the expense of others, restrain themselves from upon such interests, due to the fact they are situated equally to all others in society.²⁶²

Smith explains this self-restraint by appealing once more to mutual sympathy. Since justice, for Smith, consists in actions that arouse resentment in spectators, a person who violates justice is aware that all spectators will disapprove of his actions.²⁶³ Moreover, Smith believes that when (and if) the violator of justice reflects upon his action, she too will be ashamed of her motives.²⁶⁴ After all, a person who is capable of seeing herself from the third person perspective and her sense of propriety arises from this perspective. It is only in the heat of the moment in which her first person perspective takes over. A person who violates justice and who is capable of seeing his action the way an impartial spectator would observe it, must end up feeling both shame and remorse.²⁶⁵

It is the reasoning of this violator of justice that is crucial to drawing the Rawlsian analogy. Smith writes firstly that although a man may give preference to himself, it is in seeing himself from the perspective of the multitude that he realizes

²⁶⁰ Smith, *Theory of Moral Sentiments*, II.ii.2.2.

²⁶¹ John Rawls, 'Justice as Reciprocity' in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999) p.190.

²⁶² Smith, *Theory of Moral Sentiments*, II.ii.2.2.

²⁶³ *Ibid.* II.ii.2.1.

²⁶⁴ *Ibid.* II.ii.2.3.

²⁶⁵ *Ibid.* II.ii.2.3.

that he cannot treat himself as being in any way superior to it.²⁶⁶ However, he writes that the problem does not arise from this mere self-preferential treatment. In fact, if a man prefers himself in the quest for power, prestige or happiness, others will be able to engage in mutual sympathy with him.²⁶⁷ In Rawlsian terms, it is fair to acknowledge that individuals have both rational and reasonable capacities; rational capacities that are self-serving and ego driven, reasonable capacities that are willing to offer fair terms to others. The trouble for Smith is not then in the rational pursuit of one's own fulfilment, but the thought that by unjustly hurting others in pursuing rational endeavours, the violator of justice is not acknowledging that those equal to him in skill and merit deserve equal treatment. Smith writes:

'[H]e may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should jostle, or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair play, which they cannot admit of. This man is to them, in every respect, as good as he: they do not enter into that self-love by which he prefers himself so much to this other, and cannot go along with the motive from which he hurt him.'²⁶⁸

In speaking of violations of justice, Smith is therefore giving an account of rational agents interacting within the constraints of rule-governed practices. These may not be institutionalized political practices in the sense political liberals have in

²⁶⁶ Ibid. II.ii.2.1.

²⁶⁷ Ibid. II.ii.2.1.

²⁶⁸ Ibid. II.ii.2.1.

mind. However, Rawls' notion of fairness is wider than his account of political justice. The practice of promise-keeping, for example, is considered an institutionalized practice in which the principle of fairness becomes operative.²⁶⁹ Where fairness and justice diverge in Rawls, is that the term 'fairness' applies to the terms of social and institutional practices in which an individual has a choice to participate, while considerations of 'justice' apply to institutions and practices in which individuals find themselves involuntarily entangled.²⁷⁰

We can see, therefore, that the three stages of Smith's argument for choosing justice over self-interest, are precisely the three that Rawls himself offers. Firstly, a Rawlsian citizen sees himself from the perspective of the multitude because he views himself as free and equal to all other citizens. This perspective of the multitude is reflected in the original position, the position of public reason, the criterion of reciprocity, etc. Secondly, from this public perspective, a man is allowed to pursue his own interests (i.e. be rational rather than completely altruistic), however, he is constrained by the rules of institutional practices. Third, these rules apply to him either because he himself finds them justified from a suitably public perspective (in which case he accepts them as a duty), or because he has obtained a relevant advantage and needs to fulfil his responsibilities on grounds of fairness (in which case he accepts them as obligations). If he is politically reasonable, he accepts these rules, in the same way as a Smithian agent looks to the impartial spectator's perspective, if he is capable of taking a third person perspective of himself.

²⁶⁹ Rawls, *Theory of Justice*, p. 345.

²⁷⁰ Rawls, 'Justice as Reciprocity,' pp. 190, 209.

Smith does depart from Rawls in the sense that he does not allow for a man to be subject to the restraints of justice only because he has taken advantage of the benefits. This means that Rawls' principle of fairness is more expansive than Smith's account of justice, but will accommodate Smith's justice just as long as Smith's notion of impartiality can be construed as a subset of Rawls' view of the perspective of the multitude. However, in Rawls' early work, fairness and justice both arise out of a sense of reciprocity.²⁷¹ They measure the degree to which a practice abides by the general principles chosen by those practicing it, when practitioners view each other as being 'similarly circumstanced'.²⁷² Rawls makes it clear that the sorts of practices he has in mind, include political practices and therefore political institutions as well.²⁷³ Rawls takes as his basic example the institution of slavery. Since all individuals in a political community, when equally circumstanced, would be unwilling to accept slavery as a general principle (i.e. tolerate it if they were made slaves,) slavery would be unjust by the standards of that political community. Thereafter, any slave within the political community would have a legitimate complaint on grounds of justice against those political institutions within the community permitting slavery. In this regard, evaluating the practices of any given set of people on grounds of justice or fairness requires not only impartiality or neutrality, but also on reciprocity.

In the next two sections I will show that that Smith's notion of impartiality can be situated in the Rawlsian conception of reciprocity, and the Rawlsian notion of public reason. This means that the perspective of the multitude described in Smith

²⁷¹ Ibid. p. 190.

²⁷² Ibid. p.209.

²⁷³ Ibid. p.190.

also applies to the perspective of the multitude in Rawls. This in turn will show that the Rawlsian and Smithian accounts of justice can indeed be reconciled.

3.2.2 Impartiality

Rawls' early views of justice were founded on a principle of reciprocity that generated a moral requirement to take an impersonal standpoint in determining the *rules* that will guide social cooperation. In this view, reasonable and rational citizens pursuing objectives that may conflict with each other, realize that they will have to establish a set of standards by which to adjudicate competing claims.²⁷⁴ If an impersonal standpoint is not taken in establishing such rules, then in some cases, social practices will be governed by rules where individuals become 'mutually aware' that one of them is forced to accept conditions or practices that the other does not find acceptable. They both recognize the unfairness of this, and conclude that in such cases, 'One of them is, then, either claiming a special status for himself, or openly taking advantage of his position.'²⁷⁵

The fact that a claim of 'special status' violates justice as reciprocity is similar to Smith's view that 'we are but one of the multitude, in no respect better than any other in it.'²⁷⁶ The rules that apply to others are those which must also apply to us, were we in the other's position. Importantly the 'impersonal' perspective in both Rawls and Smith deviates from another interpretation of impartiality in which it is sufficient to apply the same rule to everyone. Elaborating on Rawls' famous example in *The Idea of Public Reason Revisited*, Calvin might say to Michael Servetus that

²⁷⁴ Ibid. p. 200.

²⁷⁵ Ibid. p. 207.

²⁷⁶ Smith, *Theory of Moral Sentiments*, III.3.5.

burning him at stake would be an 'impartial' application of a rule in which all those who do not believe in the Trinity must burn at stake.²⁷⁷ However, in Rawls and Smith, the standards are impartial in a different and more demanding sense: A rule or standard is applied in a way that is impartial (in the way which corresponds with justice as reciprocity) only if *every individual* who is reasonable (for Rawls) or moral (for Smith) would agree that were she in the same situation as the person to whom the rule will be applied, it would be appropriate to apply the same rule to her. Since Servetus would not agree to a rule in which all those who do not believe in the Trinity must burn at stake, the rule is not applied in the requisite impartial manner. Furthermore, since both Servetus and Calvin are aware that Servetus would not accept such a rule, they would both be led to believe that Calvin is claiming a special status for himself (which indeed he is – the status of a person who is not a heretic.)

Rawls characterizes those who violate the principle of reciprocity as being politically unreasonable. A reasonable citizen, according to Rawls, is someone who will propose and abide by fair terms as long as she believes others are willing to do so as well.²⁷⁸ Rawls notes that this account of reasonableness reflects a contractualist desire to justify our positions to those with whom we live in a justificatory relationship.²⁷⁹ However, the liberal political relationship is essentially characterized by relations of reciprocity,²⁸⁰ and it is from the idea of reciprocity that the justificatory nature of the liberal relationship derives.²⁸¹

²⁷⁷ Rawls, 'The Idea of Public Reason Revisited,' p. 771.

²⁷⁸ Rawls, *Political Liberalism*, p. 49.

²⁷⁹ *Ibid.* p. 49f.

²⁸⁰ *Ibid.* pp. 16, 50.

²⁸¹ *Ibid.* p. 50.

In order for this process to be successful an individual must be called upon to imagine herself in the shoes of all others. On what other grounds could she believe that those like herself could accept her proposal on reasonable terms? Such an imaginative process requires sympathy akin to that of Smith's impartial spectator; the idea is to use the imagination to establish rules that all would agree are impartial from a general perspective where no one gives himself or herself any advantage. Just as Smith believes that moral awareness emerges by taking a third person perspective upon oneself that curbs one's self-interested actions, Rawls writes that in order for self-interested individuals to engage in cooperative enterprises on free and equal terms, they must offer terms to each other while keeping in mind the general point of view.²⁸² In the Rawlsian framework, the relationship of reciprocity places a moral constraint on each citizens such that any terms agreed upon reflect *'the acknowledgement of principles as impartially applying to one's own claims as well as to others, and the consequent constraint upon the pursuit of one's own needs.'*²⁸³

Reciprocity requires having a particular relationship with others which puts greater weight on harmful actions imposed on them than benefits given to them. The principle of reciprocity declares that one cannot enslave others because one would not want to be a slave. It does not declare, however, that if everyone were a slave that political relations would be just. Although this would satisfy the requirements of generality and impartiality, the obligations generated by a principle of reciprocity are typically constraints placed on a person when engaging in a cooperative relationship

²⁸²Rawls, 'Justice as Reciprocity,' p. 196.

²⁸³ Ibid. p. 202.

with another person. They are derived from the inter-personal relationship, rather than from some overarching moral viewpoint.

Although Smith's account of impartiality is situated in an overarching comprehensive moral theory, it is grounded in the interactions of agent's who are trying first to win the approbation of indifferent spectators who witness their actions, and thereafter the approval of impartial spectators that they have internalized. In this sense, it also emerges from an inter-personal relationship. The difference is that it is a *moral* theory upon which is built the comprehensive rules of social interaction, rather than a sense of fairness by which political interactions are governed.

This difference, however, can be explained by the fact that in the Rawlsian public sphere, approval is not generated by agreement on the content of a sentiment or an argument, but by agreement that a particular sentiment or argument is reasonable. If one citizen disagrees with the beliefs of another, but accepts that they are the beliefs of a reasonable citizen, then he can 'go along' with the beliefs in a manner similar to the way in which Smithian agents' go along with the pursuit of rational interests. This is because in the Rawlsian public sphere, to form, revise and pursue a conception of the good is in each individual's interest, and therefore no citizen disapproves from an impartial perspective when another disagrees with her on reasonable terms.

In his debates with Jurgen Habermas, John Rawls highlights the fact that assuming reasonable pluralism, justification in the political sphere can occur at three levels. The first, *pro tanto* justification, is justification from the standpoint of common human reason. Rawls points out that given reasonable pluralism, reasonable citizens

can also engage in what he calls full justification, which appeals to individuals' private comprehensive doctrines for justification. Finally, public justification is justification from the standpoint of reasonable citizens in a liberal democratic culture.²⁸⁴ It engages a mode of reasoning that is *public*, insofar as it appeals to reasons shared by citizens as members of a political cooperative. This tripartite model of justification is a useful illustration of the three standpoints from which any given citizen might evaluate reasons offered to him or her by fellow citizens. Each citizen has access to the universal standpoint of common human reason, the non-public standpoint of associations, and the public standpoint of public democratic culture. What I would like to propose is that this public perspective can be easily shown to represent a sort of impartial spectator for political liberalism.

Rawls' focus on the normative value of public justification stems from his view that the process of public decision-making is ultimately a matter of establishing fair parameters for social cooperation amongst reasonable citizens. The fact that we do not owe public justifications to those who cannot accept *pro tanto* justifications means that we need not construct political societies that meet the demands of those who are opposed to government of any sort, or who cannot see the value of reasonable arguments. The fact that we do not owe public justifications to those who cannot accept full justifications means that we do not owe justifications to those who always give priority to their personal interests, beliefs or moral views, and refuse to accept the views of others.²⁸⁵ Those who promote only those reasons supported by

²⁸⁴ Samuel Freeman, 'Public Reason and Political Justifications', *The Fordham Law Review*, Vol. 72, No. 5 (2004):2021-2072 at pp. 2045-2047, 2051.

²⁸⁵ *Ibid.* p. 2047.

their private comprehensive doctrines are charged with being uncooperative. The choice to be uncooperative is unreasonable, primarily because cooperation is essential for political stability. We only owe public justifications to those who have shown a willingness to take on the perspective of public democratic culture in which individuals are situated as free and equal citizens.²⁸⁶

Suppose then we are confronted with a person who conscientiously opposes a law or a policy from within his or her private doctrine. We might consider liberal Catholics who question the morality of abortions, or liberal Quakers who do not believe that just wars are in fact justified. In the liberal framework of political justification, reasonable citizens need not be concerned about these objections. While they come from reasonable citizens, they do not come from reasonable citizens who have taken on a suitably public perspective.²⁸⁷

This has led several critics of Rawlsian liberalism to question whether reasonable citizens are indeed given justifications that they can reasonably be expected to endorse. It might seem fair to ask Catholics and Quakers to offer reasons to others that they can understand from a suitably public perspective. What seems unfair is to ask Catholics and Quakers who receive justifications from the standpoint of democratic culture to evaluate those justifications from that public standpoint. A Catholic might be able to recognize that abortion is justifiable from the perspective of public democratic culture, but what this means is that she finds abortion justifiable given the criteria of public reason. She does not actually endorse abortion, nor is she

²⁸⁶Ibid. p. 2047.

²⁸⁷Ibid. p. 2047.

reasonably expected to do so from the public perspective. The public perspective is silent upon whether fetuses have moral status during the first trimester. It never claims that it is unreasonable to believe that it does have such moral standing.

Therefore, the Catholic's belief that abortion is murder is a belief that needs to be taken into account when others offer her a justification. After all, she is not claiming that others cannot have abortions because abortion is murder. She is simply claiming that those who have not responded to her concerns about the murderous practice of abortions have not in fact justified their positions to her. Even if all public reasons must be offered from the perspective of public democratic culture, in order for the justification to succeed, must it not appeal to people's public reasons as well as those private reasons that are not considered unreasonable? Otherwise, in what sense is the so-called public justification publicly justified?

The liberal response would have to be that the public perspective is the only appropriate perspective of reasoning. Separating the standpoint of offering a justification from the standpoint of receiving a justification simply misses the point. The public perspective is the only perspective that reflects the views of reasonable citizens *when* they are positioned as free and equal citizens.²⁸⁸ A liberal Catholic is not receiving a justification as a liberal Catholic, but as a reasonable liberal citizen. Note that what this actually amounts to is that both the offer of reasons and their evaluations have to be done from a perspective that considers the standpoint of all reasonable citizens.

²⁸⁸ Ibid. p. 2047

In this sense the standpoint of public democratic culture is no different from the standpoint of an impartial spectator. Individuals must take on the perspective of this spectator in order for the evaluation of offered justifications to be evaluations of reasonable citizens. When the Catholic or the Quaker project themselves into the impartial spectator's position, they see that public reason has provided a suitable justification for the policy to which they are conscientiously opposed.

Therefore, the Rawlsian account of justification from the perspective of 'free and equal democratic citizens'²⁸⁹ is precisely that of a liberal impartial spectator, if we assume that (i) forming, pursuing and revising one's conception of the good is a part of an individual's rational interest, and (ii) approval does not consist in agreeing upon the content of a belief, but in agreeing upon the reasonableness of a belief. If the Catholic insisted that it was reasonable to offer arguments to all citizens that were found only within the tenets of Catholicism, then there would indeed be a problem. However, in accepting the burdens of judgment and in behaving like a reasonable citizen, the Catholic is willing to take on the perspective of spectators who may or may not give priority to the views that she finds reasonable.

3.2.3 Objection from Impartiality

I would now like to review two objections that a Rawlsian may have with an account of sympathetic liberalism based in mutual sympathy and impartiality. The first objection is that principles of impartiality are often much weaker than the principle of reciprocity, particularly with regard to a-social and anti-social preferences. The

²⁸⁹ Ibid. p. 2047

principle of reciprocity immediately disqualifies consideration of such preferences in developing social rules, since reciprocity itself presupposes a social and cooperative relationship. By contrast, it is possible to resolve disputes between anti-social individuals whilst being completely impartial (e.g. through the use of an impersonal, utilitarian calculus.)²⁹⁰

Rawls raises the Impartiality Objection when discussing why justice based in reciprocity is superior to justice based in impartiality. This argument, though simple, is vital to his defence of liberalism over utilitarianism. In Rawls' view, both reciprocity and impartiality require arbiters of justice to take a general rather than personal perspective. However, impartiality is a weaker requirement than reciprocity insofar as it gives positive weight to a-social and anti-social preferences held by certain individuals. Rawls illustrates the difference between impartiality and reciprocity by considering the utilitarian argument against slavery. Rawls acknowledges that the disutility suffered by slaves in an institution of slavery is not restricted to harms suffered under a harsh master, but also involves stunted cultivation of moral and political agency, the absence of the social bases of self-respect and so forth. It is this comparative disutility aced by slatves which makes slavery wrong from the utilitarian perspective.

However, Rawls claims that under justice as reciprocity, it would be unnecessary to compare the disutility of the slave to the utility gained by the master since by definition, slavery cannot meet the demands of reciprocity.²⁹¹ Slavery is not the sort of relationship that can be characterized as 'reciprocal'. Reciprocity already

²⁹⁰ Rawls, 'Justice as Reciprocity,' p. 209.

²⁹¹ Ibid. p. 219.

assumes free and equal cooperation amongst the agents involved. Moreover utilitarianism cannot respond to the criticism that the utility derived by the master is completely irrelevant to the wrongness of slavery, whereas justice based in reciprocity completely avoids discussion of the utility derived by the master.

Assuming that we accept Rawls' view that a-social and anti-social preferences should not be counted in determining the rules of social cooperation, it would seem that justice based in impartiality is inferior to a notion of justice based in reciprocity. However, the principle of impartiality that guides utilitarian calculi is of course quite different from that which guides sympathetic evaluations. When an individual uses the device of the impartial spectator to project himself into the situation of the slave owner, he finds the attitude of a slave owner completely inappropriate. Therefore, allowing sympathetic judgments into public discourse need not give undue normative weight to a-social and anti-social preferences and interests. Moreover, it continues to respect the political values of cooperation, freedom and equality embodied in Rawls' principle of reciprocity.

3.2.4: The Problem of Equal Status

The second objection to impartiality over reciprocity hinges on an understanding of the political relationship between democratic citizens as being one of free and equal status with respect to all other citizens. A reasonable exchange between democratic citizens reflects this basic relationship, in the sense that the willingness to exchange reasons is also a willingness to recognize another person's equal status. It would be unnecessary to reason with someone who was obliged to be deferential to our demands, or who we did not see as being capable of mature judgment. By taking

seriously the objections that others may raise to a given set of reasons, a reasonable exchange reaffirms the free and equal status of their fellow citizens.

A sympathetic exchange, by contrast, can reflect beliefs about another person's vulnerability and ineptitude rather than their free and equal status. The second concern with incorporating sympathetic judgments into public deliberation involves the respective positions of sympathizer and sympathized in evaluations of sympathy. When two individuals engage in reasoned deliberation (as opposed to sympathetic deliberation), the practice of exchanging reasons presupposes each person's acknowledgement of the other person's mature capacity for reason. Intrinsic to this presupposition is the belief in the equal status of the other participant of reasoned discourse. In demonstrating a willingness to engage in reasonable discussion, citizens also demonstrate their willingness to view each other on terms of respect and equality.

Such attribution of respect and equality is not present in any analogous way in exchanges of sympathetic judgments. When one person accedes to the requests of another because he or she sympathizes with the other, the sympathy could just as easily be inspired by the other's vulnerability as by feelings of reciprocity and equality. The sympathetic judgment could be a judgment of pity, disgust, disapprobation or a whole host of other considerations that diminish the status of the other individual. Moreover, the recipient of the sympathy may not approve or even agree with such judgments. Yet in the framework of sympathy, the person to whom sympathy is given becomes the object of sympathy, rather than an equal participant in the sympathy.

To see this more clearly, consider the situation of a father who has recently been dismissed from his job. He is not very well-off, is the primary breadwinner of a moderate sized family, and has saved a reasonable amount given his earnings and situation. The cause of his dismissal from work is the result of market pressures rather than through any fault of his own. He has cultivated the ability to take pride in being able to meet the responsibilities of employee and family man. However, he now needs to apply for government benefits to support himself and his children. Suppose under current policy stipulations he would not qualify for any support, but that a proposed policy change would make him eligible. This man is a proponent of the new policy, and publicizes his predicament in a forum of public discourse, in hopes of garnering more support for it. The question before us now is the way in which his situation ought to affect the reflections of his fellow citizens.

In a forum of public discourse, one reasonable response to this man's concerns might be the claim that each citizen ought to have a right to a minimum income, and that given the absence of any responsibility on this man's part for his job loss, he (and others in his position) ought to be given a level of support from public funds. An alternative response, equally reasonable, might be that although this man is deserving of financial support, given the scarcity of collective resources, it would be impossible to support all those in his situation and so none should be supported. In both instances, the man (assuming that he is reasonable) could accept that both the responses are reasonable, although he agrees with one and disagrees with the other.

Contrast the reasonable disagreement described above, with two possible sympathetic judgments in response to this man's appeal. Both sympathetic

judgments consider his anxieties as a father, as well as the humility required on his part when asking for support, given his original pride in being able to stand on his own two feet. The first sympathetic judge, evaluating the feelings of anxiety and humility, responds with a fellow-feeling of sadness and commiseration, and an evaluative judgment of pity. The other judge, attributing the same feelings of anxiety and humility to the man, becomes disgusted at his inability to live up to his responsibilities. Just like reasoned judgments, sympathetic judgments can contradict each other. However, unlike the reasoned judgments, neither of the sympathetic judgments would sit well with the man in question if he is really the proud and responsible breadwinner we have characterized him to be. The sympathetic judgments are not responses to his appeal, but reflections about him and his situation. His situation is being objectified and analysed, without any indication that his fellow citizens owe him a respectful response to the argument he was aiming to make by invoking the sympathy of others.

In this way exchanges of sympathetic judgments do not maintain the equal status implicit in exchanges of reasonable judgments. In order to allow sympathetic judgments to play a role in public discourse, it is therefore necessary to establish parameters under which such sympathetic arguments as provided above are given no weight whatsoever. One way to do so is to encourage all liberal citizens to recognize and appreciate their shared vulnerability with respect to the collective. The neo-Stoic view offered by Martha Nussbaum aims to accomplish this very task.²⁹² In

²⁹² Nussbaum, *Upheavals of Thought*, Chapter 8.

the remainder of this section I want to outline this view, and offer an alternative account which is more in line with the Rawlsian conception of citizenship.

According to Nussbaum, emotions recognize and embody the judgment that much of what affects an individual's ability to lead a good, flourishing life lies outside of his or her control.²⁹³ What emotions enable an individual to understand is an aspect of the external world that needs to be attributed a certain weightiness or attention for the purposes of flourishing.²⁹⁴ The emotion of fear, for example, consists in the identification of a threatening situation which must be avoided for purposes of survival. Similarly, the emotions of love and hatred identify those people whose involvement in our lives has particular relevance for us, despite our inability to govern or control them. In this view, accepting emotions as important value-judgments requires putting aside any grandiose delusions of people serving as autonomous agents entirely responsible for the course their lives take, and instead accepting that each individual is vulnerable to the practical situation in which he or she finds herself.

In Nussbaum's view, the appropriate emotional response to the newly unemployed father is neither pity nor disgust, but the recognition that anyone else could have been in his situation, including those who are now judging him. As Nussbaum says: *'the victim shows us something about our own lives: we see that we too are vulnerable to misfortune, that we are not any different from the people whose fate we are watching, and we therefore have reason to fear a similar reversal.'*²⁹⁵ Since vulnerabilities

²⁹³ Ibid. p. 4.

²⁹⁴ Ibid. p. 126

²⁹⁵ Ibid. p. 408

are shared and all are recognized as vulnerable, it is not a disrespectful condescension that ought to accompany the sympathetic judgment but rather compassion based in a sense of recognition and mutual sympathy.

Upon first reading, this sense of mutual vulnerability seems like a reasonable way to constrain the sorts of sympathetic judgments that can be used in public argument. However, cultivating an attitude of shared vulnerability may not have the scope that Nussbaum believes it to have. Nussbaum argues for example that a man living in a society where women are not given adequate legal protections from sexual harassment, can recognize the possibility of a society where men are also denied such protections, and therefore show a respectful compassion for those women and try to change legal stipulations.²⁹⁶

Yet there seems to be something odd about this description of sympathy. First of all, it is unclear whether a man raised in a society where women are not given adequate legal protections, could actually invoke the empathy to place himself in a woman's shoes. Although he might be able to play a hypothetical game of envisioning the counterfactual scenario, it is unclear whether he could fully understand the particular stresses of being in such a position of vulnerability. Secondly, even if he could comprehend what it would be like to be so vulnerable, he also knows that it is unlikely that he will ever be so vulnerable. True, there could potentially be a society where men are denied the same legal protections as women in his society. However, he does not live in such a society and in all likelihood need

²⁹⁶ Ibid. pp. 413 - 414

not expect that he ever will. Why should he be moved to compassion just because the roles could potentially be reversed?

Citizens are not obliged to recognize their shared vulnerabilities in the same manner in which they are obliged to recognize their shared capacity to reason. When an individual recognizes a fellow citizen as reasonable she recognizes something in the other person that is not only worthy of respect, but that is identical to what she respects about herself. This is similar to the Kantian idea that in recognizing each individual's capacity to reason we also recognize their common humanity. However, it is restricted to the political sphere and couched in terms of the equal moral capacity to form, pursue and revise conceptions of the goods.

Given the generality required of reciprocity, a citizen cannot place greater weight on her own ability to reason and cultivate her moral powers, than similar abilities in anyone else. Therefore, she must recognize that just as she is owed justifications when the will of others is placed upon her, she owes justifications to others when she places her own will upon them. Hence, when she takes up political positions which, if reflected in law, will affect the lives of other citizens, she must provide justifications.

This means that even if Nussbaum could successfully show that citizens ought to recognize a shared position of vulnerability, she has still not offered an argument as to why this relationship generates a duty of compassion in the same way that the shared ability to reason generates a duty of civility. In the liberal political sphere guided by the principle of reciprocity, such duties must either be natural duties, or they must emanate from the social or political relationship (that is, the relationship

between individuals). In the latter case, the obligation to temper disrespectful uses of sympathy (e.g. condescension) through compassion, or through some other response to the recognition of shared vulnerability, would require us to say something about how the duty derives from civic and cooperative relations. Why is it necessary for free and equal individuals engaged in cooperative enterprise to be compassionate towards each other?

Furthermore, if a person were to adopt a strong ethic of personal responsibility in her own life, such that she confronts whatever practical difficulties that may accost her with a sense of resilience, and perhaps commits herself to living without voicing any complaints, she could expect those she sees as 'equally vulnerable' to adopt a similar attitude. She does show others the same compassion that she would expect people to show her. Correlative to this problem is the fact that an identification of shared vulnerability in principle, does not translate into the existence of shared vulnerability in practice. Not only is one person typically less vulnerable than another but a person may be less compassionate as a consequence of such vulnerability. Someone could reasonably (and sympathetically) believe that although her life is comfortable, were she required to face a difficult situation (such as unemployment), she too would be the victim of circumstance and would be expected to endure her position without complaint.

I propose that Rawlsians need not take the step of acknowledging this situation as one of shared vulnerability. In the sentimentalist framework of Hume and Smith, it is possible to feel sympathy for those whose accomplishments we find noble and indeed heroic, because we can imagine ourselves subject to conditions in which our

courage is forced to shine through even when we did not choose the direness of the practical situation. We can feel sympathy for those who are better off than we are, because we can imagine being in their situation, in the same way that we can feel sympathy for those who are worse off.

What we are centering on is not a shared position of vulnerability but a shared capacity for self-appraisal. We all share the ability to reflect on our life and determine whether or not it is worthwhile, interesting and flourishing. While we may all apply different standards to the analysis, we all share the desire to have life narratives that are worthwhile from our own perspectives. This capacity for self-appraisal and desire for self-approval reveals a shared aspiration to live a life of dignity, potentially hindered by events outside of our control but just as plausibly aided by the social bases of self-respect and the sympathetic approval of those capable and desirous of a similar level of dignity.

This capacity for self-appraisal is perhaps best embodied in the Rousseauian concept of *amour-propre*. Rousseau's *amour-propre* or 'self-love' is typically viewed as a source of social ills that arise when individuals' capacity for self-love leads them to vice and corruption.²⁹⁷ However, contemporary scholars argue that *amour-propre* can lead to 'gentle' and 'humane' passions as well.²⁹⁸ Like sympathy it is a mirroring device. It does not exist prior to the existence of civil society, but comes into being once people learn to regard evaluate themselves in relation to others.²⁹⁹ Unlike

²⁹⁷ Frederick Neuhouser, *Rousseau's Theodicy of Self-Love* (Oxford, UK: Oxford University Press, 2003) p. 9.

²⁹⁸ *Ibid.* pp. 15-16.

²⁹⁹ Jean-Jacques Rousseau, 'Discourse on the Origin of Inequality' *The Basic Political Writings*, ed. Donald Cress (Indianapolis, Indiana: Hackett Publishing Company, 1987), footnote 3.

sympathy, it results in individuals becoming egoistical in their attempts to win honour and approbation, as opposed to the desire of praiseworthiness as reflected in meeting the standards of an impartial spectator. As Darwall points out, Smith invokes an idea similar to *amour-propre* when he considers the capacity for an individual to feel moral indignation in response to a person exhibiting too much *amour-propre*.³⁰⁰ However, such indignation results because the person in question wills to place himself and his needs, too far ahead of those of others (a person who displays too much *amour-propre*.)³⁰¹

It can equally be, however, that when another affords a sufficient level of respect *to others* in honor of their own sense of self-respect, this will be evaluated positively by sympathetic agents. After all, the ability to weigh the value of our own lives, while holding our own self-worth to some measure dependent on the esteem of others, is the basis of a sympathetic relationship. The reciprocal aspect of the relationship lies in the fact that the mutual respect which derives from the interaction of two individuals capable of reflecting on and forming value-judgments of the quality of their own lives is on par with the mutual respect derived from recognitions of reasonableness. This level of mutual respect acknowledges the moral powers of others, and their free and equal status respective to oneself; and generates terms of equality not present in recognitions of mutual vulnerability.

To get a sense of this, all we need to do is take another look at the man who is constructing a sympathetic response to women who are not afforded adequate legal

³⁰⁰ Stephen Darwall, 'Sympathetic Liberalism: Recent Work on Adam Smith' *Philosophy & Public Affairs* 28 (1999):139 – 164 at pp. 144-145.

³⁰¹ *Ibid.* p. 145.

protections against sexual harassment or assault. I argued that this man need not and even may not be able to recognize in the situation of these women, anything at all resembling his own position in society. Both his capacity and motivation for empathy may be limited. There is nothing reciprocal about his standing with respect to women who are formally free and equal in the eyes of the law, but face diminished social and legal opportunities to fully express this freedom and equality. What this man can recognize, however, is the effect that it would have on a person's sense of personal dignity to reflect upon the quality of his or her own life in the absence of these legal protections. The reflection does not take the form of a counterfactual role reversal, but the identification that something of worth to the man, namely the socio-legal bases for his dignity, also has the potential to be taken from him. Just as the reasonable man can recognize that reason in others' is of value, the man who values his ability to reflect well on his own life can recognize the importance of this same value to others. Therefore, he too must value the personal dignity of someone else, whose importance he recognizes because of his capacity for sympathy and in recognition of the value of his own personal dignity.

In this reading of sympathy, the person who judges the position of the unemployed father with pity or disgust is not just disrespecting the father, but also the personal dignity of all citizens. The condescending judgments do not take seriously the mature capacity of individuals to feel indignities, to be able to reflect upon these indignities while judging the value of one's own life, and the dehumanization that occurs when one judges his or her life to be of little worth. In a sympathetic liberalism, citizens have to hold in reverence not just the moral powers

of themselves and others in being the authors of their own lives through the formation, revision and pursuit of their views of the good; but in addition the appraisers of their own self-worth through the life that they have been given the chance to author. This establishes a variation of sympathy that is suitable for a civic relationship embodied in a principle of reciprocity.

3.3: Conclusion

In this chapter I considered whether the Smithian notion of sympathy could be adopted into the Rawlsian liberal sphere. I maintained firstly that Smith's account of justice can be reconciled with Rawls', not in terms of the content of justice, but in the function that justice plays and the way in which individuals are motivated to act justly with relation to each other. Secondly, I argued that the impartial perspective of the Smithian impartial spectator is reconcilable with the impartiality found in Rawls' account of public reason. Finally I argued that Smith's sympathy does maintain the sort of equality of status that Rawlsians would want to have in their public sphere, and that sympathy is preferable to compassion in maintaining this view on equal status.

Chapter 4: Sympathy & Publicity³⁰²

4.1: Overview of the Argument for Sympathetic Public Reason

From the perspective of the individual, the faculty of sympathy functions to communicate the social passions, restrain the expression of the unsocial passions and the bodily passions, and make the selfish passions agreeable to others by communicating the situation of those experiencing the relevant feelings of grief, joy, etc. However, sympathy also plays an important regulatory role at the social level. As all individuals have the capacity for sympathy and understand that others have this capacity, sympathy helps determine the rules and manners which constitute a particular society's sense of propriety. In Chapter 3, I mentioned that one of the consequences of humans' capacity for sympathy was for one's self-approbation to be constructed through imagined social approbation. This 'mirror' of the self, reflected in the imagined evaluations of impartial spectators, forms the basis of conscience in Smith's Theory of Moral Sentiments.³⁰³ In order to determine whether others can approve of the passions that an agent exhibits, one has to imagine what the spectator would feel, if the spectator were imagining himself or herself in the agent's shoes. This creates a 'mirror' in the sense that an agent can see her own self reflected back at her from a perspective outside of herself.

Within a liberal political society, there are at least two levels at which an individual's capacity for sympathy may play a role in regulating individuals'

³⁰² I would like to thank Chandran Kukathas, Philip Thonemann and Alex Voorhoeve for comments on this chapter.

³⁰³ D.D. Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy*, (Oxford, UK: Oxford University Press, 2007), pp. 35, 38.

political interactions. During the course of public deliberation, the ability for each citizen to recognize her fellow citizens as sympathetic agents might shape the sorts of reasons offered in justifying one's political positions. When trying to defend affordable healthcare, affirmative action or criminal justice reform, it might be easier to ask one's fellow citizens to imagine the conditions of those who are in need of such policy reform rather than to invoke philosophical concepts like justice, egalitarianism, moral desserts and so forth. Situating oneself in the imagined position of others may generate an instant recognition of the practical difficulties they face, in a way that may not be fully conveyed through abstract or technical argument.

Another level at which citizens' sympathetic faculties may regulate political interactions amongst citizens is in determining the fair terms of social cooperation. These are the terms by which citizens aim to resolve competing claims from within an institutional setting. In many cases this may require simply appealing to the law in order to determine which citizen (if any) has a valid claim upon another within the jurisdiction of a polity's legal authority. However, citizens may also appeal to legislatures to change the laws if these laws are seen as lacking, and in some cases appeals may be made to the citizenry at large to change the constitutional principles under which lawmakers legislate. Hence, by the 'terms of cooperation' I mean any code of conduct or institutional practice by which cooperation is maintained in the light of competing interests. I also include those public democratic principles and values that can be justified from the perspective of public reason. For example, in an

ideal Rawlsian political society, the two principles of justice would count as a term of cooperation.

There is clearly great overlap between sympathy regulating public deliberation and sympathy regulating the terms of cooperation. Both are closely tied to the ideas of publicity and reciprocity. In this chapter and in Chapter 5, I elaborate how envisioning liberal citizens as sympathetic agents, affects liberal arguments for the obligations of reciprocity and the demands of public justification. In order to examine the uses of sympathy more closely, however, I will consider sympathy in relation to each of these ideas in turn. In this chapter, I will outline what a principle of publicity would require for a cooperative enterprise of reasonable, rational and sympathetic agents. In Chapter 5, I go on to consider what sorts of obligations would stem from reciprocal relations between citizens so conceived.

The overall objective is to construct a sympathetic account of public reason. In the Introduction to this dissertation, I explained that Rawls' *pure* public reason has to be public at two levels. Firstly, it represents the shared standpoint from which all reasonable and rational citizens engaged in the cooperative enterprise of political society may deliberate about their common objectives and resolve their differences.³⁰⁴ Secondly, it serves as the criterion of justification that all reasonable citizens can reasonably and rationally identify as the criterion by which legitimate public policies ought to be evaluated. While the first sort of publicity specifies the content of public reason, it is the second notion of publicity which gives public reason its normative

³⁰⁴ Samuel Freeman, 'Public Reason and Political Justification' *Fordham Law Review* 72(2004): 2021-2072 at p. 2047.

force when its dictates conflict with the reasons found within a citizen's private comprehensive doctrines.

Consider what the absence of this second type of publicity would mean for a case like that of the Humanitarian and the Pacifist. If the procedures of public decision-making legitimately determined that the collective use of power would be used for intervention, then the Pacifist would not be able to reasonably endorse a legitimate political position from within her own comprehensive doctrine. The best she can do is to recognize the normative authority of public reason in determining legitimate courses of action.³⁰⁵ However, public reason can justify her position just as well as it can justify the Humanitarian position. It is, after all, only a necessary condition for legitimacy. Instead, what ultimately legitimates intervention is either a pure procedural account of legitimacy or an account where there exists a pro tanto moral duty of fairness to follow the procedural outcome. Since I have argued against pure procedural accounts of legitimacy, it must be the latter which gives intervention its legitimate authority.

However, public reason cannot specify how some moral duties weigh against other moral duties. This is the task of what Rawls calls 'full justification,' which involves reasonable citizens fitting a freestanding political conception of justice into their comprehensive doctrines.³⁰⁶ In Rawls' view, the task of ordering moral duties must be a part of the comprehensive doctrine of any reasonable individual. Therefore, a part of the function of public justification must be to ensure that

³⁰⁵ Ibid.

³⁰⁶ John Rawls, 'Reply to Habermas' *The Journal of Philosophy*, 92(1995): 132- 180 at p. 143.

reasonable individuals can at least endorse the legitimate authority of a political mandate that is in accordance with public reason (i.e. one that is *politically* justified), even if they cannot endorse the content of the mandate itself.³⁰⁷ However, he cautions that it is not the comprehensive doctrine which actually lends the public justification its normative force.³⁰⁸ In fact, a politically reasonable citizen who reasonably endorses public reason can reasonably disagree with its mandates.³⁰⁹ We have seen this throughout the thesis, in cases like that of the Liberal Catholic, the Humanitarian and the Pacifist, and the French Hijab Controversy. Rather, the normative authority granted a specific set of constitutional essentials and democratic ideals within a particular territory comes from citizens ‘taking each other’s views into account’ while affirming a political conception of justice. In short, it stems from the relationship of reciprocity itself. This is why, particularly in the absence of procedural legitimacy, reciprocity must be taken seriously as a cornerstone of public justification.

Reciprocity is also the ideal that governs the interaction of reasonable citizens.³¹⁰ In this chapter and in Chapter 5, I will focus my attention on how an understanding of citizens as sympathetic agents affects the public justifications reasonable citizens offer to each other. Occasionally, I will illustrate how such reasonable citizenship affects political reasonableness, by examining policy issues like abortion. However, this will largely be for purposes of clarification. The purpose of these chapters is to consider why reasonable and rational agents *should* take up the

³⁰⁷ Ibid.

³⁰⁸ Ibid. p. 144.

³⁰⁹ Freeman, *Public Reason and Political Justification*, p. 2047.

³¹⁰ John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993), pp. 16-17.

view of sympathetic public reason. It is a defence of sympathetic public reason as a criterion of public justification that is superior to pure public reserve. I reserve the more rigorous examination of sympathetic *political reasonableness* for Chapter 6, in which I analyse how sympathetic public reason tackles the Problem of Conscience by examining particular difficult cases like abortion, the case of the Humanitarian and the Pacifist, and the French Hijab Controversy. If we can accept that reasonable and rational citizens *should* take up the perspective of sympathetic public reason when determining proper uses of political power, and we can accept that sympathetic public reason informs which values, ideas and forms of enquiry are politically reasonable, then we can also accept that sympathetic political reasonableness is both politically and fully justified, and that political mandates justified in accordance with it are politically legitimate. In Chapter 6 I will show that sympathetic public reason is better suited than pure public reason to tackle the Problem of Conscience.

4.2: The Structure of Justification for Empathetic Judgments

In recent years, a number of political philosophers have highlighted the importance of empathetic considerations when making informed public decisions. Martha Nussbaum, for example, has stressed the importance of imagining the upbringing and emotional experiences of others for the purpose of compassionate adjudication and merciful criminal sentencing.³¹¹ Similarly Robert Goodin has advocated for the cultivation of citizens' 'deliberative imagination' when establishing procedures for

³¹¹ Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, UK: Cambridge University Press, 2003), chapters 7 and 8; Martha Nussbaum, *Hiding from Humanity* (Princeton, NJ: Princeton University Press, 2004); Martha Nussbaum, *Poetic Justice* (Boston, MA: Beacon Press, 1997); Martha Nussbaum and Dan Kahan, 'Two Conceptions of Emotion in the Criminal Law,' *Columbia Law Review*, 96 (1996):269-374 at pp. 366 – 372.

legitimate deliberative democracy.³¹² He claims that in order to ensure that others' views are adequately represented in the deliberative process, those individuals must be "*imaginatively present*' in the minds of deliberators.³¹³ Meanwhile, Ackerman and Fishkin's 'Deliberation Day' experiment reports instances of individuals who radically change their judgments on policy, in response to hearing narratives of others' experiences.³¹⁴ Overall, the general idea appears to be that understanding the situation of another through deliberation and imagination, affects the hearer in a way that captures an important aspect of decision-making on public matters.

Those who advocate for engaging the deliberative imagination in public decision-problems argue that this aspect of decision-making can be absent in reasoned argument, in fair procedural outcomes or in both. However, the precise nature of the absent element is difficult to pin down. Goodin, for example, writes that: *'a procedure in which people fail to internalize the perspective of one another qualifies as democratic only in the most mechanical of ways: without properly registering what one another is saying, it will be not an exchange of reasons but merely a count of votes.'*³¹⁵ Yet he makes this claim knowing that the 'mechanics' of 'mere counting' are often justified along grounds of equality, fairness, neutrality, anonymity, epistemic considerations, and a host of other procedural virtues that originally provided good reasons to find democratic procedures legitimate. Therefore, the appeal to imagination must refer to some insufficiency in certain procedures to capture all the correct sorts of reasons

³¹²Robert Goodin, 'Democratic Deliberation Within,' *Philosophy and Public Affairs* 29 (2000): 81 – 109 at pp. 92 – 99.

³¹³ *Ibid.* p. 83.

³¹⁴ Bruce Ackerman and James Fishkin, 'Deliberation Day,' *Journal of Political Philosophy*, 10 (2002): pp. 129 – 152 at pp. 144 – 146.

³¹⁵ Goodin, 'Democratic Deliberation Within,' p. 84.

that must go into a collective decision. Yet this says relatively little about what those considerations are.

Nussbaum makes several compelling arguments about the role of the 'narrative imagination' (or 'literary imagination') in providing a clearer picture of the demands of equality.³¹⁶ She writes of the imagination being used as a tool to understand the real 'human facts' of a case,³¹⁷ and the possibility of prudent Aristotelian poet-judges moving beyond '*an abstract pseudo-mathematical vision of human beings*' and towards '*a richly human and concrete vision that does justice to the complexity of human lives.*'³¹⁸ Again we discover that there is something crucially humanizing in judgment formation based on imagination and empathy, which may be missing from the processes of judicial and legislative decision-making. Judges, lawyers, even legislators appeal to reasons in their decision-making that are impartial by way of being impersonal. Nussbaum discusses the case of Judy Norman, who murdered her husband after several years of having to endure intense physical, psychological and emotional torture at his hands. Her claim of self-defence was dismissed by both a trial court and the North Carolina Supreme Court, on grounds that her action could not have been motivated by a feeling of 'imminent death or great bodily harm' given that her husband was asleep at the time that she shot him.³¹⁹ Nussbaum invites us to consider whether North Carolina's criminal justice system made an appropriate evaluation of Norman's criminal intent, by looking solely at the practice of criminality, and not at the social structures or

³¹⁶ Martha Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination,' *The University of Chicago Law Review*, 62 (1995):1477 – 1519 at pp. 1486 – 1496.

³¹⁷ Ibid. p. 1486.

³¹⁸ Ibid. p. 1479.

³¹⁹ Nussbaum, *Hiding from Humanity*, p. 20.

psychological conditions which resulted in the formation of Norman's criminal motivation.

Legislative procedures can also exemplify such narrow-sightedness. Consider the commitment to creating small government which is reflected in the policies promoted by the Republican Caucus of the One Hundred and Twelfth United States Congress (in session from January 2011- January 2013). During the 2011 fiscal year, forty-seven million Americans relied on Medicare benefits, including eight million who were classified as non-elderly disabled Americans;³²⁰ a similar number of Americans required food-stamps;³²¹ and about thirty per cent of the 14.5 million unemployed Americans received unemployment insurance benefits.³²² From an impersonal perspective, it may very well be reasonable for a member of Congress to believe that, given the size of the American population, far too many Americans are dependent upon social services. From this perspective, a politically reasonable citizen could justify cuts in social services. However, a legislator willing to take up the more personal perspective of the deliberative imagination would point out that a commitment to the ideals of small government at such an exceptional time in the country's history displays considerable disregard for personal livelihoods. From such a perspective, it is not necessarily reasonable to cut social services at a time when joblessness is high and the economy is yet to recover from a great financial

³²⁰ Department of Health and Human Services Committee Budget in Brief FY2011 p. 54.

³²¹ According to the Food Research and Action Center, approximately forty-four and a half million Americans required access to food stamps from the Supplemental Nutritional Assistance Program in April 2011, a number which had risen to forty-five million seven hundred by May 2011 (see Food Research and Action Center, May 2011 SNAP/Food Stamp Monthly Participation Data, p.2.)

³²² US Department of Labor, Employment and Training Administration, Unemployment Insurance Data Summary, 2011 First Quarter, p. 10.

recession. Rawls' pure public reason is therefore less demanding than an account of sympathetic public reason which would utilize the deliberative imagination.

The general idea is that the incorporation of the deliberative imagination in public discourse provides room to appeal to shortfalls in both legislative and judicial procedures. Intuitively, one can understand the difficulty of assessing complaints against pain or harm independently of the perspective of those subject to it.³²³ The personal narratives of Judy Norman, and those of citizens in need of social services, supply fuller pictures of the problems which the legislative and judicial procedures in each case were aiming to address. By utilizing the sympathetic imagination, the perspective of citizens plays a more substantial role in the process of public decision-making.

Both Nussbaum and Goodin appear to believe that the empathetic imagination is an important *supplement* to legitimate democratic procedures. Neither is willing to dismiss the important role that procedures play in the creation of legitimate democratic decisions.³²⁴ Goodin's reflective democracy imagines a reasonable individual deliberating about the competing views of his or her fellow citizens, and allowing these considerations (informed by empathy) to result in a judicious and balanced democratic vote. In Goodin's framework, each citizen's vote reflects a subjective weighting of all the private views of every citizen. These weightings by each citizen are then democratically aggregated. According to Goodin,

³²³ Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination,' p. 1487.

³²⁴ Nussbaum describes the imagination as '*supplementing*' judicial processes, (Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination,' p.1480); and Goodin offers internal-reflective deliberation as '*supplement and complement to external-collective deliberation.*' (Goodin, 'Democratic Deliberation Within,' p. 84.)

such a procedure enables a preference-based democratic process to be democratic at both the level of output (aggregation), as well as the level of input (voting), in the sense that the perspectives of different individuals in society are considered at both initial and outcome phases of the democratic process. Through imagination, the views of numerous citizens are already considered even before the aggregation of votes takes place.³²⁵

In contrast with Goodin's use of empathy as a pre-procedural refinement to the democratic process, Nussbaum situates empathy *within* the procedures of public decision-making. She considers how a judge, or a lawyer, or any reasonable citizen acting within an institutional framework, would have her deliberation informed by access to a cultivated imaginative capacity.³²⁶ In describing a neutral judge, for example, Nussbaum writes:

*'[S]he does not tailor her principles to the demands of pressure groups, and she gives no group or individual special indulgence or favour on account of their relation to her interests. As a judicious spectator, she does not gush with irrelevant sentiment. On the other hand, she does not think of this sort of neutrality as requiring a lofty distance from the social realities of the cases before her.'*³²⁷

Nussbaum seems to use empathy to clarify her answer to a much more difficult moral dilemma, namely, what is the appropriate perspective to take in

³²⁵ Robert Goodin, *Reflective Democracy* (New York: Oxford University Press Inc., 2003), p. 17.

³²⁶ Nussbaum, 'Cultivating Humanity in Legal Education,' *University of Chicago Law Review* 70 (2003): 265 – 279 at pp. 277 – 279.

³²⁷ Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination,' p. 1482.

relation to a person, in order to ascertain that judgments are impartial? Nussbaum, in effect, places great emphasis on the first person perspective in a procedure of deliberation. Nussbaum further claims that empathy, in the form of the *literary* imagination, has the additional benefit of enabling citizens to recognize that each individual's life has a value independently of the group to which the individual belongs.³²⁸ According to Nussbaum, the fact that the objects of empathy are individuals rather than groups explains why prejudice towards groups does not always extend to each member of the group.³²⁹ This, in turn, makes the capacity for empathy and imagination crucial for healthy relations of civility between citizens from different backgrounds.

For now, let us assume that Nussbaum and Goodin are right to claim that the faculty of imagination enables individuals to glean information about others' situations through a capacity for empathy. There remains an additional question regarding the justifiability of the judgments arising out of individuals' imaginative capacities. Nussbaum and Goodin remain silent upon whether the *mere fact* that one citizen has empathy for the plight of another gives the first citizen a publicly justifiable reason to advocate for the second. They identify reasons why citizens ought to be empathetic towards other citizens by invoking a bilateral account of civil relations between an empathizer and an empathized; more precisely, they explain why a citizen A ought to use her imaginative faculties to consider the needs of a

³²⁸ In Nussbaum's evaluative framework, the judicious spectator is embodied in an individual whose imagination has been cultivated by the reading of realist literature. In 'Poets as Judges' (p.1486) Nussbaum uses the terms 'literary judge' and 'judicious spectator' interchangeably. The intuition behind this is specified in 'Cultivating Humanity in Legal Education' (p.270) when Nussbaum defines the narrative imagination as '*the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions, wishes and desires that someone so placed might have.*'

³²⁹ Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination,' p. 1488.

citizen B (i.e. for purposes of identifying the psychological and socioeconomics struggles faced by citizens subject to such decisions.)

However, in order for a judgment based on empathy to be publicly justifiable, it is not sufficient to determine that A can engage in such empathy. According to the liberal principle of reciprocity, an argument only serves as a justification if the person offering it can reasonably expect all others to endorse her argument from a reasonable public perspective.³³⁰ Therefore, if the mere fact that A empathizes with B is a part of A's political justification, then A must be able to offer the fact of her empathy as a reason that all reasonable citizens can have to accept A's political justification. These reasonable members of the public might include A herself and also B, but they must also include other reasonable citizens who may not feel similar levels of empathy for B.

This means that in order for A's empathetic judgment regarding B to be publicly justifiable, it would have to be the case that any reasonable citizen C is *required* on politically reasonable grounds to consider the needs of B in reasonable deliberations about public decisions, *only because of* A's empathy for B. It is the requirements placed on C in light of A's empathy which determines the public nature of the justification, as C represents the unbiased public to whom A must justify her empathy. C's own empathy towards B is irrelevant to the justification, except insofar as it informs C's judgment as to whether the level of A's empathy is

³³⁰ John Rawls, 'The Idea of Public Reason Revisited,' *The University of Chicago Law Review*, 64(1997): 765-807 at pp. 770-771.

appropriate. By incorporating this third perspective, empathetic public justification must depart from the framework constructed by Goodin and Nussbaum.

Let us begin with a simple example to see what the public justification of an empathetic judgment would require. Suppose B is the head of a family who has recently lost his job. He is advocating for a bill which would help him to support his family during difficult economic times. A and C are citizens deliberating about whether they will become proponents or opponents on this bill. Prior to hearing the narration of B's story, assume that neither A nor C have any strong feelings for or against the bill. They each have the same set of relevant information at their disposal, and if forced to vote, they would flip a fair coin to determine their view. However, upon hearing B's story, A uses her capacity for imagination to re-examine B's situation and is so affected by his story that she decides to vote in favour of the bill. However, if the bill passes C will also be subject to the content of the bill. How might A justify her new political position to C?

It seems that there are a range of questions C could ask A in response to A's empathetic judgment. The two most obvious are perhaps 'Why do you feel empathy for B?' and 'Why should I be subject to a law because of your empathy?' The first question asks A to give an account of her reasoning regarding B's situation, while the second asks A to take the third person stand-point, and ask whether it is reasonable to impose obligations on others due to her own subjective view. In short, the first is a question of publicity, and the second is a question of reciprocity. It is necessary for A to be able to answer both questions in order to have the judgment be publicly justifiable. Let us quickly review why this is the case:

Suppose that A has a suitable answer to the question of reciprocity, but not the question of publicity. This means that C agrees that A's empathetic judgments require consideration, but A is unable to explain to C why her judgments are what they are. In such a scenario C confronts three problems: firstly, she cannot be sure that A's judgments are judicious, or if they properly discriminate between different appeals. A might be super-sensitive to the needs of all struggling parents, some who are deserving (like the responsible breadwinner who lost his job to the economy) and others who are not deserving (for example, a parent who loves his children but has never cultivated the will-power or sense of responsibility to take care of them.) Secondly, C cannot be sure that A's judgments are fair. Perhaps A empathizes with B, because she imagines him to be weak-willed, foolish or inferior, and her empathy is conditional upon a condescending sense of charity. Third, C is left with some uncertainty as to how she ought to balance A's judgments against the judgments of those with opposing views. If an opponent of the policy explains to C that implementing it will redirect the municipal or federal budget away from other initiatives, and C cannot be sure *why* A believes what she does, how can she judge A's claims for consideration against this other citizen's?

On the other hand, if A is *only* able to answer the question of publicity, but not the question of reciprocity, C might rightfully question why A's feelings ought to impose obligations upon her fellow citizens. For example, suppose A explains her attitudes towards the policy by reporting that B's story suddenly reminded her of an occasion in which her favourite uncle lost his job. According to A, the struggle to make ends meet imposed both financial and psychological burdens on her uncle and

her aunt. They faced anxieties about losing their cherished home, and being able to send their children to quality schools. Her aunt felt resentment and even some shame at her diminished social status, and her uncle was never able to fully recover his sense of self-respect as a good provider for his family. Having watched her uncle and aunt suffer from such hardship, A has the belief that any citizen going through similar circumstances deserves the support of the political community.

Here A is giving C an answer that C can both understand and expect some reasonable citizens to endorse. However, C herself need not endorse the view. She may feel the requisite compassion for B, and still think that it is not the responsibility of the political community to provide such support. If A insists that the explanation of her sympathetic judgment is grounds for political justification, then her justification violates reciprocity. It is not yet clear why A's concern for her uncle should inform public policy in any way.³³¹ This is not to say that it should not. It's simply unclear why C ought to be subject to a law for this reason.

A may have to add something to the story, such as an account of how watching her uncle experience the anxiety, shame and frustration of an economic downturn made her believe that a fair system of justice would minimize the impact recessions had on all citizens. Even then C might demand to know why another person's negative emotions ought to affect the laws to which she is subject. What are

³³¹ Recall that Rawls says: 'The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair co-operation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.' (Rawls, 'The Idea of Public Reason Revisited, p. 770.)

her obligations to citizens facing such pain? In short, it becomes necessary to give an account of precisely when an empathetic judgment meets the demands of reciprocity.

The imaginative faculty is connected to various forms of empathy: the capacity for compassion, for pity, for mercy, for moral indignation, for sympathy. Each of these may satisfy the requirements of publicity and reciprocity in different ways, and it is possible that some may not satisfy one or both of the requirements. My task will be to show that sympathy, at least, is a reasonable candidate for a type of empathy which can be publicly justified. In this paper I tackle the first of these two tasks, namely to show how sympathy meets the Rawlsian demand for publicity. I will then pursue the question of reciprocity in Chapter 5.

4.3: Rawlsian Publicity

Before launching into an analysis of the publicity of sympathetic justifications, I briefly want to outline some basic ideas in the literature of liberal publicity to which I allude in the remainder of the chapter. In *Political Liberalism*, Rawls writes that the full publicity condition is satisfied when the following three conditions hold: (i) public principles of justice govern the political processes of a liberal society,³³² (ii) the political conception of justice is justified in accordance with ‘general beliefs’ regarding democratic values, scientific knowledge and methods of enquiry and reasoning which can be found in ‘the current public views of a well-ordered

³³² Rawls, *Political Liberalism*, p.66.

society,³³³ and (iii) when each citizen can take this freestanding conception of justice and embed it into his or her own reasonable comprehensive doctrines.³³⁴

A separate feature of Rawlsian notions of publicity is found in Rawls' criterion of reciprocity, which requires citizens to offer justifications to each other on terms that they believe that other citizens could reasonably accept as reasonable.³³⁵ Rawls points out that this goes beyond simply making a person's view understandable to those to whom one is offering a justification. He writes that Michael Servetus could understand why Calvin believed that anyone who did not believe in the Trinity ought to be burned at stake. However, this does not mean that Servetus found it *reasonable* that Calvin wanted to burn him at stake.³³⁶ It was politically unreasonable insofar as Calvin was not offering reasons from a shared perspective, after having taken into account relations of reciprocity and the burdens of judgment.

Political liberals, who generally accept the criterion of reciprocity, often find the need to add further specifications to it. Two of these further specifications will be useful in my analysis of the publicity of sympathetic justification. The first is Steven Wall's distinction between that which is publicly accessible and that which is publicly understandable.³³⁷ He constructs an example in which a justification for abolishing capital punishment relies on Einstein's Theory of Relativity. Although the General and Special Theories of Relativity are 'public' in the sense of being

³³³ Ibid. p.67.

³³⁴ Ibid.

³³⁵ Rawls, *The Idea of Public Reason Revisited*, pp.137-138.

³³⁶ Ibid. 771.

³³⁷ Steven Wall, 'Public Justification and the Transparency Argument,' *The Philosophical Quarterly*, 1996:46 p.503.

established by the scientific standards of current liberal societies, arguments that invoke them will not be easy for the average citizen to follow. In Wall's terminology, although theories of relativity are publicly accessible, they are not publicly understandable.³³⁸

This becomes an important distinction in the publicity of sympathetic justification, because individuals' capacities of sympathetic imagination will fluctuate between individuals and also differ depending on the situation. A liberal who has been raised Anglican may find it easier to be in sympathy with the views of a Liberal Catholic on abortion than with the views of an Atheist. However, this same Liberal Anglican may not be able to engage in the same level of sympathy with the Liberal Catholic on matters concerning the environment. An account of sympathetic justification will have to explain whether the Liberal Catholic's views on abortion are simply not understandable to the Atheist or are instead not accessible, and whether her views on abortion and the environment are equally accessible in both cases to the Anglican.

A separate distinction is introduced by Kent Greenawalt, which differentiates accessible reasons from those which are generalizable.³³⁹ Greenawalt writes of the 'joyfulness' that came with the birth of his three sons, and how sharing that joy with his wife reaffirmed for him the importance of the 'overwhelming value of caring and love.'³⁴⁰ In his view, the joy felt at the birth of a child is general, in the sense that many parents experience such joy. However, it is only accessible through the actual

³³⁸ Ibid.

³³⁹ Greenawalt, *Private Consciences and Public Reasons*, (Oxford UK: Oxford University Press, 1995), p. 34.

³⁴⁰ Ibid. 35.

event of experiencing such joy.³⁴¹ Those who are not parents will not have access to the ethical insights that follow from the experience of such joy. Yet, Greenawalt claims that in some sense we want to say that the ethic of caring and love is general. It applies to all of us, despite the fact that not all of us have access to the insights that support it.

Greenawalt's distinction straightforwardly applies to the example of the unemployment benefits I considered in section 4.2. In that example, A's sympathy for the unemployed father came from an insight she had when her uncle lost his job. However, the insight was towards a general ethical principle of how a political community ought to be supportive of those responsible breadwinners who lose their job due to an economic downturn.

In what follows, I will try to establish what publicity looks like for sympathetic justification.

4.4: The Publicity of Sympathetic Justification

In many ways, exchanges of sympathetic justification are not that different from other types of reasonable disagreement already found within the uses of public reason. Consider the following scenario discussed by John Rawls and Samuel Freeman.³⁴² Reasonable members of a liberal democratic polity have invoked legitimate procedures of decision-making in accordance with public reason, to determine whether or not to legalize abortion. The outcome has favoured proponents for the right to choose. However, a subset of the population is pro-life on moral

³⁴¹ Ibid. 34.

³⁴² Rawls, *Political Liberalism*, p. 243n; Rawls, 'The Idea of Public Reason Revisited,' pp. 798-799; Freeman, 'Public Reason and Political Justification,' p. 2059.

grounds. From within their own comprehensive doctrine, they could never find abortion justifiable. How is it that these citizens can be asked to find abortion justifiable from the perspective of public democratic culture, and why is such justification important for liberal legitimacy when citizens do not 'actually' find such decisions justifiable?

One answer lies in the criterion of reciprocity, which requires reasonable individuals to offer to each other explanations for their political positions that other reasonable citizens may be expected to find reasonable.³⁴³ In the decision to legalize abortion, the case for abortion is supported by reasons that all citizens can find reasonable, including those who privately oppose abortion. These reasons include women's rights over their bodies and the socioeconomic burdens of carrying a child to term.³⁴⁴ In the liberal interpretation of the pro-life position, those morally opposed to abortion still recognize these reasons as significant, simply not as weighty as a foetus' right to life. On the other hand, those in favour of abortion do not recognize a foetus' right to life as having any significance whatsoever. They do not believe that a foetus has such a right. Since everyone reasonably accepts the two reasons in favour of abortion, and only a subset of the population endorses the reason opposed to it, Rawlsians argue that only proponents of abortion can form justifications for their position that meet the criterion of reciprocity.³⁴⁵

³⁴³ The Idea of Public Reason Revisited 137-138. Note that the Rawlsian 'criterion of reciprocity' is a very specific criterion deriving from the duty of civility; it is not identical to Rawls' 'principle of reciprocity' which is a separate moral duty alluded to in other parts of this paper.

³⁴⁴ Freeman, 'Public Reason and Political Justification,' p. 2059.

³⁴⁵ Ibid.

This line of analysis can supposedly be extended to all moral or ethical oppositions to legitimate laws. If a law is legitimate, then all citizens can recognize at least one public reason to accept it, namely that it was generated in a legitimate way (say through a legitimate procedure invoked after a process of deliberation guided by public reasons). As in the case of abortion, even citizens who may oppose the law from within their private comprehensive doctrine can accept this account of its legitimacy. If no citizen opposes the law on public grounds, then the law is publicly justifiable no matter how many citizens oppose it on nonpublic grounds. In order to meet the demands of the criterion of reciprocity, private reasons cannot be given any weight.

If citizens cannot accept justification from the perspective of public democratic culture, they may end up questioning the reasonableness of the procedure itself. Freeman writes, *'It will be a problem only if, as a result of their inability to accept the political resolution by public reason for one or more constitutional issues (e.g. regarding abortion), they are led to reject public reason itself in all other cases.'*³⁴⁶ Yet in a culture of pluralism, this is precisely what will happen. The burdens of judgment combined with the seriousness of the issues indicate that given a large enough political community, there will inevitably be at least one person who finds abortion to be *that particular issue* by which she measures the reasonableness of the procedure. This in turn means that in the absence of such an individual in the political community, the stability of the political system depends not on deep-seated

³⁴⁶ Ibid. p. 2056.

reasonable agreement but on the empirical fact that none have taken the destabilizing reasonable viewpoint.

Freeman adds that it is perfectly sensible that sometimes cognitively reasonable people cannot accept that which is politically reasonable,³⁴⁷ where 'cognitively reasonable' indicates beliefs that a person actually holds, compared to those held in virtue of taking up the perspective of the public sphere. For example, we may say that it is perfectly reasonable for a Catholic to be unwilling to accept the reasonableness of that which she believes is committing murder. However, Freeman does not see this as a *politically* reasonable argument, since the interpretation that abortion is murder comes from within her private comprehensive doctrine.

Yet in making this assertion, Freeman fails to distinguish private beliefs from disagreement over differences generated by the burdens of judgment. After all, public democratic culture never stipulates that it is *cognitively* unreasonable to ascribe a moral status to a foetus that would make abortions impermissible. It simply holds that such a position is *publicly* unjustifiable. In fact, the standpoint of public reason must also hold that *if* foetuses were to have the moral status that Catholics ascribe them, *then* it would, in many common circumstances, be impermissible to have abortions. Otherwise the public standpoint would be stipulating that on certain occasions, murder was justifiable. Public reason accepts such a conditional as true, while neither affirming nor denying the truth of the antecedent clause. This generates the following concern:

³⁴⁷ Ibid. p. 2057.

- (1) If the foetus has a particular moral status, then it is not publicly justifiable to have abortions (i.e. an abortion is comparable to murder.)
- (2) Either the foetus has a particular metaphysical status or it does not.

Although it does not follow from this that abortion is unjustifiable, it also does not follow that abortion is justifiable. Given the importance of not committing murders, whether or not one believes the truth of the antecedent in (1) is of pivotal importance. Pure public reason accepts neither the truth nor the falsity of the antecedent. Therefore, it can neither accept that it is justifiable or unjustifiable to have abortions. If pure public reason were to accept that the justifiability of having abortions, then it would follow from (1) that a foetus *does not* have a particular moral status. However, pure public reason cannot make such a claim. Therefore, as long as a Liberal Catholic claims that it is not publicly justifiable to have abortions, Freeman is wrong to say that Catholics are making use of their private comprehensive doctrines when asserting the impermissibility of abortion.

In order to see this more clearly, compare the above reasoning to that in a proposition like: 'If the Bible says homosexuality is wrong, then gay marriage should be illegal.' Here public reason need not deny the antecedent when making the claim that it is politically unreasonable to make gay marriage illegal on these grounds. Public reason could accept that there are passages in the Bible that claim homosexuality is wrong and still argue that as far as public democratic culture is concerned, claims in the Bible should have no bearing on the legality of gay marriage.

Once we make this distinction, the Catholic's argument is indeed one which is publicly reasonable (although not justifiable). It is reasonable in the sense that it follows reasoning that is public, and involves beliefs that public reason neither insists is true, nor insists is false. Consider how a politically reasonable citizen would go about determining her attitudes towards abortion. Her judgment would depend on how she answered three questions:

- (1) Does having a particular moral status make it wrong to murder (rather than merely kill) certain living things?
- (2) Does the foetus have a moral status that would make killing it murder?
- (3) Should murder be illegal?

Political reasonableness most certainly provides guidance in answering some of these questions. Firstly, it requires citizens to answer (3) in the affirmative. At least in the Anglo-American common law tradition, murder is differentiated from homicide or manslaughter in that it is seen as a public wrong.³⁴⁸ Like injustice or inequality, murder is one of those cases in which public reason demands citizens to take a particular moral view. One could not hold the opposite view and still be politically reasonable.

³⁴⁸ Bryan A. Garner, *Garner's Dictionary of Legal Usage*, (Oxford, UK: Oxford University Press,): p. 561.

As for question (1), the democratic values of different political societies may differ in how they answer this question. However, we could invoke a manner of public reasoning such as treating like cases alike. If we were to ask whether it could ever be justifiable to kill a child that had not reached the age of reasonable maturity (i.e. two years old, three years old, even seventeen years old) on grounds that the child was harming the parents' economic prospects or contributing to gender inequality by imposing burdens on young mothers, political reasonableness would typically give a clear indication that killing a child on such grounds would be murder.

The only place in which political reasonableness can neither guide nor command involves question (2). Freeman views this inability as automatically placing (2) within the jurisdiction of one's nonpublic beliefs or private comprehensive doctrine. Yet reasonable disagreement is just as much a concern within the public sphere as the private sphere. As we saw in Chapter 3, a defendant in a criminal murder investigation might have left no conclusive proof he committed the murder, but significant evidence in the form of DNA, prior threats, personal character, motive, etc., can be aggregated in different ways by different reasonable individuals when determining guilt. Simply because two jurors disagree on whether or not the evidence is incriminating hardly makes their reasoning nonpublic.

Yet the line between 'reasonable expectation of reasonable endorsement', and 'nonpublic reasoning' remains ambiguous. If one juror says that in her view the defendant had a motive but not the character to commit the crime, and another juror holds the opposite view, in what way are their situations different from a citizen who

believes the foetus should be treated like it has a particular moral status while another disagrees? At the level of the two individuals who are in disagreement the cases are exactly alike. At the level of publicity, however, Freeman believes that political liberalism should claim that the jurors' disagreement is reasonable disagreement which does not defy the criteria of publicity, while the metaphysical status of the foetus is reasonable disagreement on a non-public matter.

A defender of this interpretation of Rawls might argue that public democratic culture accepts that the disagreement about the guilt of a convict is about a fact of the matter for which there is epistemic ambiguity, whilst the other disagreement (over abortion) involves a question on which political reasonableness has pre-determined that there is no fact of the matter. In other words, according to public democratic culture, the point of time in which a foetus turns into a being with a moral status has the ontological status of an empty question. Since people of different faiths disagree about it, public reason simply assumes there is no correct answer. By contrast, it cannot contend that the guilt or innocence of an indicted defendant has no correct answer, so that is seen as a reasonable disagreement.

However, if public reason really develops from an overlapping consensus, it has no more authority to determine the ontological status of questions any more than it has the right to insist on the metaphysical status of objects. The burdens of judgment demand that we leave difficult metaphysical questions aside. All Rawlsians agree that, 'The public conception of justice is to be political, not

metaphysical.’³⁴⁹ The agnosticism about the foetus relies instead on the very fact that no reasoning about the foetus is at once public and reasonably acceptable by all reasonable people. Public reason is silent on the metaphysical status of the foetus, but not because it is an empty question. It is silent because it cannot even begin to answer such a question, and struggles to articulate constitutional and political reasons to circumvent this issue.³⁵⁰

A second defence of Freeman’s position may be that although public reason cannot answer the question about the metaphysical status of a foetus, it additionally finds it politically unreasonable to even consider a view on the foetus’ metaphysical status while making political decisions. This means that although public reason holds that, ‘*if* foetuses were to have the moral status that Catholics ascribe to it, *then* it would be impermissible to have abortions,’ it is politically unreasonable to consider any beliefs regarding whether or not foetuses actually have the moral status in question, when making political decisions. This view explains why it is as politically unreasonable to deny the right to life on grounds that foetuses do not have such status, as it would be to argue for the right because they do have such status.

However, the Liberal Catholic views the foetus’ right to life not merely as a moral right, but also as a political right grounded in the Liberal Catholic’s sense of justice. The existence of disagreement on the moral status of the foetus should not be sufficient to overturn a claim to a political right. Otherwise, those who are racist,

³⁴⁹John Rawls, ‘Justice as Fairness: Political Note Metaphysical’ in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999), p. 394.

³⁵⁰Freeman discusses whether the issue of the metaphysical status of the foetus must be resolved for public reason to be a complete conception of justice in ‘Public Reason & Political Justification’ p. 2058-2059.

sexist or homophobic could also justify their bigotry by questioning the moral status of personhood assigned to the victims of their prejudice. It is the sense of justice associated with a particular belief regarding the moral status of the foetus, and not only the belief itself, which is of concern when determining the justness of the practice of abortion.

Hence, Rawlsian public reason is left in a quandary: the relationship between pro-life and pro-choice advocates appears to be the same as that between jurors who believe a defendant is guilty and those who believe a person to be innocent. On what grounds can public reason claim that the former is a matter of reasonable disagreement, but the latter an account of a given party aiming to force non-public reasons upon another?

I will now argue that understanding civic relations as relations of sympathy, provides a way out of the problems highlighted by the abortion debate. Let us first look at what sympathy says about reasonable disagreement between any two individuals (whether jurors or voters), and then determine what it would say about the question of publicity itself. When two people disagree, sympathy claims that they still want the other to approve of their own position. As I argued in Chapter 3, this means that in the liberal public sphere, citizens will try to justify their political positions from a perspective with which they believe that others can agree. Smith's sympathy therefore only affects the Rawlsian account of public justification slightly, in that a justification is not only offered on shared terms, but with the desire to have others approve of the position of the citizen offering the justification.

Note that whenever the criterion of reciprocity is met, mutual sympathy is always achieved in the extended, political sense that I described in section 3.2.2. If a reasonable citizen accepts the reasons offered by another reasonable citizen, then she approves of that reasoning even if she disagrees with the outcome of that reasoning. The juror who sees that another juror has carefully weighed the evidence given to both of them, but has come to a different conclusion purely because of the burdens of judgment, has met all three conditions of mutual sympathy.³⁵¹ However, in accepting the burdens of judgment, she also knows that the other juror's situation is slightly different from hers and accounts for this in choosing to sympathize with her view.

Therefore, the two jurors are in mutual sympathy (in the political sense) despite their reasonable disagreement, as long as each believes that the other is reasonable. Can the pro-choice and pro-life advocates be in mutual sympathy if one side is accusing the other side of committing murder? Let us begin with the assumption that such a deep-seated moral disagreement cannot generate mutual sympathy, and consider why this assumption is false.

The first condition for mutual sympathy is for one spectator to imagine herself in the position of an agent, and try to determine how the agent might feel in that situation. Meeting condition (i) is very demanding when considering radically different moral views. The imagination would be required to carry out a rather difficult feat in order to imagine developing a significantly different moral calculus

³⁵¹ As stipulated in Chapter 3.1, these three conditions are: (i) mutual sympathy requires the spectator to correctly identify the passions felt by the agent through the agent's expression of the passion; (ii) it requires the spectator to judge that if she were in the agent's situation, she would be experiencing the same passions to a comparable degree (the spectator rarely feels the passions to the same extent as the agent)³⁵¹; and (iii) it requires the spectator to feel pleasure at the fact that she and the agent would experience the same passions to a comparable degree were either of them in the agent's current situation.

through practical experience, moral education and so forth. It is, of course, not impossible to do so, and in fact Kent Greenawalt and others have argued that individuals come closer to understanding the views of religious opponents than they often realize.³⁵² However, for drastically different moral and philosophical world views, we can imagine that meeting condition (i) is difficult.

In the case of the jurors I said that condition (ii) was met in the sense that if the jurors see each other as having a reasonable view, they must thereby conclude that were their situations different, they would have been able to adopt the view of the other. Circumstances surrounding (ii) are also different for those who disagree on the metaphysical status of the foetus. Although they are called upon to *believe* or act as if they believe that the others' view is reasonable, they are not really in a position to the *judge* the reasonableness of the others' view in the way that those who have similar beliefs could judge the views. A Catholic who is not liberal, or even a Liberal Protestant, may be better placed to understand the Liberal Catholic's sense of justice regarding abortion, than other reasonable citizens. This is because they may be better equipped to understand how the Liberal Catholic's 'sense of justice' is attuned to political matters, more than other liberals.³⁵³

Here, Rawlsians will likely point out that I am using the phrase 'sense of justice' rather differently from Rawls. Rawls defined it as the 'capacity to understand, to apply, and to act from the public conception of justice which

³⁵² Kent Greenawalt, *Private Consciences and Public Reasons*, p. 40.

³⁵³ This is one place where my formulation of sympathetic publicity is far narrower than the sort of publicity conceived by Greenawalt. Greenawalt writes that some experiences may be intelligible, but that to find something intelligible is not sufficient to claim that one can evaluate it (p.40). Sympathetic public justification would not work in cases where this is true, since it depends on the imagined experiencing leading to an insight about the others' reasoning.

characterizes the fair terms of social cooperation.³⁵⁴ Given that I am trying to determine whether or not the Liberal Catholic's position regarding abortion is suitably public, it is too early to use the notion of 'a sense of justice' to support my argument. The sense of justice, as far as Rawls is concerned, presupposes publicity.

However, my account of the sense of justice meets the requirements of the criterion of reciprocity, which is also a Rawlsian benchmark for publicity. As I have tried to show above, the criterion of reciprocity is met whenever mutual sympathy in the political sense is achieved. The reason that a conservative Catholic or a Liberal Protestant is better able to understand why the Liberal Catholic's views on abortion stem from a 'sense of justice' is because when the Liberal Catholic offers her views to them, they can more easily imagine that she really has weighed all the evidence carefully and given political values their due weight. Like the two jurors who, when presented with the same evidence, might be able to understand why an individual might come to the conclusion that the other juror did, someone who understands how the Catholic reasons will find it easier to accept a disagreement as a reasonable one. In short, not only are the reasons public, but the reasoning is also public.

By contrast, if the Liberal Catholic were trying to explain her views on abortion to someone with a very different comprehensive doctrine, it might not be easy for that person to assess the quality of her reasoning. As reasonable citizens, those others must still believe that the Liberal Catholic has reasonable reasons for disagreeing with abortion. However, there may be no impartial perspective available

³⁵⁴ Rawls, *Political Liberalism*, pp.19 and 77.

to them from which to judge whether the Liberal Catholic's reasoning is good reasoning.

If we imagine citizens to be perfectly sympathetic agents, however, the above problem disappears. Perfectly sympathetic agents can imagine precisely what it is the Liberal Catholic means when she talks about a 'sense of justice' towards an unborn foetus. Such agents can step into the Liberal Catholic's shoes and determine what reasons the Liberal Catholic feels are important, and can understand their normative force *qua* Catholic. They do this in a way analogous to how a reasonable citizen adopts the perspective of public democratic culture and can understand the normative force of public reason *qua* citizen.

Therefore, in cases where a reasonable comprehensive doctrine heavily informs a view on matters of justice, a perfectly sympathetic agent need not worry about the distinction between sympathetic justifications that are publicly accessible and publicly understandable. Just as a perfectly reasonable citizen can understand Einstein's theories well enough to understand how they might support the abolishment of capital punishment,³⁵⁵ a perfectly sympathetic one will understand the sense of justice and moral motivations that make a Liberal Catholic believe that the right to life of a foetus is also a matter of public justice.

The further question is whether or not this publicity of the Catholic position gives it any sort of authority in the public sphere. I view this as a matter of the duties that emerge from relations of reciprocity. I tackle this question in Chapter 5. In the

³⁵⁵ Wall, 'Public Justification and the Transparency Argument,' p. 503.

remainder of this chapter, I consider two ways in which sympathetic judgments could fail to satisfy the requirements of publicity: Failures of Judgment and Failures of Publicity.

4.5: Failures of Publicity

By invoking the definition of empathetic justification outlined in 4.2, I now claim that in order for a sympathetic judgment to be publicly justifiable, *A's sympathy* towards B must be such that C is required on politically reasonable grounds to consider the needs of B in reasonable deliberations about public decisions, *only because of A's sympathy* for B. I consider two ways in which such justifications could fail.

Failures of Publicity occur when the justification for *A's sympathy* cannot succeed despite there being no failures in *A's judgment* itself. For example, it may be that *A's judgment* is based on an emotion that C cannot identify (say admiration, guilt or compassion). This could be a variant of the demand that *A's justification* be sufficiently other-regarding (a problem I consider in 4.5.1), or it may be because *C's* own life-experiences are such that she cannot fully evaluate *A's judgment* in an unbiased manner (a problem of faulty imagination).

Failures of Judgment occur when C reasonably believes that the sympathetic judgment formed by A (in response to the situation of B) is inappropriate. From *C's* perspective, A might have an inappropriate attitude towards B, say one that is prejudiced; or C may believe that *A's imagination* does not fully capture *B's* position. I consider the first sort of problem in 4.5.1 and the second in 4.6.1. It might also be the case that despite having the correct attitude and a properly functioning faculty of

imagination, the judgment A forms fails to be adequately other regarding. This problem I consider in 4.6.2.

4.5.1: Introducing Failures of Publicity

Consider for a moment what it would mean to engage in a cooperative political enterprise with an individual who was reasonable and rational, yet incapable of any sympathy. We would know her to be a person with both rational interests and a moral outlook, and as a reasonable person we would expect her to recognize the same features in us. When proposing general terms of cooperation we would have to make room for the fact that neither of us ought to receive an advantage during a conflict of rational interests and that to the best of our ability we ought not to interfere with each other in our pursuits of what we conceive to be the good. We would expect to be treated fairly.³⁵⁶ In short, we would expect something like the general picture presented in 'Justice as Reciprocity,' although, as Rawls' own reformulation in *Theory of Justice* suggests, the details are clearly up for debate.³⁵⁷

However, once these conditions are established, we would be left to our own devices to pursue our private purposes. We could end up with rather fulfilling private and social lives, in which each of us could live in accordance with our own values, tastes and preferences. However, a personal touch would be absent from our political interactions. Indeed, offering a public justification to another citizen on grounds that a particular policy reflects one's values or preferences would generally

³⁵⁶ John Rawls, *Theory of Justice* (Oxford, UK: Oxford University Press, 1972), p. 14; see Allan Gibbard 'Constructing Justice' *Philosophy and Public Affairs*, 20(1991): 264-279; and Brian Barry 'Justice as Impartiality', (Oxford, UK: Oxford University Press, 2002), pp. 46 – 48.

³⁵⁷ Most philosophers agree that Rawls' *Theory of Justice* incorporates a conception of justice as reciprocity that includes a sense of fairness. However, I have distinguished the obligations that arise from a convention-based account of justice from those discussed in 'Justice as Reciprocity' in terms of their derivation.

be seen as an exercise of political unreasonableness. The point of political reasonableness is to take up a shared perspective, and acknowledge its superiority over our personal perspective. In return, we would avoid having to answer to the demands of other members of our cooperative, whose demands might seem self-absorbed, narrow-minded, uncritical or intolerant.

On reflection, however, one might wonder whether it is necessary to be wary of such demands when we have already assumed that our fellow cooperators are reasonable and rational agents? If during public discourse, such agents were to explain to us the values or preferences that support their views on a particular policy, they would not expect us to simply accept the policies on such grounds. Rather, they might be inviting us to examine the question from a different (private) lens, or providing a larger picture which gives an account of why their beliefs are coherent or sensible. This may not lead directly to a justification of the political position, but considerations of such reasoning might shed light on features of the practical problem that we have not previously considered. They might inform an overall justification if justification requires the weighing of reasons, *and* a particular interpretive lens.

Consider the following: the impact that policies supporting small businesses or local farmers might have on the economic flourishing of a community might be comparable to those that would result from higher paying but less fulfilling jobs brought in by larger corporations. Yet how can the degree that a job 'fulfills' a citizenry be determined from the public perspective? It requires a private lens to make such a judgment. Similarly, the importance of providing state-funded schools

the resources to teach Greek, Latin, music and the arts might be said to presuppose a certain vision of what a rewarding education consists in, a vision that need not be *publicly* defensible to every person of every outlook (since we cannot assume that everyone sees the value in a liberal arts education), but one that is widely recognized as being more fulfilling than a concept of education as a process of skills acquisition.

The question before us is whether there is any harm in taking up the lens of such a viewpoint, and considering the policy decision from a particular viewpoint at hand? Undoubtedly, if only one such viewpoint were taken to be the acceptable lens, then those who do not share this viewpoint would have reason to complain. For example, if those advocating for the support of small businesses were to be seen as 'correct' to the point where the ambitious young corporate climber's view of the good life was completely dismissed, then the latter would certainly have a reason to complain about the public defensibility of the small business supporters' claims. If Ancient Greek were taught at the expense of a modern language that reflected the spoken tongue of a linguistic minority, then surely it would be unfair to accept only the humanistic tastes as the correct one.

However, defenders of the standard view of reciprocity cannot claim that it would be wrong to ask the corporate climber to imaginatively consider the perspective of the small business owners, if the small business owners were willing to consider the perspective of the corporate climber. The treatment of each citizen would still be reciprocal with relation to every other citizen. In fact, there would be nothing wrong in *forcing* the linguistic minority to consider the perspective of the defenders of a humanistic public education, if the latter were also forced to consider

the perspective of the linguistic minority. As reasonable citizens with a sense of fairness and reciprocity, both sides would have to be willing to reflect on the others' perspective in a sincere and sympathetic manner if they had cause to believe the other would do the same. Note that reciprocity persists whether it is an individual's tastes that require sympathetic evaluation, or the needs of a minority *group*. For both, it operates as a way of allowing certain private interests into public discourse.

In short, if agents engaged in seeking fair terms of cooperation were not sympathetic, then a wide array of values, aesthetics, reasonable world views and non-public ethics would have to be eliminated from public discourse. This elimination would occur despite the fact that such beliefs are compatible with reasonable citizenship. This does not yet show, of course, that sympathetic judgments *should* be considered in the political sphere. It is simply meant to address the concern that introducing sympathetic judgments into public discourse would inevitably generate unreasonable demands into political considerations. Sympathy is consistent with fairness and reciprocity in the sense that each citizen could sympathetically consider the perspective of the other if the other were willing to do the same. No non-public tastes or preferences would be advantaged in this way, because no one would be forced to *accept* the other point of view (although they might be forced to consider it).

In this section I anticipate two ways in which the publicity of sympathy might be called into question. The first is the worry that a sympathetic judgment is informed by the passions that enable a person to experience sympathy. Since passions and the experience of passions are inherently subjective the sympathetic

judgment itself cannot be made public. I argue that although the experience of *passions* is subjective, the *emotion* which informs the sympathetic judgment is based on a belief that can be communicable.

4.5.2: Emotions

In discussing the justificatory capacity of emotions, theorists are careful to differentiate between two rather different conceptions of what an emotion is. According to the first conception, emotions are experienced as physiological sensations devoid of evaluative content³⁵⁸. They are ‘mechanistic’³⁵⁹ in the sense that they are ‘*forces more or less devoid of thought or perception – that they are impulses or surges that lead the person to action without embodying beliefs*’³⁶⁰. A slightly more charitable interpretation of this conception is one where emotions are either physiological responses to one’s environment or an individual’s perception of these physiological responses³⁶¹. In this view, although individuals still experience emotions as a passive response to a physiological change, it is the awareness of this change which constitutes the emotion as opposed to the feeling itself. In both readings, however, no beliefs or cognitive processes of any kind contribute to the experience of the emotion.

The second general conception of emotions is a cognitivist view. In this view, although emotions are experienced qualitatively by individuals, there is an

³⁵⁸ Gerald Gaus, *Value & Justification* (Cambridge, UK and New York, NY: Cambridge University Press, 1990), pp. 26 – 33; D. Kahan & M. Nussbaum ‘Two Conceptions of Emotion in Criminal Law’, *Columbia Law Review*, 96(1996): 269 – 374 at pp. 273, and 278-282; Robert Solomon ‘Philosophy of Emotion’ in Michael Lewis, Jeanette Haviland-Jones and Lisa Feldman Barret (eds.) *Handbook of Emotions* (New York, NY: The Guildford Press, 2008) p.3.

³⁵⁹ Kahan & Nussbaum, ‘Two Conceptions of Emotions in Criminal Law,’ pp. 273, 278.

³⁶⁰ *Ibid.* 277-278.

³⁶¹ See Gerald Gaus’ discussion of the James-Lange Theory of Emotion in ‘Value & Justification’, pp. 27-28.

additional interpretive or evaluative element to an emotion, one which is variously considered to be a type of belief, thought, appraisal or intention³⁶². One such view of emotions is the cognitive-arousal theory confirmed by the experimental findings of Stanley Schachter and Jerome Singer. According to Schachter and Singer's now famous experiment, individuals who are subject to the same physiological arousal (e.g. epinephrine) experience different emotional responses given their beliefs about the situation with which they are confronted³⁶³. In the study, individuals injected with the same level of epinephrine but subjected to either an angry stooge or a euphoric stooge, experienced feelings of anger or euphoria which corresponded to that of their environment. Moreover, those who were aware of the physiological side-effects of epinephrine did not experience either anger or euphoria when confronted with said stooges, implying that they used their knowledge of the side-effects to explain the symptoms they were experiencing. This experiment confirmed the hypothesis that emotional states arise when individuals use the cognitive resources at their disposal to explain their physiological experiences.³⁶⁴

The precise nature of these cognitive resources has been subject to nearly four decades of debate. Robert Solomon cautions that cognitive resources need not be 'beliefs', but may be better understood as 'evaluations' or 'appraisals'.³⁶⁵ By this he means that the cognitive elements of emotion need not contain propositional content or be informed by facts. In fact, cognitive states need not be self-conscious. It is not

³⁶² Robert Solomon 'Emotions, Thoughts and Feelings: What is a 'Cognitive' Theory of Emotion and Does it Affectivity?' *Royal Institute of Philosophy Supplement*, 2003 p. 3.

³⁶³ Stanley Schachter and Jerome Singer, 'Cognitive, Social, and Physiological Determinants of Emotional State,' *Psychological Review*, 69:5 pp. 379 – 399.

³⁶⁴ Schachter and Singer, 'Cognitive, Social, and Physiological Determinants of Emotional State,' p. 395.

³⁶⁵ Solomon, 'Emotions, Thoughts and Feelings: What is a 'Cognitive' Theory of Emotion and Does it Neglect Affectivity', p. 4.

necessary for a person to be consciously aware that one is angry or euphoric in order to experience anger or euphoria³⁶⁶. However, Solomon concedes that emotions are the sorts of things we can '*think our way into*'³⁶⁷. What matters is the fact that we *can* reflect upon our emotions, deliberate about them and articulate aspects of them, even if we do not do so at the moment we are experiencing the emotion.

Our task then is to determine which conception of emotion best describes a person's capacity for sympathy. If sympathy falls into the cognitive category, we must further consider what sorts of cognitions it requires. If sympathy lacks any evaluative content or reflective belief, then the emotion itself cannot be a subject of justification. As an experience imposed upon an individual by his or her environment and physical constitution, there is nothing constituting the emotion that can be the subject of rational enquiry except its causes. This is not to say that we cannot discuss whether it is correct to subject individuals to such external environments. We may rightly identify a culture of fear or hedonism to be detrimental to personal development or social cohesion. However, such a discussion focuses on the consequences of such emotions, rather than on the intrinsic value of the emotion itself. For example, we cannot ask whether it is appropriate for an individual to feel such an emotion, or whether it is the responsibility of the public to respond to the normative implications of such emotive states. The argument, "I have a bad feeling about Policy X," has little normative import if emotions cannot be subject to evaluation or deliberation.

³⁶⁶ Ibid. p. 2.

³⁶⁷ Ibid. p. 11.

On the other hand, if sympathy requires cognitive elements that are unconscious or not articulable,³⁶⁸ then consensual justification also seems out of the question. How can an individual expect others who disagree with her to accept her judgment if she herself is not aware of their content? In the following, I will argue that Smith's view of individual sympathy corresponds with several features of the internal-sensation theory of emotion, but that the device of the impartial spectator provides a sufficiently deliberative heuristic by which to rectify any evaluative deficiencies generated by such characteristics. Then I consider the degree to which we may expect others to accept judgments grounded in an emotion of sympathy as grounds for justification

The most cited account of the internal sensation theory of emotion is perhaps William James'. He wrote:

*"Common sense says: we lose our fortune, are sorry and weep; we meet a bear, are frightened and run; we are insulted by a rival, are angry and strike. The hypothesis here to be defended says that this order of sequence is incorrect, that the one mental state is not immediately induced by the other, that the bodily manifestations must first be interposed between, and that the more rational statement is that we feel sorry because we cry, angry because we strike, afraid because we tremble, and not that we cry, strike, or tremble, because we are sorry, angry, or fearful, as the case may be."*³⁶⁹

³⁶⁸ Solomon argues for an account of 'judgment' which can be both unconscious and non-articulable (Solomon, 'Emotions, Thoughts and Feelings: What is a 'Cognitive' Theory of Emotion and Does it Affectivity?' p. 10).

³⁶⁹ William James, 'What is an Emotion?' *Mind* 9 (1890):188 - 205 at p. 190.

Put slightly more formally, the common sense view says that when an Event E occurs, it causes a feeling F, which in turn causes a physical response P. The event of losing our fortune (E), causes a feeling of loss (F), which results in the physiological response of tears (P). Similarly, meeting a bear (E) causes a feeling of fright (F), which in turns causes the response of trembling (P). However, the James-Lange Theory claims that E causes P through a change in environment, and it is P which causes F. By meeting a bear (E) we begin to tremble (P), and it is the perception of this change in our own bodies which causes us to experience fright (F).

Although this account of emotion has been discounted by contemporary theorists, we must consider the possibility that sympathy as Smith conceives it bears the internal sensation stamp. This is because Smith's notion of sympathy borrows heavily from a theory of psychology developed by David Hume, and Hume's theory of emotion is standardly placed in the internal sensation school³⁷⁰. In explaining the operation of sympathy in the *Treatise of Human Nature*, Hume writes: *"When I see the effects of passion in the voice and gesture of any person, my mind immediately passes from these effects to their causes, and forms such a lively idea of the passion, as is presently converted into the passion itself."*³⁷¹ Here we do not imagine the situation of the other person as in the case of Smith. Rather, for Hume, the imagination is the faculty which enables us to infer cause from effect³⁷². This idea of causality is important for sympathy in the *Treatise* as, *'No passion of another discovers itself immediately to the mind. We are only sensible of its causes or effects. From these we infer the passion: And*

³⁷⁰ See John Deigh 'Cognitivism in the Theory of Emotions', *Ethics* 104 (1994): 824 -854 at p. 825; also Gaus 'Value & Justification' p.26.

³⁷¹ David Hume, 'Treatise of Human Nature', III.3.I.

³⁷² Hume famously defines cause as 'An object precedent and contiguous to another, and so united with in in the imaginations, that the idea of the one determines the mind to form the idea of the other, and the impression of the one to form a more lively idea of the other.' *Treatise of Human Nature* I.3.XIV.

*consequently these give rise to our sympathy.*³⁷³ The imagined effects arise so quickly in the mind, however, that sympathy itself is experienced as a sort of contagion.³⁷⁴

Hume illustrates this mechanism of sympathy as the immediate transfer of passions through an example of the 'terror' and 'pity' felt at the impending surgery of another individual.³⁷⁵ His illustration easily fits the requirements of the James-Lange Theory of emotion. In the presence of surgical instruments (E), discomfort begins to arise (P) which creates the feeling of terror (F). The feeling of terror persists despite the fact that the rational and evaluative faculties of the individual know that he himself will not be undergoing any kind of surgery. His terror is a response to his environment caused 'immediately' by inferring from the presence of surgical instruments and the anxiety of the person to be operated upon, that there will be a painful surgery.

Smith's theory, however, depends far more on the faculty of imagination as a process by which individuals consciously or unconsciously place themselves in the situation of the person affected by a particular circumstance. Smith tries to illustrate the effects of the faculty of sympathy on individuals by discussing reactions to three general cases: the case of a person who will be stricken in the arm or leg, the case of a dancer walking on a tight-rope, and the case of a beggar suffering from sores and ulcers. Smith writes that when viewing each of these events, we '*naturally shrink and draw back our own leg or our own arm*' in the first case, '*naturally writhe and twist and balance*' in the second case (i.e. as if we ourselves were in dancer's position,) and in

³⁷³ David Hume, 'Treatise of Human Nature', III.3.I.

³⁷⁴ Stephen Darwall, 'Empathy, Sympathy, Care,' *Philosophical Studies*, 89(1998): 261 – 282 at pp. 264.

³⁷⁵ David Hume, 'Treatise of Human Nature', III.3.I.

the third-case we '*feel an itching or uneasy sensation,*' but only if we are '*weakly-constituted*'.³⁷⁶

We can describe the process as follows: in each case, when we witness another person confronting a situation E, we expose ourselves to a corresponding situation E* through our imagination. E* is similar to the original event, except that we are the ones subject to it. It is either an immediate projection of ourselves into the other scenario³⁷⁷ or the conscious decision to enter into the other person's point of view. In E* we become the dancer, the beggar or the person about to be stricken with a blow. The similarity between E and E* depends on the cognitive faculty of the imagination. If we imagine the tight-rope to be lower than it actually is, or the stroke to be less dull, we would not feel the strength emotion. In fact, the pain or pleasure of the other we experience through sympathy is never as strong as the feeling of the person actually experiencing the event.³⁷⁸ Similarly, our cognitive awareness of the fact that we are not *actually* in the same situation impedes us from responding the same way. This is why spectators always experience the imagined event less intensely than the actual event. "*That imaginary change of situation, upon which their sympathy is founded, is but momentary. The thought of their own safety, the thought that they themselves are not really the sufferers, continually intrudes upon them...*"³⁷⁹

In order for Smith's account of sympathy to be an internal sensation account of emotion, two things must be true. First, the move from E to E* must be non-cognitive. If the imagination described by Smith *always* consists in a type of belief,

³⁷⁶ Smith, *Theory of Moral Sentiments*, I.i.1.3.

³⁷⁷ Stephen Darwall, 'Empathy, Sympathy, Care,' p. 264.

³⁷⁸ Smith, *Theory of Moral Sentiments*, I.i.4.7.

³⁷⁹ Ibid. I.iv.7.

evaluation or appraisal, then sympathy only satisfies the cognitive conception of emotions. Secondly, the emotions generated by E* must either meet the requirements of the common sense view of emotion or the James-Lange view of emotion. That is, event E* must either cause a physiological response P which causes a feeling F, or E* must cause a feeling F which causes a physiological response P.

Let us begin with the first question. How does an event E generate the imagined event E*? D.D. Raphael points out that Smith oscillates between a conception of sympathy that *explicitly* requires an imaginative faculty, and that which leaves the role of imagination ambiguous³⁸⁰. In some cases, Smith describes a sympathetic response as the ‘instantaneous’ transfer of passion from one person to another³⁸¹ (i.e. a self-projection.) Given the immediacy of this transfer, it is unclear whether or not the faculty of imagination is required in cases of sympathy with another’s passions. However, there is still room to believe that an evaluative faculty is at play, for Smith quickly cautions that passions can cause antipathy in the absence of knowledge of another’s situation. Describing the behaviour of an angry man, Smith writes: “*As we are unacquainted with his provocation, we cannot bring his case home to ourselves, nor conceive anything like the passions it excites.*”³⁸² As a result, what would have generated sympathy had we known the cause of his distress, instead generates ‘disgust’, in fact ‘exasperates us’, because we are unaware of his situation.³⁸³

Therefore, Smith appears to concede that an appraisal of the situation can inform the quality and direction of our sympathy. Once we realize that the angry man has reason to be angry, we will sympathize with his anger. However, Smith also

³⁸⁰ D.D. Raphael, ‘The Impartial Spectator’ Chapter 2: Sympathy and Imagination, pg. 13

³⁸¹ Smith, *Theory of Moral Sentiments*, I.i.1.6.

³⁸² *Ibid.* I.i.1.7.

³⁸³ *Ibid.*

seems to accept the fact that our emotions are not absent prior to our full understanding of the situation. Instead, they are corrected after our knowledge of the event. Smith says, for example, that despite antipathy towards the angry, we feel instantaneous sympathy with the plight of the victims of anger even before we know whether they are deserving of it³⁸⁴. Yet if imagination is always an evaluative response, then our immediate sympathy with the victims over that of the person showing signs of anger requires explanation. Since we do not have any idea as to the cause of the anger, why would we not approach the situation with complete neutrality?

The explanation of this phenomenon requires a brief look at the taxonomy of passions in *Theory of Moral Sentiments*. Passions are first split into bodily passions and passions of the imagination.³⁸⁵ Bodily passions reflect a physical state of the body, such as hunger, thirst or appetite. Although these passions are directly and intensely felt by the individual, a sympathetic response is not natural to the expression of these passions.³⁸⁶ Unlike in Hume's account of an imagined cause immediately giving rise to sympathy, Smith says that a spectator cannot feel hungry simply because he sees a person eating voraciously. Moreover, he claims that the universal response to such voracious eating is in fact displeasure at the inappropriate demonstration of the bodily passion in question.³⁸⁷ The role played by sympathy is to curb the agent's expression of the passion, as he is in sympathy with the disgust that a spectator will experience upon witnessing his appetite. Even when the hunger is not only felt but

³⁸⁴ Ibid.

³⁸⁵ Here I adopt Charles Griswold's nomenclature (Griswold: 114).

³⁸⁶ Smith, *Theory of Moral Sentiments*, I.ii.2.1

³⁸⁷ Ibid.

clearly unavoidable, sympathy directs individuals to restrain its expression.³⁸⁸ In the case of bodily passions, therefore, sympathy is clearly an evaluative mechanism directed at the person acting upon the passion.

Passions of the imagination, however, can appear to have the contagious effect that they have in Hume. There are three types of passions of the imagination: selfish passions like grief and joy, unsocial passions like anger or justice, and passions of habit like love. The clearest case of a passion of the imagination being 'immediate' or contagious, involves witnessing grief or joy in the face of another. Smith writes, "*The passions, upon some occasions, may seem to be transfused from one man to another, instantaneously, and antecedent to any knowledge of what excited them in the person principally concerned. Grief and joy for example, strongly expressed in the look and gestures of any one, at once affect the spectator with some degree of a like painful or agreeable emotion.*"³⁸⁹ In the absence of knowledge of their cause the emotion of sympathy is 'imperfect'³⁹⁰ but certainly not absent.

Smith's explanation for this is that in witnessing the expression of grief or joy upon a person's face, we connect this to the idea of fortune or misfortune.³⁹¹ He appeals to the inference from effect to cause in much the same way Hume does, with one caveat. Smith is concerned very specifically with the situation of the other person, and not just to the person's environment. Griswold suggests that this very concern with the particular situation of others makes Smith's view of emotion a

³⁸⁸ Ibid.

³⁸⁹ Smith, *Theory of Moral Sentiments*, 1.i.1.6.

³⁹⁰ Ibid. 1.i.1.9.

³⁹¹ Ibid. 1.i.1.8.

relational or intentional view of emotion,³⁹² which in turn would require a cognitive account of emotion as its basis. Even when the evaluative capacity of the imagination is imperfect, it is still in operation. For example, we find prisons more disagreeable than palaces because we immediately associate them with the discomfort of the inmates, even though justice would make us believe the inmates' situation justified.³⁹³ We find romances agreeable, not because we feel any romantic affinity to the object of love, but because loving passions lead to situations generating the more agreeable passions of hope, happiness and fear³⁹⁴.

All three types of imaginative passions use the imagination to consider the *situations* of others, which lead to sympathy. By contrast, the bodily passions do not make use of such imagination, but also do not lead to sympathy. Even during the uses of imagination that can be properly identified as immediate and unwilled projections into the situations of others, the emotion does not operate like emotional contagion. We are able to reflect upon our sympathetic responses to situations if we choose. As a result, we are also able to deliberate with others on whether or not our sympathies are appropriate, as long as they too have this reflective capacity. Therefore, we may conclude that unlike Hume's account of sympathy, sympathy for Smith is a cognitive emotion.

³⁹² Charles Griswold, *Adam Smith and the Virtues of the Enlightenment* (Cambridge, UK Cambridge University Press, 1999), p.86.

³⁹³ Smith, *Theory of Moral Sentiments*, 1.ii.3.4.

³⁹⁴ *Ibid.* 1.ii.2.2.

4.6 Failures of Judgments

4.6.1: Unreasonable Attitudes

In addition to the possibility that sympathy itself would fail to generate publicity, there is the further problem that the judgments of sympathy might not be sufficiently public. In this final part on sympathy and publicity, I look at how sympathetic judgments can fail to be public, and what this says about the scope of sympathetic justifications. I begin with the Problem of Unreasonable Attitudes, which occurs when C, in receiving a sympathetic judgment from A regarding B, believes that A's attitude towards B is politically unreasonable.

In order to understand the Problem of Unreasonable Attitudes, let us once again look at Rawls' version of the justification of slavery. In this criticism of utilitarianism, Rawls asks whether the wrongness of slavery lies in the fact that the harm to slaves is greater than the pleasure afforded to slave owners, or whether the wrong can be isolated in the fact that it is harmful to slaves?³⁹⁵ Of course, utilitarianism can try to account for the badness of violations of personal rights by ascribing great utility to respect for personal freedoms. According to Rawls, the problem is that the benefits or pleasures that can be attributed to the slave owner should not play any role in a framework of public decision-making.

The slave owner has an inappropriate attitude towards his or her slaves. It does not matter that we as a society value the humanity of the slaves *more* than the pleasure of the slave owner. If our public decision-making procedure is reasonable,

³⁹⁵ Collected Papers: 209

then the claims of the slave owner will not be taken into any account at all. Only claims that are reasonable are considered in public decision-making, and the slave owner does not have any reasonable claims. In fact any claims that are racist, misogynistic, homophobic, or generally intolerant, must be eliminated *prior* to any public deliberation.

Therefore, the Problem of Unreasonable Attitudes has essentially to do with the inputs into the procedure of deliberation. Here I borrow terminology from an interpretation of democratic theory found in the social choice literature, in which the democratic procedure is seen as a mechanism which takes inputs in the form of citizens' preferences or beliefs, and aggregates them to produce an output in the form of the collective decision.³⁹⁶ Much of the Rawlsian discussion on public reason assumes that only public reasons are suitable inputs for procedures of public decision-making. This is accomplished by weighing all reasons from the public point of view, which necessarily eliminates any input from non-public reasons.³⁹⁷ Therefore, the slave owner's preferences, beliefs and claims regarding his slaves would be excluded because they are not appropriate inputs given the slave owner's reprehensible attitudes towards his slaves.

The use of restricting inputs into public deliberations in order to ensure reasonable and reciprocal attitudes could be jeopardized by the use of sympathetic judgments in public decision-making forums. For example, it is not inconceivable

³⁹⁶ Robert Goodin, 'Input Democracy' in eds. Frederick Engelstad and Øyvind Østerud *Power and Democracy Critical Interventions* (Hants, England and Burlington, VT: Ashgate Publishing Company), p. 80; John Dryzek and Christian List, 'Social Choice Theory and Deliberative Democracy: A Reconciliation' *British Journal of Political Science*, 33 (2003):1-28, p.4; Martin van Hees, 'The Limits of Epistemic Democracy' *Social Choice and Welfare*, 28 (2007): 649 – 666 at p. 650.

³⁹⁷ Samuel Freeman, 'Public Reason and Political Justifications,' *Fordham Law Review* 72 (2003):2021-2072 at pp. 2057.

that a reasonable citizen with the narrative imagination described by Nussbaum would on occasion be able to empathize with those whose attitudes public democratic culture finds reprehensible. In fact, John Harsanyi has a model of distributive justice which utilizes this precise strategy.³⁹⁸ His equiprobability model is designed to determine the moral superiority of any two distributions of goods on utilitarianism grounds. When an individual has to determine whether a distribution D_1 is morally superior to a distribution D_2 , then, assuming that both distributions consider goods distributed across equal numbers of people, (call this number N), Harsanyi asks that a person first utilize the Smithian impartial spectator to determine what his utility would be, were he to take up the position of each of the N people in society.³⁹⁹ Harsanyi calls the preferences that a person has when he takes up the perspective of the impartial spectator, a person's *moral preferences*.⁴⁰⁰ As a utilitarian, Harsanyi argues the moral superiority of one distribution over another (from the perspective of an individual) is reflected in whether an individual *morally prefers* one distribution over another. This means that whether D_1 is superior to D_2 can be determined by calculating the expected utility that a person would have as a member of society, if he were equally likely to be any of the N individuals. If his expected utility in D_1 is greater than that of D_2 then D_1 is the more just distribution.

This model differs from accounts of rational behaviour, only insofar as preferences are determined using an impartial spectator.⁴⁰¹ This means that it is the

³⁹⁸ John Harsanyi, 'Morality and the Theory of Rational Behaviour,' in Amartya Sen and B.A.O. Williams eds. *Utilitarianism and Beyond*, (Cambridge, UK: Cambridge University Press, 1982), pp 39 - 62.

³⁹⁹ *Ibid.* p.46.

⁴⁰⁰ *Ibid.* p.47.

⁴⁰¹ *Ibid.* pp. 47-48.

impartial spectator that is weeding out all the amoral or immoral preferences that might bias a person's judgment. A similar phenomenon occurs in sympathetic justification, but such justification tailors to accounts of justification that are more definitively specified.

Consider a more contextualized account of slavery in which the narrative imagination can become fully operative. Gideon Rosen has provided one such example, regarding slavery in the Ancient Near East.⁴⁰² Rosen asks us to consider a Hittite society where (i) slaves or not seen as sub-human, but less fortunate humans (i.e. slavery is a misfortune comparable to illness or poverty in our society)⁴⁰³; (ii) any person could potentially become a slave due to imprudence or bad luck, in the same manner that anyone in our society can become ill if they have bad health or do not properly take care of their health⁴⁰⁴; (iii) the institution of slavery is a long standing social norm, "taken for granted" across the Ancient Near East⁴⁰⁵; and (iv) Ancient Near Eastern societies predated the earliest debates regarding the morality of slavery, which occurred in Late Antiquity.⁴⁰⁶

Rosen claims that although we might still find slavery to be an immoral institution when morally evaluating such societies, a reasonable Hittite Lord who carefully considered all the relevant moral considerations of chattel slavery that were accessible to him at the time, would not have been able to judge its wrongness.

"Given the intellectual and cultural resources available to a second millennium Hittite lord,

⁴⁰² Gideon Rosen 'Culpability and Ignorance,' *Proceedings of the Aristotelian Society*, New Series, Vol. 103 (2003), pp. 64-66.

⁴⁰³ *Ibid.* p. 64.

⁴⁰⁴ *Ibid.* p. 65.

⁴⁰⁵ *Ibid.* p. 65.

⁴⁰⁶ *Ibid.* p. 64.

it would have taken a moral genius to see through to the wrongness of chattel slavery.”⁴⁰⁷

Although the facts of slavery are accessible to the Hittite Lord, the appropriate reasoning about the morality of slavery is unavailable. Suppose we tried to imagine ourselves in the place of the Hittite Lord in order to determine the appropriateness of his moral conclusions. Given our twenty-first century knowledge, we would know that the practices are wrong. However, if the Hittite Lord really did not have access to the sort of reasoning to which we are accustomed, through the use of our imagination we would conclude that we too would have been mistaken about their wrongness had we been raised in the Ancient Near East. Although we are free to evaluate the practices themselves, because we know that the Hittite Lord is not free in this respect, our imagination can respond to this handicap. It is entirely possible that through our capacity for sympathy, we would determine on occasion that engaging in a completely unreasonable practice may be undertaken by reasonable individuals who have good reasons to be mistaken about what is reasonable.

In terms of inputs into the collective decision-making procedure, our initial account of public justification allowed only for reasonable inputs that could conflict with each other (i.e. it allowed for reasonable disagreement). The justification of sympathetic judgments, by contrast, allows for reasonable inputs as well as unreasonable inputs that consist in beliefs mistakenly adopted by otherwise reasonable people. These beliefs are not public in the sense that we could reasonably expect all reasonable citizens to endorse them. Rather, they are public in the sense

⁴⁰⁷ Ibid. p. 66.

that we could reasonably expect all reasonable citizens to understand why a reasonable citizen might have mistakenly adopted them.

Now we might think, at this point, that this opens the door to an exchange of reasons that are ultimately not justifiable. When considering restrictions on religious expression, for example, Rawls wrote that the fact that Servetus could understand the reasons why Calvin wanted to burn him at stake, did not constitute reasonable justification.⁴⁰⁸ Although Calvin might expect Servetus to understand his reasoning, he could not expect Servetus to reasonably endorse it. Should we not exclude the reasoning of the Hittite Lord on similar grounds?

A sympathetic spectator could respond that there are several differences between Calvin and the Hittite Lord: first of all, unlike Calvin who presumably knows that Servetus cannot accept his reasoning on reasonable grounds, the Hittite Lord does *not* know that a slave cannot be expected to endorse his reasoning on reasonable grounds. He might infer from the badness of slavery, that the slave would not accept his reasoning on egoistical grounds (that is, given the choice between being a slave and not being a slave, the slave would choose not to be a slave out of his own self-interest). However, given his cultural background, he is unaware that reasonable people reasoning properly would immediately exclude his conclusions.

By contrast, Calvin was not accusing Servetus of being self-interested or egoistical in denying the existence of the Trinity. Rather, in condemning Servetus' beliefs, what Calvin was doing amounted to denying reasonable pluralism. Servetus

⁴⁰⁸ Rawls, *The Idea of Public Reason Revisited*, p. 771.

was not condemned because he was being unreasonable. Servetus was condemned because he was believed to be wrong. Rosen's Hittite Lord Example exemplifies a situation in which reasonable reflection conditioned upon certain cultural codes, leads an otherwise reasonable person to accept an unreasonable position. What is crucial is that the reasonable person has adopted such beliefs *by mistake*, rather than through some commitment to the truth.

However, this leads to the problem that social conditioning might often be involved in the adoption of unreasonable behaviour. Rosen claims, for example, that sexist American men in the 1950s, who could not see a woman's claims to educational and professional opportunities as being on par with similar opportunities sought by men, are in a position comparable to that of the Hittite Lord.⁴⁰⁹ Their sexism could be construed as the result of how they were raised and not any sort of malicious intent. How the sexist American man differs from the Hittite Lord is that he is well aware of the debates supporting women's rights. However, he has been raised to find the reasons favouring women's rights "obviously wrong",⁴¹⁰ in much the same way that the Hittite Lord takes it for granted that the institution of slavery is obviously appropriate.

Now suppose that this Hittite Lord or the Sexist Man is our B. A has a capacity for narrative imagination and realizes that although B is wrong in his views, she can use her imagination to understand why it is that he believes what he does. Does this mean that A finds B's views reasonable? Not necessarily, for Nussbaum

⁴⁰⁹ Rosen 'Culpability and Ignorance,' pp. 66-67.

⁴¹⁰ Ibid.

understands the narrative imagination to be a critical faculty that frames the empathetic evaluation in terms of the imaginer's own personal objectives.⁴¹¹

Nussbaum writes: *"The narrative imagination is not uncritical: We always bring ourselves and our own judgments to the encounter with another, and when we identify with a character in a novel, or a distant person whose life story we imagine, we inevitably will not merely identify, but also judge that story in the light of our own goals and aspirations. But the first step of understanding the world from the point of view of the other is essential to any responsible act of judgment..."*⁴¹² In other words the narrative imagination does not only consider B's views, but B's views in light of A's projects.

In many respects, this is in line with the specifications of reasonable disagreement. Although A can understand how and why B came to the best conclusions that he could based on the evidence available to him, B cannot reasonably justify his position to A. The question is whether he can reasonably expect A to endorse his beliefs, and unlike the Hittite Lord, the sexist American man must know that he cannot. Unlike the Hittite Lord, he is fully aware that there are debates raging on second wave feminism; or at the very least, the existence of these debates could be made public to him in political debate. By contrast, the feminists who are aware the sexist American man believes what he does based on the evidence available to him, also know that he is not being politically reasonable. Political reasonableness requires individuals to desist from appealing to prejudices of the sort the 1950s American Man holds.

⁴¹¹ Nussbaum, 'Cultivating Humanity in Legal Education,' *University of Chicago Law Review* 70(2003): 265 - 280 at p. 270.

⁴¹² *Ibid.* p. 270.

This means that A can consistently say that while it might be reasonable for B to have the views he has, the views themselves may not be reasonable views. In the absence of objective moral truths, what would it mean for a view to be unreasonable independently of a reasoning agent? One answer is that when B comes into contact with reasonable people who do not share his views, he might be subject to change. If A has a capacity for narrative imagination, then she must agree that the Hittite Lord is blamelessly ignorant for not being aware of the wrongness of slavery. However, suppose that B has been non-maliciously sexist within the boundaries of law (i.e. suppose B is a teacher who informally encourages his male students to apply to college, and discourages his female students from doing the same). Citizen A engages her capacity for narrative imagination. Would she also find B's practices justifiable?

The trouble is that the justification of the empathetic judgment is a part of the public decision-making process, so the problem of discrimination is primarily one of the suitability of the inputs in a legitimate procedure of public deliberation. However, empathy cannot guarantee such reasonable procedural inputs. Therefore, sympathy can never be a sufficient reason for a justification to be publicly acceptable. A sympathetic judgment is only justifiable if it also meets the demands of reasonableness.

4.6.2: Faulty Imagination

The second problem with the use of sympathetic judgments in public justification involves the capacity of C to determine whether the sympathy of another citizen is

warranted. C may believe that A's capacity for imagination is somehow faulty, and may criticize the judgments she makes on these grounds.

Unlike the Problem of Unreasonable Attitudes which was a pre-procedural problem, the Problem of the Faulty Imagination lies within the procedures of decision-making. Let us take as our example, the view propounded by US Supreme Court Justice Sonia Sotomayor, who was grilled during the Senate hearings leading up to her confirmation, because she had said on several occasions: "*Justice O'Connor (a female Supreme Court Justice) has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases...I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.*"⁴¹³ Two members of the Senate Judiciary Committee, who participated in her confirmation hearings, interpreted this statement as a means by which to question her willingness to make impartial decisions on issues before the Court, or whether she would be swayed by extra-legal prejudices. What they failed to realize was that a citizen might ask her fellow citizens to consider her experiences as a woman, a racial minority, a veteran or even a member of the elite, not because she would benefit from policies generated as the consequence of sympathy with her experience, but because she believes her experiences form justifiable grounds for policy reform. Just as there are insights about the ethics of love and care that are generated by the experience of being a parent, there may be insights about the nature of justice and fairness that are gleaned from individuals' experiences.

⁴¹³ Judge Sonia Sotomayor, *Address to 'Raising the Bar Symposium'*, (Berkeley, California, 2001).

However, only when she separates her claims for sympathy from her justification of said sympathy, can she begin to examine whether the sympathy is publicly justifiable. In order to do so, those who are offered sympathetic justifications must engage in a type of sympathetic judgment themselves. C must take the position of A, and determine whether A's sympathy is appropriate given both her life experience and those of others.

Suppose we were to require that in making a sympathetic justification, Citizens A and C were both required to take the perspective of the other when judging the others' view towards B's situation. In some cases, those forced to consider the opposing view may willingly change their own reasonable views for the reasonable views of another, once they are able to sympathetically consider the perspective of that other.⁴¹⁴ The corporate climber might put greater weight on the claims of his opponents, once she learns she can sympathize with aspects of their values. The school curriculum might end up reflecting aspects of both the humanistic pedagogy and the needs of the linguistic minority, as the two sides come to believe that the other perspective has some worthwhile criteria by which to inform the public decision. If such a process of sympathetic imagination were undertaken, sympathy would only lead to greater convergence of individuals views. It would not invite completely self-regarding demands, because the sympathetic agents we are considering are also reasonable and rational.

⁴¹⁴ Bruce Ackerman and James Fishkin for example, report 'dramatic' changes to attitudes on social policy when members of different social classes engage in extended, small-group deliberation (Ackerman and Fishkin 'Deliberation Day' *The Journal of Political Philosophy*, 10(2002):129-152 at p. 141).

The distinction between a sympathetic agent and a reasonable sympathetic agent hinges on the other-regarding features of the justifications that they are willing to provide. There is a world of difference between a citizen who says “We must pursue policy X because X would be beneficial for me” and one who says “Does it really signify nothing that policy X would mean so much to me when I am a fellow reasonable and rational citizen?” While both claims are egoistical (and therefore standardly nonpublic), the second claim still makes an appeal to others. It asks others to recognize certain features of the person making the claim, and is consistent with a willingness to recognize these features in others. The second claim manages to be both egoistical and other-regarding; egoistical in the content, other-regarding in the means by which it aims to justify itself (i.e. from the other point of view.) The other’s ability to perform the act of recognition is crucial for the offered justification to work.

The question is whether these are the sorts of other-regarding appeals on which reasonable citizens ought to be deliberating. A child who says to her father, “*Does the fact that buying me a doll will put a smile on my face really signify nothing to you when I am so adorable when I smile?*” is of course offering a justification that would work only if the other were to recognize certain features of the claimant, (i.e. that the doll would make her happy, that her happiness is important,) or features that reflect the relationship between claimant and receiver of justification (i.e. that *he wants* to see her with a smile on her face). Yet if we were to replace the child in this scenario with a grown person, the doll with a substantial sum of public funds, and the father with a political collective, the other-regarding claim made here would seem out of place.

This is because what the person is asking others to recognize are features that should be irrelevant to the political process.

Indeed, we have seen something like this before and dismissed it on grounds of reciprocity. When the slave owner asked us to consider his claims in favour of slavery, reciprocity required them to be dismissed because he had the wrong attitude towards slaves. The attractive lobbyist could similarly have her claims dismissed, not because she herself has the wrong attitude towards someone, but because in order for her justification to work, she would need someone else to have the wrong attitude towards her. Asking that others give a person privileges because she looks a certain way, is as unreasonable as asking that others have privileges taken away because they look a certain way. No reasonable citizen would make such a claim, and so the need for recognition is not by itself a sufficient ground for justification.

I have throughout been coupling sympathy with reason and rationality, and have therefore never supported its claims to sufficiency. There are, however, times when sympathy is necessary for a justification to work. Certain reasonable claims, after all, would be disputable if others could not recognize the relevant features of the person making the claim. Claims involving disability benefits, for example, require that others recognize both the illness and the effect that such an illness has on the life of those individuals struggling with it. Consider the claims of a woman suffering from post-partum depression who needs to use public funds to help her nurture her newborn child. It is hard to believe that a political collective would make provision for those suffering with any sort of depression, unless reasonable individuals were capable of recognizing mental health to be a serious concern. It is

the very ability to recognize the suffering in another that makes their claims for help justifiable. Absent the capacity for sympathetic imagination, there would be no awareness of the fact that the ill were actually suffering.

Now in deep-seated disagreements about sympathy, such as those between Justice Sotomayor and her non-Latina colleagues, as long as both parties try to understand the sympathetic imagination then regardless of whether they manage to succeed, the difference in perspective may be taken as adding a separate layer of analysis to the debate. It may call for more trust and more respect on the part of those who disagree with each other. However, if each is viewed as reasonable and the attempt to offer justification is recognizable, then there are good reasons to invoke such trust and charity towards the other when the perspective seems beyond one's comprehension.

4.7: Conclusion

In this chapter, I have tried to establish what publicity in the context of sympathetic public reason requires. I first argued that sympathetic public justification, like public justification with pure public reason, must meet criteria of publicity and reciprocity. I then showed that the nature of publicity is different for sympathetic and pure public reason. While pure public reason uses only reasons that are shared from a common perspective, sympathetic public reason can utilize reasons that are accessible when a person imaginatively places himself or herself into the perspective of another being. I showed how this type of sympathetic publicity would resolve the debate on abortion differently than the resolution found in pure public reason.

The final two sections of this chapter looked at concerns about the ways in which sympathetic public reason might be non-public. First, I considered the concerns that judgments based in sympathy fail to be public, simply because sympathy is not a cognitive faculty, and therefore does not warrant public deliberation. I showed that this was not the case. Then I looked at two Failures of Judgment – one in which the person engaged in sympathetic judgment formation has politically unreasonable attitudes towards others; and another in which her capacity for sympathetic imagination seems biased by her life experiences. In both cases, I tried to show that as long as citizens are reasonable and rational, as well as sympathetic, the problems do not arise.

Chapter 5: Sympathy and Reciprocity

In the preceding chapter, I addressed the concern that an exchange of reasons based in individuals' sympathy (i.e. sympathetic reasons) might not be suitably public to serve as grounds for public justification. In the process I clarified a troublesome distinction made by liberal philosophers, between reasons that are publicly accessible and those that are reasonably endorsed by all reasonable individuals. In the model of pure public reason, justifications that are politically reasonable are those that invoke reasons from within a particular subset of all reasons that are reasonably endorsed by all reasonable individuals. Reasons that individuals can understand but not endorse, for example, do not constitute bases of justification in accordance with the Rawlsian criterion of reciprocity.⁴¹⁵

Sympathetic reasons, I argued, are neither *merely accessible* nor reasonably endorsed by all reasonable citizens. Like merely accessible reasons they are non-public, in the sense that they are not the shared reasons of all individuals. However, all can identify why sympathy-based reasons *could* have normative force from the perspective of *some* reasonable individuals. When sympathetic citizens place themselves in the positions of those who hold these non-public standards of reasoning, they can understand how their non-public reasons developed, and they can accept that from a non-public perspective, such reasoning might seem like it ought to be the criteria upon which public decisions are made.

⁴¹⁵John Rawls, 'The Idea of Public Reason Revisited', *The University of Chicago Law Review*, 64(1997): 765-807). Rawls writes that: 'Servetus could understand why Calvin wanted to burn him at stake,' indicating that Calvin's reasons were publicly accessible to Servetus (p.771). According to Rawls, what made these reasons politically unreasonable was that Calvin could not expect Servetus to accept such reasoning.

In this chapter I intend to look at the normative force that such non-public reasons ought to have in the public sphere. When I discussed the moral foundations of pure public reason in the Introduction to this dissertation, we saw that two features of a criterion of justification must be public in order for it to have normative authority in the public sphere. First, the *content* of pure public reason must be public so that all reasonable citizens can, in theory, reason in accordance with it, and can reasonably endorse those reasons to varying degrees. Secondly, the reasons which a citizen has for taking up the perspective of pure public reason must be public. In the case of pure public reason, the duty of fair play and the idea of reciprocity provide public grounds for accepting its perspective as having normative authority. When reasonable citizens accept these grounds, they agree that in order for a course of action to be politically legitimate, it must be justifiable from the perspective of pure public reason. For example, a pro-life advocate who believes that abortion is murder will believe the practice to be privately unjustifiable no matter what pure public reason requires. However, she must be able to see that it is *publicly* justifiable in order for the practice to be politically legitimate.

My conclusions from Chapter 4 show that the sympathetic imagination can enable individuals to understand the content of non-public reasons to which others subscribe, and can enable them to get a sense of how to reason from within perspectives that are not their own. In some cases, but not all, they also get a sense of why such positions are reasonable from the perspective of reasonable citizens. These cases are distinguished by the fact that the individuals who reason according to them do not have prejudicial attitudes towards their fellow citizens, but are able, from

within their non-public perspective, to acknowledge them as free and equal, reasonable and rational agents who are engaged in a mode of social cooperation. As a result, such citizens are reasonable in the Rawlsian sense.⁴¹⁶

In this chapter, I turn to how sympathetic public reason meets the second requirement of public justification. I show why all reasonable citizens can agree that sympathetic public reason ought to serve as the criterion of justification which grants a political position normative authority in the public sphere. I will argue that when citizens recognize each other as possessing the capacity for sympathetic judgment formation, the relationship of reciprocity generates two further duties. These duties provide grounds for some types of non-public reasoning to have greater normative authority in the public sphere. The two further duties generated by sympathetic liberals situated in relations of reciprocity are the Duty of Deliberative Sympathy and the Duty of Respectful Political Equality.

What I call the Duty of Deliberative Sympathy requires that any normative theory of public justification must reflect an account of reasonableness that is consistent with those aspects of an individual's personal narrative that are identifiable as experiences common to and appropriate for free and equal reasonable citizens. I will argue that such experiences include the aspiration to live in accordance with a conscience that has been formed after critical deliberation on a wide array of difficult moral problems confronting reasonable citizens living in a liberal democratic society. As a consequence of the Duty of Deliberative Sympathy, citizens are required to be sensitive to the struggles created by what, in Chapter 1, I

⁴¹⁶ Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p.50.

called the Problem of Conscience. I will show that this sensitivity is sufficient to require reasonable citizens to allow other citizens the chance to avoid the burdens of the Tragic or Brutish Conscience, by justifying political positions in accordance with their non-public reasons.

What I call the Duty of Respectful Political Equality requires citizens to show each other a form of respect consonant with the sense of self-worth each citizen would need to bring to the cooperative enterprise, if the citizen were to be viewed as an equal partner. Political liberalism already goes far towards accomplishing this, by requiring that every collective act is publicly justifiable to all reasonable citizens (even when they do not find it privately justifiable or 'most reasonable' from a public perspective). I distinguish the notion of respect already present within the liberal tradition from the one I advance, by showing how sympathy would require citizens to allow their fellows to exercise their reasonable judgment in shaping policy, not simply in accepting it as justifiable from the perspective of a particular criterion of justification.

Just as the duty of civility and the obligation to obey the law were generated by relations of reciprocity, and gave pure public reason its normative force, the duties generated by sympathetic citizens situated in relations of reciprocity lend normative weight to the use of a sympathetic variant of public reason. This variant of public reason incorporates certain forms of non-public reasoning that is cultivated by reasonable citizens. What these forms of non-public reasoning have in common is that sympathetic citizens can sympathize with the experience of developing such reasoning, and can respect the fact that citizens would want to live lives in

accordance with its prescriptions. For example, moral reasoning is non-public, but all citizens can identify with the deliberative struggle which contributes to the formation of reflectively stable moral values and can understand why individuals want to live in accordance with these values.

I will argue that sympathetic citizens generate what, following Darwall, I call, 'appraisal respect' for the non-public reasoning of their fellow reasonable citizens, and that this is grounds for sympathetic citizens to take up the non-public perspective of their fellow citizens, and give it normative weight in the public sphere. Since citizens can understand the difficulty of performing certain kinds of reasoning, and can accept that reasonable people will want to live in accordance with their non-public reasoning, they will incorporate such non-public reasoning into their criterion of justification.

For example, the way in which reasonable individuals non-publicly weigh conflicting considerations in cases like abortion or the Hijab Controversy, in part depends on whether or not they believe good reasoning involves commitments to laicism, scriptural interpretation, scientific evidence, or some combination of these reasons. (Note that all reasonable citizens must agree that laicism and scientific evidence are *politically* reasonable, but they need not agree that this sort of reasoning is *actually* reasonable.) If a citizen who did not believe that scriptural interpretation was required for good reasoning were to take up the perspective of a citizen who did, the former would have a sense of why some reasonable citizens would place such great weight on the belief that abortion is disrespectful of human life. In addition, she would have a sense of why someone could reasonably believe that the

non-public framework of reasoning adopted by the pro-life advocate ought to have normative authority for decision-making.

Just as in the case of political reasonableness, where citizens understand the content of pure public reason, and also understand why it should be given normative authority for public decision-making, sympathetic liberalism enables citizens to place themselves in others' positions to understand both the content of non-public reasons and the normative authority of *non-public* reasoning from the others' perspective. Then, due to the generated appraisal respect, citizens have a further reason to believe that such non-public reasoning ought to have normativity in processes of *public* justification. The result is that the religious views of the pro-life advocate, and the secular views of the Laiciste feminist, both become public in the sense that the content of the framework of reasoning, as well as its grounds for normativity, both become public.

5.1: Reciprocity in Liberalism

The idea of reciprocity characterizes the relationship of free and equal individuals who are engaged in a fair scheme of social cooperation.⁴¹⁷ Since political liberals view political society as a fair cooperative enterprise,⁴¹⁸ they must also view reciprocity as a fundamental characteristic of the political relationship.⁴¹⁹ Furthermore, the political conception of justice which regulates the interactions of citizens in a political sphere

⁴¹⁷ John Rawls, *Political Liberalism*, pp. 16-17, 50; John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Belknap Press of Harvard University), p. 77.

⁴¹⁸ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA and London, England: Belknap Press of Harvard University Press, 1997), pp. 52- 53; Rawls, *Political Liberalism*, pp. 15 – 22.

⁴¹⁹ Rawls, *Political Liberalism*, p. 17.

must reflect this relationship of reciprocity.⁴²⁰ Various political duties and obligations, (e.g. the duty to obey the law,) derive as a consequence of this system of regulation.⁴²¹ The idea of reciprocity is presupposed in the liberal ideas of justice, duty and obligation. A good criterion of justification is one which provides a way to seek fair terms of cooperation that reflects the relationship of reciprocity.⁴²²

Reciprocity is often characterized as an idea situated between those of mutual advantage and impartiality.⁴²³ Theories of impartiality are non-egoistical and can require individuals to pursue particular courses of action that are not in their self-interest.⁴²⁴ Reciprocity resembles impartiality in the sense that if a person generally benefits from a social practice, then in a given instance, it may require him to go against his self-interest to maintain the rules of the practice. For example, if a person generally benefits from the institution of promise-keeping, then even if he finds himself in a situation where it is in his self-interest to break a promise, reciprocity maintains that in the absence of conflicting moral obligations, he still ought to keep it.⁴²⁵

However, impartiality is far more demanding than reciprocity. Firstly, a sense of impartiality can generate obligations towards those with whom individuals do not engage in social cooperation, such as foreigners, children and members of politically unreasonable interest groups. Second, impartial standards may conflict with each

⁴²⁰ Ibid.

⁴²¹ John Rawls, *Theory of Justice* (Oxford, UK: Oxford University Press, 1972), chapters 51 and 53

⁴²² Gutmann and Thompson, *Democracy and Disagreement*, p. 53; Rawls, *Political Liberalism*, pp. 49 – 50.

⁴²³ Gibbard, 'Constructing Justice,' *Philosophy and Public Affairs* 20 (1991): 264 – 279 at p. 266.

⁴²⁴ Ibid. p. 267.

⁴²⁵ John Rawls, 'Justice as Reciprocity' in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999), p. 210.

other, and higher level impartial standards would have to be invoked to resolve such conflicts.⁴²⁶ Impartially applying the standards set by the utilitarian Greatest Happiness Principle would yield very different results from applying impartial standards established by Kant's account of moral freedom.⁴²⁷ It is also not always clear which higher level impartial standard could be invoked to resolve conflicts, such as those between utilitarianism and Kantianism.

By contrast, individuals cooperating on terms of reciprocity agree upon how to resolve their conflicts of views and interests, prior to any instance in which such conflicts must be resolved.⁴²⁸ The foreigners and children that may be subject to impartial standards adopted by a group need not actually agree to be judged by those standards in order for those standards to be applied to them impartially. Likewise, the higher-level standards invoked to resolve conflicts of impartial moral views need not require any kind of agreement. They may depend on other concerns such as the epistemological constraints of public political argument.⁴²⁹ Agreement is the constraint that reciprocity places upon impartiality, and it is this sense of agreement which supports the idea of mutual advantage.

When institutional arrangements of a political society do not secure advantages for all citizens, but impose obligations on them all, then citizens who do

⁴²⁶ Thomas Nagel, 'Moral Conflict & Political Legitimacy,' *Philosophy & Public Affairs*, 16 (1987): 215-240, at p. 229.

⁴²⁷ John Stuart Mill, 'Utilitarianism,' *Collected Works vol. 10*, ed. J.M. Robson (Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1963-1991). After introducing the Greatest Happiness Principle, Mill writes of Kant and his Formula of Universal Law that: 'when [Kant] begins to deduce from this precept any of the actual duties of morality, he fails, almost grotesquely, to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageously immoral rules of conduct. All he shows is that the *consequences* of their universal adoption would be such as no one would choose to incur.' (Utilitarianism, Chapter 1, paragraph 4.)

⁴²⁸ Rawls, 'Justice as Reciprocity,' p. 206.

⁴²⁹ Nagel, 'Moral Conflict and Political Legitimacy,' pp. 230 – 231.

not benefit from the arrangement can point out that were they free and equal, they could not reasonably be expected to endorse such arrangements. Those who support such institutional arrangements must then acknowledge that through their support, they are presupposing that not all citizens ought to be treated as free and equal cooperatives of a fair social scheme. Those who support such practices or policies are then disregarding one of the fundamental characteristics of the political relationship.

Reciprocity recognizes the fact that free and equal individuals would not voluntarily choose to cooperate with each other unless each benefitted from the cooperation. This insight establishes a benchmark for what citizens are owed when social cooperation is not voluntary, such as when individuals are born into political societies. According to Rawls, the involuntary subjection of citizens to institutions makes it all the more 'urgent' that the regulating principles meet the demands of reciprocity.⁴³⁰ Since participation in political society is not actually voluntary, it is important that at the very least, the conception of justice which regulates political society *could* be one to which free and equal, reasonable and rational citizens would subscribe.

The insight regarding mutual advantage also connects the idea of reciprocity to that of justifiability. If we treat citizens as free and equal, then the terms of cooperation we propose to them must be those that we sincerely believe they would find justifiable. This means that when we determine that a citizen 'could' find a law or social policy reasonably justifiable, we do not simply mean that they 'could' hypothetically endorse it if they had a different set of values, or if they had rational

⁴³⁰ Rawls, 'Justice as Reciprocity,' p. 209.

interests different from the ones that they do. We take citizens' beliefs and values as they are, but assume that they are indeed seeking fair social cooperation with other free and equal citizens. In fact, this is a part of the characterization of the 'reasonable citizen.'⁴³¹

One of the contributions of the requirement of mutual advantage is that reciprocity, unlike impartiality, is not closely connected to the idea of altruism.⁴³² Since impartiality can encourage the general good or welfare, it may be consistent with impartiality to ask one person to sacrifice for many. A military draft, for example, might be consistent with an impartial conception of political justice in which all individuals are asked to do what they can to preserve and protect their country. Reciprocity separates itself from impartiality in the sense that despite being non-egoistical it is personal. A citizen can object to a military draft on grounds that it would not be reasonable to suppose that all free and equal individuals would reasonably accept such a policy. The only condition required by reciprocity is that this person has not voluntarily benefitted from the draft in some way (say by receiving a scholarship from the military in return for the possibility of being drafted). If they have in some way benefitted, then other duties of reciprocity (such as fair play, or fidelity to one's promises), might require these individuals to submit to the scheme of cooperation, as long as the scheme is fair.

This reflects what Rawls has called the criterion of reciprocity. The criterion of reciprocity requires that 'when those terms are proposed as the most reasonable terms of fair co-operation, those proposing them must also think it at least reasonable

⁴³¹ Rawls, *Political Liberalism*, p. 50.

⁴³² Gutmann and Thompson, *Democracy and Disagreement*, p. 54; Rawls, *Political Liberalism*, p. 16.

for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.⁴³³ He instantly cautions that such an agreement will not be based upon terms of justice that are 'most' reasonable, but on terms that all can find reasonable to some level.⁴³⁴

In general, the way obligations derive from relations of reciprocity is as follows: people who view themselves as engaging in a fair cooperative enterprise with free and equal agents are led to seek fair terms of cooperation.⁴³⁵ Since all agents are free and equal, the only way to determine such terms is through mutual agreement (as none can be forced by others to accept any given term). Therefore, agents offer each other terms that they believe others could reasonably accept.⁴³⁶ In offering such terms to each other, each agent realizes that offering terms simply because they benefits himself will never suffice in securing the agreement of others. Rational individuals are not wholly altruistic.⁴³⁷ If general agreement is not secured, then the person who disagrees with the terms of cooperation can complain that he or she is subject to it, rather than being free and equal.⁴³⁸

Rawls claims that those situated in relations of reciprocity are then confronted with two kinds of commitments: obligations and natural duties. Obligations are moral demands imposed upon a citizen as a consequence of his or her voluntary actions. For example, the obligation imposed upon an individual by a

⁴³³ John Rawls, 'The Idea of Public Reason Revisited,' *The University of Chicago Law Review*, 64(1997): 765-807 at p. 770.

⁴³⁴ Ibid.

⁴³⁵ Gutmann and Thompson, *Democracy and Disagreement*, pp. 52 – 53; Rawls, *Political Liberalism*, pp. 16, 49 – 50.

⁴³⁶ Rawls, *Political Liberalism*, pp. 49 – 50.

⁴³⁷ Gutmann and Thompson, *Democracy and Disagreement*, p. 54; Rawls, *Political Liberalism*, p. 16.

⁴³⁸ Rawls, 'Justice and Reciprocity,' p. 209.

promise that she made is a consequence of her having voluntarily made the promise. By contrast, natural duties are those that are imposed upon individuals non-voluntarily, such as the duty to support just political institutions.⁴³⁹ They are imposed on citizens in recognition of their reasonable and rational natures. Both natural duties and obligations are recognized as morally binding by individual citizens situated reciprocally (e.g. by individuals behind a veil of ignorance).⁴⁴⁰ However, unlike obligations, natural duties are those which one would expect to be recognized even outside of the social cooperative.⁴⁴¹

The Duties of Deliberative Sympathy and Respectful Political Equality are duties in the sense that they result from (typically non-voluntary) membership in a liberal political society. However, their universal applicability is questionable. In *Theory of Justice* Rawls determines whether or not a natural duty ought to have force within the public sphere, by asking whether all agents beyond a veil of ignorance would choose to recognize its universal applicability.⁴⁴² My method of defending the force of duties in this chapter stems from an earlier Rawlsian method, which situates citizens in positions of reciprocity and then tries to determine how these citizens would agree to resolve competing claims within political society.⁴⁴³ The terms agreed to when citizens are so situated, form the basis of an original social agreement. Acting in accordance with those terms is necessary for justice as reciprocity.

⁴³⁹ Rawls, 'A *Theory of Justice*,' pp. 114-115.

⁴⁴⁰ Ibid. p. 333.

⁴⁴¹ Ibid. p. 115.

⁴⁴² Ibid. Chapter 51.

⁴⁴³ Rawls continues to use this method in his later work. The defense of the duty of civility which I outlined in the Introduction depends on the fact that civility results from reciprocity.

Given that the objective of reciprocity is cooperation based on mutual agreement and advantage, liberals must account for why individuals continue to respect their duties and obligations in the face of deep-seated disagreement such as those exposed in intense moral debate. For example, Rawls writes that reciprocal obligations require submitting to some unjust laws.⁴⁴⁴ He means that upon hearing of the painful experiences of fellow citizens denied healthcare opportunities, educational opportunities or proper end of life care, due to the complexities of issues like affordable care, affirmative action and euthanasia, individuals might need to comply with the letter of the law as long as the institution is 'near just.'⁴⁴⁵ However, given a citizen's other moral commitments, why would it be that the obligation to comply with an unjust law motivates compliance in such situations?

Many have argued that this phenomenon can be explained by the fact that citizens' moral psychologies are such that they are conditioned to submit to certain reciprocal obligations, one of which is the duty to comply with unjust laws. Without deviating far from the Rawlsian paradigm of justice, Gibbard writes of the possibility of individuals having an innate sense of 'fair reciprocity,' whereby individuals may treat others decently 'simply because' they have received decent treatment from them in the past.⁴⁴⁶ Rawls' own account of moral psychology is quite different. Although reciprocity is connected to his idea of a reasonable citizen with a sense of fairness,⁴⁴⁷ reciprocity does not have any power to motivate moral action. Rather, for Rawls, the psychological development of a sense of justice is based on ties of

⁴⁴⁴ Ibid. Chapter 6, sec. 53.

⁴⁴⁵ Rawls, 'A Theory of Justice,' p. 353.

⁴⁴⁶ Allan Gibbard 'Constructing Justice,' p. 266.

⁴⁴⁷ Rawls, *Political Liberalism*, pp. 50-51.

affection and attachment to institutions that benefit citizens, rather than any innate sense of reciprocity.⁴⁴⁸

A third factor considered to motivate fair cooperation is the moral attitude of respect. Gutmann and Thompson argue that when each citizen can be sure that others are sincerely seeking fair terms of cooperation, and can offer mutually acceptable reasons for rejecting beliefs offered by others, then attitudes of respect can be fostered despite other kinds of moral disagreement.⁴⁴⁹ This notion of respect moves beyond simply tolerating the views of other citizens through the acknowledgement of reasonable disagreement. It involves the cultivation of an attitude that encourages continued cooperation despite reasonable differences.⁴⁵⁰ In this view, the respectfulness cultivated towards other citizens enables those with strong moral beliefs to recognize that those with conflicting beliefs are still moral persons who are trying to act in a moral way.⁴⁵¹ It inclines citizens towards 'civic magnanimity' towards their fellows.⁴⁵²

According to Gutmann and Thompson, the disposition towards mutual respect is evidenced by the fact that liberals show different levels of respect towards advocates of capital punishment in comparison to those who favour practices marked by racial discrimination.⁴⁵³ While most liberals see both positions as morally problematic, proponents of capital punishment can offer mutually acceptable reasons for their views, while proponents of racial discrimination cannot. The former meet

⁴⁴⁸ Rawls, *Theory of Justice*, pp. 490 – 491.

⁴⁴⁹ Gutmann and Thompson, *Democracy and Disagreement*, p. 78.

⁴⁵⁰ *Ibid.*, 79 – 80.

⁴⁵¹ *Ibid.*, p. 82.

⁴⁵² *Ibid.*, p. 82.

⁴⁵³ *Ibid.*, p. 79.

the demands of reciprocity, and since respect is cultivated through relations of reciprocity, their treatment by liberals is different. However, Gutmann and Thompson then appeal to the strong sense of respect cultivated by reciprocity to derive civic magnanimity as a principle of moral accommodation.⁴⁵⁴ This means that even when such magnanimity does not actually exist in practice, it is a moral principle which ought to guide the behaviour of citizens who stand in relations of reciprocity.

While I believe that Gutmann and Thompson are correct in maintaining a strong, even vital, connection between a sense of political reciprocity and the respect felt towards one's fellow citizens, it seems to me that the account they propose for this mutual respect does not suffice to explain the attitudes of the average liberal. An American liberal may respect the moral deliberative capacities of her fellow citizens while still recoiling with horror at the six-hundred and sixty-seven state sanctioned executions which took place in the United States during the first decade of the millennium.⁴⁵⁵ Moreover, if the person in question is an American liberal, such horror is quite likely a *moral* feeling insofar as it arises as a consequence of a deeply ingrained moral principle or value.⁴⁵⁶ If we interpret Gutmann and Thompson's account of civic magnanimity to indicate that the desire for social cooperation is sustained in such cases by attitudes of respect counteracting feelings of alarm and outrage, then Gutmann and Thompson's account fails to afford proper concern for

⁴⁵⁴ Ibid. pp. 79, 82.

⁴⁵⁵ Death Penalty Information Center, 'Facts about the Death Penalty,' August 2011, p. 1.

⁴⁵⁶ This definition of 'moral feeling' is offered by John Rawls. Rawls writes that: "In general, it is a necessary feature of moral feelings, and part of what distinguishes them from natural attitudes, that the person's explanation of his experience invokes a moral concept and its associated principles. His account of his feelings makes reference to an acknowledged right or wrong." [*Theory of Justice*, p. 481].

the role moral indignation plays in citizens' moral deliberations. Magnanimity could not possibly cause reasonable citizens to turn a blind eye to what they reasonably believe to be grave wrongs, to the extent that they continue faithfully in their endeavour for fair social cooperation with those who support such actions.

However, Gutmann and Thompson never claim that magnanimity is a feeling, sentiment or even an attitude. Rather, they present it as a principle of moral accommodation characterized by openness and charitable interpretation in morally laden political deliberation.⁴⁵⁷ This, however, brings us back to our starting point. What sorts of attitudes would liberals have to cultivate towards their fellow citizens to maintain a desire to seek fair terms of cooperation and a willingness to engage in charitable and open-minded moral deliberation, in light of strong feelings of moral indignation that may quite naturally flare up during such deliberation?

In what follows I argue that if we conceive of liberal citizens as free and equal *sympathetic* agents with access to a capacity for deliberative imagination, then we can explain how citizens can cultivate attitudes of respect towards fellow citizens with whom they disagree. This will illustrate how citizens are motivated towards further social cooperation, even in times of deep-seated moral disagreement.

5.2: Sympathy and Respect

In Chapter 3, I wrote of how spectatorship and concern for spectators' mutual sympathy leads Smith to postulate that ethical self-restraint is the result of each sympathetic agent learning to view the attitudes of others as a mirror by which to

⁴⁵⁷ Gutmann and Thompson, *Democracy and Disagreement*, pp. 82 - 85

judge her own self.⁴⁵⁸ Using the analogy of the mirror, each liberal citizen can imagine the difficulty that other agents face when trying to understand their own views on capital punishment, abortion, end of life care, or a number of other complex moral decisions. If an agent's views on these issues are substantiated by the particular way in which she balances her ethical, philosophical, religious or even political values, she can ask herself whether or not she could approve of her own position if she did not have these values. By discovering the difficulty of answering such a question, she gains a sense of the reasons that others have for responding to her views in the way in which they do.

She also gains a second, even more valuable insight: a sense of propriety regarding the behaviours of others in response to the difficulties they face in understanding her point of view. If others respond to her views with the moral dogmatism that Gutmann and Thompson fear might exist in the absence of civic magnanimity,⁴⁵⁹ or if in their fury at her views they respond with disdain or even violence, she can rightfully disapprove of their behaviour. Her sympathies tell her that despite the difficulty of reasonably accepting her position, it should not lead to such ridicule or madness on the part of others. However, if they respond with a level of moral indignation or anger that is appropriate for their reasonable views, yet show restraint in acting on such anger due to the principle of magnanimity, she can be sure that she is viewed as a reasonable, moral being confronting a complex moral problem with other reasonable, moral beings.

⁴⁵⁸ Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge, UK: Cambridge University Press; 2002), III.i.1.3.

⁴⁵⁹ Gutmann and Thompson, *Democracy and Disagreement*, p. 80.

Here civic magnanimity becomes an operative principle, but for a different reason than the one proposed by Gutmann and Thompson. Rather than recognizing other citizens as reasonable moral beings who deserve respect *despite* their moral differences, every citizen sees in herself and in every other a reasonable moral being who is encountering a difficult moral problem with a number of other reasonable moral beings. While this may or may not generate respect in every citizen, it will necessarily generate sympathy in all sympathetic citizens. After all, every citizen is in the same position. If a moral dogmatist in this group claims that she does not want to try to understand the position of another, the social mirror will remind her that the other could reply to her in the same way. If it would be inappropriate for others not to try to understand her position, it must also be inappropriate for her to be so dismissive of others, since all are identically situated.

Note that a sympathetic attitude would be consistent with the beliefs of a citizen who thinks she knows the demands of 'true' morality, while the others fail to grasp it. If she asserts her account of the truth to others, and they respond with mild scepticism or even exclaim that despite all their best efforts it is futile to try to understand her, then the imagination ought to make her sympathetic towards them. She can imagine what it might be like not to understand the complexity of the view she is trying to present, but they cannot imagine what it might be like to grasp its complex truth.

In fact, the more complex and reflective the view, the more generous one's sympathetic nature ought to be towards those who cannot understand it. If I am a legal scholar who required a year of law school to develop fluency in legal jargon, I

should sympathize with non-lawyers who cannot understand the jurisprudential tradition from which I am making my political evaluations. If I am an elected official who took several years to master the rhetoric required to make public arguments, or a policy analyst who had to learn to make sense of empirical reporting and statistical evidence, I have no reason to disregard the difficulty non-experts have in understanding or accepting my viewpoint. Similarly, if I were a lifelong Catholic, I could not expect others to fully understand the important foundations upon which my beliefs regarding abortion rest.

By extension of the narrative imagination, I must now be prepared to understand and accept the complex and arduous path which other citizens took before they came to a stable reflective perspective on their ethical and philosophical viewpoints. Even if I believe them to be wrong, I can feel sympathy for the journey that (in my view) led them to the wrong destination. As a moral being, I ought to be able to appreciate the nobility of the act of confronting a difficult moral question, of not taking conventional wisdom as one's guide, and instead setting out to balance myriad conceptual, intuitive and practical reflections amassed over several years of study and life-experience, which finally leads one to acquire a reflectively stable (if erroneous) moral belief.

The shared experience of struggling to gain a stable moral perspective will certainly generate mutual respect amongst those who have taken such an endeavour, as long as these individuals are sympathetic agents. Even some who have not taken such an endeavour, but whose sympathetic imaginations are well-cultivated will be able to access the nature and importance of the struggle. However, the object of such

respect will not be the status of another as a moral being or as an equal citizen. Those citizens who appear to use political deliberation as a forum to air platitudes or tirelessly propound their own non-public point of view will not generate such respect no matter how sincerely they were to believe that they were right. In using public forums to proselytize, these citizens reveal that they do not have respect for the viewpoint of others, which means that either (i) they are unsympathetic to those who are situated identically to them, or (ii) they have not in fact taken upon themselves the extended, self-critical moral deliberations which are the object of such respect. Had they experienced such an internal struggle, their sympathetic imaginations would have taken into account the difficulty presented to others in balancing such moral reasons against other aspects of their experience.

To borrow terminology from Stephen Darwall, the respect generated by the shared experience of moral deliberation is not a type of 'recognition respect' which is generated as a consequence of recognizing a particular feature of the other.⁴⁶⁰ Instead, it is a form of what Darwall calls 'appraisal respect.' Darwall writes: 'the appropriate ground for [appraisal] respect is that the person has manifested characteristics which make him deserving of such positive appraisal.'⁴⁶¹ Such respect consists in identifying 'the excellences of a person' with respect to a certain set of standards, but also in believing that the person agrees that such standards are acceptable.⁴⁶² Darwall gives the example of a skilful tennis player who does not take seriously the standards of sportsmanship embraced by the profession. Although we may admire his skill, he

⁴⁶⁰ Stephen Darwall, 'Two Kinds of Respect,' *Ethics* 88(1977): 36 – 49 at p. 38.

⁴⁶¹ *Ibid.* pp. 38 – 39.

⁴⁶² *Ibid.* pp. 41, 42.

has not succeeded in achieving appraisal respect because we have no reason to believe he himself appreciates the standards of the profession.⁴⁶³ Therefore, appraisal respect weighs in not only on one's ability to undertake a given activity, but also on a person's character.⁴⁶⁴

Similarly, in the sympathetic agent's respect for participants of moral deliberation, the respect need not be generated by the intellectual sophistication or depth of passion that a person feels towards his or her moral commitments. It certainly need not be generated by agreement. It is sufficient to identify in oneself and the other person mutual respect for the demands of rigorous moral analysis. Whether or not we believe that the other person is equipped to undertake such a task, much less succeed in it, may be irrelevant if the attempt is made in a way that most sympathetic moral beings can identify as laudable.

In addition to mutual appraisal respect for all those who have undertaken moral deliberation, the sympathetic imagination may also generate appraisal respect in times where a citizen, through no fault of her own, finds the demands of moral deliberation bewildering or psychologically burdensome. For example, if a person has been raised to believe that questioning the authority of scripture will lead to unimaginable harms, then the sympathetic imagination may find it appropriate that she responds to the subject of teaching evolution in public schools in a politically unreasonable manner. Although from the perspective of pure public reason she is violating the duty of civility by appealing to non-public reasons, a sympathetic

⁴⁶³ Ibid. pp. 41, 42.

⁴⁶⁴ Ibid. p. 42.

public reason would encourage her fellow citizens to accommodate her views to some degree, in response to the appraisal respect they feel for her.

In order to make the case somewhat clearer, let us suppose that in general this individual does try her best to meet the demands of the criterion of reciprocity (that is to offer others terms that she reasonably believes they could reasonably accept.) The teaching of Creationism, however, is a special case in which she cannot be politically reasonable, due to the way in which she has been taught to reason. Through sympathy, her fellow citizens understand why the Creationist is not being politically reasonable in this instance, and why she cannot take up the perspective of pure public reason. If they view her as a citizen who generally tries to meet the demands of social cooperation (i.e. publicity, reciprocity, etc.), then they ought to be willing to accommodate her moral views due to their appraisal respect. Clearly, it may not be possible for them to fulfil all the Creationist's non-public demands. However, they can accommodate by allowing some room for the science-Creationism debate in the curriculum, though perhaps not by giving it the central place the Creationist would have wanted.

Some may argue that I distort the notion of appraisal respect by arguing that a citizen can be shown such respect for her capacity for moral deliberation, even when she has shown that she is in fact incapable of such moral deliberation. However, I am claiming that this citizen is only incapable of moral deliberation in situations where she is asked to question the dictates of scripture. There is no reason to suppose that such deliberation is exhaustive of all the moral deliberation that a citizen might come across *qua citizen*. For example, she might be fearful of the word

of God, and still be perfectly capable of sitting on a jury in cases of grand theft, larceny, etc.

Secondly, even if this citizen was not able to engage in any sort of moral deliberation, our sympathetic imagination would inform us that it was not for lack of inclination. The citizen was not making a choice not to engage in such deliberation. Rather, through sympathy, we would understand the psychological burdens placed upon her as she tries to engage in reasonable discourse with her fellow citizens. We may view her as having a disadvantage or disability in engaging the practice of public deliberation, but this is sufficient to meet the demands of appraisal respect.

In effect the sympathetic imagination reinterprets what it means to respect the burdens of judgment (i.e. to accept that reasonable individuals will disagree.)⁴⁶⁵ In this reinterpreted form, this requirement is based not only on the epistemic grounds that reasonable people *can* disagree on complex questions, but also on the more personal struggle that individuals face in determining what it is that their consciences demand. The fact that it is possible to sympathize with *reasoning* as well as with reasons illuminates the benefits of incorporating sympathetic justifications into public deliberation.

While the disagreement persists, reasonable citizens have at their disposal a new set of reasons that can be publicly shared. Reconsider an example that I brought up earlier, that of the politically reasonable Catholic who belonged to a liberal polity in which the practice of abortion was legitimate. One of the reasons that abortion was

⁴⁶⁵ Rawls, *Political Liberalism*, pp. 54-58.

legitimated was because the strongest reason to oppose abortion was that the foetus had interests that the state ought to protect. Since the force of such an argument depended on the metaphysical or moral status of the foetus, and since pure public reason was not equipped to determine the appropriate status of the foetus, the reason was given less weight from the public perspective than public reasons such as women's rights and equality.⁴⁶⁶

The response of the sympathetic reasonable citizen towards the Catholic will differ from that of the standard, Rawlsian liberal citizen in at least two ways. First of all a sympathetic citizen not only recognizes the reasonableness of the Catholic's non-public moral beliefs. She can imaginatively project herself into the Catholic's shoes to get a sense of why a fellow reasonable citizen would subscribe to that particular moral viewpoint. The sympathetic liberal need not merely recognize the Catholic's position as one of several possible reasonable perspectives. Rather, by invoking her sympathetic imagination, she can actually judge the abortion case from the perspective of the Catholic. She can develop a sense of why, from this perspective, it is important to respect the foetus' interests. Obviously, if the sympathetic citizen stops projecting herself into the Catholic's shoes, she can make a different set of judgments. However, she now has a sense of why respect for the foetus might be important, all things considered, from the Catholic perspective. Just as all reasonable citizens could accept the normative significance of pure public reason *qua citizen*, the sympathetic imagination enables all sympathetic citizens to accept the normative significance of the Catholic perspective *qua Catholic*.

⁴⁶⁶ Freeman, *Public Reason and Political Justification*, p.2058.

As a result, a sympathetic citizen also realizes what the Catholic is sacrificing when she is called upon to accept as politically legitimate, those practices which are at odds with her private comprehensive doctrine. If the Catholic truly believes that a foetus possesses the sanctity of a human life, then the practice of abortion will not only lead to a belief that foetuses are being murdered. This belief may very well be accompanied by emotions of sorrow or disgust at the loss of human life. The sympathetic liberal will be aware of these emotions, and will be able to use this awareness as a reason to be sensitive towards the Catholic viewpoint when making public decisions. Consideration for the Catholic viewpoint is no longer based only in a sense of fairness or reasonableness. The sympathetic liberal agent is situated so that she also understands what is at stake for the Catholic, when making abortion a legitimate practice. Although it does not follow that she automatically defers to the Catholic position, she now has reason to give greater weight to her concern for the reasonable Catholic, when determining whether to reasonably accept that abortion ought to be legitimate.

The second difference between sympathetic liberals and Rawlsian liberals is that the former can understand the deliberative struggle that led to individuals forming their particular moral world views, and are therefore willing to show respect for the individual who has gone through this struggle. The sympathetic citizen would not only understand the reasonableness of the Catholic perspective but respect the Catholic for coming to such a perspective. This offers a level of public justifiability to the Catholic view on abortion because any reasonable and sympathetic citizen could take up the Catholic perspective, and would have reasons

independent of the Catholic perspective to show respect for its normative authority (i.e. the reasons found in their own appraisal respect for the development of a Catholic moral outlook). This means that the Catholic position has met the two criteria for public justification: the content is public accessibly, and every sympathetic citizen has at least one reason for accepting its normative authority from a public perspective.

Some may object that being able to enter into the perspective of another should not be sufficient to entail the normative authority of the reasoning from the public perspective. It might seem that if I were to extend my argument, I might have to conclude that if Servetus had a sympathetic imagination and could enter into Calvin's perspective, then he would understand why Calvin believed that subscription to nontrinitarianism was reasonable cause for execution. He would thereby have to agree that it is publicly justifiable for Calvin to want to burn him at stake.⁴⁶⁷

The problem with Calvin's attitude towards Servetus, however, is that there is little to no moral accommodation, sympathy or respect on Calvin's part. A reasonable and rational citizen ought not to have this attitude towards someone he considers situated to him on terms of reciprocity. As we saw in the case of the Hittite Lord in Chapter 4, a reasonable attitude towards one's fellow citizens is a precondition for the sympathetic imagination to find the other perspective publicly justifiable. Therefore, Servetus need not find Calvin's point of view publicly justifiable, in order to be a sympathetic citizen.

⁴⁶⁷ Rawls, 'An Idea of Public Reason Revisited,' p. 770.

By contrast the liberal Catholic does have a reasonable and rational attitude towards her fellow citizens. She can understand why it is not politically reasonable to ask others to accept the metaphysical status of the foetus as the sort of being whose interests ought to be protected by the government. In fact, she is not asking them to accept the metaphysical status of the foetus. What she is asking is for them to respect the fact that *she, the Catholic*, has reasons for endorsing this particular metaphysical view. She believes herself deserving of such respect, on grounds that her fellow citizens can recognize her as a moral agent with a stable philosophical viewpoint. This respect provides the reason that justifies the moral accommodation of her view in the public sphere.

Naturally, some may wonder why Calvin cannot make the same appeal towards Servetus. Why should Servetus not morally accommodate Calvin's views on grounds that Calvin is a moral agent with a stable philosophical viewpoint who deserves appraisal respect? The first response to Calvin has already been stated, but requires elaboration. We cannot accommodate views which do not acknowledge the freedom and equality of others, and which do not show them the respect deserving of moral agents. Sympathetic liberal citizens take their appraisal respect for others' moral viewpoints as grounds for justifying moral accommodation. However, the appraisal respect is generated by the identification of all citizens as free and equal agents situated towards each other in relations of reciprocity. Calvin's moral

viewpoint, however, does not recognize reciprocity. It denies Servetus his freedom of thought, and his opportunity to formulate his own conception of the good.⁴⁶⁸

Therefore, in demanding moral accommodation for his views, Calvin is first using reciprocity to justify moral accommodation, and then denying the importance of reciprocity by refusing to acknowledge the fact that Servetus must be treated as a free and equal, reasonable and rational agent. Calvin's position is inconsistent. This becomes clearer if we realize that on grounds of reciprocity, Calvin ought to be willing to show Servetus the same appraisal respect that he wishes Servetus to show him. After all, from the perspective of public reason, both Calvin and Servetus are symmetrically situated. They both have non-public comprehensive views that are informed by several years' moral and philosophical deliberation. The fact that Calvin cannot have appraisal respect for Servetus and cannot morally accommodate his views shows that Calvin is also not being a sympathetic agent who views himself as situated to other reasonable citizens in relations of reciprocity.

In reality, it will undoubtedly be the case that some reasonable citizens have a better capacity for sympathy and appraisal respect than other reasonable citizens. Sympathetic justification cannot be determined by the nature of these capacities, as they may be arbitrarily distributed across the population. Rather, what I propose is to determine which terms of cooperation agents who are reasonable and rational would accept, if they knew themselves and each other to be sympathetic agents. Then, these terms of cooperation may be justified as 'duties' in the political sphere. Just as all reasonable citizens are expected to fulfil the duty of civility, regardless of

⁴⁶⁸ Rawls, *Political Liberalism*, pp. 18-19.

whether or not they *actually* accept the free and equal status of all citizens, all reasonable citizens will be expected to fulfil the duties of Deliberative Sympathy and Respectful Political Equality, regardless of whether or not they are actually sympathetic. Below, I use the framework of fair cooperation amongst reasonable and rational agents to justify the two duties.

5.3: Justification of the Duty of Deliberative Sympathy

In the last section, I argued that many citizens of a liberal polity face a common deliberative struggle when shaping their personal moral perspectives. Such moral perspectives must be sustained against a wide variety of life experiences and philosophical objections. As a result, moral agents with reflectively stable moral views often have to engage in a long process of internal deliberation before they can reflectively endorse their moral viewpoints. Although different citizens who go through this deliberative struggle may come up with a variety of moral viewpoints to endorse, the very existence of such a struggle becomes a shared experience and the basis of mutual respect. This means that when sympathetic agents in relations of reciprocity try to determine the terms of fair cooperation by which to resolve competing claims, the capacity for this shared experience can inform their justification.

Recall that the way reciprocal duties and obligations arise is that each citizen offers such duties as a part of the terms that they sincerely believe that others can endorse.⁴⁶⁹ In this section, I defend the first of two duties which sympathetic agents would adopt were they seeking fair terms of cooperation. The Duty of

⁴⁶⁹ John Rawls, 'Justice as Fairness,' in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA and London, UK: Harvard University Press, 1999), pp. 52-62.

Deliberative Sympathy requires all reasonable citizens to ensure that a public criterion of political justification reflects aspects of individuals' personal narratives that are identifiable as experiences common to and appropriate for free and equal citizens. Extended moral deliberation is one such experience, although there are several others.

The general idea is that if two citizens A and C are situated towards each other on terms of reciprocity, then C can acknowledge that A's reasoning is publicly justifiable if the following conditions hold:

- (i) C can have sympathy for A's reasoning in light of her understanding of A's experiences.
- (ii) C can have appraisal respect for A as a consequence of such sympathy.
- (iii) C can identify features of political society which contributed to A's having had such experiences.

My discussion in the previous section explains the importance of the first two conditions. Condition (i) reflects the fact that the sympathy which reasonable citizens have for the experiences of other reasonable citizens makes them aware of what is at stake for those who hold the other perspective, when a practice that is contrary to their views is made legitimate. Condition (ii) reflects the fact that when one citizen tries to project herself into another's perspective and realizes that the other perspective is an appropriate mode of reasoning, she feels appraisal respect for the internal deliberative struggle undertaken by the other citizen in developing that moral perspective.

The importance of the third condition may have several elements. Firstly, if citizens are reciprocally situated, then if political society contributes to the generation of a particular experience (such as moral deliberation, economic struggles, etc.,) then any citizen could have conceivably faced such an experience. As we saw in Chapter 3, this argument for the third condition might be true in some cases but not all. For example, when confronting racial or gender discrimination, it may be difficult for C to take up the position of A, if A's reasoning is informed by experiences that stem from her race or gender.

I will focus on what I see as the most important reason for acknowledging the third condition as an important factor in the Duty of Deliberative Sympathy. This is the belief that when political society is creating certain conditions, then its citizens have a special responsibility to accommodate the perspectives generated by individuals facing such conditions. Throughout this chapter I have referred to the fact that citizens situated with respect to each other on terms of reciprocity must view each other as free and equal participants of a cooperative enterprise. In doing so, they are willing to place constraints upon themselves in order to secure some mutual advantages for themselves and their fellow citizens. The Duty of Deliberative Sympathy is generated by the observation that in doing so, citizens commit themselves to certain struggles that they otherwise would not need to endure. The struggle to both engage in and resolve moral deliberation is simply a fact that moral agents in a free liberal society will have to undergo. Unlike individuals in morally homogenous societies, liberal citizens are confronted with a range of comprehensive doctrines, and citizens are therefore more aware of moral inconsistencies and the

need for moral deliberation. In conceiving of themselves as free and equal, reasonable and rational citizens, who must take responsibility for collective decisions, citizens are naturally positioned to consider the content of correct moral law.

Now this is not a 'burden' about which it would be reasonable for a liberal citizen to complain. However, it is a process that we would expect most liberal citizens to undertake in an ideally liberal society, and from experience we know that the process is often daunting, painful, alienating and bewildering. Given that there is only a limited amount of choice in undergoing this process, we have a duty to support our fellow citizens when they undertake such an endeavour. It would be demanding upon citizens to first create a society where they are required to engage in a particular form of moral deliberation, and then deny that political reasonableness has to take this into account.

Imagine if political society decided not to take responsibility for what it positions its reasonable citizens to become. In particular, imagine a situation in which citizens face personal harm for not shaping themselves to society's mould. For example, a free and equal citizen who chose not engage in any moral deliberation, public or private, because of the pain endured in the process, would in fact be hurting himself or herself. In such cases citizens could claim that if they were truly free and equal, they would not have reasonably and rationally agreed to face such harms for the sake of mutual cooperation. In refusing to take responsibility for shaping citizens in a certain way, political society is refusing to acknowledge the ideal of reciprocity.

Presumably, members of these political societies could reply that they believe that it is good for citizens to engage in the deliberative struggle of developing their own moral points of view. If implementing certain institutions turns citizens into what it is good for them to be, is it not a part of the advantage which citizens secure through free and equal political cooperation? My first response to this objection is that even if the ordeal is in a citizen's best interest, other citizens still have reasons to alleviate the stress and pain that it generates. The citizen subject to the ordeal has not undertaken it voluntarily. It is due to political and societal pressures that the citizen has cause to undertake it. Furthermore, other citizens have experienced similar ordeals, and are aware of the pain and struggle it causes. Since the experience is shared by all citizens, the difficulties become a part of the shared reason of every citizen. It is not only that every citizen has *access* to these reasons, but because all citizens are subject to such ordeals as a consequence of the political society to which they belong, these shared reasons are also public reasons. Every reasonable citizen recognizes the gravity of the personal moral struggle.

Furthermore, the cooperative political endeavour requires each citizen to contribute to the formation of any collective decision to utilize political force in a legitimate manner. As we saw in Chapter 1, however, the cooperative nature of liberal citizenship also means that every citizen is drawn into accepting responsibility for those legitimate laws which reflect the collective decisions of the citizenry at large. This led to what I termed the 'Problem of Conscience.' Citizens are asked to withhold appeals to their non-public moral viewpoints when justifying their

political positions to each other, and yet also asked to take responsibility for collective decisions that go against their deep-seated moral views.

By conceiving of liberal citizens as sympathetic agents, the Problem of Conscience becomes even more pressing. Each citizen is able to use the sympathetic imagination to place himself or herself in the position of other citizens, and see that some of those citizens find morally egregious those very acts for which they are responsible. A sympathetic citizen can sensibly ask how such a citizen might reasonably be viewed as free and equal to all others. The politically reasonable answer is that the citizen still receives benefits from a political society regulated by the two principles of justice and the values of public democratic culture. However, this does not address the concern of freedom or equality. Citizens are not free because they are subject to laws which they find reprehensible; and they are not equal because those laws were created by fellow citizens who can embrace the view of themselves as authors or agents of the collective decisions. (In response to this latter objection, I defend the duty of Respectful Political Equality.)

A further concern for those advocating for sympathy to be integrated into the public sphere is the profound influence that the public sphere has on shaping individuals' lives in the private sphere. In one traditional liberal picture, there is a public sphere of shared values and beliefs belonging to democratic society, as well as a private sphere of values and understandings belonging to individuals and families. In addition there is a non-public 'social' sphere of values and beliefs which belongs

to associations like churches, universities and scientific organizations.⁴⁷⁰ The private and non-public spheres constitute the 'background culture' of society,⁴⁷¹ while the public sphere is demarcated by shared public values.

In reality, there is no strict separation. If the basic structure of society includes social, legal, economic and familial organizations,⁴⁷² then the decisions made in the political forums necessarily regulate every aspect of the basic structure (e.g. what children are taught in schools, what opportunities there are for social mobility, what it is appropriate to wear in public, etc.) Through these channels, public institutions shape the lives of individual citizens. This means that if such political forums exclude sympathetic considerations, then individual private lives will also be affected by the absence of these considerations. The exclusion of sympathy does not just affect political interaction. Offering concern for a young pregnant woman in the case of abortion, or respect for individuals' religious expression through their choice of clothing, or offering social services to families whose primary breadwinner has lost his or her job, capture the concerns that citizens truly face in their private lives. In order to fulfil the original liberal vision of moral personhood, which is partly defined as the ability to form, revise and rationally pursue one's own conception of the good,⁴⁷³ there ought to be some element of public decision-making which considers what is important for reasonable citizens from their own perspective.

Since all citizens are reasonable and rational, and all are aware that the Duty of Deliberative Sympathy will make political institutions more sympathetic to the

⁴⁷⁰ Rawls. *Political Liberalism*, p. 221.

⁴⁷¹ Ibid. pp. 13-14.

⁴⁷² Ibid. p. 258.

⁴⁷³ Ibid. pp. 19, 103.

actual conditions citizens face while living both public and private aspects of their lives, citizens may also be willing to make Deliberative Sympathy one of the terms of the original agreement for fair cooperation. It is only when a moral duty derives from the original terms of agreement that it can be said to be a duty required in the public sphere. Given the extraordinary level of influence public institutions exercise over private life, all rational citizens have reasons to want public justification to be sympathetic. This then justifies the Duty of Deliberative Sympathy.

5.4: Justification of the Duty of Respectful Political Equality

The Duty of Respectful Political Equality requires that citizens show to every other and receive from every other a form of respect that is consonant with the sense of self-worth which each citizen would need to bring to the cooperative enterprise, if the citizen were to be viewed as an equal partner. When conceiving of political participation as a cooperative enterprise, we know that within the boundaries of this enterprise citizens are subject to laws that only a few may positively endorse. By this I mean that there are many citizens who might take the perspective of pure public reason, and determine that although they can acknowledge the reasonableness of a law, were they sole legislators they would choose another reasonable course of action.

Consider again our example of the Humanitarian and the Pacifist, who have irreconcilable differences on their views regarding a just war, although they both believe it constitutes a form of humanitarian intervention. From her non-public perspective, the Humanitarian believes that fighting such a war is morally required, while the Pacifist argues that all war is immoral. The pure public reasons offered to

justify a just war or to justify non-interference are not the actual reasons of the policy's proponents or opponents. Suppose these are the reasons that are used to ultimately justify intervention. Then the Pacifist who takes up the position of pure public reason can acknowledge the political reasonableness of intervention. However, she knows that if she were the legislator making the decision, she would offer a different set of public reasons which did not in fact justify the war.

The Duty of Respectful Political Equality tries to capture the idea that it is in everyone's best interest if each reasonable citizen can view herself as the legislator of the law as often as is possible. While the Duty of Deliberative Sympathy requires each citizen to acknowledge all others as being worthy of appraisal respect, the Duty of Respectful Political Equality requires that each citizen be able to view herself as being worthy of appraisal respect. As a consequence of this, she must be able to see herself as one of the many legislators of the law. This is accomplished when public justification requires some (though not all) of a reasonable citizen's non-public desires and objectives, to carry normative weight in collective decision-making.

The desires I have in mind may be characterized as judgments of common good, while the objectives include those states of affairs such as intervention or peace, which can only come about through 'collective participation.' I use the term 'participation' and not 'action' since accounts of collective action typically require a series of background assumptions about the intentions and mental states of those participating. By collective participation I simply wish to convey that system-wide participation is required to successfully achieve the objective, such that the average citizen will not have the option to opt-out of at least some degree of participation.

Collective participation is reflected in scenarios like that of the 'Humanitarian and the Pacifist' which I introduced in Chapter 1. If a liberal polity decides to engage in military enterprise for the purposes of humanitarian intervention, then pacifists within liberal society are also participants of this intervention insofar as they contribute to the economy which contributes to national revenue which finances the war; insofar as they watch media reports on the war and engage in debates regarding how to end the dispute most quickly; and insofar as they are engaged in any social and political practices which are connected to the war effort. In this sense participation does not require a direct causal contribution to the war effort (such as the contribution by someone who enlisted in the military in light of the humanitarian significance of the war.) Rather, it comes about through engagement and participation in social practices which shape the enterprise.

Citizens of a liberal polity might view common goods and objectives requiring collective participation as one of numerous benefits of engaging in political cooperation. Once we make non-public moral reasons a part of public reason, several common good arguments become publicly justifiable. Since they are common good arguments, they are other-regarding, not self-regarding. Since they reflect views on the 'good,' they are informed by citizens' personal life narratives.

We might hesitate to adopt such conceptions into an account of public reason, since there are several views of the common good that are clearly incompatible and would cause conflict. One such idea of the common good might be religious education in schools for the purposes of teaching children correct values, or the appropriate account of cosmology and creation. Unlike the Humanitarian and the

Pacifist, who both acknowledge that war is a form of humanitarian intervention and disagree about the relative weights they place on humanitarianism and pacifism, those who propound religious education might not be able to convince others of the value of their position.

I am assuming, however, that those propounding their own conceptions of the common good are reasonable citizens who understand that others will disagree and are willing to weigh the demands of reasonable and fair political interaction against their beliefs about the common good. In other words, those reasonable citizens who wish to teach creationism in schools would have their views taken seriously in this context, only if they sincerely believe that it is in the best interest of all students to learn creationism *all things considered*. In this way, non-public beliefs are allowed into public deliberation as common good arguments.

No doubt in practice this requirement generates certain epistemic demands. Those who want to teach creationism must show that they are not simply trying to undermine the religious expression of others, and have considered the harms of their so-called common good (e.g. the affect it will have on students' scientific education if they cannot grasp the complexity of the debate). They must also show that they can be sympathetic to other viewpoints. Once they do this, however, the Duty of Respectful Political Equality will lend force to their moral arguments, even if such arguments are made in the public sphere.

One concern that may come up with the incorporation of common good and collective participation arguments into public discourse, is that it implies that it is acceptable to subject the will of one citizen to that of another, even if the first citizen

reasonably disagrees with the content of the other citizen's will. For example, if the Humanitarian believes that a just war is a reasonable *moral* objective, then it is perfectly acceptable for him to advocate for intervention and thereby subject the Pacifist to participating in a just war on moral grounds that are contrary to the Pacifist's morality. This is quite different from the standard liberal framework, in which the Humanitarian claims that intervention is justified 'from the perspective of pure public reason,' and that the Pacifist must accept it on shared grounds. Given sympathetic public reason, the Humanitarian is able to justify this claim from private morality because the Pacifist has appraisal respect for her view, and because each reasonable citizen is meant to be able to see herself as one of the legislators of the law.

Yet if this argument regarding subjection of will holds in the case of sympathetic public reason, then it also holds for the traditional Rawlsian case. Simply because the Pacifist is not being *unreasonably* subject to the will of a fellow citizen, traditional Rawlsians seem unconcerned about the fact that her will is indeed being subjected, and that there are politically reasonable reasons not to subject her will so (namely that it is equally politically reasonable to believe that pacifism is a more significant *public value* than humanitarian intervention.) This hearkens back to the sorts of problems I found worrisome in Chapter 2, in which contradictory perspectives could both be found politically reasonable.

In short, the argument for Respectful Political Equality is that there are times when political society must choose to adopt certain courses of action which are implicitly constituted by substantive accounts of the common good and objectives of

collective participation. For example, society must either decide to engage in humanitarian intervention or not. Given reasonable disagreement on such actions, there needs to be a fair way to ensure that one subgroup of citizens does not always have their private wills aligned with the choice of action pursued by the public, while another subset only receives reasonable justifications for their choices. If a person were always the recipient of a justification, but could never actually see her private objectives realized in the public domain, then she would constantly be helping to fulfil the visions that others have for their political society, without ever having any of her own desires or objectives fulfilled.

In part, the Duty of Respectful Political Equality connects with Rawls' idea that the first principle of justice must grant each citizen the social bases of self-respect. In Rawlsian political liberalism, this is accomplished by assuring each citizen the same number of votes as all other citizens, by enabling everyone the right to run for office and to participate in the political sphere. If any citizen is not granted such rights, then her equality is said to be undermined in comparison to those of others. Similarly, the Duty of Respectful Political Equality extends this social base of self-respect to the deliberative parts of the political sphere. It requires each citizen to be able to make the greatest possible contribution to political deliberation, and to protect herself from being subject to political powers defying her own will on grounds that it is politically reasonable.

In several cases, this will mean greater compromise out of respect for varying moral viewpoints. In the case of the Humanitarian and the Pacifist, for example, it is doubtlessly true that only one of the two will be satisfied with the outcome of a

public decision regarding whether or not to engage in a just war. However, it may be that if the polity chooses to engage in a just war, then out of respect for the Pacifist, it must take further measures to minimize civilian casualties, and in the future support international policies that avoid the need for intervention. Similarly, if the country chooses not to go to war, it may (out of respect for the Humanitarian) offer other forms of aid and asylum to the victims of inhumane treatment. The Duty of Respectful Political Equality, coupled with the idea of moral accommodation, means that some kind of compromise is typically owed those citizens whose views about the common good are not realized by legitimate uses of power.

This Duty of Respectful Political Equality is consistent with the traditional liberal view that perhaps for a given law, an individual may have to compromise her claims or interests in the name of social cooperation. However, it adds a caveat. Firstly, it distinguishes between political issues that are of deep importance to individuals (the sorts of complex moral cases which I have been discussing), and political issues whose results are not ideal but acceptable. The notion of acceptability here is of the sort that would be reflected in a freely chosen compromise. A citizen's attitude towards such laws would be one in which a citizen could truthfully say, 'I would not have chosen that law if I were a self-legislator, but nor do I find myself disgusting and deplorable for being subject to it.' Laws which leave a citizen feeling badly about his or her status as a moral being or even a good human are not terms to which any reasonable citizen would have agreed to be subject, if she were free and equal.

5.5: Conclusion

This chapter has argued that citizens capable of sympathy and situated towards each other on terms of reciprocity view each other in light of a certain kind of appraisal respect given their shared struggles. Not only do they respect the fact that other citizens undertook a particular struggle that led the citizen in question to cultivate a particular form of reasoning, but having either encountered similar struggles themselves or due to their sympathetic capacity of imagining how such struggles might affect a person, citizens appreciate the importance of living in accordance with the reasoning learned through such life experiences.

However, simply because appraisal respect gives citizens a reason to take up others' perspectives and consider its importance and authority, does not mean that citizens will actually do so. I argue that there is a moral Duty of Deliberative Sympathy which requires citizens to do so. The argument for the existence of such a duty stems from the fact that the political sphere itself shapes the struggles that many citizens face. The fact that there is room for free moral deliberation, or that a particular polity is going through an economic recession, is not entirely the fault of the citizen experiencing the struggle. Given that citizens are capable of sympathy, they know that if the collective is imposing a burden on a particular citizen (even a burden that will later prove to be in the individual's interest), then there is value in ensuring that citizens can live within political society with the self-awareness or identity that is formed by carrying such a burden. For example, if a citizen has struggled to come to reflectively stable moral beliefs as a consequence of living in a

liberal polity that encourages free thought, then the liberal polity should not deny the individual a right to live in accordance with those moral ideals.

I argue that a further benefit of accepting the Duty of Deliberative Sympathy is that it transforms the nature of the interference that legitimate political institutions often impress upon citizens in their private lives. Practices that are normally thought to be very much a part of the non-public background culture of a polity (e.g. what clothing a woman wears) are shaped and guided by the public sphere. The Duty of Deliberative Sympathy cannot limit this interference of the public sphere, but can ensure that when political powers interfere, they do so by trying to justify their interference to citizens as individuals living private lives and capable of having private experiences, and not just as reasonable and rational citizens. Since all reasonable and rational citizens can benefit from such an arrangement, I argue that reasonable and rational citizens engaged in determining fair terms of cooperation will choose to accept the Duty of Deliberative Sympathy as one of the terms.

The Duty of Respectful Political Equality arises from several features of sympathetic liberalism. Firstly, the combination of the capacity for sympathy and the Duty of Deliberative Sympathy increases the number of non-public reasons that are characterized as public on grounds of being arguments for the common good. Secondly, sympathy highlights a difference in status between citizens who are offered public justifications for politically legitimate courses of action that are contrary to their private comprehensive doctrine, and citizens who are offered public justifications that are in accordance with their private comprehensive doctrines. By imaginatively projecting oneself into the situation of citizens who are morally

opposed to legitimate courses of collective participation, their will is being externally subject to a course of action that is in defiance of it. The Duty of Respectful Political Equality serves to distribute such subjection in a way that is deemed fair, while also extending the social bases of self-respect.

Chapter 6: The Problem of Conscience Revisited

In this concluding section I wish to demonstrate how the incorporation of sympathetic judgments into the framework of public justification ultimately solves the Problem of Conscience with which I began this dissertation. I will show how the reformulations of the concepts of publicity and reciprocity that I advanced in the last two chapters, frame a practice of collective moral accommodation that enables citizens to resolve conflicts of judgments while appealing to their reasonable private comprehensive doctrines. These revisions of liberal publicity and reciprocity make three contributions to the practice of public collective public decision-making. In the first two sections of this chapter, I will consider these three contributions in turn. Then in sections 6.3 and 6.4, I will illustrate how these features of sympathetic liberalism inform the practice of collective moral accommodation.

In the early chapters of this thesis, I tried to show that the liberal ideal of political society gives rise to what I called the Problem of Conscience. Reasonable and rational citizens desire to live on fair terms with all other citizens, and therefore impose constraints on the realization of their own will by accommodating the wills of others.⁴⁷⁴ Since they see all citizens as being situated as free and equal to each other, and engaged in the cooperative enterprise of political society, they choose to behave in accordance with an ideal of reciprocity.⁴⁷⁵ As a consequence of this, they are willing to justify their political positions to each other. This is the basis of the

⁴⁷⁴ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA and London, England: Belknap Press of Harvard University Press, 1997), p. 79.

⁴⁷⁵ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 16, 49-50.

liberal principle of legitimacy and its corresponding moral duty of civility.⁴⁷⁶ I showed in Chapter 1, however, that in light of the principle of legitimacy and the duty of civility, liberals also bear a degree of personal responsibility for the legitimacy of actions taken on by their political society.

This means that liberal citizens must choose between taking personal responsibility for the legitimacy of practices found immoral, and refusing to act in accordance with the moral duty of civility. The struggles they confront in reconciling these competing moral demands constitute what I have called the Problem of Conscience. I discussed three variations of this problem. The Problem of the Tragic Conscience arises when a reasonable and rational citizen would like to be able to fulfil the duty of civility, and would like to be able to see herself as engaged in fair social cooperation with others, but finds that the terms required to fulfil such a duty are too morally demanding. A pro-life advocate who believes the practice of abortion to be murderous may confront such a Tragic Conscience if the right to abortion becomes legitimate law.

However, if she does not have to struggle with a Tragic Conscience, and instead simply accepts responsibility for enabling abortions to become a legitimate practice, then she would be said to have a Brutish Conscience. A Brutish Conscience indicates that though a reasonable citizen accepts a particular practice or course of action to be morally reprehensible, she does not struggle with accepting responsibility for it the way a person with a Tragic Conscience would. In the case of our pro-life advocate, such an advocate would be said to have a Brutish Conscience if

⁴⁷⁶ Rawls, *Political Liberalism*, pp. 217.

she held the following three beliefs at once: (i) The practice of abortion is murderous; (ii) The practice of abortion is politically legitimate; and (iii) I accept personal responsibility for the legitimacy of abortions. The pro-life advocate is a brute insofar as she believes abortions to be murderous but does not have any regret or guilt about being responsible for making murders legitimate practices.

Finally the Problem of the Clear Conscience arises because citizens may alter essential features of their life in order to resolve the Problems of the Tragic or Brutish Consciences, in ways that seem to require too much sacrifice. If a pro-life advocate felt the need to leave her Church because she accepted personal responsibility for abortion, or alienated her (politically unreasonable) friends and family in some way, then her fellow citizens may believe that she has made too large a sacrifice in order to fulfil her duty of civility to them. Although the citizen's own conscience is clear, her fellow citizens may feel bad placing her in such a situation.

The first of three contributions of sympathetic liberalism to resolving the Problem of Conscience is to diminish the boundaries between reasonable citizens' politically reasonable views and their privately reasonable views about political decisions. When reasonable citizens make judgments about political decisions, they acknowledge the free and equal status of all other citizens in both their public and non-public reasoning. A reasonable citizen who is a Liberal Catholic can believe that it is necessary to acknowledge the equality and well-being of women, while still believing that political society ought to make abortion illegitimate on grounds of respect for human life. While belief in the equality and well-being of women is a politically reasonable view, the belief that the practice of abortion does not respect

human life is a non-public view on a political decision. These latter set of views can in turn be distinguished from non-public views on private matters, where reasonableness is not required to maintain respect for the free and equal status of all citizens. This means that a reasonable Liberal Catholic, who holds the two beliefs I have described above, can also privately believe that Catholics are morally superior to non-Catholics. As long as she does not use this belief to guide her views on political decision-making, either publicly or privately, she will remain a reasonable citizen.

The second revision which sympathetic liberalism implements involves two duties that every citizen acquires in relation to their fellows, when each recognizes every other as free and equal, reasonable, rational and sympathetic. I argued that citizens who are sympathetic towards each other will have appraisal respect for certain experiences that their fellow citizens have gone through. Since these experiences shape individuals non-public views, there exists a duty to take up a position where citizens can get a sense of why their reasonable fellow citizens believe that some non-public reasons ought to inform what the collective ought to do. The Duty of Deliberative Sympathy states that any normative theory of public justification must reflect an account of reasonableness that is consistent with those aspects of an individual's personal narrative that are identifiable as experiences common to and appropriate for free and equal reasonable citizens. Along with the Duty of Deliberative Sympathy, I argued for the Duty of Respectful Political Equality, which requires that citizens must show each other a form of respect

consonant with the sense of self-worth each citizen would need to bring to the cooperative enterprise, if the citizen were to be viewed as an equal partner.

The third contribution offers an account of how reasonable citizens weigh the views of their fellow reasonable citizens, when making judgments about political decisions. In Chapter 2, I characterized citizens as having to weigh three sorts of reasons when determining whether outcomes of legitimate procedures were justifiable. They first weighed a set of reasons in favour of Policy A (called R_A), against the set of reasons in favour of a Policy B (called R_B). In addition, they considered reasons R_P , which were the reasons to accept the procedurally legitimate outcome, regardless of their reasons in favour of R_A and R_B . I will now show that reasonable citizens' appraisal respect for fellow reasonable citizens means that the way in which they add weights to reasons in R_A , R_B and R_P depends at least in part on how they believe other citizens weigh these reasons. This leads to greater convergence between reasonable citizens' views on what ought to be the collective decision regarding a particular use of power.

In illustrating these three contributions, I will utilize several examples already introduced in this dissertation to illustrate how problems with 'pure public reason', (that is public reason without the additional constraints necessary to enable justificatory accounts of legitimacy) are resolved by the sympathetic public reason we would expect to find in sympathetic liberalism. Through this analysis we will see that the sorts of justificatory problems faced in political liberalism, in fact split into four different categories: In section (6.1) I will discuss problems which arise due to pure public reason's distinction between public reasons and reasonable non-public

reasons (both of which are separate from *unreasonable* non-public reasons.) I will use the abortion case to show how this distinction collapses in sympathetic liberalism. In section (6.2) I will show how the Problem of Conscience discussed at the end of Chapter 1 can be minimized by looking at the Hijab Controversy in France. I will show, however, that the way sympathetic public reason resolves this controversy depends on whether we interpret the objective of proponents as minimizing a negative externality or achieving a state of affairs which requires collective participation. In section (6.3) I will look at what I call the 'collective participation problem', which is the problem of justifying policies which demand that all citizens participate, despite the persistence of reasonable disagreement. I will evaluate this problem in light of debates between liberal pacifists and proponents of humanitarian intervention. Finally in section (6.4) I look at cases where the choice is either to interfere with individuals without offering proper justification, *or* preventing other individuals from initiating policies that require collective participation.

6.1: Sympathy and Abortion

Abortion poses a Problem of Conscience for liberal legitimacy because it requires liberals who believe abortion to be an immoral practice to take responsibility for making abortion legally permissible for those who believe otherwise. Those who are pro-life thereby find themselves subject to a Brutish Conscience or a Tragic Conscience, or both. Their conscience is brutish in the sense that they are responsible for the legitimacy of the law that allows others to disrespect the sanctity of human life. Furthermore, by legitimating such a law, they are thereby imposing a restraint on fellow pro-life supporters, who would like to interfere with the actions of those

who disrespect the sanctity of life. Since they themselves believe that it is wrong to have abortions and that such immoral actions ought to be stopped, fellow proponents of life can reasonably ask them how they can live with themselves while accepting responsibility for the legitimacy of such practices. The accusation conveys the sentiment of '*Et tu Brute?*' and demands to know how someone who believes abortion to be such a violation of life could possibly allow such practices to be permissible. In a similar vein, the liberal proponent of life faces a Tragic Conscience, in the sense that their moral commitment to respecting human life is in constant struggle with their commitment to showing respect and fair treatment to their fellow citizens.

Now the liberal response to pro-life supporters has traditionally been that although both pro-life and pro-choice positions are reasonable, the pro-choice position is supported by more public reasons than the pro-life position. The pro-choice position is supported by reasons such as women's free and equal status on the one hand, while the pro-life position is supported by the respect for human life.⁴⁷⁷ However, grounding the pro-life position is a belief that foetuses have a metaphysical status that requires all citizens to afford them the same moral consideration that ought to be given to other human beings.⁴⁷⁸ Public reason originally claimed that while all share the belief that women's freedom and equality would be jeopardized by no right to abortion, there is no agreement on the

⁴⁷⁷ Samuel Freeman, 'Public Reason and Political Justifications,' *Fordham Law Review* 72 (2003):2021-2072, at pp. 2055, 2059.

⁴⁷⁸ *Ibid.* p. 2059.

metaphysical status of the foetus, and hence the reasoning of the pro-life advocate is not suitably public.⁴⁷⁹

A sympathetic liberal responds to this by placing herself in the shoes of a reasonable pro-life proponent. In doing so she realizes that she can not only identify the pro-life position as reasonable, but can also understand the force of conviction that comes of viewing the foetus as having a particular metaphysical status. She can see why such a belief ought to be action-guiding, and she can see how the metaphysical status of a foetus becomes an epistemic question of the same sort as the true guilt or innocence of a convicted felon. In other words, she can imagine the 'truth' of the pro-life position from at least one non-public but reasonable standpoint.

Furthermore, because she has appraisal respect for those who non-publicly affirm the standpoint in question, she can see why the pro-life position ought to have a degree of normative authority in the public sphere. This means that whereas before the metaphysical status of the foetus was not a part of public reason, it can now become a reason that members of the public have a reason to consider. This reason is not the truth of the metaphysical status of the foetus, but respect for those who believe that it has a particular metaphysical status. Finally, those who cannot or will not take up the position of the pro-life proponent through sympathetic imagination, must accept that the pro-life position has normative weight, given the Duty of Deliberative Sympathy.

⁴⁷⁹ Ibid. p. 2059.

It may be objected here that understanding why another person views something as true is quite different from viewing it as a truth or even a possible truth oneself. Unless the sympathetic liberal actually changes her viewpoint based on this imaginative faculty, she is not doing anything further than acknowledging its reasonableness. In general, I agree with this objection. However, what it shows is that in acknowledging the reasonableness of the pro-life position, unsympathetic liberals were not fully acknowledging what it meant to have a reasonable belief about the metaphysical status of the foetus. Believing that a foetus has a particular metaphysical status is packaged with attitudes about abortion itself. Those who believe that a foetus has a particular moral status may feel sorrow, or alarm or indignation at the knowledge that foetuses are being terminated. Citizens' capacity for sympathy enables them to imagine how such moral attitudes affect the citizen in question, and provides them with a reason to assuage the difficulty in reconciling responsibility for the legitimacy of abortion with emotions and attitudes associated with the belief that the practice is morally repugnant.

More generally, sympathy can make all moral disagreement a part of reasonable public deliberation, as long as the comprehensive doctrines from which the moral views emanate are reasonable comprehensive doctrines. Unreasonable comprehensive doctrines would fail to meet the publicity requirement because in placing oneself in the shoes of someone with a racist, misogynistic, homophobic or otherwise prejudiced outlook, a liberal citizen could see that the outlook was inappropriate by virtue of being unreasonable. However, if liberals hold that a comprehensive doctrine like Catholicism is reasonable, then by placing oneself in the

shoes of a Catholic, a liberal would not have any reason to find the Catholic worldview inappropriate. While maintaining the distinction between reasonable and unreasonable, the incorporation of sympathy into the liberal framework effectively eliminates the distinction between public and non-public reasonableness.

In the language of justification, the elimination of this distinction amounts to *political justification* and *full justification* effectively collapsing into each other. In Rawls's view, political justification is justification from within the political domain to individuals in their capacity as citizens.⁴⁸⁰ It appeals to reasons that have force within public democratic culture – reasons such as constitutional essentials or legislative procedures. Full justification is justification to a person from within her reasonable comprehensive doctrine, conditional upon the comprehensive doctrine affirming the free and equal, reasonable and rational status of citizens.⁴⁸¹ By contrast, I have argued that if citizens strive to sympathize with all other reasonable citizens, then ideally they will be able to determine *publicly* whether a particular use of political power is *fully* justified. If it is not fully justified, this will become a problem for public justification, because the deliberative imagination has made every reasonable comprehensive doctrine a position from which free and equal citizens can exchange reasonable views. For example, we no longer consider political values like 'all ought to respect human life' as a different category of reasons from reasonable values like 'foetuses' lives ought to be respected'. All of these reasons become public reasons, and public justification would have to account for them.

⁴⁸⁰ Freeman, 'Public Reason and Political Justifications,' p. 2065.

⁴⁸¹ John Rawls, 'Reply to Habermas,' *The Journal of Philosophy*, 92 (1995): 132- 180 at p. 144.

This means that public debates about abortion, gay marriage, evolution, etc., must now incorporate reasonable private views about political matters because such views are no longer non-public. At first this may be seen as quite a step back for political liberalism. Many liberals depend on the fact that non-public reasons are given relatively little weight, when constructing their arguments for these issues. For example, Rawls' argument in favour of the right to choose would be undermined if the public sphere gave positive weight to the claim that those who have abortions do not display adequate respect for human life.⁴⁸²

However, reasons need not be so alarmed. If the Liberal Catholic is also reasonable, rational and sympathetic, the result will simply be more reasonable disagreement in the public sphere than we originally anticipated. If sympathy can make any gains in resolving public reasonable disagreement (as I will claim it does in section 6.2) then we need not worry that the incidence of public reasonable disagreement will increase.

In fact, incorporating sympathy into a theory of public justification expands reasonable disagreement in a way that liberals ought to welcome, because it makes some headway into solving the Problem of Conscience. When a sympathetic liberal places herself in the shoes of a reasonable Liberal Catholic, then assuming a sufficiently robust faculty of imagination, she begins to understand the effects of the Brutish and Tragic Consciences to which politically reasonable pro-life proponents are subject. She realizes both the unfortunate nature of the tragic consequence, but

⁴⁸² Rawls, *Political Liberalism*, p.243fn.

also that it is in some way inappropriate for the reasonable pro-life proponent to simply allow abortions to take place in the name of social cooperation.

Therefore, she allows the pro-life supporter to appeal to her private comprehensive doctrine whenever it is necessary for her to do so, to ease or eradicate the burdens upon her conscience. If the fact that a citizen believes abortion to be murderous, is grounds for her defence of the pro-life position, then those who place themselves in the shoes of this citizen understand the force of this reason. They will either accept her reasons for not fulfilling the duty of civility or accept that the Duty of Deliberative Sympathy allows her not to fulfil the duty of civility.

By allowing appeals to reasonable private comprehensive doctrines, and thereby increasing the cases of public reasonable disagreement, the public justifications which survive the inclusion of previously non-public reasons will diminish the number of people who suffer from problems of conscience. As I will try to illustrate, the existence of these burdens of conscience, and the acceptability of appealing to private comprehensive doctrines, allows for greater moral accommodation. Suppose, for example, there are ten reasonable liberal Catholics in our political society, six of whom are suffering from Brutish and Tragic consciences when trying to respect a law which allows abortion after the first trimester. The other four are willing to accept responsibility for the legal permissibility of first trimester abortions, because when they weigh other values like women's right to choose, they do believe that first trimester abortions are justifiable all things considered. The remaining six, as reasonable and rational citizens, are still trying to reach compromises with other reasonable citizens, and are still willing to accommodate

certain aspects of others' morality into their political society. Although they do not approve of the actions of those who have abortions, reasonableness and sympathy enable them to view those committing abortions as moral agents. It is simply that first trimester abortions are not the justifiable point of accommodation from their perspective.

By allowing them to invoke their reasonable comprehensive doctrines in discussions about abortion, we might find that three of the six are willing to accept first and second trimester abortions if the mother is underage, or if the pregnancy were the result of a sexual assault, or under some other set of contingencies. The idea is that these concerns, coupled with sensitivity towards the moral accommodation of other citizens, might lead to a set of laws with which fewer citizens suffer from Tragic or Brutish Consciences. This may involve restricting abortions for some people, but increasing opportunities for others. This is not to say that all reasonable disagreement may be resolved through such bargaining. Rather, the idea is that if laws are designed to be sensitive to reasons that citizens actually have, the fewer the number of problematic consciences we will find prevalent in political society.

Now a final objection might be that a person who is strongly pro-life and who sees abortion as a moral outrage may not be able to view those of her fellow citizens who have abortions, as reasonable and rational moral agents. If she does not view them in this way, then the fact that she could prevent them from having an abortion and does not will weigh on her conscience. She perhaps sees herself as committing a serious omission in not insisting that her fellow citizens not perform immoral actions.

It is important to realize that a sympathetic liberalism cannot and need not tolerate such an attitude towards one's fellow citizens. Recall Rosen's example of the Hittite Lord who was raised in a culture where slavery was seen as a misfortune but not as a moral evil.⁴⁸³ When a sympathetic liberal placed herself in the shoes of this Hittite Lord, she discovered that the attitude of the Hittite Lord was wrong, but that the Hittite Lord was not an amoral agent. He was following a moral code that was ultimately not reasonable and rational, but one he believed to be moral nonetheless. Moreover, the sympathetic liberal understood why the Hittite Lord was committing such immoral acts despite being a moral person. She was unwilling to accommodate his views into public justification because his attitude towards his slaves was not one that was sustainable under relations of reciprocity.

Similarly, even if a pro-life supporter believed that what her fellow citizen was doing was wrong, the pro-life supporter's ability for sympathy would not immediately lead to the conclusion that the woman having an abortion was immoral. Rather, in placing herself in the shoes of the woman having an abortion, she would realize that the woman was in fact a moral agent, despite making a terrible moral mistake from the perspective of the pro-life supporter. Unlike the Hittite Lord, however, the attitude of the woman having an abortion towards the aborted foetus does not defy the demands of reciprocity or fairness. She would still be owed a justification if one were to interfere with her actions, and given that she does not find abortion immoral, there would be no justification suitable that would justifiably prevent her from having an abortion. This means that instead of interfering with her

⁴⁸³ Gideon Rosen, 'Culpability and Ignorance,' *Proceedings of the Aristotelian Society*, 103 (2003):61-84 at pp. 64 – 66.

behaviour by making abortion illegitimate, it would be more appropriate for the pro-life proponent to appeal to her sympathies and ask her to accommodate certain elements of the pro-life view in her decision about whether or not to have an abortion.

6.2: Weighing Reasons and The Hijab Controversy

I argued that by incorporating sympathetic liberalism into our framework of public justification we are left with far more reasonable disagreement in the public sphere than we originally encountered. When adopting pure public reason as a framework of justification, liberals confronted the problem of reasonable disagreement that resulted from conflicts of public values. In the example with the Hijab Controversy, we faced a citizenry in which all individuals valued equality, but disagreed on whether a ban on wearing the Hijab to state schools served to promote or prevent equality from being realized. One set of citizens argued that the practice of wearing a Hijab represented the submission of women in a patriarchal society, and hence the ban on the Hijab was a form of liberation which made women more autonomous.⁴⁸⁴ Another set of citizens, however, argued that religious liberty and the expression of one's religious view is also important in maintaining political equality. In this view, preventing Muslim schoolgirls from wearing the Hijab indicates a sort of state paternalism towards citizens' religious beliefs,⁴⁸⁵ and consequently their religious identity.⁴⁸⁶

⁴⁸⁴Cecile Laborde, 'Female Autonomy, Education and the Hijab,' *Critical Review of International Social and Political Philosophy*, 9(2006): 351-377 at pp. 354 to 357.

⁴⁸⁵ Ibid. p. 360.

⁴⁸⁶ Ibid. p. 362.

By conceiving of citizens as sympathetic, all reasonable arguments have the potential to be shared through the use of the imagination. Therefore, resolving the disagreement on abortion becomes comparable to resolving reasonable disagreement on public values. Suppose our reasonable disagreement is of the following form: there exist two incompatible policies, A and B, which are justified by sets of reason R_A and R_B respectively. Using our example of the Hijab, suppose Policy A is to ban the wearing of headscarves and Policy B is to permit it. In order to show how reasonable justification would work in a sympathetic liberal framework, I will simplify the example. However, it is assumed that the process can be generalized for more complex variations.

Let us denote the reasons in R_A as (a_1, a_2, \dots, a_n) where all a_i are reasons to support the ban of wearing headscarves in state funded schools. In our simplified example, let a_1 correspond to the reason that the Hijab represents a kind of subjugation of women, and a_2 the reason that a government funded school is a proper place to cultivate skills that enable a person to become an autonomous citizen both in public and in private.⁴⁸⁷ Similarly denote the set of reasons in R_B as (b_1, b_2, \dots, b_k) and assume that all b_i constitute reasons to oppose the ban. Let b_1 be the reason that the ban represents a type of state paternalism that is contrary to autonomy. Let b_2 represent the fact that for some Muslim girls, wearing a headscarf is fundamental to their sense of autonomy. As we have already seen, some reasons might fall within the scope of both R_A as well as R_B . Let a_3 and b_3 both be the reason that helping children develop a sense of autonomy is an important concern for every member of a political society.

⁴⁸⁷ Ibid. p. 354.

Now suppose Policy A becomes legitimate law in accordance with legitimate procedure. For proponents of Policy B, this means that they now have to consider a further set of reasons R_P , which is the set of those reasons supporting Policy A in light of the fact that it is the outcome of a legitimate procedure. For some pre-procedural proponents of B, R_P will be of sufficient weight to enable them to find Policy A justified.

Let us assume, however, that there is at least one person who continues to find Policy B unjustifiable. We can imagine, for example, a *Laïciste* feminist who cannot fully believe that any woman would choose to wear a Hijab without being subject to (possibly unconscious) levels of subjugation.⁴⁸⁸ If political society chooses to hold Policy B to be legitimate law, the *Laïciste* feminist will now suffer from a Brutish or Tragic conscience, or both. In such cases, proponents of Policy B will also have a new reason to consider in their post-procedural analysis of Policy B. Let us call reasons associated with the Problem of Conscience R_C .⁴⁸⁹

We might think then, that with the utilization of sympathy, pre-procedural proponents of the ban on the Hijab must now consider reasons in R_A , R_P and R_C while those opposed to it are called upon to consider R_B , R_P , and R_C . However, sympathy accomplishes one further task. It makes proponents of Policy A more aware of the relevance of reasons b_i to proponents of Policy B, and vice versa. In the context of the Hijab Controversy, this means that although individuals may believe that the

⁴⁸⁸ Ibid. Laborde distinguishes *Laïciste* feminists who support the ban in the name of strong separation of state from religion, from what she calls ‘radical feminists’ and ‘republican feminists’, who believe that banning headscarves interferes with agency and autonomy respectively (pp. 352, 364).

⁴⁸⁹ Ibid. Laborde discusses whether Mill’s claims in ‘On Liberty’ and ‘The Subjection of Women’ might apply to evaluations of autonomy in the case of the Hijab (pp. 357, 360, 369.)

feminist in question is wrong in placing such great weight on a_1 (i.e. the fact that headscarves are a form of subjugation), the very fact that she gives it such great weight gives others a reason to place greater weight on it. Their appraisal respect for her, combined with their awareness of the Duties of Deliberative Sympathy and Respectful Political Equality, and their awareness of the burdens of conscience, means they will place greater weight on aligning their views with those of certain perspectives that they themselves do not believe is the correct one. Similarly, since the feminist is also a sympathetic agent, the fact that others place more weight on b_1 or b_2 gives her reason to increase the weight she gives to these, and thereby diminish the relative weight she places on a_1 . As long as the elements of R_A and R_B are compatible with reasonable comprehensive doctrines, each person must factor in a little bit of positive weight to all a_i and b_i .

Note that although the *Laïciste* feminist may end up placing less relative weight on a_1 , the claim is not that, through sympathy, the feminist somehow comes to see a_1 as being less important. I am assuming here that her feminist beliefs are relatively stable, and that as a moral agent who believes in the autonomy of all women, she continues to maintain the same zeal for alleviating the subjugation of women. However, as a reasonable and rational, sympathetic citizen, she could increase her zeal for diminishing state paternalism, when she sees how important it is to her fellow citizens. This means that the weight she places on reason b_1 will increase, thereby diminishing the *relative* weight she places on a_1 .

It may be objected that this may not always be possible. For example, the *Laïciste* feminist's commitment to a_1 seems directly at odds with b_2 , the belief that for

some Muslim girls, wearing a headscarf is a part of their sense of autonomy.

Undoubtedly, any increase in the weight the feminist ascribes to b_2 will be tempered by the strength of her beliefs regarding a_1 . However, even in such a case, the feminist views those who support b_2 as moral agents, and as a reasonable and sympathetic citizen, she endeavours to make some accommodation for their views in how she weighs her own.

The basic idea is that sympathy introduces two new sets of concerns in individuals' post-procedural evaluations of procedurally legitimate policy. There is the concern for the Problem of Conscience (i.e. the reasons in R_c), and the belief that the Problem of Conscience ought to be minimized. In addition there is a process by which citizens offer a different set of weights to reasons (a_1, a_2, \dots, a_n) and (b_1, b_2, \dots, b_k), in light of the weights that others offer these reasons. In doing so, the post-procedural aggregation of reasons from each citizens' personal perspective will bring each citizen closer to convergence with every other citizen.

Ideally, citizens may repeat the process of weighing reasons, using a reasonable procedure to aggregate across citizens, and then sympathetically re-evaluate them post-procedurally, until citizens' views achieve complete convergence. In some ways, this may be the purpose of extended deliberation on policy alternatives over time. There is evidence, for example, that Americans' attitudes towards abortion converged much more quickly towards general beliefs about its permissibility during the years directly after *Roe v. Wade*.⁴⁹⁰ There are of course several explanations as to

⁴⁹⁰ William Ray Arney and William H. Trescher 'Trends in Attitudes Towards Abortion: 1972 to 1975' *Family Planning Perspectives*, 8 (1976), pp. 117-124.

why this occurred. However, we might suppose that one of them is that as the debates about abortion became more public, Americans were better able to exercise their sympathetic faculties towards those who had favourable views towards it.⁴⁹¹

However, sympathetic liberalism also offers a mode of adjudication for the interim, when citizens' views have not fully converged. The sympathetic liberal constructs a normative framework of justification by recognizing reciprocity and the obligations of cooperation. This means that in the absence of public justification, citizens must place significant weight on the free and equal status of their fellows. In the abortion case, we saw that the reason we could sympathetically justify the right to abortion is not the fact that abortion is publicly justifiable, but the fact that we could not give a free, moral agent reasons that justified interference from a shared perspective.

It might seem at first glance that in such cases, sympathetic liberalism amounts to yet another defence of non-interference. When we cannot offer a reason to interfere, we simply defer to a person's rights of non-interference. However, the 'deference' of sympathetic public reason to a person's freedom is consistent with offering the person numerous and wide-ranging reasons not to have an abortion, and demanding of the citizen that she be as sympathetic as she can towards those offering her these reasons. She is still asked to be sensitive to the fact that the legal permissibility of the abortion weighs upon the conscience of not only herself, but

⁴⁹¹ Arney and Trescher, 'Trends in Attitudes Towards Abortion: 1972 – 1975'. There is also evidence that amongst groups where the debate was much more divided (i.e. church going Catholics), individual attitudes became much more radical in both directions. In the wake of a serious conflict, sympathies seemed to extend only to the faction with which an individual identifies, not to the group at large (Arney and Trescher p.118).

upon her entire political society. She is still asked to consider the opposing moral point of view and to judge her action from these points of views in addition to her own perspective. It is only after weighing all of these reasons, that she can choose for herself whether or not to have an abortion.

Furthermore, sympathetic liberalism does not justify non-interference in every instance. Non-interference is only required before citizens have fully converged in their views. One further complexity to the problem is that those *Laïciste* feminists who support the ban do so because young Muslim girls, who are told to wear headscarves by their parents, may never fully develop the requisite autonomy to claim that they have a right to non-interference on grounds of their free and equal status. The *Laïciste* feminist could argue that the entire point of banning the headscarf is to utilize collective power to transform individuals so that they have the opportunity for autonomous citizenship. They could further claim that those who are opposed to the ban are as unreasonable as the Hittite Lord who refused to recognize the free and equal status of his slaves. Unfortunately, neither pure public reason nor sympathetic public reason is equipped to adjudicate this further claim. Whether or not a traditional, religious upbringing is consistent with freedom in the sense of autonomy remains too complex a question to be resolved within the public sphere.

At the very least, however, sympathetic public reason should be able to explain how it determines trade-offs between the rights of private individuals and associations (like families) and what I will call collective participation problems. In collective participation problems a general law is imposed on all citizens, despite the fact that some find it an unjustified interference on their freedom (e.g. when a Pacifist

experiences tax increases as a result of a humanitarian war effort). Collective participation problems differ from problems involving individual choices, in the sense that the justifiability of the objective is itself up for debate. While it may be possible to see why no free and equal citizen would want the state to justify prohibitions on what to wear and what to do with their bodies, it is not as straightforward to claim that no free and equal citizen would choose religious identity over autonomy, or vice versa.

Before determining how trade-offs between individuals' rights and policies requiring collective participation can be adjudicated by sympathetic public reason, we must determine what sorts of justifications can be offered for 'collective participation' itself. Collective participation problems recognize the fact that many uses of political power demand the participation of every member of the polity, if the legitimate objective is to be realized. The paradigm example of a situation of collective participation is that of the liberal Pacifist who is opposed to a war that is widely regarded as just, and which some reasonable citizens consider to be a humanitarian effort. Regardless of which course of action the collective chooses, either the Pacifist or the Humanitarian will suffer from the problems of conscience I have outlined. This is because every citizen directly or indirectly contributes to the war effort by contributing to the economy, paying taxes, and accepting the rewards of more patriotism, civil participation, etc. As a consequence, every citizen is asked to take responsibility for the fact that the war is legitimate. The collective decision not to fight a war also means that a citizen must participate in the daily life of a civil society that is showing disregard for the humanitarian demand to be involved. Either way,

some citizens will have to participate in practices that go contrary to their moral views. How can sympathetic public reason offer justifications to those who are so burdened, when no public justification is actually available? In section 6.3 I will look at collective participation problems by taking a closer look at the debate between the pacifist and the humanitarian, before trying in section 6.4 to determine how best to trade-off individual liberties with problems of participation.

6.3: Pacifism and Humanitarian Wars

In the case of Pacifism and Humanitarian wars, we find two citizens who disagree on whether or not a country ought to go to war. They both agree that the war is a just war. However, the Pacifist believes that the moral obligation to maintain peaceful relations and not take human life is sufficient reason not to fight any war, including a just war. By contrast the Humanitarian believes that in addition to the permissibility of fighting a just war, there is a strong moral requirement to intervene. Let us assume that the convictions of both the Pacifist and the Humanitarian are sufficiently strong to ensure that regardless of whatever course of action political society undertakes, someone will face the problem of the Tragic or a Brutish conscience.

The case of the Pacifist and the Humanitarian may seem like a variation of the classic problem of publicly justifying a just war to a liberal Quaker.⁴⁹² In that problem, a liberal Quaker recognizes the legitimacy of a given political institution whose procedures have determined that there ought to be a just war. According to pure public reason, since the institutions are legitimate, the Quaker also has the further obligation to follow the law, since civil disobedience and conscientious

⁴⁹² Rawls, 'The Idea of Public Reason Revisited,' p. 787fn.

refusal are only rights in *nearly* just societies.⁴⁹³ (I.e. if we assume completely just political institutions instead of nearly just political institutions, there cannot be any grounds for civil disobedience.) In this manner, pure public reason views the justification of a just war to a liberal Quaker as comparable to justifying abortion to a liberal Catholic.⁴⁹⁴ The problem consists in finding a set of suitably public reasons by which to justify a law for which there is a separate duty to obey.

Sympathetic public reason interprets the problem rather differently. Firstly, it does not uphold the view that there is a natural duty to obey the laws of just institutions. As argued in Chapter 2, it recognizes that there may be a *pro tanto* obligation to obey legitimate law and even just law, but that all things considered reasons must be examined in a case-by-case basis in order to accommodate reasonable disagreement. Further, it does not see the problem of justification as a problem of acknowledging and overcoming the special non-public reasons that Quakers might have that prevent a justification.

In the tradition of pure public reason, these special non-public reasons give Quakers license to engage in the practice of ‘witnessing’, in which they publicly bear witness to the ways in which legitimate law encroaches upon their private beliefs, while maintaining their obedience to the law in the name of the just institutions which generated it.⁴⁹⁵ Sympathetic public reason, by contrast, typically does not need to recognize the practice of witnessing since it does not view the reasons propounded by the Quaker as non-public. A citizen is asked to weigh all the reasons

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

against each other and determine whether a justification has or has not been achieved. Moreover, the fact that a public reason is in conflict with a person's non-public, moral commitments, is already a part of the larger Problem of Conscience. Therefore, the practice of bearing witness only needs to be undertaken by citizens who truly are not sure how they weigh their pure public reasons against other reasons. Witnessing may allow citizens to recognize that there are concerns not reflected in the legitimate decision. However, since they are not sure how these reasons ought to be weighed against other reasons, it need not generate a Problem of Conscience.

Finally, introducing a believer of humanitarian intervention into the picture emphasizes the central problem as sympathetic liberalism conceives it. This is the problem that at times, a liberal polity will simply have to impose a Tragic or Brutish Conscience upon some of its citizens. If we assume reasonable disagreement, we can always postulate the existence of one reasonable citizen whose beliefs challenge the procedurally legitimate decision on conscientious grounds. The Humanitarian serves to show that no matter what the collective polity chooses, a Problem of Conscience will arise. We must determine what (if any) justificatory resources sympathetic liberalism has at its disposal for such situations. The larger question looming in the background is whether in the light of reasonable disagreement, the use of collective political power can ever justify courses of action that necessitate the involvement of all citizens.

Let us first consider the case from the perspective of the Pacifist. If the liberal polity decides to engage in warfare, then the Pacifist appears to have a list of

legitimate complaints that she can take to her fellow citizens. First of all, they are using collective power towards an end which the Pacifist does not find reasonably justifiable. Moreover, they know she finds it immoral, and third, they know she will have to take responsibility for the legitimate use of power towards such ends. It seems that they are not treating her like a free and equal member of the cooperative. In fact, although they know that both the Pacifist and the Humanitarian are in similar circumstances, in the sense that each may be subject to a tragic or brutish conscience, the polity is choosing to trouble the Pacifist's conscience and not the Humanitarian's. Why is the Humanitarian's point of view favoured?

The Pacifist knows that if the polity respected the burdens upon her conscience then the Humanitarian could generate an analogous list of concerns. However, it is not immediately clear whether this is sufficient to justify burdening the Pacifist with a tragic or brutish conscience. The relationship between the Pacifist and the liberal polity to which she belongs parallels that of a promisee who has had a promise broken by a promisor. Just as we would expect the latter to show the former some degree of regret (and in some cases offer compensation), we would also expect a polity to do likewise for a citizen whose conscience is burdened because it cannot justify its legitimate policies to her non-public mode of reasoning.

Throughout, I have talked about obligations like keeping one's promises as pro tanto obligations that can be overridden when stronger, contrary reasons become operative (e.g. saving a human life.) However, there are also cases when it may not be clear which pro tanto reason overrides which others. What if a promisor has made two promises to two different people, genuinely believing that both promises could

be kept? If the promisor later realizes that the promises cannot be fulfilled simultaneously, then she would of course have to renege upon her promise to one promisee. However, a sympathetic promisor would at least show some regret at having to break a promise, as she can understand the disappointment felt by that other person.

Similarly, when a sympathetic liberal polity cannot fulfil its promise of providing a reason to each citizen that she can reasonably be expected to endorse, for pursuing a course of action, it too ought to feel a degree of regret, and make amends in the best way possible for all parties. If the legitimate procedures of public decision-making were to decide in favour of Humanitarian intervention, accommodations must be made in recognition of the Pacifist's view. For example, the polity may choose to make funds available for other initiatives that reflect the Pacifist's moral commitments. If there is a military draft in place, they might excuse identifiable Pacifists (e.g. Quakers) from service. While these actions on the part of the polity do not diminish the guilt or sense of responsibility the Pacifist might feel for the decision to wage a just war, they serve to show that the polity is sensitive to the burdens of conscience it is placing upon the Pacifist. Similar measures of accommodation would have to be taken on behalf of the Humanitarian, if the outcome of legitimate procedures were favourable to the Pacifist. In accommodating the views of those who do not find a course of action justifiable, the polity is striving to the best of its ability to treat all citizens as free and equal, although unjustifiably forcing some (e.g. the Pacifist) to participate in collective activities that they find immoral.

In doing so, the polity may also be said to bear witness to the reasons recognized in the Pacifist's moral view. Since sympathetic liberalism views both the Pacifist's reasons and the Humanitarian's reasons as public reasons, in taking up the view of both the Pacifist and the Humanitarian in turn, each member of the collective recognizes the weight of both commitments. Therefore, in situations of perfect or near perfect sympathy, each spectator should experience a moral dilemma. Although the two contrary commitments can be assigned weights privately, they cannot be assigned adequate weight in the public sphere. Therefore, regardless of what course of action a collective chooses, it must act *as if* it were one agent facing a moral dilemma.

It follows that any time a collective cannot offer a justification to at least one citizen for its actions, the ability for sympathy will place members of the collective into a moral dilemma. If one citizen cannot accept a certain course of action B for reason R_A , and another cannot accept action A for reason R_B , any sympathetic spectator observing both members of the collective will feel the forcefulness of both R_A and R_B . In seeing the conflict between reasons, and also by understanding why each citizen weighs the reasons as they do, any sympathetic spectator would also give both reasons substantial weight. While it would lead to deliberations of when R_A is weightier than R_B and vice versa, the conclusion may be that from the public perspective, there is simply no way to determine which is the weightier concern.

In summary, the inability of a liberal polity to justify a position to a reasonable citizen generates two sorts of obligations: the first obligation is to the reasonable citizen herself. In order to continue to treat her like a free and equal reasonable

citizen despite the Problem of Conscience, the polity must accommodate her views in other ways. This shows that although she is not being offered a justification in this one instance, her relative status to other citizens remains one characterized by reciprocity. The second obligation requires acknowledging that the reason that a justification cannot be offered is because from the public perspective, there exists a moral dilemma. Although each individual citizen can resolve this dilemma from the private perspective (by offering a greater weight to R_A or R_B), the sympathy expected of citizens in the public sphere means they can recognize the immense importance of both conflicting reasons, and cannot determine a suitable way to determine which is of greater importance.

The first of these two types of obligations might raise criticism on the ground that it seems to be a form of bargaining, rather than a real justification to pursue a particular policy. Trying to accommodate a citizen's views on other policies suggests that the polity is aiming to compensate her, or win her cooperation in other ways. Even if the Pacifist is granted funding for other peace-keeping missions, this should not affect the responsibility she has towards this particular humanitarian intervention.

Sympathetic liberalism can accept this criticism because the Pacifist herself identifies the existence of a public reason not to offer her a justification. Just as the practical situation of a promisor with two promises requires that a promise must be broken, the practical situation of the liberal polity means that a justification simply cannot be offered to all reasonable citizens. The complaints of the Pacifist are not critical of the practical situation itself. As a reasonable member of the polity, she

accepts that the practical situation cannot be helped, that in some cases there is simply no good justification available to all reasonable citizens. Rather, the content of her complaint is that as a consequence of the practical situation of the liberal polity, she is not being treated like a free and equal citizen engaged in a cooperative enterprise with her fellows. In offering accommodation, her fellow citizens demonstrate that they are willing to maintain the demands of reciprocity to the extent that they can.

A further objection may be raised, however, that in offering accommodation rather than justification, a sympathetic account of public reason does not afford the same deep-seated normative agreement that Rawls originally intended. It may be objected that sympathetic liberalism merely offers a more sympathetic *modus vivendi*. If the Pacifist were in a position to insist on no intervention and compensate the Humanitarian, then she would have done so. Political forces simply happen to favour the Humanitarian in this case.

This objection highlights the fact that pure public reason offers an answer to cases like just war and abortion that are generalizable to most cases. It claims that both are publicly reasonable in almost any liberal polity. By contrast, sympathetic liberalism really does not claim that just wars can always be legitimate or never be legitimate. It first appeals to a legitimate procedure, and then mandates post-procedural compensation for those who strongly believe the procedure to generate an unjustifiable obligation. In this sense the decision may seem arbitrary.

However, the sympathetic liberal has achieved an 'arbitrary' decision that is sensitive to the deliberative struggle of every individual, aims to respect their consciences, and compensates them when this is not possible in a way that is consistent with their free and equal status. Pure public reason, by contrast, labels any citizen with strong non-public commitments as politically unreasonable. It denies justification to citizens who can easily make the strength of their non-public positions available to their fellow citizens. Instead, it asks politically unreasonable citizens to take the public perspective and recognize the reasonableness of the legitimate outcome.

6.4: Individual Liberty vs. Collective Participation

It may seem that the proposed reconciliation to the Pacifist vs. Humanitarian case misses one of the more central concerns raised by justifying collective participation problems. The problem is that if sympathetic liberals are committed to justifying all legitimate decisions *to each citizen* (i.e. from the citizen's private perspective), then one liberal citizen is given a significant amount of veto power in determining which pieces of legislations are truly legitimate. For example, if the government is trying to increase taxes in order to set up a nationalized healthcare system, or trying to decrease overall pollution by regulating the amount of emissions sent into the air, then one individual who strongly believes that nationalizing healthcare is immoral, or that global warming does not warrant interference with individual decision-making, will have it in his or her power to demand justifications and accommodations to suit their private views and needs.

The point of sympathetic liberalism is certainly to enable individual citizens' moral concerns to be taken more seriously in the public sphere. Therefore, it may be the case that all citizens feel the political strain of having to justify what they see as obvious right to healthcare and environmental protection, to those with contrary moral commitments. This also encourages liberals to investigate the moral commitments of their own positions. In the case of healthcare, for example, the sense of justice may be a strong political ideal that leads towards legislation for affordable healthcare. However, beyond that sense of justice ought to lie the stronger concern for those citizens putting their well-being in jeopardy because they do not have adequate access to health care.

I have argued earlier, however, that sympathetic liberalism is committed to greater respect for individual freedoms (as seen in the case of the abortion) when Problems of Conscience cannot or have not yet been resolved. In treating all individuals as free and equal, individuals must be given greater freedom to determine which restrictions they place upon their own life. The key point is that they must continue to behave as sympathetic, reasonable and rational individuals. When confronted with a serious need for collective participation, with an array of moral, scientific and socioeconomic reasons justifying a particular course of action, these individuals can no longer claim that the public reasoning goes against their private conscience, and that legitimate law is therefore not justifiable to them.

In debates regarding religious expression in the public sphere, for example, a citizen cannot simply appeal to vague or abstract ideals such as autonomy, solidarity or liberty. Nor should they do so when propounding their reasonable non-public

views (i.e. the 'rightness' or 'wrongness' of war in the case of the Humanitarian and the Pacifist.) While maintaining respect for these ideals and arguing in accordance with them, both parties must observe how these ideals translate into the facts of fellow citizens' actual experience. Although more room is made for moral arguments in sympathetic public deliberation, the sympathetic imagination places the actual experience of citizens at the centre of the analysis. Smith's sympathy is about imaginatively projecting oneself into another's situation in order to measure whether their response is appropriate.⁴⁹⁶ Private morality is only given greater weight because it is a part of citizens' well-being not to be subject to tragic and brutish consciences, and because there is more awareness of the struggle to reach one's private moral standing.

However, sympathetic liberalism need not sustain appeals to abstract moral concepts in response to a cry for help from citizens who can clearly be seen to be suffering. Although individuals are offered a great deal of liberty under sympathetic liberalism, they must also show their willingness to be other-regarding in order to maintain their status as reasonable citizens. Therefore, they may sometimes be called upon to accept higher taxes for collective participation problems, and interference with their own liberty. A sympathetic objection to these taxes needs to consist of a careful articulation of how a citizen's private values continue to be sensitive to the recognized suffering of others, and why despite this recognition, the citizen's conscience must oppose ways to alleviate the suffering. Pointing out the severe economic burdens imposed by affordable care may in some cases be a legitimate

⁴⁹⁶ Stephen Darwall, 'Empathy, Sympathy, Care,' *Philosophical Studies* 89 (1998): 261 - 282 at p. 268.

claim offered by a sympathetic liberal against an increase in taxes. Possibly, concerns about spending and fiscal responsibility could play a role in a sympathetic objection. Demanding to know why one citizen ought to face increased taxes in order to assist another citizen, or maintaining an unsympathetic commitment to personal responsibility to justify why the government's redistributive policies are unfair, simply will not display a sufficient amount of recognition for the disadvantages faced by fellow citizens.

6.5: Conclusion

The purpose of this final chapter has been to show how the sympathetic account of public reason I have defended in this dissertation, changes the dynamics of public discourse. It offers new tools to citizens with which citizens can justify their political positions. These tools are the sympathetic imagination, appraisal respect and the Duties of Deliberative Sympathy and Respectful Political Equality.

These new features of liberalism remove the distinction between reasonable public and reasonable non-public reasons regarding political issues. Furthermore, they make the Duties of Deliberative Sympathy and Respectful Political Equality, duties that must be weighed against other duties to one's fellow citizens. Finally, I have suggested that in cases where citizens have not figured out how to eradicate the Problem of Conscience, sympathetic liberalism will generally favour individual liberty.

I made this final claim because sympathetic liberalism asks citizens to take seriously the free and equal status of other citizens, when imposing their views upon them. However, I must moderate this claim because individual liberty will not have

such favour in every instance. Whether or not individual liberty or some other outcome is the result of political deliberation depends entirely on more specific aspects of the political situation than individual citizens' reasonable, rational and sympathetic natures. Individuals will show sympathy while weighing reasons against each other, and choose to morally accommodate each other's views in ways that are situation-specific.

All that is required of citizens is that when they engage in such deliberation, they must show that they have sympathetically considered the situation of those others with whom they disagree. For example, a woman choosing to have an abortion must still be willing to listen to the moral concerns of anti-abortion activists. A person who believes in Humanitarian intervention must be willing to accommodate the views of the Pacifist in other aspects of policy, wherever possible. The individual worried about the interference of government in raising taxes, must show that he or she is acutely aware of the struggles of other citizens which demands such redistribution.

While procedures continue to legitimate most public decisions by offering strong pro tanto obligations to follow procedural outcomes, there is a process of post-procedural evaluation which determines whether the decision satisfies the justificatory requirements, and avoids being overly authoritative. This overcomes several of the limitations of pure public reason. More citizens actually agree with the content of legitimate laws (rather than simply agreeing with the law from a public perspective that they do not take to be their own perspective). Moreover, their moral

views are better accommodated in public deliberation, which still maintains the values of publicity, reciprocity and sympathy.

Bibliography

- Ackerman, Bruce and James Fishkin. 'Deliberation Day.' *Journal of Political Philosophy*. 10 .2002: 129 – 152.
- Arney, William Ray and William H. Trescher. 'Trends in Attitudes Towards Abortion: 1972 to 1975.' *Family Planning Perspectives*. 8 .1976:117-124.
- Barry, Brian. *Justice as Impartiality*. Oxford. UK: Oxford University Press, 2002.
- Chapman, J. W. *Rousseau: Totalitarian or Liberal*. New York. NY: AMS Print, 1968.
- Constitution of the United States of America
- Constitution of Canada
- D'Agostino, Fred. 'Some Modes of Public Justification.' *Australasian Journal of Philosophy* 69 (1991): 390-414.
- Darwall, Stephen. 'Two Kinds of Respect.' *Ethics* 88(1977): 36 – 49 at p. 38.
- . 'Empathy, Sympathy, Care.' *Philosophical Studies* 89 (1998): 261 - 282.
- . 'Sympathetic Liberalism: Recent Work on Adam Smith.' *Philosophy & Public Affairs* 28 (1999):139 – 164.
- Death Penalty Information Center. 'Facts about the Death Penalty.' 2011.
- Deigh, John. 'Cognitivism in the Theory of Emotions'. *Ethics* 104 (1994): 824-854.
- Dryzek, John and Christian List. 'Social Choice Theory and Deliberative Democracy: A Reconciliation.' *British Journal of Political Science*. 33 (2003): 1 -28.
- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Oxford. UK: Oxford University Press.
- Feinberg, Joel. 'Collective Responsibility.' *The Journal of Philosophy*. Vol. 65. No. 21. Sixty-Fifth Annual Meeting of the American Philosophical Association Eastern Division (Nov. 7. 1968): 674-688.
- Freeman, Samuel. 'Public Reason and Political Justifications.' *Fordham Law Review* 72 (2003):2021-2072.
- . 'The Burdens of Public Justification.' *Politics, Philosophy and Economics* 6 (2007): 5-43.
- Gaus, Gerald. *Value and Justification: The Foundations of Liberal Theory*. Cambridge, UK: Cambridge University Press, 1990.
- . *Justificatory Liberalism*. New York, NY: Oxford University Press, 1996.
- . *The Order of Public Reason*. Cambridge, UK: Cambridge University Press, 2010.

- Gibbard, Allan. 'Constructing Justice.' *Philosophy and Public Affairs*, 20 (1991): 264 – 279.
- Goodin, Robert. 'Democratic Deliberation Within.' *Philosophy and Public Affairs* 29 (2000): 81 – 109.
- . *Reflective Democracy*. New York: Oxford University Press Inc., 2003.
- . 'Input Democracy.' In *Power and Democracy: Critical Interventions*, edited by Frederick Engelstad and Øyvind Østerud. Hants, UK and Burlington, VT: Ashgate Publishing Company, 2004.
- Greenawalt, Kent. *Private Consciences and Public Reasons*. Oxford, UK and New York, NY: Oxford University Press, 1995.
- Griswold, Charles. *Adam Smith and the Virtues of the Enlightenment*. Cambridge, UK: Cambridge University Press, 1999.
- Gutmann, Amy and Dennis Thompson. *Democracy and Disagreement*. Cambridge, MA and London, England: Belknap Press of Harvard University Press, 1997.
- Hart, HLA and AM Honore. *Causation in the Law*. Oxford, UK: Clarendon Press, 1959.
- Hees, Martin van. 'The Limits of Epistemic Democracy.' *Social Choice and Welfare*, 28(2007): 649-666.
- Hobbes, Thomas. *Leviathan*, edited by Richard Tuck. Cambridge, UK: Cambridge University Press.
- Hume, David. *A Treatise of Human Nature*, 2nd edition, edited by L.A. Selby-Bigge and P.H. Nidditch. Oxford, UK: Clarendon Press, 1976.
- Laborde, Cecile. *Critical Republicanism: The Hijab Controversy and Political Philosophy*. Oxford, UK: Oxford University Press, 2008.
- 'Female Autonomy, Education and the Hijab.' *Critical Review of International Social and Political Philosophy*, 9(2006): 351-377.
- 'Secular Philosophy and Muslim Headscarves in Schools,' *Journal of Political Philosophy*, 13(2005): 305-329.
- Larmore, Charles. 'Political Liberalism.' *Political Theory* 18 (1990): 339 – 360.
- . *The Autonomy of Morality*. Cambridge, UK: Cambridge University Press, 2008.
- Macedo, Stephen. *Liberal Virtues: Citizenship, Virtue and Community in Liberalism Constitutionalism*. Oxford, UK: Clarendon Press, 1991.
- Mill, John Stuart. 'Utilitarianism,' in *The Collected Works of John Stuart Mill, Volume X: Essays on Ethics, Religion and Society*, edited by J.M. Robson, Introduction by F.E.L. Priestly. Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1985.
- Miller, David. *National Responsibility and Global Justice*. Oxford, UK: Oxford University Press, 2007.

- Nagel, Thomas . 'Moral Conflict & Political Legitimacy.' *Philosophy & Public Affairs*, 16 (1987): 215-240.
- Neuhouser, Frederick. *Rousseau's Theodicy of Self-Love*. Oxford, UK: Oxford University Press, 2003.
- Nussbaum, Martha. 'Poets as Judges: Judicial Rhetoric and the Literary Imagination.' *The University of Chicago Law Review*, 62 (1995):1477 – 1519.
- . *Poetic Justice*. Boston, MA: Beacon Press, 1997.
- . *Upheavals of Thought: The Intelligence of Emotions*. Cambridge, UK: Cambridge University Press, 2003.
- . 'Cultivating Humanity in Legal Education.' *University of Chicago Law Review* 70 (2003): 265 – 279.
- . *Hiding from Humanity*. Princeton, NJ: Princeton University Press, 2004.
- Nussbaum, Martha and Dan Kahan. 'Two Conceptions of Emotion in the Criminal Law.' *Columbia Law Review*, 96 (1996):269-374.
- Quinn, Warren. 'Actions, Intentions and Consequences: The Doctrine of Doing and Allowing.' *The Philosophical Review*, 98 (1989): 287 – 312.
- Raphael, D.D. *The Impartial Spectator: Adam Smith's Moral Philosophy*. Oxford, UK: Oxford University Press, 2007.
- Rawls, John. *Theory of Justice*. Oxford, UK: Oxford University Press, 1972.
- . *Political Liberalism*. New York: Columbia University Press, 1993.
- . 'Reply to Habermas.' *The Journal of Philosophy*, 92 (1995): 132- 180.
- . 'The Idea of Public Reason Revisited.' *The University of Chicago Law Review* 64 (1997): 765-807.
- . *Justice as Fairness: A Restatement*. Edited by Erin Kelly. Cambridge, MA: Belknap Press of Harvard University, 2001.
- . 'Justice as Reciprocity.' In *John Rawls: Collected Papers*, edited by Samuel Freeman. Cambridge, MA and London, UK: Harvard University Press, 1999.
- . 'Distributive Justice.' In *John Rawls: Collected Papers*, edited by Samuel Freeman. Cambridge, MA and London, UK: Harvard University Press, 1999.
- . 'Legal Obligation and the Duty of Fair Play.' In *John Rawls: Collected Papers*, edited by Samuel Freeman. Cambridge, MA and London, UK: Harvard University Press, 1999.
- . 'The Justification of Civil Disobedience.' In *John Rawls: Collected Papers*, edited by Samuel Freeman. Cambridge, MA and London, UK: Harvard University Press, 1999.

- Raz, Joseph. 'Disagreement in Politics.' *The American Journal of Jurisprudence* 24 (1998): 25-52.
- Rosen, Gideon. 'Culpability and Ignorance.' *Proceedings of the Aristotelian Society*, 103 (2003):61-84.
- Rousseau, Jean-Jacques. *The Basic Political Writings*. Ed. Donald Cress. Indianapolis, Indiana: Hackett Publishing Company, 1987.
- Scanlon, T.M. *What We Owe To Each Other*. Cambridge, MA and London, UK: The Belknap Press of Harvard University, 1999.
- . 'Utilitarianism and Contractualism.' In *Utilitarianism and Beyond*, edited by Amartya Sen and Bernard Williams. Cambridge, UK: Cambridge University Press, 1982.
- Schachter, Stanley and Jerome Singer. 'Cognitive, Social, and Physiological Determinants of Emotional State.' *Psychological Review*, 69(1962): 379 – 399.
- Shakespeare, William. *Julius Caesar*, edited by Arthur Humphreys. Oxford, UK: Oxford University Press, 1984.
- Smith, Adam. *The Theory of Moral Sentiments*, edited by Knud Haakonssen. Cambridge, UK: Cambridge University Press, 2002.
- Smith, MBE. 'Is there a prima facie obligation to obey the law?' *Yale Law Journal* 950(1972-1973): 950 – 976.
- Solomon, Robert. 'Emotions, Thoughts and Feelings: What is a 'Cognitive' Theory of Emotion and Does it Neglect Affectivity?' *Royal Institute of Philosophy Supplement*, (2003):1-18.
- . 'Philosophy of Emotion.' In *Handbook of Emotions*, edited by Michael Lewis, Jeanette Haviland-Jones and Lisa Feldman Barret. New York, NY: The Guildford Press, 2008).
- Spinoza, Benedictus de. *Political Treatise*, edited by R.H.M. Elwes. New York, NY: Cosimo Inc., 2005.
- Thompson, Dennis. *Political Ethics and Public Office*. Cambridge, MA: Harvard University Press, 1987.
- . *Restoring Responsibility: Ethics in Government, Business and Healthcare*. Cambridge, UK: Cambridge University Press, 2005.
- United States. Department of Health and Human Services. *Committee Budget in Brief FY 2011*. 2011.
- . Department of Labor. Employment and Training Administration. 'Unemployment Insurance Data Summary, 2011 First Quarter.' 2011.
- Wollheim, Richard. 'A Paradox in the Theory of Democracy.' In eds. Peter Laslett and Walter Garrison Runciman *Philosophy, Politics and Society*. New York, NY: Basil Blackwell, 1962.