Reasonable Illegal Force: Justice and Legitimacy in a Pluralistic, Liberal Society*

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INTRODUCTION

Ideally, should good liberals be able to get along? That is, should people committed to the view that all citizens should be treated as fundamentally free and equal be able to forswear illegal force and agree instead to abide by a common legal system to resolve their political disputes?[1] For example, assume that good liberals can reasonably disagree about whether and under what conditions a woman should have the right to choose an abortion.[2] Can those who think the law is unjust be expected to limit themselves to legal methods of protest and legal avenues of political mobilization? If one is committed to the rule of law, as opposed to the rule of raw power, then one has to hope that the answer is "yes," but I will argue for a more qualified "not necessarily, not always."

John Rawls, the most profound expositor of what we can hope for under the rule of liberal law, presents a conception of an ideal society in which the answer is simply yes. He starts from the premise that even in an ideal free society, people will still be divided by deep philosophical and

* I would like to thank Arthur Applbaum, Gilly Nadel, Nien-he Hsieh, Mattias Kumm, Evan Charney, Fred Schauer, Peter DeMarneffe, Frank Michelman, Rachel Kadish, Leanne Coyne, and the participants in the Ethics and Political Theory Workshop at Harvard University for their helpful comments on earlier drafts.

1. I limit the question to political disputes because no society will ever perfectly handle all individual disputes. Sometimes crime victims will be unsatisfied because criminals will go free, and sometimes innocent people will be convicted of crimes and unjustly punished; sometimes tortfeasors will escape liability, and sometimes those who have caused no harm will nonetheless be held accountable; etc. The question whether one could justify using illegal force to right a particular injustice that results from the imperfections of the police and the judicial system is beyond the scope of this discussion.

2. The point at which good liberals cannot reasonably disagree is obviously itself going to be a contested point, but I do not deal with it here. For a nuanced discussion of how to handle such disputes, particularly if one is a government agent, see Arthur Applbaum, "Democratic Legitimacy and Official Discretion," *Philosophy & Public Affairs* 21 (1992): 240–74.

Ethics 111 (January 2001): 344–373
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religious differences.[3] Nevertheless, he argues that reasonable people recognize that only by accepting the "obligations of legitimate law"[4] can they *respectfully* settle disputes about "constitutional essentials and matters of basic justice," namely, "questions of fundamental political justice."[5] This is how he puts the point, using the example of abortion:

> Disputed questions, such as that of abortion, may lead to a stand-off between different political conceptions, and citizens must simply vote on the question. . . . The outcome of the vote is to be seen as reasonable provided all citizens of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason. This doesn't mean the outcome is true or correct, but it is for the moment reasonable, and binding on citizens by the majority principle. Some may, of course, reject a decision, as Catholics may reject a decision to grant a right to abortion. . . . But they can recognize the right as belonging to legitimate law and therefore do not resist it with force. To do that would be unreasonable.[6]

In what follows, I explain how Rawls's conception of reasonable citizens accepting the obligations of legitimate law provides a framework for understanding why there is ideally a strong prima facie duty to forswear illegal force. But I also argue that it provides *only* a prima facie duty to forswear illegal force. For even in an ideal, pluralistic, liberal society, issues may arise, such as abortion, with respect to which some reasonable

3. See, e.g., John Rawls, "The Idea of Public Reason Revisited," *Chicago Law Review* 64 (1997): 765–807, pp. 765–66 (hereafter cited as PRR), and *Political Liberalism* (New York: Columbia University Press, 1993), pp. 36–37 (hereafter cited as *PL*).

4. PRR, p. 782.

5. On the notion of "respect," see, e.g., *PL*, p. 303: "The problem of specifying the basic liberties and grounding their priority can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect." See also the many references to the "duty of civility" in PRR; e.g., on p. 769. Quotations from PRR, p. 767.

6. *PL*, pp. lv–lvii. A nearly identical passage can be found in PRR, pp. 798–99. This passage may seem to suggest that current law on abortion, established in Roe v. Wade, 410 U.S. 113 (1973), and upheld most recently in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), is less legitimate than it could be because there was never a general vote on the question. There are those who hold that position. See, e.g., Justice Scalia's dissent in Casey, 505 U.S. at 979. But even though *Roe* was the result of an expansive reading of the Constitution by the Justices on the Supreme Court, rather than a direct vote of the people, I assume it would count as legitimate law for Rawls. I believe Rawls is using the concept of a vote as a synecdoche for any form of legitimate political action under a democratic constitution. Disputes over Marbury v. Madison, 5 U.S. 137 (1803), notwithstanding, the Supreme Court is the legitimate interpreter of the Constitution, and even if *Roe* was not the best interpretation of the Constitution, it was a reasonable one. Indeed, in the PRR passage, Rawls changes the language to read "the outcome of the vote . . . is to be seen as legitimate provided all *government* officials, supported by other reasonable citizens, . . . sincerely vote in accordance with the idea of public reason" (PRR, p. 798; emphasis added). Presumably Rawls means all government officials with the relevant jurisdiction. Finally, it should be noted that the people could always repeal *Roe* by amending the Constitution.

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people will think that the law unacceptably tolerates, establishes, or embodies a grave injustice.[7] (I refer to these possibilities collectively under the heading of unjust laws.) If such issues arise, I claim that objectors, who are as reasonable as a liberal has reason to be, may sometimes rightfully conclude that illegal force is morally appropriate.

When I say that people who use illegal force in an ideal, pluralistic, liberal society can nonetheless be as reasonable as a liberal has reason to be, I do not mean to condone their choice. In particular, I think that those who use illegal force to attack the right to an abortion are doubly wrong. They are wrong about the justice of abortion,[8] and they commit unjust acts in the name of an unjust cause. I support coming down on them with the full force of the law. My point is that one cannot infer that they are less reasonable than they ought to be simply from the fact that they are willing to use illegal force. For if we assume, for the sake of argument, that they are right about the injustice of abortion, and that they have little hope of taking legal actions which would bring the law in line with the demands of justice any time soon, then they may be, depending on a host of other details, morally justified in using illegal force.[9]

My aim in this article is not to undermine hope for a society more generally ruled by legitimate law. Surely, we have made great progress in creating a more equal society, replacing relations that were grounded simply in power with relations grounded in liberally defensible law.[10] And we can hope to go further in promoting the rule of legitimate liberal law: continuing to tailor the substance of the law so that it better reflects plausible conceptions of justice; adjusting the processes of law making and adjudication so that they better embody fair, non-corrupt contests of conflicting interests and attempts to accommodate conflicting con-

7. Law can tolerate injustice by allowing people in their private capacity to take unjust actions; it can establish injustice by providing rules for interaction which result in actions that by themselves are not unjust but have unjust cumulative effects; it can embody injustice by empowering or commanding state actors to unjustly deprive people of their life, liberty, or property.

8. See Alec Walen, "Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus: Another Foundation for the Right to an Abortion," *Brooklyn Law Review* 63 (1997): 1051–1140.

9. In *PL*, p. 243, n. 32, Rawls seems to claim that all reasonable liberals will agree that a woman has "a duly qualified right to decide whether or not to end her pregnancy during the first trimester." But Rawls specifically addresses that footnote in PRR, p. 798, n. 80: "Some have quite naturally read the footnote . . . as an argument for the right to abortion in the first trimester. I do not intend it to be one." He insists he was merely trying to illustrate what it would mean to have a position that could not be supported with public reason, not to argue that the denial of a first semester right to abortion is such a position.

10. These relations were undoubtedly propped up by commonly held illiberal beliefs in natural hierarchies of authority. To that extent, they would not have been felt as expressions of raw power. But anyone capable of shaking the shackles of such illiberal belief would then have been confronted with what could only seem to be raw power trying to keep her in her traditional place.

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ceptions of justice; and better enforcing the law so that social interactions are generally protected from the illegal and unjust use of force. But in asking what we can hope for, we should embrace only ideals that are made for this world, a world in which even fully reasonable people have conflicting interests and conflicting conceptions of justice.[11]

I proceed as follows: first, I discuss the concepts of reasonableness and illegal force. Second, I argue for the general proposition that when the law is sufficiently unjust, then illegal force, within certain limits, may be used if it promises to rectify the injustices more effectively than any legally available means. Third, I present an argument that uses Rawls's conception of reasonable citizens trying to cooperate in a pluralistic, liberal society to ground the claim that, ideally, people should forswear illegal force. Fourth, I argue that the duty to obey legitimate law, even in an ideal liberal democracy, is not absolute, and that one need not forswear illegal force when the law is substantially unjust. Finally, I address four objections to my claim that a good liberal can be as reasonable as one has reason to be and still use illegal force in an ideal pluralistic liberal society.

THE CONCEPTS OF REASONABLENESS AND ILLEGAL FORCE

Before addressing the substantive arguments, I pause to make preliminary comments on the two central concepts of reasonableness and illegal force. Reasonableness concerns one's willingness to engage in the task of seeking fair terms of cooperation which all can accept. The principle of reciprocity dictates that if others are willing to propose and abide by fair terms of cooperation, then one should be willing to do so as well. But the notion of reasonableness is not meant to imply that one would accept any terms proposed by others, even if fundamentally unjust. "The criterion of reciprocity is normally violated whenever basic liberties are denied."[12] If the terms one is presented with are too unjust to be acceptable, then one can make a reasonable decision not to agree to be bound by them.[13]

Reasonableness does not depend, however, on the correctness of one's view of justice. If one would have sufficient moral reason to use illegal force were one's underlying claims of justice true, and if one cannot be morally or epistemically faulted for having one's views (that is, they are views about justice which reasonable people could have), then one cannot be accused of being unreasonable simply because one's substantive views about justice are actually false. If it turns out that one's

11. This commitment to realistic ideals is at the core of political liberalism, premised as it is on the inevitability of reasonable disagreement in a free society.

12. PRR, p. 771.

13. As Hobbes says, "The laws of nature oblige *in foro interno;* that is to say, they bind to a desire they should take place: but *in foro externo;* this is, to the putting them in act, not always." *Leviathan* (New York: Collier, 1962), chap. 15, p. 123.

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underlying claims of justice are false, what has gone wrong is not that one has failed to give proper credit to the importance of seeking fair terms of cooperation which all can accept. One has gone wrong on a more substantive level.

Turning to the concept of illegal force, there are two ways one could use it: against the state in the effort to change the law and against individuals in the effort to prevent the law from having its unjust effect in particular cases. I refer to these respectively as political and nonpolitical illegal force.

Political illegal force is clearly what Rawls has in mind when he says that using illegal force would be unreasonable. For it is political illegal force that directly conflicts with the idea that the coercive power of the state needs to be justified to the reasonable citizens of the state.[14] Nevertheless, there are two reasons why I think it is important to include the category of nonpolitical illegal force, even if only in a derivative manner. First, there are many occasions when the concerns that could motivate the use of political illegal force could just as well motivate the use of nonpolitical illegal force. Moreover, these forms of illegal action not only rest on a common desire to fight injustice, they also represent two poles between which lies a middle ground involving some hope that one's private illegal action will also contribute to a change in the offending law. For example, if one believes that the legal right to have an abortion is a grave injustice, one might choose to block access to an abortion clinic believing that by doing so one will save certain fetuses from an unjust demise, while remaining agnostic about whether one will thereby bring about a change in the abortion law. Any theory of illegal force would be artificial if it discussed, or worse, applied to, only the purely political use of illegal force.

Second, when properly delimited, nonpolitical illegal force, like political illegal force, involves taking actions that others can straightforwardly object to as disrespectful. The proper delimiting factor is the presence of at least a threat to violate the legal rights of others if necessary to achieve a certain goal. This violation, whether imminent or actual, of the legal rights of others distinguishes illegal *force* from other illegal actions, such as, for example, privately using illegal drugs. These other illegal actions, which involve neither the ambition to change the law nor the threat to violate or the actual violation of the rights of others, raise a different kind of question about the obligation to obey the law more generally, one which I do not address here.[15] My concern is with

14. This point is discussed in some detail near the end of the section examining the argument to forswear illegal force in an ideal, pluralistic, liberal society.

15. Many of the discussions of the general duty to obey the law concern cases in which the law is simply overly broad, and one could confidently break it without violating anyone's rights or undermining the general respect for the law. See, e.g., M. B. E. Smith,

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those cases in which one is at least arguably morally justified in violating the legal rights of some to protect oneself or others from injustice in the law.[16]

THE JUST USE OF ILLEGAL FORCE IN A NONIDEAL SOCIETY

Justice requires us to respect each other's moral rights. Morality more broadly requires us to promote justice. As members of society, this broader duty requires us to ensure that the law that governs society is just, and that social conditions in general are just. Apathy about injustice is not a form of unjust behavior the way violating the rights of another is, but injustices are nonetheless not to be taken lightly.

Recognizing the importance of pursuing justice, Rawls acknowledges that there are conditions in which people have a moral right to engage in certain illegal activities to fight legally sanctioned substantial injustices.[17] If society is basically just, but certain unjust practices—unjust on any reasonable liberal conception of justice—seem resistant to legal reform pressures, then one may consider engaging in civil disobedience. Civil disobedience involves using only marginally harmful, nonviolent forms of illegal action, such as trespassing or the public flouting of an unjust legal restriction, to make a basically just society reflect upon its shortcomings as it otherwise would not and thereby accelerate reform.[18] If society is not basically just, then more militant forms of action may be called for. Under those conditions, one would not be particularly hopeful that one can cause people to recognize the injustice of the practices they support (at least not immediately); rather one would hope that by

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"Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973): 950–76; Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986), chaps. 2–4; Heidi M. Hurd, "Challenging Authority," *Yale Law Journal* 100 (1991): 1611–77; Fred Schauer, "Rules and the Rule of Law," *Harvard Journal of Law and Public Policy* 14 (1991): 645–94; and Larry Alexander, "The Gap," *Harvard Journal of Law and Public Policy* 14 (1991): 695–701. My concern in this article is not with overbreadth but with disagreements over the requirements of justice.

16. The choice to have an illegal abortion, if the law were changed so that fetuses were accorded a legally protected right to life, would present a difficult case to categorize. On the one hand, violating the fetus's legal right to life could count as illegal force. On the other hand, if a fetus cannot be the bearer of moral rights on its own, then violating its legal right shows it no disrespect and cannot count as the use of illegal force. The issue is further complicated insofar as there is reasonable disagreement about whether the fetus can be a bearer of moral rights. I proceed on the assumption that the decision to have or to help another obtain an illegal abortion would involve nonpolitical illegal force only if one used illegal force to ensure that the option is available.

17. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), §§ 53, 55–59 (hereafter cited as *TJ*).

18. See *TJ*, § 55, esp. at p. 366. On Rawls's understanding, civil disobedience "does not require that the civilly disobedient act breach the same law that is protested." *TJ*, § 55, p. 364.

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using illegal force one can more quickly put an end to fundamentally unjust practices or at least minimize their harm.[19]

Rawls deals with civil disobedience and militant action under the heading of nonideal theory. Ideally one would not have to flout the law, violate people's property rights, or harm them physically, or threaten to do the same, in order to rectify an unjust law or draw attention to unjust social conditions. One would instead be able to bring about whatever relatively minimal changes are called for through political activity (broadly understood to include not only voting but also lobbying, public speaking, political organizing, and the like), public interest legal action, or private enterprise. It is only when the legal options do not allow sufficiently quick and effective redress of sufficiently egregious injustices that one should even consider resorting to illegal force.

There are three reasons why it is important to work within the law if possible. First, there is the Hobbesian reason, that illegal force undermines the peace we all want.[20] Second, there is the Kantian reason,[21] that the law provides settled conventions necessary for determining what rights people have—allowing them to form legitimate expectations about their property, their liberty, and even their right to life and limb—such that violations of the law that harm other people's legally protected interests are presumptively violations of their moral rights.[22] Third, there is the democratic-egalitarian reason, that in a democracy one should respect the law chosen by the people as long as the democratic processes were sufficiently fair and open, for the alternative—given that one has failed to convince the majority of one's point of view—is to treat the

19. *TJ*, § 55, p. 367.

20. Rawls thinks such concerns are relevant in forming a modus vivendi under law; *PL*, p. 159. Presumably they still operate when the social contract is more solid.

21. I call this "the" Kantian reason, because I think it is the most important Kantian reason. Another kind of Kantian reason focuses on fairness: that if one thinks the law should generally be obeyed, then one cannot give oneself a special exemption. I don't focus on this appeal to fairness as a separate reason to obey the law, but I do discuss it in the context of forswearing political illegal force in an ideal democracy.

22. The right to life and limb may seem to be clear enough that law is not needed to "fix" it. But even if morality draws some fairly clear lines to which the law must hew regarding when killing or harming are acceptable (e.g., self-defense), there are other questions for which the law is called upon to fill in the blanks: what kind of risks can people impose on each other? When can one recover for a harm? When can one demand aid, either of another, or of society generally? And even in areas such as self-defense, there are questions, such as when must one retreat, which the law is called upon to settle.

See *TJ*, pp. 235–36, on legitimate expectations. For the Kantian source, see Immanuel Kant, *The Metaphysical First Principles of the Doctrine of Right*, trans. Mary Gregor (New York: Cambridge University Press, 1991), chap. 1, which is well illuminated by the discussion in Christine Korsgaard, "Taking the Law into Our Own Hands: Kant on the Right to Revolution," in *Reclaiming the History of Ethics*, ed. Andrews Reath et al. (New York: Cambridge University Press, 1997), pp. 300–303.

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democratic majority as not being as well qualified or as entitled to make law as one takes oneself to be.[23]

The importance of the law both in providing peace and setting the bounds of our moral rights and, assuming the law has a democratic pedigree, the importance of respecting the equality of one's fellow citizens ground what Rawls calls "our natural duty to support and further just institutions."[24] Because political institutions are necessarily imperfect, Rawls claims that this duty extends, in a nearly just state, to a duty "to comply with unjust laws provided that they do not exceed certain bounds of injustice."[25] Stated in those terms, this may seem to be a rather sweeping claim, to the effect that one should always obey the law, no matter how trivial it is and how inconsequential its violation would be, unless the law is substantially unjust. But a more plausible reading is that Rawls claims that one should obey the law, even if somewhat unjust, insofar as disobeying the law would have any nonnegligible tendency to undermine basically just institutions.

Since using political illegal force would have exactly the aim of forcing the hand of the basically just institutions, it clearly should not be taken up at the first sign of injustice. When it can be used depends on the type of illegal force being considered. One need not hold off on the use of civil disobedience until the injustice is dramatic. As Rawls says, civil disobedience "expresses disobedience to the law within the limits of fidelity to the law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, [and] by the willingness to accept the legal consequences of one's conduct."[26] Insofar as one is considering the use of more militant illegal force, one should be that much more hesitant to use it. With respect to nonpolitical illegal force, since people have a moral claim to the enjoyment of their legitimate expectations of others, one should recognize that not every injustice can justify nonpolitical illegal force either. And with regard to both sorts of illegal force, even if the injustice in the law is fairly extreme and society is far from any sort of democratic ideal, there are still limits on how one can promote justice. Among these limits are that one should restrict oneself to using force that is proportional to the wrong one is trying to right, that one should direct one's actions

23. Rawls discusses majority rule in *TJ*, p. 356, noting that "if minority rule is allowed, there is no obvious criterion to select which one is to decide and equality is violated." He discusses the connection between legitimacy and following procedures in *PL*, pp. 427–29, noting that a "legitimate procedure is one that all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking" (p. 428).

24. *TJ*, p. 334.

25. *TJ*, p. 355. See also *PL*, p. 428.

26. *TJ*, p. 366.

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against those most responsible for the injustice, and that one should avoid treating others as mere means of fixing the law.

Nevertheless, although not every injustice can justify using illegal force, the three reasons to forswear illegal force are all defeasible by sufficiently egregious injustices. The desirability of peace may be less than that of promoting justice, people's claims to reap the benefit of their legitimate expectations may be weaker than the claims of others to have a fundamental injustice righted, and the law may either lack a democratic pedigree, or even if it has one, the majority's disrespect for the rights of others might undermine the moral status of the law.[27]

THE ARGUMENT TO FORSWEAR ILLEGAL FORCE IN AN IDEAL, PLURALISTIC, LIBERAL SOCIETY

What distinguishes an ideal democracy from a nonideal one is that in an ideal democracy the law results not only from fair democratic procedures, but it is supported by reasonable people who think that it is just and who do as much as can be expected to try to justify it to their fellow citizens. Rawls claims that in such a democracy, one ought to forswear the use of political illegal force. Indeed, he says that in an ideal democracy "there is strictly speaking no case for civil disobedience and conscientious refusal."[28] Yet Rawls admits that a reasonable liberal could judge that the law in an ideal democracy is substantially unjust. So the question is, how can one lose the moral right to use illegal force to fight an unjust law simply because it is supported by reasonable people who think that it is just and who do as much as can be expected to try to justify it to one?

Rawls's answer is that reasonable people who disagree about what justice calls for still agree that the political institutions of an ideal democracy give rise to legitimate law. They form an overlapping consensus on the thought that an ideal democracy is as good an institution for respectfully settling, for the present, disputes about matters of fundamental political justice as one can hope for. Moreover, they agree to abide legiti-

27. Consider, for an extreme but clear example, the claims of antebellum slave owners to the enjoyment of their slave property. When weighed against the claims of the slaves to be free, the slave owners' claims shrink to insignificance. More generally, Rawls notes that "the parties [to the social contract] agree to put up with unjust laws only on certain conditions. Roughly speaking, in the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case." In the event that these conditions are not met and the majority acts in ways that are not "consistent with the understanding of the rights of the majority in the constitutional convention," one need not "acquiesce" in the unjust law; *TJ*, p. 355.

28. PRR, p. 787, n. 57. One explanation for this claim regarding civil disobedience is that it "addresses the sense of justice of the majority of the community" (*TJ*, p. 364). Insofar as others have already reasoned conscientiously within a liberal framework, the consciousness raising role of civil disobedience would be out of place. But clearly Rawls is making a bigger point than this.

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mate law. As Rawls says of legitimate law, "It may not be thought the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her as a citizen and is to be accepted as such."[29]

There is, however, a gap in this answer. Even if one could not hope to improve upon the institutions and practices of an ideal democracy, there is still a question why one should forswear illegal force if the law, legitimate as it may be, is nonetheless unjust. This gap cannot be filled simply by defining a reasonable person as one who would forswear illegal force under such conditions; one then wonders why one should be reasonable. Indeed, one is still left wondering why the injustice in the law ceases to be sufficient ground for telling the majority that they have failed to provide terms of cooperation that one can agree to. The fact that they cannot be procedurally faulted is not, by itself, an obviously sufficient answer. We need a substantive moral argument for the proposition that injustices in the law cease to provide moral ground for using illegal force once the institutions and practices for lawmaking can no longer reasonably be faulted.

There are two Kantian arguments that can be offered to bridge this gap. First, there is a universalization argument: since one could not will a better system, one should live within the system as it is; anything else would be an attempt to live by special rules, and practical reason does not allow anyone a special exemption from the general rules. Second, there is a respect for others as ends in themselves argument: since others are doing all that one can expect of them in trying to justify the use of the coercive power of the state, one would show them great disrespect by stepping outside of the framework most conducive to settling political disputes in an egalitarian way and using force to redirect the coercive power of the state.

The position with regard to nonpolitical illegal force follows on the heels of the position with regard to political illegal force. The reason not to engage in nonpolitical illegal force in general is that people's legal rights have a moral status. Either they reflect prior moral rights, or they give rise to legitimate expectations, which are moral claims. In a nonideal world, one nevertheless has to expect that others will sometimes be morally justified in violating one's legal rights; though one has a moral right to rely on them given that the law is what it is and one has to make plans as best one can, one can also understand how rights based on a set of laws more or less corrupted by injustice may lose in the moral balance to more pressing moral claims. In the ideal world, one's plans still have to allow for the possibility that what is currently a minority view may, through legal political activity, become the law of the land. But if one reasonably thinks that the law is just, one has no reason to recognize the adequacy of the justification others may present for violating one's legal

29. PRR, p. 770.

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rights. Accordingly, one who thinks the law is just can reasonably expect that her legal rights are morally secure, at least from violation by reasonable people. And while one who thinks the law is unjust has a moral duty to support changes which would make it just, she should not have to suffer violations of her legal rights for the sake of those harmed by the injustice in the law that those who think the law is just do not have to suffer. Thus one should forswear nonpolitical illegal force in an ideal, pluralistic, liberal society.

I proceed now to discuss first what Rawls thinks is the essence of an ideal, liberal democracy, and why he thinks it is as good as it gets. I turn then to the two Kantian arguments against political illegal force. The argument concerning nonpolitical illegal force is already fully developed.

1. *Public Reason and the Idea of an Ideal Democracy*

The forum in which citizens can try to work out fair terms of cooperation as equals is a democratic government. Rawls focuses in particular on constitutional or what he considers the same, deliberative democracy.[30] As he says, "The definitive idea for deliberative democracy is the idea of deliberation itself. When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions."[31] Of course, unanimity is not to be expected in most matters, so a constitutional democracy must use certain procedural devices to resolve those questions, at least for the moment.

Besides having adequately fair procedures for making political decisions, an ideal democracy is characterized by the fact that the government officials and the citizenry as a whole approach the task of finding fair terms of cooperation, at least as regards constitutional essentials and matters of basic justice,[32] as reasonable people, committed to public reason and the principle of reciprocity. Such reasonable citizens elevate a democracy to ideal status because they are as respectful and willing to compromise in order to find fair terms of cooperation as one could expect anyone to be.

To flesh out this last claim, I will do a quick survey of the concepts Rawls introduces to frame the idea of a reasonable citizen. I start with an examination of Rawls's definition of reasonable citizens: "Citizens are reasonable [1] when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one

30. PRR, p. 772.

31. PRR, p. 772.

32. Presumably, when what is at stake is not a constitutional essential or a matter of basic justice, citizens can simply vote their interests, and something like a utilitarian default can determine, e.g., where to build a stadium, or whether to subsidize a certain industry, etc.—though even for these less fundamental issues, fairness should also be a consideration.

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another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and [2] when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms."[33] The first prong shows that reasonable citizens are willing to be guided by a conception of political justice, not by what is in their individual best interest. The second prong, embodying the principle of reciprocity, shows that reasonable citizens would accept the sacrifice of their interest as long as others would do so as well. It is hard to see how one could seek more willingness to cooperate without asking people to denigrate their own point of view or to treat themselves as less worthy than others.

There is, however, one other dimension of the cooperative venture which also has to be addressed, namely, how reasonable people should limit the terms they offer each other so that it is maximally likely that they can find terms that they can all agree upon. To fill this gap, Rawls introduces the concept of public reason.

Public reason is that form of reason the content of which is limited to what Rawls calls "political conceptions of justice."[34] Political conceptions are to be distinguished from conceptions that involve what Rawls calls "comprehensive doctrines." A comprehensive doctrine "covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner."[35] It "includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct."[36] In contrast, a political doctrine concerns only "basic political and social institutions (the

33. PRR, p. 770. Rawls introduces a third aspect of being a "reasonable person" (I don't believe he means a contrast with a "reasonable citizen") in *PL*, p. 54: "the willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime." See also PRR, p. 805. The burdens of judgment explain disagreement without impugning "the reasonableness of those who disagree" (*PL*, p. 55). At that general a level, they seem unproblematic as a condition for "the idea of reasonable toleration in a democratic society." However, when they are specified to include such factors as the difficulty of assessing evidence and the difficulty involved in making overall assessments of normative considerations, Rawls gets into trouble; see *PL*, pp. 56–57. As Leif Wenar points out in "*Political Liberalism:* An Internal Critique," *Ethics* 106 (1995): 32–62, pp. 42–44, modern Catholic doctrine is tolerant of others the way a reasonable doctrine should be but rejects the kinds of factors Rawls lists in his discussion of the burdens of judgment as not relevant to explaining disagreement and not necessary for toleration. I would solve this problem by dropping reference to the burdens of judgment as part of the definition of a reasonable person or citizen. It is enough that a reasonable citizen have some way of recognizing that those with whom she disagrees are not ipso facto unworthy of respect as free and equal citizens.

34. PRR, p. 773.

35. *PL*, p. 59.

36. *PL*, p. 13.

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basic structure of society)," including the rights and liberties of people qua "free and equal democratic citizens."[37]

There are two reasons why using public reason will help reasonable citizens find terms of cooperation that they can all accept. First, using public reason ensures that the state does not get needlessly involved in disputes between comprehensive doctrines. Public reason, being concerned only with the basic structure of society, cannot be used to justify the suppression of comprehensive doctrines or even to engage their nonpolitical aspects, except indirectly, insofar as they are incompatible with a liberal constitutional regime.[38] Rawls does not think comprehensive doctrines should be strictly excluded from public discourse. His position is that political views supported with reference to comprehensive doctrines should also be supported, "in due course," by public reasons. He calls this "the proviso."[39] If one uses public reason in accordance with the proviso, that will ensure that one does not support laws that overreach the political sphere.

Second, public reason provides a framework in which people divided by reasonable pluralism with regard to their comprehensive doctrines can come together and reason using shared liberal principles and values. Reasonable pluralism with respect to comprehensive doctrines is pluralism that does not reflect people's self- or class-interest, but rather reflects those differences that arise from the free use of human reason even when people are not moved by self- or class-interest.[40] People divided by reasonable pluralism can still form an overlapping consensus on liberal principles and values because there are many ways to ground such a commitment.[41] Using public reason ensures that people stay within the area of overlapping consensus. It does not ensure that they will find agreement on the interpretation and application of those principles and

37. PRR, pp. 776, 780. Rawls explains the idea of the basic structure in *PL*, p. 258: "The basic structure is understood as the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation." Later he says, "What is distinctive about the basic structure is that it provides the framework for a self-sufficient scheme of cooperation for all the essential purposes of human life, which purposes are served by the variety of associations and groups within this framework" (*PL*, p. 301). In *TJ*, p. 7, he defines "major social institutions": "By major institutions I understand the political constitution and the principle economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions."

38. Public reason "does not trespass on citizens' comprehensive doctrines so long as those doctrines are consistent with a democratic polity" (PRR, p. 807).

39. PRR, p. 776.

40. See *PL*, pp. 36–37.

41. See *PL*, pp. 169–71.

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values.[42] To decide between conflicting political positions—as must be done, even if only provisionally, to handle concrete questions such as whether abortions will actually be allowed or prohibited—citizens must appeal to democratic lawmaking procedures which all can accept as fair.[43] But the process of debating which laws would be most reasonable will be as inclusive and respectful as possible if people can at least agree on the terms of the debate.

One may worry that it is not possible to engage in public reasoning without ultimately engaging the whole truth as represented by one's comprehensive doctrine, making the use of public reason a kind of charade. But Rawls insists, I think rightly, that public reasons are not "puppets manipulated from behind the scenes by comprehensive doctrines." Rather, public reasons express political values as ordered by political conceptions which "should be complete. This means that each conception should express principles, standards, and ideals, along with guidelines of inquiry, such that the values specified by it can be suitably ordered or otherwise united so that those values alone give a reasonable answer to all, or to nearly all, questions involving constitutional essentials and matters of basic justice."[44] This is not to deny that political conceptions will be grounded in or in some way related to comprehensive doctrines; it is to insist that they also be "expounded apart from, or without reference to, any such wider background."[45] What is important about them is that they cohere in their own right, not that they are grounded in some particular way.

In summary, the use of public reason, in accordance with the proviso, ensures that people will not try to use the law to force their view of a good life on others, while at the same time allowing them to debate how to design the basic structure of society in terms of principles and values that they share. Without requiring people to be overly deferential to others, it ensures that political discussions are as inclusive and respectful as one could want them to be in a liberal society divided by reasonable pluralism.

If the law is not only properly supported in public reason by the relevant government officials and by other citizens, but the structure of the democratic institutions is also at least adequately fair—allowing for a full range of democratic deliberation and influence over government decision making—then one cannot complain that the law is in any way

42. Reasonable political conceptions can "differ . . . in how they order, or balance, political principles and values even when they specify the same ones" (PRR, p. 774). They doubtless also differ over such issues as probable effects of a given course of action.

43. "Some political rule of action must be laid down and all must be able reasonably to endorse the process by which a decision is reached" (PRR, p. 797).

44. PRR, p. 777.

45. *PL*, p. 12.

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lacking legitimacy.[46] It might be possible to have an alternative arrangement which would be equally legitimate and would have led to a different outcome. But if reasonable people can agree that the current arrangement is at least adequately fair, then it provides the structure for an overlapping consensus on how to resolve political disputes, and no one can reasonably object that the system needs to be reformed before it can create, interpret, and apply legitimate law. This is a fundamental point which bears repeating: if the democratic institutions are at least adequately fair, and the government officers and citizenry in general act from and follow public reason, then the law provides a point of agreement for all reasonable people; it is the best structure one can hope to find for settling fundamental political questions. When the law is already fully legitimate, using illegal force can only undermine that legitimacy by eroding its democratic pedigree.

2. *Kantian Arguments to Forswear Political Illegal Force Given That the Form of Government Is as Good as It Gets*

As indicated above, there are two Kantian arguments that link the claim that the form of government is as good as it gets with the conclusion that one ought to forswear political illegal force. The first is a universalization argument: since one could not will a better system, one should live within the system as it is; anything else would be an attempt to live by special rules, and practical reason does not allow anyone a special exemption from the general rules. Implicit in the premise that one could not will a better system is the claim that one cannot do better by willing a system very much like an ideal democracy, but with occasional exceptions for those instances when people think that the best way to end a substantial injustice is to use political illegal force. One may, of course, be tempted to take such a position when one believes that the law tolerates, establishes, or embodies a substantial injustice. But one has to acknowledge that morality makes no special dispensations for anyone. If one can ap-

46. The notion of legitimacy at issue here is fairly thick. Rawls sometimes discusses a thinner notion according to which a legal regime's legitimacy depends primarily on its pedigree, that is, on whether power was acquired as the rules in that society allow it to be acquired. Thus, in contrast with democratic legitimacy, he discusses the legitimate rule of kings or queens, claiming that their power is legitimate if "they were the legitimate heir[s] to the throne in accordance with the established rules and traditions of, for example, the English or the French crown" (*PL*, p. 427). He also speaks elsewhere of a well-ordered but nonliberal society whose "legal system satisfies certain requisite conditions of legitimacy in the eyes of its own people"; John Rawls, "The Law of Peoples," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), pp. 529–64, quote at p. 530. The thinner notion may be useful for determining whether the law deserves any respect as law, whether it can give rise to legitimate expectations, and whether it deserves respect from other countries. But with regard to the question whether one can justify using political illegal force against the law of one's own country, the thicker notion is wanted.

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peal to what one believes is a substantial injustice to justify using illegal force—despite the fact that others, presumably a majority of others, reasonably disagree—then others can too. Thus by making an exception for one's own deeply felt convictions about justice, one is committing oneself to the proposition that a state in which people try to use illegal force when they believe it necessary to right injustices in the law is better than one in which people use public reason and democratic institutions for lawmaking to settle disputes relating to matters of basic justice and constitutional essentials. This, however, can't be right. It contradicts the conclusion from the previous section. Moreover, as Rawls says, "consenting to [some democratic] procedure[s] is surely preferable to no agreement at all";[47] and presumably, it is preferable to some hybrid of agreement and resort to force. Again, quoting from Rawls, "in choosing a constitution . . . and in adopting some form of majority rule, the parties accept the risks of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative procedure. There is no other way to manage a democratic regime."[48]

The other Kantian argument appeals to the idea that one should respect one's fellow citizens as ends in themselves: since others are doing all that one can expect of them in trying to justify the use of the coercive power of the state, one would show them great disrespect by stepping outside of the framework most conducive to settling political disputes in an egalitarian way and using force to redirect the coercive power of the state. The conclusion that one would show others great disrespect by using political illegal force follows from the principle of reciprocity, which dictates that if others are showing one all the respect one could ask for, then one owes like respect in return. By using political illegal force, one abandons the attempt to justify the coercive power of the state to others.[49] Instead, one seeks to use the machinery of the state to augment one's own power and impose one's will—however much it may be directed by concerns with justice—on others. If the state has fallen from the ideal either because the democratic institutions have collapsed or at least been corrupted, or if the majority has abused its mandate by passing laws which could not plausibly be defended with public reason, then at least certain citizens can complain that they are not treated as free and

47. *TJ*, p. 354. Rawls goes on in the next sentence to recast the universalization argument: "The situation is analogous to that of the original position where the parties give up any hope of free-rider egoism: this alternative is each person's best (or second best) candidate (leaving aside the constraint of generality), but it is obviously not acceptable to anyone else."

48. *TJ*, p. 355. Immediately after saying this, Rawls discusses the conditions in which one need not be bound by unjust democratic law, but these conditions are conditions of a nonideal democracy.

49. As Rawls explains, when citizens support the actions of government officers, they must present reasons that others "can not only understand . . . but reasons . . . that they, as free and equal citizens might also reasonably accept" (PRR, p. 771).

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equal. In that case, reciprocity would not require those citizens to forswear political illegal force, and it is no stretch to assume one could take up their cause on their behalf. But if the law's pedigree traces to the operation of the institutions of an ideal democratic state, then no one can complain of not being treated as a free and equal citizen. Therefore one has no excuse to treat others as less than free and equal citizens, which one would do by arrogating to oneself the power to direct the law in disregard of their free and equal democratic input.

In sum, an ideal, pluralistic, liberal society governed by a deliberative constitutional democracy in which the government officers and citizens in general act from and follow public reason is as good as it gets. It may still produce unjust laws, but it will only do so because many if not most in the society reasonably, if mistakenly, think the law is just. In that event, a reasonable person must forswear political illegal force, even if convinced that the law is unjust. Using political illegal force would be inconsistent with the Kantian principles of universalizability and respect for one's fellow citizens as ends in themselves.

THE ARGUMENT FOR ILLEGAL FORCE EVEN IN AN IDEAL, PLURALISTIC, LIBERAL SOCIETY

I tried to present the argument in the last section as sympathetically as I could, because I think it goes a long toward helping us to understand why we should, in general, forswear illegal force, at least insofar as our situation approximates an ideal, pluralistic, liberal society. But I am still not convinced. I believe there is both an intuitive and an analytical case to be made against Rawls's position on the duty to forswear the use of illegal force in a society governed by fully legitimate law.

My intuitive objection to Rawls is simply that I find his position implausible with regard to the right to an abortion. I believe that a woman being denied the right to an abortion is not so different from a person being denied the right to religious freedom. Both are substantial injustices. Of course, from a liberal standpoint, the latter denial is beyond the pale, whereas the former is not. That is, the case for freedom of religion is paradigmatic and clear in a liberal society, whereas the case for abortion rights is less clear. But this difference in clarity does not seem to swamp the relevance of the degree of injustice at stake.

I imagine that the abortion debate could be carried forward much as it is in an ideal democratic society, and it would be easy for a "pro-choice" person such as myself to smugly insist that "pro-life" people ought to restrict themselves to lawful and nonthreatening forms of protest. But I ask myself how I would want to behave if the tables were turned. Suppose *Roe v. Wade* were overturned and a democratic majority in the country decided to restrict abortion to a very small range of cases, say only where the woman's life is in grave danger because of the pregnancy *and* she either responsibly used birth control which happened to

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fail or her pregnancy resulted from rape.[50] I believe such a law would infringe on women's fundamental liberty rights.[51] As a result, I hope that if such a law were passed I would have the courage to help women, at least those I know, to get illegal abortions if they wanted them. While this alone may not indicate that I would be willing to use illegal force, I would hope also to have the courage, if the occasion presented itself, to use some degree of illegal force, both political and nonpolitical, to promote abortion rights. That is, I would hope to have the courage to use at least some degree of illegal force to defend the illegal operations of an underground clinic (compare helping out on the underground railroad in pre–Civil War times), and the courage to engage in civil disobedience if it promised to help restore the legal right to an abortion. Thus there is no question in my mind that I would reject the constraint Rawls proposes, were the tables turned in the abortion debate.

I cannot see how the law would have more normative force if I were on the other side of the abortion issue. I imagine that if I believed that abortion were murder (or a wrong of nearly that magnitude), I would hope to have the courage to join forces with those who are willing to put protection of innocent fetuses ahead of respect for legitimate law by, for example, sabotaging abortion clinics and illegally blocking access to them. I might even threaten to use, and if necessary actually use, coercive force on those abortionists that I considered systematic murderers.[52] In reality I am glad that relatively few "pro-life" people are willing to go that far.[53] I suspect that many are not so bold because they do not really think that abortion is a wrong like murder.[54] But with respect to those who do think abortion is that kind of wrong, and who use force to try to stop it, I cannot fault them for failure to realize that they owe more respect to the law per se. And again, I do not believe the situation would change if this same conflict were to take place in an ideal democracy.

50. Even this is more liberal than some pro-lifers would allow, the Pope included. See Pope John Paul II, *The Gospel of Life* (*Evangelium Vitae*) (New York: Knopf, 1995), pp. 101–6.

51. See Walen, "Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus."

52. If one saw someone approaching another with the intent to kill that other unjustly, one would hope to have the courage to use whatever force was necessary to prevent the killing, regardless of whether such force were legal or not. If one thinks abortion is such an unjust killing, how could one not draw the analogy? I owe thanks to Leanne Coyne for reminding me of this.

53. But there are some. As of 1995, it was reported that "the tally of violence over the past 12 years includes 123 cases of arson and 37 bombings in 33 states, and more than 1,500 cases of stalking, assault, sabotage and burglary, according to records compiled by the Bureau of Alcohol, Tobacco and Firearms (ATF) and the clinics themselves"; Laurie Goodstein and Pierre Thomas, "Clinic Killings Follow Years of Antiabortion Violence," *Washington Post* (January 17, 1995), p. A1.

54. See Ronald Dworkin, *Life's Dominion* (New York: Knopf, 1993), pp. 30–32, 68–69 (suggesting that the abortion debate does not turn so much on whether a fetus counts as a person, but on different views of how to take into account the "value" of human life).

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The analytical case against Rawls's position focuses on both of the Kantian arguments. First, with respect to universalization, I believe one could have reason to will that people use political illegal force if they are sufficiently convinced that it is the best way to promote justice. The resulting system would be less stable than one in which all reasonable people forswore political illegal force, but not too much less stable.[55] As long as people were careful to use illegal force in a fairly precise way, so that the offending law is changed but the system of basically just institutions is left essentially intact, a democratic society could remain stable. People would have to forsake political illegal force if it would be foreseeably too disruptive, and would have to err on the side of forsaking illegal force. But they would not have to forswear political illegal force altogether.

Of course, the claim that just institutions could survive the occasional use of political illegal force by people who hold themselves out to be reasonable does not imply that a reasonable person could choose the maxim that political illegal force can sometimes be used. To justify choosing that maxim, one would have to explain why it is reasonable to prefer what would result from the occasional use of illegal force to an ideal democracy with fully legitimate law.

I offer two reasons to think the choice of illegal force may be better. First, one might reasonably prefer a more active role in determining how a dispute is to be resolved. Though a democracy should leave one many ways to try to influence the choices the government makes, there may be times when nothing will be as effective as civil disobedience. Flouting the law has a way of grabbing attention as leafletting, lobbying, and other forms of legal public participation within one's reach may not. (Of course, if one has enough money to buy major advertisements, to arrange protest marches, and the like, one may not need to engage in civil disobedience. But not all people or groups worried about injustice will also have deep pockets.) Thus given the choice of ineffective action, which may leave one with the feeling of standing idly by, and effective civil disobedience, the appeal of the latter may be too much to pass up. The opportunity to be more active in support of justice when one hears its call may be worth the risk of losing to a truly unjust position supported with illegal force.

The second reason to think that illegal force may be better helps to explain why one might be willing to make the trade-off of being more proactive and knowing that others with whom one disagrees will too: one might have faith that the truth about justice will win out. One might

55. I use the concept of stability that Rawls discusses in *PL*, pp. 142–43. My concern is both with the prospect that "those who grow up under just basic institutions acquire a sense of justice and a reasoned allegiance to those institutions sufficient to render them stable" and with maintaining an overlapping consensus on public reason and the democratic institutions as the source of legitimate law.

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think that justice will be more tenacious than injustice. More specifically, one might think that it will almost always be difficult to change the status quo; people get invested in it, and they approach change skeptically. If the law is unjust, it may take more than a little convincing to make it just, and illegal force may be more effective in overcoming that psychological barrier than any set of legal options.[56] But there may be an asymmetry such that once justice is established, it will be fairly resilient. That is, while illegal force may be effective in changing the law to make it more just, it may not be particularly effective in changing the law to make it less just. If one has this faith in justice, one might support the occasional use of illegal force. It might do good and would be less likely to do harm.

One could argue that this faith in justice, this faith that truth will win out, flies in the face of history. Certainly the last century was full of sad examples of societies succumbing to the most horrifically unjust forces: Nazis, Stalinists, the Khmer Rouge, tribal genocide in Rwanda, and so on. But one could also argue that these countries were in such bad shape, were so far from an ideal, liberal democracy when the murderous forces took over, that they show nothing about the stability of justice. And one could optimistically point to the progress made over the past few centuries in many countries, expanding suffrage and eliminating at least the overt forms of discrimination against minority or previously disempowered segments of the population. Thus I assert that one could reasonably believe that even in an ideal democracy, the occasional use of illegal force would have a tendency to promote rather than hinder justice. The state would always be entitled to oppose illegal force with force, but it would tend to be more successful in doing so when the illegal force is used on behalf of unjust causes than when it is used on behalf of just ones.

Now, with respect to the argument that people should be treated as ends in themselves, equals worthy of respect, there are two responses. First, rights claims in general have to be seen in context, and even fairly strong claims may sometimes have to give way in the interest of saving others from harm. In that vein, the right to be given a justification that one can accept, when matters of fundamental political importance are at stake, is not absolute. Second, if one is supporting a law that is actually unjust, one is not fully respecting others, and the principle of reciprocity is less stringent than it may have at first seemed.

To illustrate the proposition that rights claims have to be seen in context, consider the claim not to have a lethal object turned upon one. This is a fairly robust claim, not to be disrespected lightly, but if the object is heading toward five others and the only way to save them is to turn

56. This is not to say that the people who support the status quo do so in bad faith. The tendency not to recognize the need for change could be a factor in the burdens of judgment.

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it upon another, then it may be so turned. That is the lesson of the now famous Trolley Problem.[57] I am not suggesting that all rights claims are equally affected by a utilitarian calculus. The claim not to be used as a means of stopping a trolley, when the cost to one would be one's life, is more robust than the interest of even a great number in being saved from the trolley.[58] But the claim not to be harmed does not give rise to an absolute right, and one can sometimes justify inflicting harms on innocent people if the goal one is serving is sufficiently important.

Consider now a woman's claim to go to an abortion clinic. If she reasonably believes that abortion is permissible, and if the law gives her the right to get one, then she is blameless as a murderer is not. But if abortion is a wrongful killing, then aborting a fetus would nonetheless be a great injustice. Using force to stop her from getting an abortion would violate her legitimate expectations, but it is implausible that such expectations would necessarily tip the scales against doing something morally equivalent to preventing a wrongful killing. Likewise, her claim not to be forced by the law either to give up the option of having an abortion or to have to seek an illegal abortion—when the law reflects the influence of political illegal force rather than simply reflecting the will of a democratic majority—could pale in comparison to the claim of the fetus not to be unjustly killed.

Turning to the specific claim to be given a justification, the natural thing to say is, Why would one think such a right is absolute? (Though this is a dangerous path to go down; the twentieth century is littered with the corpses of people disposed of by dictators who brooked no dissent.) There is a kind of Kantian universalization argument one could deploy here. The claim is that one cannot help but insist on justifications that one would accept oneself, and that one therefore is committed to giving such justifications to others. This argument does not stand up to scrutiny, however. Why can we make an exception for the unreasonable and not for the substantively mistaken? Indeed, making an exception for the substantively mistaken is not clearly incompatible with Kantian universalization. For one can step back and consider oneself from the third-person perspective, from which one can imagine saying that when others support law with objectively sufficient reasons, any objection one has is wrong. Given the availability of this third-person perspective on oneself—it is taken all the time in retrospect—it seems that the concept of reciprocity does not require one to be able to justify all political choices in a way that all reasonable people can accept.

I am not suggesting that it is unimportant to justify the actions of

57. First formulated by Philippa Foot in "The Problem of Abortion and the Doctrine of the Double Effect," in her *Virtues and Vices* (Berkeley: University of California Press, 1978), p. 25.

58. See Alec Walen, "Doing, Allowing, and Disabling," *Philosophical Studies* 80 (1995): 183–215.

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the state to those who live under it. Such justification is central to the idea that the government not only should serve the people, but that it should treat all people as individuals worthy of respect whose welfare cannot be simply amalgamated. Indeed, one of Rawls's most important insights is that utilitarianism fails because it "does not take seriously the distinction between persons."[59] The practice of justifying the government to all who live under it, or more precisely to all reasonable citizens, is crucial to protecting that insight. Nonetheless, what is ultimately of first importance is justice itself, which requires that all individuals have their rights respected. If one has to force the hand of the government in a particular matter, to bring the law in line with justice, then the offense to those whose democratically enacted law is displaced may be a tolerable price to pay.

The second response to the argument against political illegal force based on respect turns on the principle of reciprocity. The argument against illegal force was based in part on the claim that those who support the democratically legitimate law are being as respectful as one could expect anyone to be and that one therefore owes them similar respect in return. But it is not so clear that they show all the respect one could expect. By following democratic procedures, they are as procedurally respectful as one could want. But if they support unjust laws, they are not as substantively respectful as they should be. Even if their mistake about justice is reasonable and one may not blame them for the disrespect they show the victims of injustice, one may consider their claims to respect compromised nonetheless. (Compare innocent aggressors, whom one can kill in self-defense, even though they are not blameworthy, and even though one would not be free to kill innocent bystanders in self-preservation.)[60]

In sum, neither the argument from universalization nor the argument from respect is convincing. One should of course be wary about using political illegal force in an ideal democracy. One should use it only if one has solid reason to believe that it will not disrupt the stability of what are basically just institutions and only if one is confident that it is the best way to bring the law more in line with justice. And, of course, civil disobedience is to be preferred over more radical forms of illegal force unless, again, it is clear that nothing but more radical force will achieve the desired result, and it is likewise clear that the result is important enough to warrant the costs. These caveats, however, should not be confused with a more general claim that it cannot be reasonable to use political illegal force against fully legitimate democratic law.

59. *TJ*, p. 27.

60. See my "Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus," pp. 1085–1107. See also Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252–90.

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The implications of what has been said for nonpolitical illegal force are twofold. First, rights claims based on legitimate expectations obviously can go in the moral balance against claims to be saved from an unjust law. As noted above, if aborting fetuses violates their moral rights in a way akin to a murder, then using force to prevent a woman from getting an abortion surely is justified, no matter what her expectations may have been. Conversely, if denying women the right to an abortion deprives them of a fundamental right to control their bodies, then using force to protect underground abortion clinics could easily be justifiable. One may not be able to justify oneself to those whose legal rights one violates, but this failure can be no more significant in the nonpolitical than in the political context.

Second, if one may be able to justify using political illegal force even against fully legitimate law, then legitimate expectations in an ideal democracy are not fully reliable. One should expect that if reasonable people think the law is sufficiently unjust, they may decide to use illegal force to oppose it. And if they can morally justify trying to use the coercive power of the state to impose their view of justice on everyone without first getting legitimate democratic support, surely they can take more direct action to promote justice.

Thus I conclude that a person with a deep commitment to liberal justice, with a deep appreciation for the idea of public reason, and with a strong desire to respect others by using force only in accordance with legitimate law may still have reason, on occasion, to use illegal force, even in an ideal democracy governed by legitimate law. For even in an ideal democracy there will be reasonable pluralism, and the law may reflect a false view of justice. If it does, then justice may call for the use of illegal force. And even if it does not, one is not necessarily less reasonable than one should be if one makes a reasonable mistake in thinking that justice calls for the use of illegal force.

FURTHER ARGUMENTS AGAINST ILLEGAL FORCE AND REPLIES

I want now to explore briefly four other reasons that might be offered for the proposition that one should forswear illegal force, even if one thinks that a fundamental injustice is at stake, as long as one agrees that the law sanctioning that injustice is fully legitimate.

1. *The Appeal to Truth Is Incompatible with Political Liberalism*

Rawls says that if those who oppose abortion were to forcefully resist abortion laws, they would be "attempting to impose by force their own comprehensive doctrine."[61] This seems a peculiar thing to say. One can offer a public reason for using illegal force, namely, that the policy on abortion that one opposes is fundamentally unjust, a violation of the

61. PRR, p. 799.

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rights of citizens (or, in the case of fetuses, future citizens). Thus one who would break the law need not subscribe to the kind of religiously fanatical, autocratic, or dictatorial doctrines that Rawls thinks will "assert that the religiously true, or the philosophically true, overrides the politically reasonable."[62] Nevertheless, Rawls has a point. One who would have recourse to illegal force is one who has forsaken the goal of justifying the terms of cooperation to his or her equal co-citizens. And if one has done that, then it could be argued that one might as well come out directly with one's comprehensive doctrine and seek to enforce it.

The problem with this argument is that it is hyperbolic. First, there is no reason to treat all issues alike. One may think that a particular injustice is too great to be tolerated, while generally desiring to find fair terms of cooperation on which all reasonable people can agree. Second, the notion of cooperation applies at two levels, and one can cease to be cooperative at one level, while not on the other. At its base, the notion of fair terms of cooperation concerns the basic structure and the rights and liberties it establishes. On another level, the notion of fair terms of cooperation concerns the cooperative enterprise of finding the fair terms for the basic structure. One can cease to cooperate on the second level when one is convinced that those with whom one would cooperate would actually impose unjust conditions on cooperation on the first level. But in taking up illegal force and withdrawing, in a limited way, from cooperation on the second level, one is staying committed to maintaining fair cooperation on the first, more basic level. And one need not abandon one's commitment to public reason to put first-order justice first.

2. *The Burdens of Judgment Should Make One Too Diffident about One's View of Justice to Take Up Illegal Force against Legitimate Law*[63]

Rawls introduces the burdens of judgment to explain reasonable pluralism, that is, to explain why reasonable people in a free society, even when careful to avoid being biased by self- and class-interests, are likely to disagree about basic philosophic, religious, and moral matters.[64] Without getting into the content of the burdens of judgment, it is sufficient to note that Rawls himself disavows any connection between political liberalism and the burdens of judgment, on the one hand, and skepticism or diffidence, on the other. "Above all, [political liberalism] does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs."[65] This is an "above all" point because many comprehensive doctrines include reasons to be confident in those very doctrines. If polit-

62. PRR, p. 806.

63. Brian Barry seems to embrace this view in *Justice as Impartiality* (New York: Oxford University Press, 1995), p. 169 and §§ 27–30 more generally.

64. See n. 33 above.

65. *PL*, p. 63.

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ical liberalism were incompatible with those doctrines then it would unacceptably exclude vast proportions of the otherwise reasonable population.[66] Besides, what matters in the appeal to the burdens of judgment is that one not interpret disagreement as a sign of either stupidity or bad faith, so that one can maintain sufficient respect for those with whom one disagrees to allow them equal standing to influence the shape of the law and to allow them to work out their beliefs unimpeded. One need not embrace skepticism to ground this kind of respect.

One might respond by saying that a reasonable person need not be crippled with doubts but still must reject certainty.[67] The thought is that if one were truly certain about one's beliefs, then one must think that anyone who disagrees with one is making some kind of mistake that no one can reasonably make. I reject this thought. I can imagine being certain of some particular belief and explaining to myself that others don't share my belief, not because of some defect in their ability to reason, but because they were not fortunate enough to have the formative experiences I have had which make my judgment better than theirs.[68] Regardless, even if we accept that one must not be "certain" of one's beliefs about practical matters if one is to accept that disagreement can be reasonable, it does not follow that one cannot have confidence sufficient to use illegal force.

3. *The Problem of Instability*

The first worry here is that if we admit that legitimate law is not always binding on reasonable people, then it will erode our ability to see it as even generally binding.[69] The underlying thought is that for people to retain their commitment to legitimate law in general, they have to see it as a kind of civic religion. They have to view the Constitution and the basic political institutions as imbued with transcendent value and rare wisdom. Challenge that faith by indicating its practical limits and all that will remain will be fragmentary judgments about this or that law's particular merit. There will be no consensus that the law is generally legitimate and worthy of support.

If this or something like it is true, then it should be taken seriously.

66. *PL*, p. 150.

67. See Barry, *Justice as Impartiality*, p. 181.

68. See John McDowell, "Might There Be External Reasons?" in *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams*, ed. J. E. J. Altham and Ross Harrison (Cambridge: Cambridge University Press, 1995), pp. 73–74.

69. Rawls expresses this concern when he says: "Harmony and concord among doctrines and a people's affirming public reason are unhappily not a permanent condition of social life. Rather, harmony and concord depend on the vitality of the public political culture and on citizens' being devoted to and realizing the ideal of public reason" (PRR, p. 803).

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If respect for legitimate law were so fragile that it could not endure the occasional good faith rejection of legitimate law by seemingly reasonable people, then reasonable people would be obliged to treat legitimate law as always binding. But I see no reason to think our civic religion is so fragile.

A related issue concerns the thought that one cannot avoid undermining the legitimacy of the law if one uses political illegal force in an ideal democracy. One might be concerned that any law that results from the use of illegal force can have no legitimacy since it would always be tainted by its illicit pedigree. Thus one might suggest that even if political illegal force did not undermine the stability of basically just and fully legitimate institutions altogether, the changed law would be unstable; as soon as force or the threat of force were withdrawn, the law would revert to its old form. If this were so, then the most one could hope for is a kind of temporary victory not really worth having.

Though this concern makes sense in the abstract, I think it neglects the way law and legal institutions really work. Even the best political institutions reflect power struggles as well as reasoning about justice and procedural fairness. In the United States, the reason we have the amendments to the Constitution that ended slavery, ensured that the right of citizens to vote will not be denied on the basis of race or color, and declared that states could not deprive people of life, liberty, or property without due process of law, nor deny to anyone equal protection of the laws, is that the North defeated the South in the Civil War.[70] Most national boundaries in the world reflect military conquest or political decisions made in the aftermath of war. Some of these divisions and treaties are unstable, as proved to be the case with the Treaty of Versailles, which ended World War I but which arguably set the stage for World War II. Others, like the reconstruction of Germany and Japan after World War II, seem to have led to very stable democracies, even though the basic framework was imposed by victorious countries on defeated countries.

My point is simply that law imposed by force can take on a legitimacy and life of its own once it starts to function as law. Rawls agrees: "Are the citizens of Rousseau's society of *The Social Contract* never fully autonomous because the Legislator originally gave them their just constitution under which they have grown up? . . . Surely not."[71] Of course, the law has to be fair enough for future generations to use it rather than discard it. But we are assuming that one who succeeds in using political illegal force is reasonable and proposes laws which reflect a reasonable conception of justice. Once in place, these laws may be regarded as having been

70. These are the Thirteenth, Fifteenth, and Fourteenth Amendments, respectively.
71. *PL*, p. 402.

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adopted in the wake of a negotiated settlement which has to be honored as any treaty would be. They would not immediately have the same sort of legitimate status as fully legitimate democratic law. But if all sides can see that the final result of the settlement is sufficiently fair, the drive to change the law may be no greater than it would be for any other law passed by a prior generation.[72] And eventually, through continued use, such laws can be assimilated into the body of fully legitimate law.[73]

This optimistic picture may not pan out in all cases. It may be that by using force one inspires one's opponents to use force. The worst possibility is that a state of general warfare would break out, leading to a loss of general civility.[74] An intermediate possibility is that the state could step up its pressure on those who would use illegal force and successfully suppresses it. The danger here is that the state may violate people's privacy and liberty in order to keep the peace. The best possibility, short of a new, stable legal order, is that the other side would look for opportunities to use illegal force to restore the old law but would not take them if they endangered general respect for just institutions.

The first two possibilities are clearly to be avoided unless the injustice at issue is simply too grotesque to tolerate (it is hard to imagine that some, but only some, reasonable people would think such a condition obtains in an ideal democracy). But the third possibility is a "next best" with which one could live. It would be a sort of modus vivendi in which people did not forswear illegal force out of respect for legitimate law per se but out of a prudential desire not to make things worse than they already are. Note that this kind of modus vivendi is what I am suggesting may exist anyway when reasonable people disagree deeply about matters of basic justice. They should forswear illegal force not because of respect for legitimate law per se but only insofar as they must to avoid unjustifiably violating people's rights or undermining basically just institutions which give rise to legitimate law. If one foresees that one will not be able to create new law which all reasonable people will, at least after a while, abide by because they view it as legitimate law, one may nonetheless choose to try to change the law, shifting the burden of considering when to use illegal force to those who take the opposite position.

72. See Stuart Hampshire, *Innocence and Experience* (Cambridge, Mass.: Harvard University Press, 1989), for an illuminating discussion of the role of fairness in negotiation between warring sides in the development of notions of justice and legitimate law.

73. Compare the use of stare decisis by the Supreme Court. If the Court is convinced that an old decision is wrong and harmful, it will overrule it, but merely being convinced that it was originally wrongly decided is not sufficient ground to overrule it if people have come rely on it. See Casey, 505 U.S. at 854. See also Dickerson v. U.S., 120 S.Ct. 2326, 2336 (2000) (affirming Miranda v. Arizona, 384 U.S. 436 [1966], on the ground that the *Miranda* warning "has become embedded in routine police practice to the point where the warnings have become part of our national culture").

74. Consider, e.g., what has happened in much of the Balkans.

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4. *Commitment to Binding Legitimate Law Could Be Socially Dominant*

Even if it is not necessary for good liberals to agree to abide by all legitimate law, it could happen that an ethos of unconditional respect for legitimate law will grow to become dominant in society. It might already be the case. If such an ethos is or becomes dominant, this argument continues, there would be a new overlapping consensus on that point. Indeed, this process could be simply an extension of the process Rawls describes when he discusses the emergence of an overlapping consensus in support of politically liberal institutions. Rawls suggests that what started out in Europe, after the religious wars, as a mere modus vivendi to establish peace eventually turned into a principled constitutional consensus as people's comprehensive doctrines "shifted" to accommodate the principles of a liberal constitution.[75] As people continue to respect legitimate law, their comprehensive doctrines may shift even further to embrace the thought that respect for legitimate law is an absolute political (and moral) obligation.

I have two responses. First, legitimate law is not a normative analog to liberal conceptions of justice. The overlapping consensus on liberal principles and values prioritizes certain basic liberties, central among which is the liberty of conscience, or the liberty to pursue one's own conception of the good. Acceptance of the priority of the right over the good makes respect for the liberty of conscience stable.[76] The agreement to abide by legitimate law seems to have the same structural capacity to bring conflicting conceptions, now of justice, together in a state of mutual respect. But legitimate law does not have the same normative priority over justice that justice has over the good. The Hobbesian reason to obey legitimate law is that it promotes the common good; as such it has no priority over justice. The Kantian concern with legitimate expectations and the democratic concern with egalitarianism appeal in their own right to justice. With respect to these reasons to obey legitimate law, if there is a conflict between the demands of justice and the demands of legitimate law, what one has is a conflict within the demands of justice, and legitimate law has no automatic priority.

Second, even if a vast majority of people came to view legitimate law as binding over the other demands of justice, I do not see how such a movement would have normative force. The fact that many or most reasonable people think that the position I have been arguing for is less just than theirs would be no more significant than the fact that the majority, say, think that abortion should be legal. They could still be wrong. I am not denying that there can be progress in the debates over these moral topics. Indeed, if there is progress, then what will seem plausible, and hence reasonable, will change. But I see no reason to think that the

75. *PL*, p. 158–64.

76. See *TJ*, p. 31, for the priority of the right over the good.

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grounds for illegal force that I rely on here will one day cease to be plausible enough to count as reasonable.

CONCLUSION

The hope for completely stable peace under legitimate law seems to me a vain one in a world divided by reasonable pluralism.[77] Even people who are as reasonable as one could expect good liberals to be may, when dealing with issues such as abortion, correctly view the law as marking a mere modus vivendi. But it is an interesting question just how far such instability extends. On the one hand, abortion may present a fairly unusual problem, one arising because of a boundary question (who gets to count as a person?) that is really only unavoidably difficult in the case of a fetus who, because of biological necessity, depends on just one person.[78] Other currently socially divisive issues, such as the right to die or homosexual rights, don't have quite the same troubling profile. The right to die is fraught with empirical uncertainties so that even if one is convinced that it is a substantial right, it is hard to be sure just how it should be handled, and the current attitude in the country seems appropriately experimental and cautious.[79] Homosexual rights, on the other hand, seem to be a relatively easy case in the sense that no good case can be made within public reason for denying homosexuals equal rights. Currently they are denied equal rights, but that injustice is one that cannot be justified as part of legitimate law based on plausible public reasons.[80]

In addition, abortion may not even be as divisive an issue as I have portrayed it as being. As indicated above, very few people behave as if they actually think that abortion is murder, and those that do are generally treated as kooks even by other abortion opponents. This kind of sociological observation cannot stand in for an argument. In ancient times, very few people thought that slavery was an abomination, and any who took up arms to end it would doubtless have been considered kooks. If

77. Rawls himself acknowledges the possibility that stability might not obtain "for any democratic conception." See *PL*, p. 66.

78. Rawls acknowledges that there may be "cases that do not fit" within public reason, but expresses a hope that they "all have special features that both enable us to understand why they should cause difficulty and show us how to cope with them as they arise." PRR, p. 803. It is unclear to me whether other boundary questions, such as how we deal with noncitizens, especially illegal immigrants, would be as divisive as abortion. I owe thanks to Arthur Applbaum for bringing this kind of example to my attention.

79. See Chief Justice Rehnquist's opinions in Washington v. Glucksberg, 117 S.Ct. 2258 (1997); and Vacco v. Quill, 117 S.Ct. 2293 (1997).

80. See Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's sodomy laws against homosexuals), and the federal "Defense of Marriage Act" (defining marriage as a heterosexual union for federal purposes and aspiring to authorize states not to recognize same-sex marriages performed in other states); but see Romer v. Evans, 116 S.Ct. 1620 (1996) (striking down Colorado's amendment prohibiting laws protecting homosexuals). See also Alex Walen, "The 'Defense of Marriage Act' and Authoritarian Morality," *William and Mary Bill of Rights Journal* 5 (1997): 619–42.

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the majority one day comes to recognize that abortion really is an abomination on a par with murder, then today's "kooks" will be vindicated. But I don't see that happening.

However, consider the possibility that the U.S. Constitution will be amended to allow states to make it a crime to desecrate the national flag.[81] Even though I can see how a reasonable argument for criminalizing flag desecration can be made in public reason, I am a sufficiently strong supporter of free speech rights that I think I would be willing to engage in civil disobedience to protest such a law.

It is hard to say, therefore, how unusual the circumstances would be in which a good liberal could use illegal force in a society governed by fully legitimate law. I would like to believe that an ideal, pluralistic, liberal society would rarely be troubled by issues which could not be resolved through legitimate law. But I am also convinced that even in an ideal world, I should keep my conception of substantive justice in view when assessing the bindingness of legitimate law. I might find that there is a profound injustice in the law and that illegal force would provide the best way to address that injustice. If so, I believe that I would be no less reasonable than I ought to be if I had the courage to use illegal force.

81. I don't see this as being as extreme as the repeal of the First Amendment in full, which Rawls says would not be a valid amendment because it would be a plain retreat from the goal of making ours a reasonably just, liberal constitution; *PL*, p. 239. A flag-burning amendment would not be so clearly incompatible with liberalism.

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