

The Morality of CONFLICT

Reasonable Disagreement and the Law

Samantha Besson

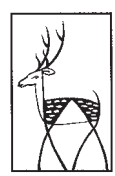
The Morality of Conflict

This book explores the relationship between the law and pervasive and persistent reasonable disagreement about justice. It reveals the central moral function and creative force of reasonable disagreement in and about the law and shows why and how lawyers and legal philosophers should take reasonable conflict more seriously. Even though the law should be regarded as the primary mode of settlement of our moral conflicts, it can, and should, also be the object and the forum of further moral conflicts. There is more to the rule of law than convergence and determinacy and it is important therefore to question the importance of agreement in law and politics. By addressing in detail issues pertaining to the nature and sources of disagreement, its extent and significance, as well as the procedural, institutional and substantive responses to disagreement in the law and their legitimacy, this book suggests the value of a comprehensive approach to thinking about conflict, which until recently has been analysed in a compartmentalised way. Developing such a global theory of disagreement in the law should be read in the context of the broader effort of reconstructing a complete account of democratic law-making in pluralistic societies. The book will be of value not only to legal philosophers and constitutional theorists, but also to political and democratic theorists, as well as to all those interested in public decision-making in conditions of conflict.

The Morality of Conflict

Reasonable Disagreement and the Law

Samantha Besson



OXFORD AND PORTLAND, OREGON
2005

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

© Samantha Besson, 2005

Samantha Besson has asserted her right under the Copyright, Designs and Patents Act 1988, to be identified as the author of this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any mean, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing at the address below.

Hart Publishing, Salters Boatyard, Folly Bridge,
Abingdon Rd, Oxford, OX1 4LB
Telephone: +44 (0)1865 245533 Fax: +44 (0) 1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN1-84113-492-9 (hardback)

Typeset by Datamatics Technologies Ltd, in Minion 10/12 pt
Printed and bound in Great Britain by
MPG Books, Bodmin, Cornwall

'Demander à un État libre des gens hardis dans la guerre et timides dans la paix, c'est vouloir des choses impossibles; et, pour règle générale, toutes les fois qu'on verra tout le monde tranquille dans un État qui se donne le nom de république, on peut être assuré que la liberté n'y est pas.'

MONTESQUIEU, *Considérations sur les causes de la grandeur des Romains et de leur décadence*, (Oxford,Voltaire Foundation, 2000) ix

Acknowledgements

This book is constituted of a selection of the material of the larger Habilitation thesis I submitted at the University of Bern, Switzerland in March 2004 under the title *Reasonable Disagreement and the Law*. I amassed many debts while writing it. First of all, I would like to thank Jörg Paul Müller, my 'Habilitationsbetreuer' at the University of Bern, for having trusted me and followed me patiently on this unusual project at the crossroads between continental and Anglo-American legal philosophies. In New York I was fortunate to start my research under the friendly advice of Jeremy Waldron. His book *Law and Disagreement* convinced me to deepen the study of the role of disagreement in the law. His kind encouragement and confidence in my work helped me to see this project through to completion. I also wish to thank Joseph Raz for his support and for having made it possible for me to spend my first year of post-doctoral research at Columbia and then return to Balliol College, Oxford. I owe a lot to his friendship and invaluable advice. During my second year at Balliol College in 2000-2001, I also benefited from numerous stimulating discussions with Timothy Endicott; I am grateful for our disagreements which helped me structure and refine my arguments. I also owe a lot to Nicos Stavropoulos' generous and perspicacious comments and criticisms during all the years I spent at Oxford. Last but not least, I am grateful to John Gardner for his constant encouragement and advice over the years.

I would like to thank the institutions and foundations which have made this project possible. The Swiss National Science Foundation supported the project with a three-year post-doctoral research scholarship which enabled me to start my research in Columbia in 1999 and pursue it in Oxford from 2000 to 2002. I would also like to thank the Columbia Law School and Balliol College, Oxford which proved to be perfect environments in which to pursue this research. Last but not least, I am grateful to the Provost and the Fellows of The Queen's College, Oxford, who elected me to a three-year Junior Research Fellowship in 2001 and thus gave me the opportunity to complete my research and work on the manuscript of this book in ideal conditions. To the extent that the book reproduces previously published work in revised versions, I am grateful to publishers and editors for permission to use and revise that work here. Chapter 7 first appeared in a collection of essays entitled *Democracy, Citizenship and Globalization*, edited by Marisa Iglesias and Jordi Ferrer (Berlin, Duncker & Humblot, 2003). Chapter 8 was first published in (2003) 23(2) *Oxford Journal of Legal Studies* 211. Chapter 10 was

published in a collection edited by Luc Wintgens, entitled *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot, Ashgate, 2005).

Over the years, I have benefited from the comments and criticisms made by colleagues and friends, and also by participants in seminars and workshops, especially in Oxford, New York, Florence, Barcelona and Amsterdam. I am particularly grateful to Silvina Alvarez, Nicholas Bamforth, Nick Barber, Tom Campbell, Paolo Comanducci, Pablo De Lora, John Eekelaar, Jordi Ferrer, Roberto Gargarella, Ernesto Garzon Valdes, Oliver Gerstenberg, Leslie Green, Klaus Günther, Tony Honoré, Josh Holmes, John Hyman, Marisa Iglesias Vila, Dori Kimel, Dimitrios Kyritsis, Colin Jennings, Cristina Lafont, Grant Lamond, Timothy Macklem, Georgio Maniaci, Jose Luis Marti Marmol, Jose Juan Moreso, Bronwen Morgan, Maribel Narvaez, Dwight Newman, Kalypso Nicolaïdis, Otto Pfersmann, Stephen Perry, Daniela Piana, Thomas Pogge, Ofer Raban, Miriam Ronzoni, Wojciech Sadurski, Irit Samet-Porat, Daniel Smilov, Dale Smith, Georg Sommeregger, John Stanton-Ife, John Tasioulas, Stephen Tierney, Detlef von Daniels, Neil Walker, Luc Wintgens, Ruth Zimmerling and Lorenzo Zucca. Needless to say, none of these people are responsible for any of the errors, omissions, or oddities that the book undoubtedly still contains. Further thanks should go to my students at both the Universities of Oxford and Geneva for constantly challenging the foundations of legal philosophy in a pluralistic and global world. Finally, I would also like to thank Richard Hart for his early interest in my work, for agreeing to publish a book based on a much longer Habilitation thesis, and also for his generous and patient linguistic and stylistic advice.

It has become clear to me that this book would never have become a reality without the unconditional support I received from my parents, and more generally without my caring family as a whole. I have also benefited from my friends' encouragement and never-ending patience over the years. In particular, I would like to thank Martin Burns, Marc-André Côté, Martin Edwards, Paul Foote, Anne-Catherine Hahn, Kirtee Kapoor, Maris Köpcke Tinture, Morten Kringelbach, Yannick Laurent, Hélène Neveu Kringelbach, Sally Norris, Marie-Claude Pahud, Marianna Patané, Christine Peters, Rosario Sanchez, Sushma Sharma and Stephen Walker. I am particularly grateful to Thierry Theurillat for having been such a great friend and support during the whole length of the project. Finally, I would like to express my special gratitude to Pierre Tercier, my 'Doktorvater', for his unfailing friendship ever since we first met in 1991.

Samantha Besson

Lausanne, February 2005

Contents

Acknowledgements *vii*

Introduction **1**

I. The issue 1
II. The significance 7
III. The approach 10
IV. The structure 12

PART ONE: THE NATURE OF DISAGREEMENT **17**

1. The Notion and Types of Disagreement **19**

Introduction 19
I. The notion of disagreement 19
II. The types of disagreement 22
1. Political-moral disagreement 22
2. The scope of political morality 24
a. Rawls' separation of political morality from comprehensive moral doctrines 25
i. Rawls' overlapping consensus 25
ii. Rawls' way out 27
iii. A revised Rawlsian model of political-moral disagreement 30
b. Habermas' separation of ethical-political discourse from moral debates 31
i. The early Habermas and the problem of political-moral disagreement 33
ii. The late Habermas and the separation of the moral from the ethical 36
III. The fact of disagreement and the ontological challenge 39
1. The challenge 39
2. The challenge's defeasibility 41
3. Learning from the challenge 44
Conclusion 45

2. The Sources of Disagreement and Legal Indeterminacy 47

Introduction 47

I. The sources of disagreement 47
1. Verbal lack of agreement 48
2. Conceptual disagreement 48
a. Borderline disagreement 50
b. Pivotal disagreement 51
3. Normative disagreement 52
a. Epistemic disagreement 53
b. Metaphysical disagreement 54
i. From value conflict to metaphysical disagreement 54
ii. Types of metaphysical disagreement 55

II. From moral disagreement to legal indeterminacy 57
1. The debate 57
2. The notion of indeterminacy 59
a. Indeterminacy, uncertainty and objectivity 59
b. From moral to legal indeterminacy 62
c. Types of legal indeterminacy 64
3. The relationship between disagreement and legal indeterminacy 65

Conclusion 66

3. The Essential Contestability of Normative Concepts 69

Introduction 69

I. The concept of 'essentially contestable concept' 72

II. The sources of essential contestability 74
1. Verbal lack of agreement 75
2. Conceptual disagreement 75
a. Borderline disagreement 75
b. Pivotal disagreement 78
3. Normative disagreement 80

III. Minimal agreement in understanding and disputable paradigms 81
1. Minimal agreement in understanding 82
2. The disputability of paradigms 84
3. Shared paradigms and conceptual truth 86

Conclusion 88

4. The Reasonableness of Disagreement 91

Introduction 91

I. The notion of reasonableness 91
1. Three caveats 92

2. Four distinctions 93
a. Reasonableness and rationality 93
b. Public reasonableness and private reasonableness 95
c. Person-based reasonableness and content-based reasonableness 96
i. The distinction in general 96
ii. The person-based account of reasonableness 97
iii. The content-based account of reasonableness 98
d. Actualist reasonableness and probabilistic reasonableness 99
3. Three illustrations 101
a. Rawls' partisan conception of public reason 101
b. Habermas' transcendental conception of reasonableness 103
c. Gutmann and Thompson's reciprocal conception of public reason 104

II. The significance of reason 105
1. The value of the reasonable 105
a. A pragmatic legitimation: stability and cooperation 106
b. An epistemological legitimation: the search for truth 107
c. A moral legitimation: mutual justification 107
i. Individual justification 108
ii. Public justification 108
2. The limits of the reasonable 110

III. The burdens of reason 111

IV. The implications of reasonable disagreement 113
1. The challenge of internal scepticism 113
2. From the inconclusiveness of public reason to alternative modes of political legitimation 115
3. The benefits of reasonable pluralism and the living rule of law 116

Conclusion 118

PART TWO: THE SIGNIFICANCE OF DISAGREEMENT 121

5. The State of Nature Fiction 123

Introduction 123

I. The fiction as argument 124
1. General 124
2. Setting the scene: the state of nature 126
a. Hobbes' state of nature 126
b. Rousseau's state of nature 128
c. Kant's state of nature 131
d. Hume's state of nature 133
3. Introducing the problem: the extent of disagreement 137

a. Hobbes' account of the extent of disagreement 137
b. Rousseau's account of the extent of disagreement 139
c. Kant's account of the extent of disagreement 141
d. Hume's account of the extent of disagreement 145
4. Judging the situation: the significance of disagreement 147
a. Hobbes' account of the significance of disagreement 147
b. Rousseau's account of the significance of disagreement 149
c. Kant's account of the significance of disagreement 151
d. Hume's account of the significance of disagreement 152
II. Some non-fictional objections 155
1. From the conceptual truth to the fact of disagreement 155
2. Some empirical objections 156
Conclusion 159

6. Disagreement as a Source of Coordination Problems 161
Introduction 161
I. Coordination problems and why we need to solve them 164
1. The need for coordination 164
a. The desirability of coordination 165
b. The possibility of coordination 167
2. Coordination problems 168
a. General considerations of collective action 168
b. The Prisoner's Dilemma 171
c. Pure coordination problems 172
d. Partial conflict coordination problems 173
3. The resolution of coordination problems 176
a. The need to solve coordination problems and the moral case for *determinatio* 176
b. From the need to coordinate to the reasons to solve coordination problems 178
c. Conscious coordination and the reasonableness of the options 179
II. Law as a way of contributing to securing coordination 181
1. On legal coordination in general 182
a. From natural to collective coordination 182
b. From informal to formal coordination 185
2. First-level coordination: the constitution of a legal order 186
a. The argument 187
b. The challenges 189
i. From convergent behaviour to rule 190
ii. Coordination and pivotal disagreement 192
3. Second-level coordination: the constitution of law-making procedures 195

4. Third-level coordination: the constitution of concrete laws 195
III. Coordination as law's main function 197
1. The argument 198
2. The challenges 200
a. The absence of all-encompassing concerted action 200
b. The absence of all-encompassing need for cooperation 201
Conclusion 203

PART THREE: THE RESPONSE TO DISAGREEMENT 205

Section One: Law-Making Procedures 207

7. Deliberative 'Voting Ethics' 209

Introduction 209
I. The legitimacy of procedural legitimacy 212
1. The issue of legitimacy 212
2. The democratic paradox 213
3. Epistemic populism or soft substantivism 216
4. Substantive proceduralism 220
a. Pure decisionism 220
b. Substantively legitimate proceduralism 221
i. The minimal substantive legitimation of procedural legitimacy 221
ii. Substantive *cum* contingent proceduralism 222
II. The justification of democratic deliberation 223
1. The justification of democratic participation 224
2. The justification of deliberation 226
III. Deliberation and disagreement 228
1. Actual reasonable agreement *qua* regulative ideal of deliberation 228
2. Deliberative disagreement 229
3. Potential reasonable agreement *qua* internal logic of deliberation 232
IV. The inescapability of voting 233
1. The need for closure 233
2. Various proposals of modes of closure 236
a. Non-institutional modes of collective choice 236
b. From institutional deliberation, through accommodation, to vote 237
V. Voting *after* deliberating 240
1. A *deliberative* justification of voting 240
2. The misgivings of the deliberative opposition to aggregative procedures 243

VI. Deliberative 'voting ethics' 245
1. Voting ethics *from within* 245
2. The deliberative ethics of *voting*: minimal decisiveness 246
3. The deliberative ethics of *majority rule*: maximal decisiveness 248
a. From unanimity, through minority rule, to majority rule 248
b. The argument of maximal decisiveness 250

Conclusion 254

8. Four Arguments against Compromising Justice Internally 257

Introduction 257

I. The concept of compromise 259
1. A few distinctions 259
2. A caveat: the disagreeable nature of compromise 262

II. The justification of compromise 263
1. Compromise of interests 264
2. Compromise of principles 265
a. General 265
b. Multiprinciple compromise 269
c. Single-principle compromise 270

III. The limitations of compromise 271
1. Inefficiency 272
2. Potential injustice 272
3. Concept attribution 275
4. Political integrity 277

IV. Democracy as a fair compromise 280
1. Democracy as compromise *qua* process 280
2. Democracy and further compromises *qua* outcome 281

Conclusion 282

SECTION TWO: LAW-MAKING INSTITUTIONS 285

9. Constitutional Rights *Qua* Legislative Precommitment 287

Introduction 287

I. A few definitions 290

II. The precommitment model of constitutional constraints 292
1. Elster's model of individual precommitment 293
2. The constitutional analogy 294
a. The principle of analogy 295
b. The analogy applied 296

III. The limitations of the precommitment conception of constitutional constraints 298
1. General 298

2. The precommitting subject: Ulysses versus a majority of the voting population 299
a. Ulysses versus a complex collective entity, the people 299
b. Ulysses versus the intergenerational people 301
3. The object of the precommitment: the charm of the sirens versus rights misconceptions 302
4. The target of precommitment: individual weakness of will versus reasonable disagreement 303
a. Political *akrasia* as precommitment main target 304
b. A few limitations: reasonable disagreement versus collective *akrasia* 305
i. The limitations 305
ii. Assessing the risks 306
iii. The paradox of constitutional precommitment 309
5. The implementation of the precommitment: Ulysses' crew *qua* external enforcer versus the people 310
6. The operation of the precommitment: keeping someone tied versus judging rights-violations 313
7. Implications for the precommitment model of constitutional rights 315

IV. A counterobjection: the constitutionalisation of democracy 316
1. Democracy-enabling and democracy-constitutive precommitment 317
2. A few limitations: constitutive predecision versus constitutional precommitment 319
3. Implications for the precommitment model of constitutional rights 322

V. The precommitment model *revisited* 323
1. The different levels of entrenchment model 324
a. The different rights entrenched 324
b. The different tiers of entrenchment 325
i. Fundamental civil and non-political rights 326
ii. Constitutive procedural rules and democratic rights 326
2. A few built-in correctives 328
a. General 328
b. Flexible amendability 329
c. Essentially contestable concepts 330
d. The people's last word in constitutional interpretation 333

Conclusion 336

10. Participation and the Paradox of Democratic Representation 339

Introduction 339

I. The contours of democratic representation 343
1. Notion and scope 343
2. Five constitutive elements 346
a. Who is represented 346
b. Who the representatives are 347
c. How the representatives are chosen 348
d. What the representatives represent 349
e. How the representatives represent 352
II. The challenge of disagreement 353
1. The challenge 353
a. Why disagreement should be represented 353
b. How disagreement should be represented 355
2. A common response: descriptive group representation 356
a. From disagreement representation to descriptive representation 356
b. The implementation of descriptive disagreement representation 358
III. The counterchallenge 360
1. The paradox of democratic representation 360
2. The counterchallenge of diversity 361
IV. The representation of disagreement reconceptualised 362
1. The paradoxical relationship between disagreement and representation 363
2. The revised model of disagreement representation 364
a. A balance of descriptive and substantive representation 365
b. A balance of trusteeship and delegation 367
V. Some implications: the democratic legitimacy of representation 368
Conclusion 370

Section Three: The Content Of Law 373

11. Integrity: Should the Law Speak With One Voice? 375

Introduction 375
I. The concept of integrity 378
II. The constitutive elements of integrity 382
III. The circumstances of integrity 386
1. From utopia to ordinary politics: the necessity of integrity 386
2. From dystopia to ordinary politics: the plausibility of integrity 387
3. Back to ordinary politics: the practicability of integrity 391
a. The object-related limitations of integrity 391
b. The process-related limitations of integrity 392
IV. The value of integrity 392

1. The independence of integrity: the service conception of integrity 393
2. Three arguments for an independent principle of integrity 396
   a. The argument of public morality 396
      i. The public duty of integrity 396
      ii. From integrity to political judgement 399
      iii. The relationship between integrity and justice in public morality 401
   b. The argument of communal responsibility 403
      i. The personal duty of integrity 404
      ii. The community personified 405
      iii. The communal responsibility of integrity 406
   c. The argument of authority *qua* authorship 410
      i. General 410
      ii. Razian authority and integrity 411
      iii. Raz's counterargument 415

Conclusion 416

12. Conflicts of Constitutional Rights: Nature, Typology and Resolution 419

Introduction 419

I. The nature of rights 421
   1. Moral rights or rights in general 421
      a. The modified interest theory of rights 422
      b. From interests to duties 423
   2. Legal rights 424

II. The nature of conflicts of rights 425
   1. Conflicts of moral rights or rights in general 425
      a. The inescapability of conflicts of rights 425
      b. Some responses to sceptical arguments 427
   2. Conflicts of legal rights 430
      a. The inescapability of conflicts of legal rights 430
      b. Some responses to sceptical arguments 430

III. The typology of conflicts of rights 431
   1. Conflicts of moral rights or rights in general 431
   2. Conflicts of legal rights 435

IV. The resolution of conflicts of rights 436
   1. Conflicts of moral rights or rights in general 436
      a. General 436
      b. The qualitative priority of rights 437
      c. The quantitative weighing of rights 439
         i. The relative importance of the interests protected 440
         ii. Some correctives 440

d. Conciliation or prioritisation 442
i. The case of rights of different stringencies 442
ii. The case of rights of equal stringency 443
2. Conflicts of legal rights 443
a. Internal resolution 444
i. Hierarchy of rights 444
ii. Rules of conflict 445
b. External resolution 448
i. Weighing 448
ii. Conciliation or prioritisation 449
iii. Criteria of conciliation 451
Conclusion 453

Section Four: The Authority Of Law 457

13. Coordination-based Obligations to Obey the Law 459

Introduction 459
I. Definitions and delimitations 461
1. The concept of authority 461
2. The types of authority 463
II. The mixed pedigree of coordination-based duties to obey the law 465
1. Natural duties to coordinate 466
a. Root duties to coordinate 466
i. The scope of natural duties 467
ii. The background of natural duties 469
iii. The stringency of natural duties 470
b. Auxiliary duties to abide by the coordination outcome 472
2. Acquired duties to coordinate 473
a. Consent-based duties to coordinate 473
b. Semi-voluntarily acquired duties to coordinate 474
3. Mixed duties to coordinate 475
III. Coordination-based obligations *qua* obligations of fair play 477
1. The main regime of fair play obligations 478
a. The basic definition 478
b. Two additional elements 479
2. A general challenge: law as a cooperative scheme 481
3. An additional condition 483
a. The condition: the positive acceptance of benefits 483
b. A general challenge: the idea of acceptance of benefits 484
c. A specific challenge: the acceptance of legally procured benefits 486
i. The willing acceptance of benefits 487
ii. The knowing acceptance of benefits 489

IV. Raz's three conditions for authority 490
1. General 490
2. Legal reasons to coordinate 492
3. Conformity to the three theses 493
a. The pre-emption thesis 493
b. The dependence thesis 495
c. The normal justification thesis 496
i. A first challenge: the need for public identification 497
ii. A second challenge: the need for collective decision-making 498

Conclusion 499

14. Democracy, Disagreement and Disobedience 503

Introduction 503

I. The authority of democratic law 505

II. Disobedience to democratic law 506
1. Large-scale resistance: revolutionary resistance 506
2. Small-scale resistance and civil disobedience in particular 507
a. General 508
b. Some constitutive elements 508
i. Illegality 509
ii. Publicity 510
iii. Political and moral motivation 510
iv. Non-violence 512
v. The exhaustion of legal means: *ultima ratio* 512
vi. The acceptance of the consequences of one's actions and in particular one's punishment 513

III. The justification of civil disobedience 514
1. Legal justification 514
a. A priori justification 514
b. A posteriori justification 515
2. Moral justification 516
a. General 516
b. Civil disobedience *qua* democratic test of legitimacy 518
c. A few limitations to the justification of civil disobedience 519
3. The *right* to civil disobedience 522

Conclusion 524

Conclusions 527

I. Taking reasonable disagreement seriously 527
1. From disagreement to law and back again 527
2. The rule of law as response to disagreement 528

3. Disagreement as response to the rule of law 530
4. Means to keep a balance 532
II. Towards global legal pluralism 534
1. The idea 534
2. Three illustrations 535

Bibliography ***539***
Index ***591***

Introduction

I. THE ISSUE

> La fragmentation des idéaux politiques, celle des sphères de justice et, jusque dans le domaine juridique, la multiplication des sources de droit et le foisonnement des codes de juridiction nous invitent à prendre avec le plus grand sérieux cette idée de *désaccord raisonnable.*[1]

FOLLOWING RICOEUR'S CONCERN,[2] the object of the present book is the relationship between *persistent and widespread reasonable disagreement* ('désaccord raisonnable,' 'rationaler Dissens')[3] *about justice* and the *law*. The book purports to emphasise the central moral function and creative force of reasonable disagreement in the law and hence show why and how lawyers and legal philosophers should take reasonable conflict more seriously.[4] Even though the law is traditionally regarded as the primary mode of settlement of our moral conflicts, it is important to understand that it can and should be the object and the forum of further moral conflicts. The aim of the book is therefore to argue for a *political morality of conflict in the legal realm*. People may be said to disagree reasonably about justice when, despite thinking and conversing in good faith and doing their best to apply the general capacities of reason pertaining to the domain of inquiry, they cannot converge on a view of justice on the same grounds, be it in a particular case or at a more abstract level.[5] For reasons of clarity, I will hereafter refer to persistent and widespread disagreement about justice among reasonable people as 'disagreement.'

Moral disagreements that appear to resist rational resolution are a pervasive feature of the modern world. This reality is much more unsettling than the mere facts of social and moral pluralism; it is the recognition that, on matters of supreme importance we thought we would agree about, reason is not likely to bring us together, but tends to drive us apart.[6] Historical contingencies surely

[1] RICOEUR, 1995, 220.

[2] See also WALDRON, 1999A; HAMPSHIRE, 1999; RANCIÈRE, 1995; LUKES, 1991, 20.

[3] In German scholarship, the Anglo-American distinction between 'rational' and 'reasonable' corresponds to Habermas' distinction between 'instrumental' and 'communicative' rationality. As a result, 'reasonable disagreement' in English corresponds to (communicative) 'rational disagreement' in German. In French, the distinction between '*rationnel*' and '*raisonnable*' allows for the English opposition to be directly translated.

[4] The terminology is rather loose and I will refer indifferently to 'disagreement,' 'conflict,' 'dissent' or 'dissensus.' See Chapter 1.

[5] In what follows, I will use the masculine and feminine forms of the pronoun interchangeably to avoid so-called 'false gender neutrality.'

[6] See the recent exchange between PIPPIN, 2003, 101 and RAZ, 2003D, 154–56.

played an important role in bringing this about, but it is also the liberal practice of toleration and public discussion which, by fostering the social and cultural heterogeneity of our societies, seems to multiply the very circumstance that it means to circumvent.[7] This expectation of reasonable disagreement was generally absent from ancient and medieval teleological ethics, but under the sceptics' influence it loomed large in early modern thought, undermined the Stoic hope in the so-called 'community of reason'[8]; its lesson was given, in particular, by more than a century of religious wars and influenced the moral thought of many modern philosophers.[9]

Not only do we encounter moral disagreements in our personal lives, but also, and most significantly, in *political debates*. Disagreement about principles, justice, the right, rights or other normative matters is an issue that has already been much discussed in modern *political theory.* Political structures and action cannot but be affected by reasonable pluralism and pervasive disagreement among citizens about the good and, as I will argue, the right. The difficulty with those accounts is that they have aimed more at determining how *consensus* could be achieved from there and hence how disagreement could be suppressed.[10] Only rarely and very recently have they aimed at examining *why* we *disagree*, how our disagreement is structured, how deep it goes and how we should address this inescapable and arguably beneficial state of affairs.[11] Moral and political disagreements are here to stay and are even exacerbated in democracies like ours where those who rule are also the subjects of those rules. Our views of the relationship between disagreement and politics would therefore gain from a better understanding of why we disagree and how disagreement is construed in the first place, before we engage in solving it at any cost.[12] It is important, in other

[7] See LARMORE, 1999, 600–1. This was also Montaigne's conviction about the vain exercise of deliberation. See on the ambiguity of deliberation, KNIGHT/JOHNSON, 1994.

[8] See LONG, 1983; SELZNICK, 1987, 457.

[9] See the *post-metaphysical* turn in recent moral philosophy and the need, in the face of moral pluralism, to develop a middle path between the external imposition of normative truth and pure facticity-based validity: HABERMAS, 1998A. See in the same vein, HUNYADI, 1995's pluralism-based reading of normativity and morality in general *qua* conflict resolution and intersubjective rule-making procedure.

[10] See on the intrinsic relationship between political theory and the fact of political disagreement and on the hypothesis that the attempt to remedy the latter has always been at the origin of the former: RANCIÈRE, 1995, 15, 91, 112. See for the origins of this criticism of the depoliticising effect of political philosophy in that it tries to abolish plurality and disagreement and thus to undermine the political realm, ARENDT, 1998, 222. See, in the same sense, CONNOLLY, 1983, 243 on the centrality of essentially contested concepts in politics and the contradictory urges to depoliticise in political theory. See also BERLIN, 1969B on the relationship between value pluralism and political theory, and the tendency to transform political philosophy into an expert-informed political science that suppresses pluralism. See further HABERMAS, 1998A, 38, 87, 367 on the complexity of modern societies and the centrality of the risk of disagreement. See also LYOTARD, 1983 according to whom the search for a form of morality acceptable to everyone seems catastrophic.

[11] See VEITCH, 1999, 1.

[12] See LYOTARD, 1983, xi; FOUCAULT, 1980, 85. See also LORAUX, 1997, 53 on the Greek *polis*: 'Plaider pour une repolitisation de la cité des anthropologues, c'est prendre au sérieux et l'apport anthropologique et la part conflictuelle du politique, et ne pas se contenter d'étudier le conflit comme "présupposé de son dépassement" dans l'ordre civique.'

words, to question the *consensus on the importance of consensus* in politics[13] and the '*consensual idyll*' that characterises contemporary political theory.[14]

And this all the more so as we not only disagree about justice, but we also have conflicting views about principles of cooperation, tolerance and restraint in the face of disagreement about justice, as well as the different modes and procedures that aim at resolving it by choosing one view and binding us despite disagreement.[15] It is this further level of complexity and pluralism which has recently led to challenge the answers given by the *liberal* political tradition to the inescapable truth of reasonable disagreement, and in particular Rawls' idea of public reason and of an overlapping consensus over minimal issues of justice[16] or Habermas' model of reasonable discursive convergence on justice.[17] The guiding liberal ideal has always been that the terms of a political association must and can be rationally transparent and reasonably *justifiable to* those they are supposed to bind, for only in this way can individuals, who tend naturally to be at dispute, enjoy respect as persons in their own right.[18] It is, in other words, the very idea of public reason that was meant to solve disputes and the questions raised by reasonable pluralism that has now itself become the object of reasonable disagreement.[19] In encouraging reasonable social and moral pluralism and toleration, liberal theorists have underestimated the scope and depth of reasonable disagreement on basic principles and constitutional essentials.[20]

This critique of liberal reliance on reasonable consensus about justice has been made since the early 1990s.[21] Alternative accounts of political legitimacy have been put forward since, although not always successfully.[22] The point is, however, that, in the *legal realm*, people have only recently started to see all the difficulties the question of reasonable disagreement raises.[23] As Ricoeur points out in his metaphoric opposition between political theory *qua* theory of war and legal philosophy *qua* theory of peace,[24] the *law*, as an offspring of politics,

[13] Loraux, 1997, 67: 'On peut s'interroger sur le *consensus à faire du consensus le lien nécessaire de la politique*.' (emphasis added).
[14] Rancière, 1995, 143, 149.
[15] See Boltanski/Thévenot, 1991, 169.
[16] See Rawls, 1971; Rawls, 1993; Rawls, 1999d; Rawls, 1999e; Rawls, 1999f.
[17] See Habermas, 1998a; Habermas, 2003.
[18] Waldron, 1993a, 35 ff.
[19] Veitch, 1999, 110.
[20] Wingo, 2003, 39 ff.
[21] See eg Larmore, 1996, 152 ff on the relationship between the expectation of reasonable disagreement, pluralism and political liberalism. See for a more 'agonistic' form of liberalism that factors in value pluralism and, more generally, reasonable disagreement, see Berlin/Williams, 1994. For its implications in the legal context, see Veitch, 1999.
[22] See eg Bohman, 1996; Gutmann/Thompson, 1996; Gaus, 1996; Raz, 1998a; Sunstein, 1999; Waldron, 1999a; Klosko, 2000; Dryzek, 2000; Kutz, 2001a; Wingo, 2003.
[23] See on the relation between law and the '*ideology of agreement*' on a rule, Shklar, 1964, 105: 'Law is sealed off from the world of conflict, lifted out of the sphere of social dispute.'
[24] Ricoeur, 1995, 10–11: 'Pour donner un tour dramatique à l'opposition que je fais ici entre une philosophie politique où la question du droit est occultée par la hantise de la présence incoercible du mal à l'histoire, et une philosophie où le droit serait reconnu dans sa spécificité non violente, je propose de dire que la *guerre* est le thème lancinant de la philosophie politique et la *paix* celui de la philosophie du droit' (emphasis added).

has commonly been seen as a way to settle our disagreements in a collective and political process.[25] For all that members of a polity disagree, they face a deadline and they must reach a decision; political and legal deliberation is not merely a moral conversation or debate, but it is concerned with resolving a political conflict.[26] Disagreement would not matter if people did not prefer a common decision; and the need for a common decision would not give rise to politics, as we know it, if there was not at least the potential for disagreement about what the common decision should be.[27] The law is therefore generally understood as providing us with a way to agree to disagree or agree and on how to do so.[28] This is confirmed, for instance, by what Bourdieu refers to as the law's *symbolic force*, that is to say its ability to make legal settlements appear neutral, just and fair.[29]

It remains to be seen, however, how everyone could agree on the necessity of coordination and of a settlement, in the first place, ie on the need for law, and on the settlement that is chosen when people disagree with its content, but also with the form the settlement should take, in the second place. Given the existence of widespread moral and political disagreement in our societies, one may ask oneself not only how to settle these conflicts in a legitimate way, but also how to agree reasonably on the need for a common settlement and the way to reach it, ie how to *agree to disagree or agree*.[30] One could say therefore that the law's relationship to disagreement is Janus-like; not only can the law be understood as *the main response* to moral disagreement, but it is itself affected by reasonable disagreement about its *raison d'être*, procedures and modes of justification.[31] It has to solve reasonable disagreements and indeterminacies of its own.[32] Moreover, if it is clear how reasonable disagreement pervades the law and thus creates a difficulty that needs to be addressed, it should come as no surprise either that this second-order form of disagreement presents both advantages and disadvantages.[33] Not only would the law gain from being seen as one of the main responses

[25] Waldron, 1996, 1538 ff who regards this view as having been part of Western jurisprudence, especially positivist jurisprudence since Hobbes. See also Waldron, 1999c, 36 ff. See also MacCormick, 1995b, 76.

[26] See Williams, 1993, 135.

[27] See Waldron, 1999a, 101 on the 'circumstances of politics' and the dialectic of disagreement and coordination. See also Hume, 1975, II, 191–92. See also Boltanski/Thévenot, 1991, 26, 39.

[28] Some authors speak of this fundamental and minimal agreement as the '*Grundkonsens*', ie the basic agreement that consists in the readiness for deliberation and coordination and in the renunciation of violence: Müller, 1998, 262; Müller, 1993, 20 ff; Müller, 2002, 13–18, 88. See also Haverkate, 1992, 143: 'Die Verfassung ist *konsentierte Dissensgrundlage*.'

[29] See Bourdieu, 1987. See also Frank, 1949, 57 ff on the kind of 'false legal absolutism' that derives from the use of legal vocabulary.

[30] See Loraux, 1997, 90 ff who speaks of the '*lien de la division*', ie the social link of division.

[31] See Halpin, 2001, 1 and 177 on this very paradox. See also Ricoeur, 1990, 324–33; Ricoeur, 1995, 126, 134; Abel, 1996, 82–83.

[32] On law's own conflicts that often transform and channel prior moral conflicts into legally resolvable ones, see Veitch, 1999, 182 ff.

[33] See Kress, 1987: 'Law, Dworkin contends, requires disagreement as the appropriate *golden means to flourish*. Too little and law stagnates; too much and law founders (pp. 88–89, 236–39).'

to moral disagreement, but disagreement should not be too quickly ignored or suppressed[34] by the law in the name of the latter's unity and coherence[35] or on grounds of democratic concordance.[36] Law has a role to play in the suppression of disagreement, but disagreement too should be given its own place within law as a creative[37] and *jurisgenerative* force.[38] The upshot of disagreement is not necessarily a generalised state of war, as some would like us to believe.[39] So, the law has to deal with its own disagreements, but it should also, in some cases, encourage them by facing what one may call the *paradox of reasonable disagreement* openly.[40]

The discussion of the relationship between law and disagreement cannot therefore be reduced to the existence and significance of disagreement, on the one hand, and the emergence of the rule of law as a perfect response to the latter, on the other.[41] The paradox just revealed calls for a detailed discussion of conceptual, institutional, procedural and functional elements of the law under the new light of the persistence of reasonable moral disagreement in the law. Any satisfactory political and legal theory must provide a way of dealing with moral disagreement and the fundamental problem of finding a legitimate and justifiable way of making collective decisions binding in the face of continuing moral conflict.[42] The main contention of the book is that persistent disagreement about justice and the right calls for a *re-evaluation of the way we think and write about the law*. It aims at constructing an account of law that can accommodate the truth of reasonable disagreement about justice and hence to make proposals of institutional and procedural design that can contribute to taking better account of the democratic circumstances of law-making.[43] The book's approach may therefore be coined *reconstructivist*[44] in response to critical and deconstructivist reactions to pervasive reasonable disagreement about the right and more generally legal

[34] See for a discussion of the 'jurispathic' function of legal reasoning and institutions in case of indeterminacy or underdeterminacy of the law, COVER, 1984, 40 ff.

[35] See Chapters 11 and 12.

[36] See eg with respect to the predominance of the concordance principle and of compromise in Swiss politics and law, RHINOW, 1984, 31–32, 38; LENDI, 1981; SCHEUNER, 1976; SCHEUNER, 1979. See also Chapters 7, 8 and 14.

[37] See for such a constructive rather than a destructive approach to disagreement, HUME, 1978, xvi.

[38] See COVER, 1983 and MICHELMAN, 1988 on 'jurisgenesis'. See also UNGER, 1996, 65–66: 'Law is the product of *real collective conflict*, carried on over a long time, among many different wills and imaginations, interests and visions.'

[39] See eg HOBBES, 1999, ch 13, 88–89. See also more recently, NEVES, 2000.

[40] See KUTZ, 1994. See, more generally, MORGAN, 2002, 531 ff, 536 ff on the constructive presence of the paradox of indeterminacy in legal reasoning. See LUHMANN, 1988, 153 ff on the '*creative use of paradox in law.*'

[41] See for the same critique, LYOTARD, 1983, 213: 'Dans la politique délibérative, celle des démocraties modernes, le différend s'expose, bien que l'*apparence transcendentale d'une finalité unique* qui en viendrait à bout persiste à le faire oublier, à le rendre supportable.' See also SHKLAR, 1964, 100 on the dangerous consequences of 'agreement-as-an-end-in-itself' *qua* independent value of legal theory.

[42] See RAZ, 1998A, 50 on some of the new proposals in that direction.

[43] On the importance of institutional design, see KOMESAR, 1984; KOMESAR, 1994.

[44] See on *post-sceptical* thought in the face of disagreement, HUME, 1978, xvi. See also FATE-NORTON, 1993A, 7.

indeterminacy which are common today.[45] In this respect, the book does not regard legal indeterminacy as being radical nor as spreading over to absolute moral indeterminacy and hence as rendering any legal constraint or even any reconstructive account of legal constraints illusory.[46] It assumes it is possible to retain modern rationalist and foundationalist standards,[47] and in particular minimal liberal principles of equality and fairness, and hence to reconstruct our legal practice within such a framework.[48] Taking reasonable disagreement seriously and regarding it as a normal and permissible condition of our political and legal deliberations may be regarded not only as a condition of a pluralist order and hence as a central element of politics and law, but also as a way to cultivate the possibilities contained in current ideologies.[49] In this sense, any sensible and pluralistic deconstruction necessarily implies a minimal reconstruction of our legal order and of our legal conceptions around reasonable disagreement and pluralism.[50]

To borrow Ricoeur's metaphor once more,[51] legal philosophy would gain from being understood not only as a theory of peace, but also, and in a very Hegelian way,[52] as a theory of war. If legal philosophy is often conceived as a theory of peace, it is because disagreement lies at its origins.[53] Agreement and disagreement do not stand in opposite and unrelated positions to each other, but are, on the contrary, *two sides of the same coin.*[54] In Hume's terms, indeed, if we wish to converge, it is because we diverge, but if we diverge in the first place, it is because we wish to converge.[55] Thus, understanding and accommodating disagreement should not only become a central part of any legal and political philosophy for its

[45] See Benhabib, 1994b. For reasons of space, I will not engage in depth with post-modern, critical and deconstructivist approaches of law in this book, although I will occasionally discuss some of their contentions in the course of my argument.

[46] This would be the case if one took Luhmann, 1988's creative paradox and gap or Singer, 1984's nihilist account of law's indeterminacy seriously. See, however, Fish, 1991b on the possibility of constant reconstruction of the law through the very fact of permanent contradiction and questioning.

[47] See on the possibility to concede the appeal of post-modern pluralist and critical claims while rejecting their anti-foundationalism and scepticism, Twining, 2000, ch 7; Haack, 1998.

[48] See Marks, 2000 on the critique of ideology and reconstruction of the legal order *from within*. See also Sypnowich, 2001 on the possibility and the necessity to reconstruct the law in awareness of ideology, so to speak. See more generally on this possibility, Freeden, 2003, 18.

[49] See Freeden, 2003, 126–28. In this book, I refer to ideologies as 'complex combinations and clusters of political concepts in sustainable patterns' (Freeden, 2003, 51).

[50] See MacCormick, 1990 for a reconstructivist stance after deconstructionism, both *qua* constructivist heuristic *in* the law (see Chapter 11) and *qua* constructivist account *of* the law. See on the need to reconstruct politics around the reality of disagreement Rancière, 1995 and Connolly, 1983, 243.

[51] See Ricoeur, 1995, 10–11.

[52] See Hegel, 1996, § 324: 'Finite pursuits are rendered unstable and the ethical health of peoples is preserved. Just as the movement of the ocean prevents the corruption which would be the result of perpetual calm, so by war people escape the corruption which would be occasioned by a continuous or eternal peace.'

[53] See Ricoeur, 1995, 10–11.

[54] See Veitch, 1999, 1: 'In a sense they might be thought of as two sides to the same coin: how to agree to disagree requires consideration of what we agree upon. But how to analyze disagreement can often be overlooked in the rush to create terms of agreement.'

[55] See Hume, 1975, II, 191–92. See also Boltanski/Thévenot, 1991, 26, 39; Waldron, 1999a, 101.

own sake, but it could also contribute to a better understanding of the types and forms of agreement we may hope to achieve in our political practice.

II. THE SIGNIFICANCE

The relationship between moral disagreement and the law is an issue of utmost importance in contemporary legal philosophy. Not only does taking it seriously imply a new way to think about politics, but it is also constitutive of a new approach to law.

First of all, the question calls for a *new way to think about politics*. The mode of reflection about the significance of political disagreement in political philosophy applied here is new in the sense that it does not amount merely to discussing the *metaphysics of disagreement* and its meta-ethical implications. It also looks into the *social and political significance of the persistence of reasonable disagreement* among people who know and accept that some of the views they hold collectively about justice by virtue of their legal decisions are right and others wrong,[56] or, more often, that the reasonable distributive decisions that are made collectively 'represent some people's preferences which, though based on reasons, are not superior to some alternatives that they could have opted for and that others in the population prefer.'[57] This new way of thinking about politics reinserts disagreement into the core of political philosophy and of the study of collective action,[58] instead of attempting to minimise it through different political constructions.[59] It does not, for instance, attempt to construct a *theory of justice* from the fact of reasonable pluralism, but merely to discuss what the implications of disagreement for daily or 'normal'[60] politics ought to be and not simply deduce them from theory or a mere thought experiment.[61]

This matters in terms of *political truthfulness* and *publicity.*[62] It is crucial that our political institutions face reasonable disagreement openly and ground their authority on the existence of disagreement and the need to address it, rather than ignore it at the price of manipulating public opinion and of betraying our true reasons for obeying the law,[63] thus potentially encouraging the very counter-productive disagreements the constitution of the polity aimed at channelling and fostering in more creative directions. We must recognise that political debate is

[56] On this new agenda for political philosophy, see Waldron, 1999a, 3.
[57] Raz, 2003d, 156.
[58] See Rancière, 1995, 15, 91, 112 on Hobbes and Rousseau.
[59] See for this critique, Rancière, 1995.
[60] See Gaus, 1996 for the use of this term.
[61] See for the same critique, Gutmann/Thompson, 1996, 4.
[62] See Hobbes, 1999, ch 30. See on Hobbes and education, Waldron, 1998c.
[63] See Hobbes, 1999, ch 30, 231–32: 'It is against the sovereign's *Duty* to let the people be ignorant or mis-informed of the grounds and reasons of ... his essential rights.' See on the principle of political truth in Hobbes' political theory, Flathman, 1993, 3, 99. See on Hobbes' principles of publicity, Waldron, 2002c.

not conclusive, but that this does not make it futile either: it might result in political decisions which are often ad hoc, contingent and always liable to be challenged, but the process of public debate is nevertheless something valuable in itself. As Arendt argues, the mistake of traditional political philosophy is to *depoliticise politics* by trying to set aside human plurality, disagreement and the related contingency and indeterminacy of political decisions and judgements.[64] By contrast, Arendt's project is to 'restore its old dignity to politics.'[65] Although it has now been 40 years since Arendt made her point about the centrality of disagreement to politics, mainstream political philosophy is still caught in the same cobweb, still unwilling to take plurality seriously, still searching for theoretical principles in politics so rationally compelling that even generations yet unborn must accept them, thus making redundant the haphazard contingency of accommodations reached in actual political arenas.

Secondly, the question also inspires a *new way of thinking about the law*. Even if the issue of the relationship between moral disagreement and politics has been addressed for some years now, it is *more central* to the whole theory of law than it has been thought to be until now.[66] Reluctance to see this can be explained by the frequent association of jurisprudence with theorising strictly about justice, rather than also associating it with theorising about politics and the collective action of people who think about matters of justice, but think differently about them.[67] The legal system is a central part of the political system; legal institutions are political institutions, the rule of law is a political ideal and adjudication and legal reasoning are part of the political culture. Philosophy of law may therefore be regarded as a large sub-field of political philosophy, as it was in classical and modern political theory.[68] We must recognise that legal deliberation is thoroughly political. But we can recognise this without eliminating law as a mediating set of reasons, a grammar through which this particular dialect of politics is spoken, as well as a framework which makes certain choices available and not others.[69]

More particularly, taking disagreement seriously implies examining in more detail the political procedures of law-making and specifically theorising legislative democratic law-making in accordance with the growing trend of *democratic jurisprudence*[70] or '*legisprudence.*'[71] The time has come to take the democratic

[64] See Arendt, 1998, 220–22; Arendt, 1968a, 17 ff.

[65] Arendt, 1998, 35.

[66] The central role of disagreement for legal theory and more generally our understanding of law need not imply that the nature and normativity of law cannot also be explained *in other terms*. See Chapters 6 and 13.

[67] On this point, see Waldron, 1999a, 6 referring to Aristotle's discussion of the diversity of human cities. See also, Arendt, 1973. See also Raz, 1998a, 26.

[68] See Shklar, 1964, 222 on this point and its consequences for the way in which the issue of disagreement is addressed in legal theory. See more generally for a political approach to legal theory and legal positivism in particular, Waldron, 1999a and 1999c; Campbell, 1996.

[69] See Waldron, 1999a, Introduction.

[70] This was once the standard case in jurisprudence: see eg Montesquieu, 1989, II, ch 2. See more recently, Waldron, 1999a; Waldron, 1999b; Waldron, 2004b; Hershowitz, 2003.

[71] See eg the essays collected in Wintgens, 2002 and Wintgens, 2005.

origins of law seriously, especially the fact that when the law is established democratically, authors and subjects of those laws are but one and the same body, thus placing reasonable disagreement at the heart of the law-making exercise. Placing disagreement and democracy at the centre of jurisprudence has crucial implications on traditional issues of general jurisprudence, such as law's authority and legitimacy or the relationship between legal validity and moral legitimacy. In fact, political jurisprudence, and democratic jurisprudence in particular, escape traditional divisions and often sterile disputes[72] and provide the means for a fresh look at common jurisprudential problems.[73] But the reverse can also be true: democratic jurisprudence can help refocus debates in democratic theory on what makes them fundamental in daily politics and the law-making process; this is the case, as we will see, of the need for a deliberative voting ethics or for an explanation of the paradox of democratic representation.

These two dimensions of significance of the proposed approach to the relationship between reasonable disagreement and the law have naturally attracted the attention of moral and political philosophers. Although the *literature* on moral and political disagreement is vast,[74] there have so far been but a few articles or essays on its relationship to the law.[75] For a long time, the main concerns about disagreement reflected in jurisprudence revolved around either issues pertaining to scepticism and the ontological implications of disagreement or to the strict separation of morality from law and politics. The tendency to re-assess central legal issues from the perspective of disagreement is therefore quite new. Only one major book has been devoted to the precise topic to date: Jeremy Waldron's *Law and Disagreement.*[76] This seminal book was the first to state how significant

[72] See eg Dworkin, 2002, 1678 ff on the conservative nature of contemporary legal positivism by contrast to early Benthamite legal positivism.

[73] As will soon become clear, it is not my point in this book to seek allegiance to any distinct jurisprudential camp in particular. My approach is clearly that of a legal positivist and even of a legal conventionalist, but in a normative sense which neither Dworkin (see Dworkin, 2002) nor Finnis (see Finnis, 2000b) would reject. In this respect, it comes very close to Waldron's (Waldron, 2001a) or MacCormick's (MacCormick, 1985) brands of normative positivism. Since my account does not claim exhaustivity in the law's conventionality (contra Coleman, 2001), this intermediary form of conventionalism remains compatible with Dworkin's minimal conventionalism (see Dworkin, 2002). Finally, my account remains exclusive (Raz, 2004c) and does not follow the steps of inclusive legal positivists like Coleman (Coleman, 2001) or Waluchow (Waluchow, 1989), who insist on the overarching role of the rule of recognition in the incorporation of moral concepts into the law. Law excludes morality and as such its rule of recognition cannot foresee the incorporation of morality (first-order morality of law), but law can also exclude or modulate the exclusion of morality and as such it necessarily mirrors some moral concepts which it refines and concretises (second-order morality of law).

[74] See eg among published books in the area, Boltanski/Thévenot, 1991; Lukes, 1991; Mason, 1993; Tully, 1995; Bohman, 1996; Larmore, 1996; Gaus, 1996; Sunstein, 1996a; Gutmann/Thompson, 1996; the essays in Macedo, 1999; Sunstein, 1999; Hampshire, 1999; Gowans, 2000; Klosko, 2000.

[75] See MacCormick, 1990; Kutz, 1994; Boyer, 1995; George, 1997; Raz, 1998b; Michelman, 2002c. See also the different reviews and reactions to Waldron, 1999a: Christiano, 1999a; Eskridge, 2000; Posner, 2000; Christiano, 2000; Estlund, 2000b; Lucy, 2000b; Goldsworthy, 2001; Eisgruber, 2002a; Habermas, 2003; Kavanagh, 2003a; Bohman, 2003.

[76] See Waldron, 1999a. See also Waldron, 1999b and more recent articles listed in the bibliography.

disagreement in and about the law is and what should be done about it. The topic still calls for a more comprehensive and systematic approach and this is what the present book is proposing. It should therefore be understood as an attempt to give stronger foundations to the theory of disagreement developed by Waldron, to contest some of its conclusions in areas it covered and to develop it further into unmapped domains.

Of course, publications have multiplied over the years accompanying the heightened consciousness of disagreement. Other books broadly related to the issue of reasonable disagreement have been published recently. Their scope is limited, however, as they concentrate on distinct aspects of the question rather than offer a comprehensive overview of the issue. These issues are in particular the impact of reasonable disagreement on the deliberative nature of democracy,[77] its role as an incentive for political justification through the law given the limits of moral justification,[78] its influence on the limits of theorising in judicial decisions[79] and, finally, its lack of acknowledgement in liberal legal reasoning.[80] Despite some notable exceptions,[81] most theorists who have addressed the question have not looked deeply enough into the different sources and types of disagreement,[82] and into its significance in the legal context, and have concentrated on issues discussed in the third part of the present book, and even then not in a systematic way. Conversely, classical works, from the social contract theory tradition in particular, were the first to explore the close relationship between disagreement and the law. They explored the issues of the nature and significance of disagreement extensively. They stopped short, however, of a discussion of the accommodation of disagreement within the law itself and of the advantages of such disagreement in and about the law. This book is the first of its kind therefore to discuss all the themes left to us by social contract theorists *and* raised more recently by critical challenges.

III. THE APPROACH

In order to address the complex constellation of issues pertaining to the role of reasonable disagreement in and about the law, the book's approach needs to be carefully chosen and clearly delineated.

[77] See GUTMANN/THOMPSON, 1996.
[78] See GAUS, 1996.
[79] See SUNSTEIN, 1996A.
[80] See VEITCH, 1999.
[81] I think in particular of DWORKIN, 1986 who not only draws attention to the inescapable reality of disagreement in the law, but also distinguishes between different sources and types of disagreement. See also MASON, 1993 who explains political disagreement by distinguishing its different sources. See, finally, EISGRUBER, 1990, 279 on the importance of the different categories of disagreement.
[82] See MORAWETZ, 1992, 403.

First of all, the book's main approach is a *universal* or *general* one as opposed to that of special or particular jurisprudence. It purports to develop a general jurisprudence of conflict, which applies to common dimensions of most of our Western democratic legal systems. Hence it will not focus on any school of thought or tradition in particular, but on the authors who are most relevant to each issue addressed. This is not to deny the important differences between the legal practices that have inspired each of these theories such as, for instance, and to put it schematically, the 'American obsession' with adjudication and the judicial review of rights[83] and the more European and continental concern for legislation and theorising democratic law-making. The difference between *analytic* jurisprudence and *continental* discussions has, however, slowly become moot. What 'analytic philosophy' has come to mean today is undoubtedly vague.[84] Originally it referred to the fact that philosophy had a domain of its own to which it would apply a special philosophical method, ie conceptual analysis. Of course, legal theory being an explanation of the nature of law and the concept of law being part of people's perception of the nature of law, conceptual analysis is an important part of legal theory.[85] But today, in view of the importance of experience and practice, political morality cannot be restricted to a purely conceptual domain. Moreover, the increasing mobility of scholars, the growing interest of democratic and political jurisprudence,[86] and the emergence of important common post-national jurisprudential issues have gradually tempered the specificity of both schools of legal thought. Hence, problems related to the persistence of disagreement being roughly the same in European legal orders, the continental or analytical origin of a theory is a secondary issue and the objection to its difference an impairment of true understanding.[87] In sum, therefore, the present book should not be taken as an exercise either in pure Anglo-American analytical or in pure continental legal philosophy.

Secondly, not only does this book's jurisprudential method claim to be universal, but it will combine, when appropriate, considerations of moral philosophy,

[83] See HART, 1983, 123 on the opposition between the 'nightmare' and the 'noble dream.' On this point, see WALDRON, 1999A, 8–10; WALDRON, 1998B; HERSHOWITZ, 2003, 209–10. For instance, SUNSTEIN'S, 1996A book focuses on judge-made law and the implications of disagreement for its legitimacy. A similar tendency can be noted in VEITCH, 1999 who focuses on judicial legal reasoning despite a more general title and ambit.

[84] LARMORE, 1996, 3.

[85] RAZ, 2004B, 327–28.

[86] I will not be arguing in this general jurisprudential account that non-democratic law is no law, but that a legal system which does not aspire to be democratic and try to organise itself in such a way is not a legal system. Only so can the concept of law be a discriminating concept, along the lines discussed by FINNIS, 1980. See WALDRON, 2004B. See also MARMOR, 2004 on the rule of law ideal and the aspirational concept of law.

[87] See MCCARTHY, 1994, 44.

political theory, legal theory, sociology and political psychology.[88] The complexity of reasonable disagreement requires such a *pluri-disciplinary* approach. More particularly, the book puts a particular emphasis on *classical* and *early modern* political theorists, whose legal theory was closely built into their main political theory. This should hopefully trigger a 'dialogue across the ages,' but also cultures. In such a dialogue we ought to try to compare our different understandings of society with one another, even though they were formulated in different contexts as responses to historically quite specific situations.[89] The study of common problems and of the answers given by classical and modern jurisprudence may prevent contemporary legal discussions from becoming uninterestingly parochial from a philosophical point of view.[90]

Finally, it is important to emphasise that the book adopts a *constructivist* approach to the relationship between moral disagreement and the law. In this sense, it comes closer to a normative account of the way the law should be and react to persistent disagreement in politics, than to a mere description of what it is and how this is possible.[91] This approach is confirmed by the book's concern for political and democratic jurisprudence, which sees law as part of a democratic effort.[92] What we need is a jurisprudential account that does two things: one that both reflects the structure of actual social institutions, including the structure of participants' deliberations and disagreements, while also explaining how those institutions can provide their decisions with legitimacy and their participants with genuine reasons for action in conditions of reasonable disagreement.[93]

IV. THE STRUCTURE

By reference to the tradition of early modern political theory and to social contract theories in particular, the book covers a lot of ground.[94] It aims to

[88] See for such an attempt to bring together moral and political considerations with sociological and psychological observations in the context of political disagreement, MASON, 1993 and FROHOCK, 1994, 979. See also KLOSKO, 2000 for reliance on findings in the field of social science and especially survey research on the beliefs and attitudes of liberal citizens and the extent of their convergence on political principles. See also KÖNIG, 1988, 8 on the dialectic between individual and political psychology. The realisation of this dialectic is central in order to overcome a widespread psychoanalytical blindness to the collective roots of many individual affections, but also the incapacity of many sociological theories to grasp the entire measure of the individual behind pre-existing social patterns.

[89] See WALDRON, 1995B, 146. See also WALDRON, 1990A, 49 ff; WALDRON, 1999C.

[90] See DUNN, 2000.

[91] See eg DICKSON, 2001A; PERRY, 2002; FINNIS, 2000B.

[92] See WALDRON, 2004B on democratic jurisprudence *qua* general jurisprudence.

[93] See KUTZ, 2001B.

[94] For reasons of space, much original material had to be left out, and in particular, a chapter on the psychology of disagreement and a chapter on Arendt's tribute to political pluralism which belonged to Part 2; a chapter on tolerance and mutual accommodation which belonged to section 1 of Part 3; a chapter on democratic participation and judicial review which belonged to section 2 of Part 3; and a chapter on legal indeterminacy and the rule of law, as well as a chapter on pluri-intentionalism in legal interpretation which belonged to section 3 of Part 3.

present the *broad picture* and reconstruct what could be the point and the constitutive elements of a legal order in circumstances of reasonable disagreement about justice, thus leaving the detail of each of its specific dimensions to further studies. This effort of reconstruction of a concept of law that takes moral disagreement seriously is three-tiered. In this sense, it follows Williams' distinction[95]: first, it explains the occurrence and nature of disagreement; then, it establishes its persistence and significance; and, finally, it discusses various responses to disagreement and especially the law's.

The first part of the book addresses the question of the *existence* and *nature* of disagreement. Its main objective is to assess the occurrence and persistence of reasonable disagreement about justice. It does so by presenting the *notion* and *types* of disagreement (Chapter 1), by discussing its *sources* and legal indeterminacy in particular (Chapter 2), by examining the *essential contestability* of normative concepts used in the legal context such as the concept of justice (Chapter 3), and, finally, by assessing the *reasonableness* of disagreement (Chapter 4). The first chapter addresses the different *types* of disagreement that are relevant to theorising the law, such as moral, political and legal disagreement. It then goes on to examine what the meta-ethical implications of reasonable disagreement are. The second chapter discusses the distinction between verbal, conceptual and normative disagreement. It also examines the relationship between theoretical disagreement about the law and *legal indeterminacy*. The third chapter addresses a special case of disagreement that originates in the *essential contestability* of normative concepts, that is to say the fact that the correct use of concepts which encapsulate a value lies precisely in contesting their correct use. The last chapter examines the *reasonableness* of disagreement, by assessing its extent and implications for the liberal principle of mutual justification of our political and legal decisions.

The second part of the book addresses the issue of the *extent* and the *significance* of disagreement.[96] It starts by discussing the state of nature fiction and the *extent* of disagreement (Chapter 5) and then presents the *coordination problems* it raises (Chapter 6). It is useful, first of all, to establish how pervasive reasonable disagreement is, or, in other words, what its exact *extent* is. The first chapter's main concern lies in restating the state of nature fiction and recent objections to the pervasiveness of disagreement. It is only once we know how much disagreement there is that we can assess its *significance*. The second chapter examines the existence of *coordination problems* due to disagreement and the need for coordination on matters of common interest. It also shows how intrinsically related and inseparable the negative (need for convergence) and the positive dimensions of disagreement (impulse for progress and change) are.

[95] See WILLIAMS, 1993, 135 for the distinction between (i) thinking about how much disagreement there is (occurrence and significance), (ii) wondering whether it can plausibly be hoped to be eliminated (persistence) and, finally, (iii) considering what methods we have to settle disagreement (remedies).

[96] On the usefulness of the distinction between the occurrence and the persistence of disagreement, see FROHOCK, 1994, 979.

The third part of the book addresses the various *responses* that should be given to pervasive and persistent reasonable disagreement about matters of justice and to the difficulty of providing a reasonable justification of our decisions in those matters. The persistence of reasonable disagreement not only calls for a political answer and therefore for the constitution of a legal order, but it also implies important *accommodations* in the way the law can provide its remedies. Besides, the means we choose for remedying the disadvantages of disagreement should be responsive to its advantages. As I will argue, there is a relationship of mutual reinforcement and limitation between disagreement and the rule of law. The third part of the book comprises four sections where it assesses the implications of disagreement on the various alternative *law-making procedures*, the *law-making institutions*, the *content of law* and, finally, the *authority of law*.

The first section comprises two chapters that discuss different *law-making procedures* in conditions of reasonable disagreement. The first chapter assesses the sequence or *crescendo* of potential alternatives to reasonable agreement, all in the same deliberation process, which range from tolerance through mutual accommodation to taking a vote. It discusses the advantages and disadvantages of these forms of deliberative decision-making and argues for a *deliberative voting ethics* (Chapter 7). The second chapter addresses the legitimacy of *compromise* by distinguishing different forms of compromise and their degree of justification in circumstances of reasonable disagreement (Chapter 8).

The second section addresses the implications of disagreement for *law-making institutions*. It consists in an exercise in *institutional design*, in order to accommodate the democratic circumstances of law-making and in particular reasonable disagreement about justice. The section's *leitmotiv* is the idea of a partnership or *dialogue* among institutions and separate powers in controversial issues. The first chapter examines the democratic justification of *constitutional precommitment* (Chapter 9). In the second chapter, I address the paradox of *democratic representation* in conditions of reasonable pluralism (Chapter 10). The first chapter deals with the relationship and dialogue between constitutional assemblies and legislative assemblies, on the one hand, and between legislative assemblies and courts, on the other, and the second chapter with the relationship and dialogue between legislative assemblies and the people. The point in all three cases is to reveal the creative force of disagreement both within each institution and in the relations between institutions and their mutual reinforcing effect. While it is important to find the institutions that can best deal with reasonable disagreement in each case, it is the cooperative dialogue among different institutions that can enhance political participation and disagreement and hence make the most of it, while also keeping it in check.

The third section tackles questions of *content and implementation of the law*. It examines some of the facets of our traditional approaches to the law's content and legal reasoning that need to be revised in the light of disagreement. The first chapter argues that, in the realm of legal interpretation and legal decision-making, the reasonableness of our disagreements calls for the respect of other diverging views

and hence, within the limits of moral pluralism, for synchronic and diachronic consistency in principle or *coherence* (Chapter 11). As the second chapter argues, a particular case of legal indeterminacy arises when *constitutional rights conflict* and cannot therefore be made legally coherent; in these cases, alternative means of resolution should be found once the nature of these conflicts and their typology have been clarified (Chapter 12).

Finally, the last section of the third part of the book addresses the issue of *authority and civil disobedience* to the law. The first chapter defends a *coordination-based account of authority* (Chapter 13), while the second chapter examines how this account of authority can be reconciled with the justification of *civil disobedience* in conditions of reasonable disagreement about justice (Chapter 14). Given the law's central coordinative function, it cannot avoid making claims that will be at odds with the sense of justice some of us have, thus calling for a revision of traditional conceptions of legal authority and of the legitimacy of civil disobedience in conditions of reasonable disagreement.

Part One: The Nature of Disagreement

IN THIS FIRST part of the book, I would like to address the question of the existence and nature of disagreement. The aim is to examine issues pertaining to the *emergence* and *persistence* of disagreement.

In the first chapter, I start by presenting the main *types* of disagreement that are relevant in politics, such as moral, political and legal disagreement. The chapter also deals with the meta-ethical and epistemic implications of disagreement. The second chapter distinguishes different *sources* of political-moral disagreement in law and in particular between verbal, conceptual and normative disagreement. The chapter also discusses the relationship between political-moral disagreement in and about the law and legal indeterminacy.

The third chapter addresses a special source of disagreement, ie the *essential contestability of normative concepts*. These concepts are such that their correct use is to disagree about their correct use. When the law entails normative concepts like the concept of democracy or justice, it is the proper use of these concepts to be contested deep in their core meaning; to share these concepts, all we need are paradigms that can gradually be changed rather than fixed conceptual criteria. Disagreement about essentially contestable concepts can therefore be identified neither with purely conceptual nor with purely normative disagreement.

Finally, the last chapter examines the *reasonableness* of disagreement and what it implies for disagreement's persistence. It defends a person-based account of reason, according to which a person may be held reasonable even when her beliefs are wrong, if she has come to believe what she does through her exercise of reason and in all good faith. One of the implications of this account of reasonableness is the impossibility of providing a reasonable justification of a decision in cases of disagreement and hence of respecting the liberal principle of public justification. And this in turn has important consequences for our conception of political legitimacy that need to be assessed.

1

The Notion and Types of Disagreement

INTRODUCTION

> In modern pluralist societies, political disagreement often reflects moral disagreement, as citizens with conflicting perspectives on fundamental values debate the laws that govern their public life.[1]

IN ORDER TO be able to grasp the significance of moral disagreement in politics and the law and then to discuss ways to settle them, we need to understand what kinds of disagreement are meant to count as belonging to the ordinary 'circumstances of politics.'[2] As Waldron puts it, political 'disagreements come in all shapes and sizes'[3] and it is important to discriminate among them. In a first section, I will present the *notion* of disagreement, before examining, in the following section, different *types* of disagreement depending on their *objects*. Finally, the last section will discuss the so-called *ontological challenge* and the meta-ethical implications of moral disagreement.

I. THE NOTION OF DISAGREEMENT

Before discussing the different types and sources of disagreement, it is necessary to examine the notion of disagreement itself. Disagreement should not be held to mean the absence of any kind of '*consensus*'[4]; all it equates to strictly speaking is the *absence of agreement*. 'Agreement' has a fixed formal sense of strict unanimity, hence its role as a model for contracts. By contrast, 'consensus' is only loosely defined; it amounts generally to signifying a sufficient preponderance of opinions to silence others. Consensus may be reached through a bargaining process of give-and-take, modification and compromise of at least a majority of people.[5] It is therefore important to distinguish the true agreement,[6] ie the full 'endorsement'

[1] GUTMANN/THOMPSON, 1999, 161.

[2] This denomination mirrors Rawls' and Hume's 'circumstances of justice' in the context of disagreement: WALDRON, 1999A, 159 ff; WALDRON, 1999C, 154.

[3] WALDRON, 1999A, 149.

[4] 'Consensus' is meant here in its usual sense of *modus vivendi* of different disagreeable positions: see RAWLS, 1993, 389, and not as a pure '*consensus of conviction*'. See also GAUS, 1997, passim.

[5] See SCHAUER, 1997, 1312.

[6] The term 'agreement' is itself ambiguous and is generally used, depending on the context, to indicate either the full endorsement and the belief in a principle or the mere acceptance of that principle. See Chapter 8.

of the content of a decision for the same reasons,[7] from its mere 'acceptance' for different reasons.[8] In this book, 'disagreement,' 'dispute,' 'dissent,' 'dissensus' or 'conflict' are analogous terms that will be used interchangeably to refer to the same concept.[9]

The kind of moral disagreement in which this book is interested is characterised by three distinctive features. It is in these three respects that it differs from other common forms of conflict *lato sensu* with which it may be confused.

First of all, the disagreement at stake in this book is *intersubjective* and ought to be distinguished from *moral dilemmas*. The latter are purely *intrasubjective* and internal to individual conscience.[10] By contrast, reasonable disagreements about moral matters oppose at least two people. The choice to concentrate on two or more party conflicts does not follow from a mistaken but common assumption according to which whatever may turn out to be the case with two-party conflicts, one-person conflicts must be capable of being rationally resolved. Such an assumption would be unreasonable. Some intrasubjective conflicts are expressions of a complex inheritance of values and what we experience in ourselves as a conflict is something which could have been and often was first expressed as an intersubjective conflict.[11] Thus, the resolution of one-party conflicts does in fact influence that of the moral disagreements addressed in the book.[12]

Secondly, the kind of disagreement discussed in this chapter results from real differences of judgement or the 'diversity of *opinions*' among members of a political community.[13] Its object is generally constituted of principles; hence an alternative appellation of 'principled disagreement.'[14] As such, it should be distinguished from a conflict of (personal or group[15]) *interests*.[16] Such conflicts do not oppose *conceptions of justice*, but purely self-interested preferences. True, people's opinions may be

[7] See Boltanski/Thévenot, 1991, 337.

[8] See Luban, 1985, 417. See also Habermas, 1998a, 205.

[9] See Boltanski/Thévenot, 1991, 50 for a similar unified concept of disagreement. See also Veitch, 1999, 1.

[10] See Mason, 1996.

[11] Deep psychological conflicts and neurosis reflect, according to Freud, a conflict about the limits between what can be required from us externally and our own egoistic tendencies. Internal conflicts hence reflect external conflicts and vice versa. See Freud, 1995a, 444. Arendt mentions in this respect the importance of the 'dialogue of me with myself' that constitutes thought and that has the effect of introducing more plurality into the Ego. This plurality lies at the root of conscience itself, enabling it to be more than the simple internalisation of social norms and thus constituting a limit to what legal rules can impose on us.

[12] For this view, see Williams, 1981, 72–73. See also Benjamin, 1990, 57.

[13] See Waldron, 1999c, 50. It makes a difference if the disagreement at stake is about tentative opinions or if it is disagreement about long-settled practices and convictions: see Waldron, 1997b, 1475.

[14] Waldron, 1999a, 149 ff. See also Raz, 1998a, 25, note 2: 'disagreement over principles.' See also Bohman, 1995, 253 following Hume's distinction between conflicts of interests and conflicts of principles.

[15] See Barry, 1964, 7 on the causes of individual opposition to the 'public interest,' among which he cites not only cases of epistemic or metaphysical disagreement, but mere clashes of individual or group special interests. See Rousseau, 1963, II, 3 and his simplistic opposition between private interests (aggregated in the 'will of all') and the public interest or 'general will.'

[16] See Raz, 1998a, 25; Waldron, 1999c, 78 on Locke, 1999, II, 98. See also Christiano, 1996, 49.

about interests, but they need not necessarily be.[17] The origins of opinions and beliefs are often complex, but one may assume that it is possible for people to form fully disinterested opinions over moral matters. Besides, politics is about the way collective action is generated and even if people have conflicting interests about how it should be generated, the proper response to them has to await a moral response to a question of principle. This question amounts to the justice and fairness[18] of any common action for those affected by it.[19] It is important, however, to emphasise the common tendency among political and legal theorists to see all the worst political disagreements as intractable disagreements over principles or moral issues. It is crucial to remember, therefore, that not all important social and political differences involve differences of values and conceptions of those values.[20]

Finally, moral disagreements oppose *expressed* opinions about justice and the right. As such, they ought to be distinguished from *mere moral differences*, ie differences of not yet formulated or expressed moral views and differences in holding conflicting values. People might live according to conflicting views of justice or even hold conflicting values, without yet opposing conflicting beliefs about them to each other.[21] True, moral conceptions are normative views and as such, they are action-guiding. There are, however, reasons for not always wanting to realise one's views by enlisting political power on their behalf; the emergence of political conflict over moral matters depends indeed on *the political culture* and elements like *restraints of civility,*[22] that often interrupt the passage from mere doctrinal differences and moral conflicts to politically relevant moral disagreements. Besides, the divisiveness of an intractable moral difference will also depend on the *nature of the stakes*, as well as on the *degree of difference* of the views in question; it is possible to distinguish between the incompatibility of two conceptions when they cannot both be realised in a single life, their rivalry with other conceptions to which they might be confronted in some cases and, finally, their conflicting nature when one conception cannot be realised unless it sets back another. Finally, there are non-rational grounds for political action that may explain why people abstain from disagreement. One should mention history,[23] material circumstances and other factors such as rhetoric, mythology symbols or traditions.[24]

[17] See Bohman, 1995, 253.

[18] I am using 'fairness' as a separate principle capable of guiding social decision-making in circumstances where some members of the society think that *justice* requires one thing while others think *justice* requires another. In this sense, I do not associate justice and fairness as intrinsically as Rawls, 1999b, 47 does. See also Dworkin, 1986, 179 ff; Waldron, 1999a, ch 9. See Chapter 11.

[19] Raz, 1998a, 25.

[20] See Green, 2001; Raz, 1998a, 25–26.

[21] See Gowans, 2000, 14–15. See also Green, 2001.

[22] See Green, 2001, 96.

[23] History may limit our propensity to disagree and propound our personal convictions on issues on which we have disagreed too much in the past or on which conflicts have led to disastrous consequences. See eg Müller, 2002, 36 ff on the principle of human dignity.

[24] See Wingo, 2003 on the role of 'political veils,' ie non-rational sources of political motivation.

II. THE TYPES OF DISAGREEMENT

Types of disagreement are determined in function of the objects of disagreement. Legal disagreements are disagreements over moral issues that are politically relevant. After presenting these political-moral disagreements in the law, I will assess the extent to which they encompass issues of the right and not only of the good.

1. Political-Moral Disagreement

Among the different types of moral disagreement, ie disagreements over matters of value, it is necessary to differentiate and identify the kind of disagreement that will concern us as follows: *political-moral disagreement in and about the law*. To do so, it is important to analyse the passage from moral disagreement through politically relevant moral disagreement to theoretical disagreement in and about the law.

First of all, a *moral* disagreement reflects a difference of *value judgements*[25]; these may concern questions pertaining to the good, the nature and the meaning of life or the right.[26] One should note that since the object of moral disagreement is morality, some understanding of morality must be at least tacitly assumed.[27] Although it is usually accepted that a disagreement that concerns morality is a moral disagreement, qualifications of disagreements may be contested when their object is itself a borderline case.[28] Different levels of moral disagreement can be distinguished. Moral disputes usually concentrate on mid-level judgements about whether some forms of behaviour or situations are morally right or wrong, good or bad, etc. As we will see, however, there might also be broader disagreements about the relative importance of general moral values or theories.[29]

Second, *political* disagreements encompass disputes over matters of political concern.[30] They can take the form of disagreements over *fundamental principles of justice and the right.*[31] Political disagreements do not therefore amount only to conflicts of personal interests, but they also entail 'conflicts over the values that public institutions should serve for everyone.'[32] In this book, I am only concerned with the latter kind of political disagreement, that is to say only with disagreement over *moral* matters that are *politically relevant.*[33] Following Waldron's reading of

[25] Raz, 1995a, 97 ff.
[26] Raz, 1995a, 104; Waldron, 1999a, 149.
[27] Gowans, 2000, 14.
[28] See Gowans, 2000, 14 who mentions the dispute about tattoos cited by Sextus Empiricus as a borderline case.
[29] See Chapter 2.
[30] Waldron, 1996, 1538.
[31] Waldron,1999a, 15, 149.
[32] Nagel, 1987, 216.
[33] Gutmann/Thompson, 1999, 161. See for a critique of liberal theorists' main focus on *moral* disagreement over justice by opposition to *political* disagreement over justice, Waldron, 1999c, 154–56.

Kant, one may say that an 'issue of [moral] disagreement becomes political, when those who disagree on the merits agree that the community needs to reach some determinate resolution.'[34]

Finally, disagreement about *law* is the main type of political-moral disagreement we will be concerned with here. It is a type of political disagreement since law may be regarded as an 'offspring of politics.'[35] Besides, it usually raises moral issues, since law reflects, in some but not all of its aspects, the aspiration to justice of a community of people who usually happen to think differently on matters of common concern.[36] Many legal concepts are also moral concepts and legal norms often purport to settle moral conflicts by capturing one conception or making sure a concept is protected in a general fashion, thus establishing a framework for further legal disagreements.[37]

Of course, one should distinguish these kinds of *theoretical*[38] disagreements about the law, to use Dworkin's terms, from merely *empirical* or *practical*[39] ones, ie disagreements on the facts and circumstances of a legal case.[40] It might, however, be quite difficult in practice to operate that distinction given the scarcity of perfect subsumption cases where facts are clearly distinct from legal reasoning. Besides, before we feel the need to formulate our beliefs, their conflicts will often only be revealed through practical disputes; in order to resolve this kind of practical dispute, we will then usually invoke more substantive judgements. It is therefore only a matter of time sometimes before a practical dispute turns into a theoretical one.[41] Another important distinction is the distinction between *theoretical* legal disagreements and *normative* legal disagreements[42]; the former are disagreements over what the law is, whereas the latter are disagreements over what it should be. It is crucial, however, not to confuse normative legal disagreements with normative moral disagreements; many theoretical legal disagreements will indeed be grounded in normative moral disagreements, ie disagreements about what is just or what is right when these moral questions have been turned into legal questions.[43] For instance, the issue of whether affirmative action is contrary to the constitutional principle of equality is a constitutional and hence a theoretical legal question and disagreement over that issue amounts to theoretical legal disagreement despite raising normative moral questions.[44]

[34] Waldron, 1999c, 36–37.
[35] Waldron, 1999c, 36.
[36] Waldron, 1999a, 6, referring to Aristotle, 1988, 21–22.
[37] See Raz, 2004c on the relationship between law and morality. See Chapters 2, 11 and 12.
[38] See Dworkin, 1986, 3 ff, 7 ff, 31 ff, 73 on this distinction.
[39] See Williams, 1993, 133-34 for a similar distinction between practical disagreement and disagreement about value.
[40] Dworkin, 1986, 3 ff.
[41] See Boltanski/Thévenot, 1991, 163.
[42] See Dworkin, 1986, 3 ff for this distinction.
[43] See Raz, 2004c on the immanence of moral concepts in the law and the law's exclusion or modulation of the legal exclusion of morality.
[44] See Dworkin, 2000a on the role of moral concepts in the law.

2. The Scope of Political Morality

The political-moral disagreement in and about the law we are concerned with in this book may be referred to as *disagreement over political morality*. Roughly speaking, political morality does not encompass moral issues that do not usually arise in political debates, such as issues of moral virtue, character, feelings and judgement. It is important, however, not to separate too strictly other realms of morality and conceptions of the good life from political morality; questions of the right enter the private sphere just as much as questions of the good pervade the public sphere. Ultimately, then, the exact scope of political morality is a matter of political decision.[45] The problem is that not all authors agree with such an open account of the scope of political morality. They argue therefore that political-moral and purely moral disagreements should be kept entirely distinct. This has to do mainly with their acknowledgement of reasonable pluralism and reasonable disagreement on moral matters. To fence disagreement off from issues of political morality, they attempt to construct an account of the latter that is grounded in a reasonable overlapping consensus. To do so, they either opt for a content-based or normative account of reasonableness,[46] as we will see later on in the book, or, more often, restrict the scope of political morality, and this is our object here.

Following Waldron, one can present *two models* of the relationship between the right and the good. Whereas the first one regards each conception of the good as associated with a particular vision of the just society,[47] where disagreement about justice is just another aspect of disagreement over the good in the social and political sphere,[48] the second model contends that a particular theory of justice should stand apart from competing religious and philosophical conceptions.[49] According to this last model, conceptions of justice should attempt to specify a separate set of consensual principles for the basic (political) structure of a society whose members disagree about the good. An example of the first model may be given by any '*comprehensive*' moral or metaphysical doctrine[50]; utilitarianism, for instance, defends a particular vision of the good and links its conception of justice to its maximising view of the good. By contrast, Rawls' theory of justice corresponds to the second model in the sense that its conception of justice is a 'free-standing' conception representing a reasonable and 'overlapping consensus' among the many ethical conceptions that compete, even in a reasonable way, in society[51]; in this model, the principles of justice and the *right* do not depend for their justification on any particular conception of the *good* life.[52] Nor

[45] See Arendt, 1973 on this idea of political decisions over the content and scope of politics.
[46] See eg Finnis, 2001; Rawls, 1971; Gutmann/Thompson, 1996. See Chapter 4.
[47] See Sandel, 1994, 1771 referring to Kant's or Mill's 'comprehensive liberalism.'
[48] Waldron, 1996, 1551, referring to Kant's political writings.
[49] Waldron, 1999a, 149–50.
[50] One may think of any of the 'communitarian' thinkers and of Walzer, 1983, 312–13.
[51] Rawls, 1993, 12.
[52] See Rawls, 1993, xvii, 97–98. On this controversial question, see Sandel, 1994, 1766 ff.

do they in Habermas' discourse ethics, according to which the rightness and legitimacy of our political decisions depend on a reasonable agreement; this is only made possible by the separation between political discourse about the ethical-political, on the one hand, and moral discourse and disagreement about the moral, on the other.[53] In what follows, I will consider both authors' arguments in turn.

a. Rawls' Separation of Political Morality from Comprehensive Moral Doctrines

In this section, I would like to assess Rawls' claim about the separation of political morality from comprehensive moral doctrines and hence his distinction between comprehensive moral disagreement, on the one hand, and overlapping consensus about matters of political morality, on the other. To do so, after some general considerations about the difficulties facing Rawls' consensual account of political morality, I will discuss the tentative justifications he provides for his position, before concluding that his account needs to be revised and cannot avoid disagreement about political morality.

i. Rawls' Overlapping Consensus

Given his separation of principles of the right from conceptions of the good, Rawls denies the relationship between the existence of reasonable 'comprehensive moral and philosophical disagreement'[54] and the emergence of reasonable disagreement on merely political principles. Of course, the fact of reasonable pluralism, ie the difficulty of securing reasonable agreement on any comprehensive conception of the good, makes it unlikely that, even in a well-ordered society, all people will support liberal institutions and principles of justice for the same reasons.[55] Hence the more plausible idea of an *overlapping consensus on political justice*.

The necessity to secure an overlapping consensus corresponds to the (counterfactual) liberal principle of legitimacy. According to Rawls, 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.'[56] The key is then to ensure that agreement about the fundamentals of justice is possible among reasonable persons despite pervasive and persistent disagreement on other serious issues pertaining to comprehensive moral doctrines. This is achieved in conditions of reasonable pluralism by insisting on the possibility of an overlapping consensus on the very constitutional essentials and on the application of the principle of avoidance that prescribes a neutral attitude on the part of authorities as to those many decisions that are left to the arbitrary judgement of private decisions.

[53] See Habermas, 1996b, 134.
[54] Waldron, 1999a, 149 referring to Rawls, 1971 and his opposition between 'comprehensive' moral theories that claim general applicability and purely political theories of justice.
[55] Rawls, 1993, 134, 154–58.
[56] Rawls, 1993, 137.

It remains, however, to see to what extent the recognition of *reasonable political disagreements* over justice, that one can derive from Rawls' more explicit acknowledgement of extensive *comprehensive moral disagreements*,[57] is compatible with his concept of public reason[58] and the process in which the principles of justice are defined in Rawls' 'well-ordered society.' Rawls' discussion of reasonable pluralism and disagreement focuses indeed on comprehensive disagreement far more than on political disagreement over the nature of justice.[59] In his most recent work, however, he contends that 'a diversity of conflicting and irreconcilable comprehensive views' is 'not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.'[60] This derives from his observation that 'the evident consequence of the burdens of judgement is that reasonable persons do not all affirm the same comprehensive doctrine.'[61] Thus, Rawls recognises that 'the question whether legislation is just or unjust, especially in connection with economic and social policy, is commonly subject to reasonable differences of opinion'[62]; he adds that 'political liberalism does not hold that the ideal of public reason should always lead to a general agreement of views.'[63] This kind of disagreement may, however, be regarded, according to Rawls, as disagreement about the *detailed* applications[64] of the same *fundamental* principles[65] or at least the same *reasonable conceptions* of them.[66] An overlapping consensus over those fundamental principles and concepts themselves, rather than a mere *modus vivendi*, remains attainable in all cases.

This last distinction between disagreement about what the principles of justice, even understood restrictively as 'constitutional essentials,'[67] should *be* and how they should be *applied* is difficult to hold.[68] People could also be expected to disagree reasonably and fundamentally about the basic terms and principles of their association.[69] It is difficult to see why the burdens of

[57] See Waldron, 1999a, 158.

[58] See Gutmann/Thompson, 1990; Waldron, 1999a, ch 7; Waldron, 1993c (on the inclusion of religious views in political discourse); George, 1997; and Bohman, 1999.

[59] Waldron, 1999a, 151 ff and Waldron, 1999c, 70 ff, 154–56.

[60] Rawls, 1995a, 246.

[61] Rawls, 1993, 60.

[62] Rawls, 1971, 198–99; Rawls, 1993, 393. See also more recently Rawls, 1999d, 137, 72: 'Persons, as members of associations, corporations, and estates have the *right* at some point in the procedure of consultation ... *to express political dissent* and the government has an obligation to take a group's dissent seriously and to give a conscientious reply,' and 87: 'It is also *reasonable* to expect a *variety of opinion in political judgements generally*, and therefore it is unreasonable to reject all majority voting rules. Otherwise liberal democracy becomes impossible' (emphasis added).

[63] Rawls, 1999d, 170.

[64] Rawls, 1995a, 261.

[65] Rawls, 1971, 223.

[66] See Rawls, 1999d, 169.

[67] Rawls, 1993, 137. I do not share some authors' view (eg Solum, 2000, 880) that this restriction of the scope of rational consensus to constitutional essentials is sufficient to accept its plausibility.

[68] Sandel, 1994, 1783 ff.

[69] Waldron, 1999a, 152. See, however, Rawls, 1995a, 261 who raises the issue of potential political disagreement on principles of justice, but does not discuss it in depth.

judgement[70] would not weigh on questions of morality and justice equally.[71] It suffices to think of disagreements about distributive justice between prominent liberal thinkers to see that the fact of reasonable pluralism also applies to principles of justice and not only to their applications. Furthermore, it is hard to see how the exclusiveness and the limitation of public reason to constitutional essentials and the principle of avoidance would succeed in separating entirely private reasons and interests from public reasons and prevent people from referring to their background beliefs and conceptions when publicly deliberating.[72] Finally, if one assumes, for the sake of the hypothesis, the absence of reasonable disagreement about justice, why not reverse the question? One may well indeed wonder why, if it is possible to reach an overlapping consensus about matters of justice where it appears clearly through reflection and deliberation which conception is reasonable or not, it could not be so on matters of the good too? The only way to establish this would be to deliberate politically on comprehensive moral issues and such an opportunity is hardly given by Rawls' conception of political liberalism.[73] In other words, it is unclear how the assumption that the exercise of human reason under conditions of freedom will produce disagreements about the good life, but not about justice, can be justified.[74]

ii. Rawls' Way Out

Rawls offers different tentative justifications for this hiatus between political consensus and comprehensive moral disagreement. None of them, however, succeeds in providing a justification of the difference in the exercise of human reason in the moral and political realms. I will concentrate on two of them here, which focus on restricting the scope of political morality. There is another route that focuses on restricting the scope of reasonableness, which allows Rawls to argue that, although there is a fact of pluralism about justice, there is no fact of *reasonable* pluralism about justice.[75] Such a justification is, however, at odds with Rawls' theory's inherent spirit of toleration,[76] as we will see later in the book.

[70] See Rawls, 1999d, 177, who contends, when exposing the limits to reconciliation by public reason, that 'conflicts arising from the burdens of judgement always exist and limit the extent of possible disagreement,' thus maybe not really differentiating between comprehensive moral disagreement and political disagreement.

[71] Sandel, 1994, 1782 ff; Copp, 1996, 198 ff; Solum, 2000, 880. See also Pharo, 1998; Clarke, 1999; Mulhall, 1995, 13; Jones, 1995 on the epistemological limits of a political agreement about justice that are the same as the ones that called for neutrality over questions of the good in the first place.

[72] See Macedo, 1990 on this lack of honesty on the part of liberal theories.

[73] Sandel, 1994, 1789. See also Waldron, 1993c, 834 ff.

[74] Rawls, 1999d, 133–34. The same critique applies to Solum, 1994.

[75] Sandel, 1994, 1784 ff who derives this argument from Rawls, 1993, 230. See also Gaus, 1996, 13.

[76] See Rawls, 1993, 10, 58, 138, 303–4. See also more recently Rawls, 1999d, 72 on the need for a 'decent consultation hierarchy' as opposed to a 'paternalistic regime': 'It is necessary that different voices be heard, because judges' and other officials' sincere belief in the justice of the legal system must include *respect for the possibility of dissent*.' See for Rawls' inspiration of free public reason, Kant, 1965, 593.

First of all, Rawls claims that 'a public and shared basis of justification that applies to comprehensive doctrines is lacking in the public culture of a democratic society.'[77] It follows then, according to Rawls, that issues of justice are not subject to the burdens of judgement.[78] The absence of a shared basis of justification in public culture does not, however, allow one to exclude the existence of reasonable disagreement on political matters, whatever the difficulties to reach a settlement may be in this case too. Besides, this conception wrongly assumes that there is an inherent limitation to human capacity for creativity in politics, implying that something counts as a legitimate move in public reasoning only to the extent that it latches onto existing premises that everybody already shares.[79] Finally, this view too quickly reduces the idea and necessity of political justification to rational consensus and ignores other modes of securing the legitimacy of political decisions.

Secondly, Rawls claims further that 'as far as possible the knowledge and ways of reasoning that ground our affirming the principles of justice ... are to rest on the plain truths now widely accepted or available to citizens generally.'[80] This seems to suggest that the burdens of judgement, ie the hazards that affect even reasonable beliefs, do not apply in the political forum.[81] In the public sphere, *public reason* is indeed regarded as the only way to deal with issues of justice, or at least with the fundamentals of justice.[82] The criterion for respect of the ideal of *public reason* is constituted of the respect of the general principles of justice as fairness. According to this ideal, political discourse should be conducted solely in terms of political values that all (free and equal)[83] citizens can reasonably be expected to accept.[84] These values are 'expressed by the principles and guidelines that would be agreed on in the *original position*'[85]; this process of definition follows from the Rawlsian 'Four-Stage Sequence' system in which there is no place for legislative, or more generally political disagreement and deliberation[86] about the fundamental principles of justice when these are defined in the original position.[87]

Rawls' approach to the elaboration of the principles of justice in the original position does not sufficiently accommodate the expression of fundamental difference and disagreement in the legislative design, despite an expressed concern for

[77] Rawls, 1993, 61.
[78] Waldron, 1999a, 152.
[79] Waldron, 1993c, 838. See Chapter 7. See Gutmann/Thompson, 1996 and Bohman, 1999.
[80] Rawls, 1993, 225.
[81] See Waldron, 1993d. See also Finnis, 1998 who interestingly acknowledges the possibility of disagreement in the public sphere (Finnis, 1996), without, however, regarding it as reasonable and hence as central case of authority. See Chapter 4.
[82] Rawls, 1993, 226; Rawls, 1971, 198–99, 223.
[83] Rawls, 1999d, 179.
[84] Rawls, 1993, 216 ff.
[85] Rawls, 1993, 227. See also Rawls, 1999d, 140 ff.
[86] See for the same critique, Habermas, 1995b. See also Pharo, 1998, 597 ff.
[87] Rawls, 1971, 195–201: the Rawlsian 'stages' correspond to (i) the choice of the principles of justice in the original position, (ii) the framing of a just constitution, (iii) the choice of legislation by representatives of the people and, finally, (iv) the application of rules by administration and judges to particular cases.

deliberative democracy in general.[88] Not only does his model preclude disagreement and deliberation about the *principles of justice* that are deduced[89] in the original position behind a veil of ignorance erasing all particular conceptions of justice,[90] but it also prevents disagreement and deliberation about the validity of this *procedure*, that is not as freestanding as alleged,[91] and about the ways of defining the principles as opposed to other more dialogical ways, for instance.[92] This point is confirmed by the fact that Rawls gives virtually no attention to real world institutions and institutional choice, such as majority rule for instance.[93] Rawls' intention not to 'fix public reason once and for all' in order to prevent the repression of groups' divergent interests[94] does not mean much if these conflicting claims are already excluded from the original position; this 'singular' interpretation of public reason as opposed to a more 'plural' one[95] settles some controversial political questions in advance of any deliberation.[96] Using as a criterion for the respect of public reason the values and principles defined in the original position amounts to the *circular* identification of the norm framing the public debate with values which are themselves constitutive of a particular position in this debate,[97] thus not really allowing deliberation to take place.[98]

As a result, Rawls' theory cannot acknowledge the existence of reasonable disagreement about political morality; the possibility of the latter may be derived from the burdens of judgement, but it is then denied by the application of public reason to issues of justice and the right and the definition of its criteria. Rawls' position seems therefore to be caught in a serious *quandary*. On the one hand, the idea that one needs public reason implies the *existence* of disagreement in the political sphere but, on the other, if there is disagreement about justice and it is solved by the use of public reason, it would be difficult to deny that it was initially

[88] See Rawls, 1999d, 138. See Chapters 4 and 7.

[89] See Rawls, 1971, 121 who asserts that the argument he provides to show that his two principles would be chosen by the parties 'aims eventually to be strictly *deductive*.'

[90] There can be no arguments among individuals behind the veil of ignorance because, by definition, they all have the same point of view. See Manin, 1987, 348.

[91] See Larmore, 1999, 610. See also Ricoeur, 1990, 265 and Abel, 1996, 76–77. Such a construction not only ignores (i) the *social and moral pluralism* that prevails about questions of justice and not only about questions of the good as Rawls' conception of 'reasonable pluralism' has it, but it also obliterates (ii) the intersubjective way of resolving conflicts by replacing it with a *quasi-monological* establishment of one's rights. See on these critiques, Pharo, 1998, 596 ff.

[92] Waldron, 1999c, 72–73.

[93] See also Komesar, 1994, 35 ff.

[94] See Rawls, 1999d, 142–43.

[95] See Bohman, 1995, 255 ff.

[96] See Rawls, 1999d, 164.

[97] Waldron, 1999a, 154. See also Waldron, 1993a, 56–57: 'This is the cost of the move from actual consent theory with its emphasis on will to hypothetical consent theory with its emphasis on liberal reason.' See for an analogous critique, Habermas, 1983, passim, who contends that the veil of ignorance in fact *neutralises* all differences and disagreements among contractors thus *privileging* some perspectives over others.

[98] See for the same critique, Mulhall, 1995, 13: 'What possibilities of dissent from the Rawlsian theory are here permitted, other than those which that theory itself regards as legitimate?'. See also Rosenfeld, 1995, 1168. See also Macedo, 1991, 50 ff.

a *reasonable* disagreement.[99] Caught in this dilemma, Rawls cannot deny the disparity of individual views about political matters any longer and hence the possibility of reasonable disagreement about political morality.

This may be inferred, first of all, from the fact that individuals in the original position 'agree' on *principles of fairness* that aim at vesting authority to some official views about justice, thus in other words acknowledging the possibility of reasonable political disagreements in ordinary political circumstances. Rawls has recently conceded that 'citizens will of course differ as to which conceptions of political justice they think the most reasonable, but they *will agree* that all are *reasonable*, even if barely so.'[100] In case of disagreement about the *degree* of reasonableness of all the views discussed, majority rules or other democratic modalities of vote[101] will establish a 'politically (morally) binding' and legitimate law for all citizens, who will nevertheless have the conscience of having followed an uncontroversial public reason.[102]

Secondly, Rawls acknowledges that 'it is inevitable and often desirable that citizens have different views as to the most appropriate political conception'[103] and, as a consequence, as to the principles that the criterion of public reason will select. He also hazards the suggestion—without dwelling on it—that 'different social and economic interests may be assumed to support different liberal conceptions' and to 'give rise to ideals and principles markedly different from those of justice as fairness.'[104] He then contends, however, that a way out of this difficulty is to consider that 'an orderly contest between [different fundamental political ideas] over time is a reliable way to find out which one, if any, is most reasonable.'[105] In other terms, as Waldron emphasises, reasonable disagreement about fundamental principles of justice may only be conceived of ex ante when settling and arguing on a view about them. Ex post this disagreement was merely *un*reasonable since the other views have in the meantime failed as candidates for criteria of public reason.[106] If this interpretation is correct, Rawls' model seems to be caught in a circular and unrealistic conception of political disagreement.

iii. A Revised Rawlsian Model of Political-Moral Disagreement

In sum, then, Rawls' model of justice as fairness does not take sufficient account of reasonable political disagreement in our political societies,[107] by opposition to what takes place in his utopian 'well-ordered society.'[108] His views on disagreement and disobedience simply do not allow for the existence of reasons in public

[99] Waldron, 1999a, 153.
[100] Rawls, 1999d, 137, 169.
[101] See Rawls, 1999d, 178, 169 who contends that 'unanimity of views is not to be expected.'
[102] Rawls, 1999d, 87, 137.
[103] Rawls, 1993, 227.
[104] Rawls, 1993, 167.
[105] Rawls, 1993, 227.
[106] Waldron, 1999a, 154.
[107] See Christiano, 1999a, 180, note 14; Solum, 2000, 880; Singer, 1972, 90. See Rancière, 1995, 143, 149.
[108] Rawls, 1993, 35; Rawls, 1995a, 261.

deliberations which are not already shared, that is reasons which could help alter and improve our conceptions of justice.[109] This prevents his theory from falling neatly into any of the two models of relationship between disagreement about the good and disagreement about justice I presented at the beginning of this section; conceptions of the good and the right are neither entirely connected, nor clearly distinct in Rawlsian politics. If reasonable political disagreement about political morality and matters of justice is as intractable and important as it seems to follow from this presentation, however, then one needs to ascertain its relationship to more comprehensive moral disagreement. This may be done by extending Rawls' interesting contentions on comprehensive disagreement about the good to disagreement about justice.[110]

According to Waldron's derivative construction of Rawls' model, each comprehensive conception of the good could generate a corresponding conception of justice, which could derive logically from their global qualification and from ordinary adversary political conditions. A more acceptable conception of justice might therefore appear among all these different conceptions without eliminating the others. This situation could generate at most a *modus vivendi* between this more powerful conception and the others,[111] ie a mere accommodation of those groups or interests in society who happen to still be powerful and whose views may not conform to the standards of what is progressively and intuitively recognised as justice.[112] At this stage, one may well conceive that with time one of the conceptions of justice, among all the different ones that are attached to the various conceptions of the good, may gain in success through deliberation over political dissent, gradually dispossessing some conceptions of the good from their own distinct view on justice and thus slowly undermining reasonable disagreement about justice. This revised model of Rawlsian political morality remains, however, of the domain of ideal theorising and the conditions of such an evolution remain to be thought through before one may conceive rationally of such a construction of the real conditions of politics.

b. Habermas' Separation of Ethical-Political Discourse from Moral Debates

Habermas' discourse theory's relationship to political-moral disagreement is no less ambiguous than Rawls'. This is surprising as it was originally meant as a post-metaphysical answer to conditions of prevalent and reasonable moral pluralism and of social complexity, where political and legal decisions can no longer be justified directly to all.[113] In fact, Habermas has always made a point

[109] See SINGER, 1972, 86 ff.
[110] WALDRON, 1999A, 161–63.
[111] RAWLS, 1993, 147, 168.
[112] On Rawls' distinction between 'overlapping consensus' and '*modus vivendi,*' COHEN, 1993, 272 ff.
[113] See HABERMAS, 1998A, 662, 679–80. See also HABERMAS, 1993, 16: 'We must renounce the premises of the philosophy of the subject on which *rational natural law* is based. From the perspective of a theory of discourse, the *problem of agreement* among parties whose wills and interests clash is shifted to the plane of institutionalized procedures and communicative presuppositions of processes of argumentation and negotiation that must be actually carried out.' See also ROSENFELD, 1995, 1180.

of distinguishing himself from his main competitor, Rawls, by emphasising the centrality of moral conflict for normative theories of law and politics.[114]

Habermas' views on law and politics have undergone such significant development over the years that he has become a moving target. Chronologically, it is possible to observe a certain evolution in his accommodation of conflicts of values that replaced his earlier discussions of conflicts of mere interests. This shift took place in 1988 when his political-theoretical work started progressively to elaborate upon the notions of ethical-political culture and identity, thus emphasising considerations of pluralism and multiculturalism.[115] Yet, the possibility of *reasonable agreement*[116] and of a 'consent of the governed' that reflects the 'cognitivist position that there is a universal core of moral intuition at all times and in all societies'[117] seems to have been left at the centre of the Habermasian discourse model of political and legal legitimacy.[118] It seems therefore that adjustments need to be made in order to make the discourse-based approach to democratic deliberation and legislation a more realistic answer to persistent political-moral disagreement.[119]

In this section, I would like to assess Habermas' claim about the separation of the ethical-political discourse from moral debates and hence his distinction between comprehensive moral or so-called ethical[120] disagreements, on the one hand, and reasonable convergence on matters of political morality, on the other. To do so, I will discuss the ways in which the issue of reasonable political-moral disagreement appeared in the early Habermas, before, finally, addressing the late Habermas' solution to the problem and separation between the ethical-political and the moral.

[114] See Habermas, 1991, 162; Habermas, 1998a, 81 ff. If there is a difficulty with Habermas' evaluation of moral and political disagreement, then it must lie further than Rawls' approach to political differences, that is to say in his faith in the possibility of reaching a rational consensus through discourse and an inclusive use of public reason. See on this distinction between Rawls and Habermas, McMahon, 2000 and McCarthy, 1994, 50 ff.

[115] I have made the choice here of concentrating on his most recent work since the introduction of a specifically ethical mode of discourse within a complex network of interacting political discourses in 1988; the emphasis will be placed on his main opus *Faktizität und Geltung* that was published in 1992 and on his 1993 'Struggle for Recognition in the Democratic Constitutional State.' There is little in his revised non-epistemic but transcendental theory of truth that affects Habermas' position about the rational acceptability of the moral right answer reached through ideal discourse and about political and legal legitimacy (Habermas, 1999b, 54 ff).

[116] The distinction between 'rational' and 'reasonable' is primarily used by Anglo-American scholarship. It corresponds roughly to Habermas' distinction between *communicative* and *instrumental* rationality (see Habermas, 1998a, 4–5). See Chapter 4.

[117] See Habermas, 1986, 206.

[118] See Habermas, 1996b, 134.

[119] See McCarthy, 1996 for this central critique. See Lafont, 2004 and 2005 for such an attempt at reinterpreting Habermas' discourse theory along the lines of McCarthy's, 1996 main critique. She attempts in particular to combine a realist account of truth and moral rightness, with an account of political legitimacy that remains based on reasonable agreement. Although I agree on the importance of keeping the possibility of reasonable agreement as an internal logic of deliberation, I argue against making it a goal in Chapter 7 and hence agree with McCarthy, 1996.

[120] Habermas uses the Kantian distinction between pragmatic questions that call for *expedient practical reasoning*, questions of value and the good life that call for *ethical deliberation* and questions of what is right and just that call for the adoption of the *moral point of view*.

i. The Early Habermas and the Problem of Political-Moral Disagreement

Habermas' conception of democratic legitimacy was developed on the basis of his theory of communication[121] and was formulated in opposition to legal positivists' attempts to reduce legitimacy to the legality of formal procedures. For Habermas, albeit it was true that there no longer could be a direct and individual pre-existing moral justification for each and every law given growing social and moral complexity,[122] the outcomes of legal procedures could only claim legitimacy if the legal order itself was recognised as legitimate; the justification of the legal and political system as a whole conferred legitimacy on decisions arrived at through procedures that conformed to it and this justification was based for democratic systems on appeals to popular sovereignty and human rights that were, and still are in this model, co-original[123] and indistinguishable from one another. In Habermas' view, the validity claims of legal norms generally, both constitutional fundamentals and everyday legislation, rested on grounds that ought to be tested and justified in *public discourse and deliberation.*[124] It seemed therefore to follow that every law still required a direct moral justification, but through the intersubjectivity of the rational public discourse only; any legal norm that was not 'based on rational consensus' could not but be 'based on force' with the exception of fair compromise arrived at under conditions of a balance of power which was said to be 'indirectly justifiable.'[125]

This account did not, however, succeed in eliminating the *tension* and the gap between (formal) procedural legitimacy and (substantive) rational acceptability, since a law that claims legitimacy as the formally correct outcome of procedures that are recognised as legitimate is not necessarily a law that expresses something that all substantively agree upon.[126] Habermas' way of closing this gap was to make legitimate procedures themselves depend (directly) on rational discourse and reasoned agreement, thus promoting a rational opinion-formation and will-formation under which the formal (and indirect) correctness of legal-political decisions warrants the (counterfactual)[127] presumption that they express a general interest to which all affected participants *could* rationally

[121] Scope precludes explaining this essential turn in Habermas' thoughts. See in particular Habermas, 1981a and 1983 and 'Recht und Moral', Tanner Lectures 1986 in Habermas, 1998a, 541.

[122] See Habermas, 1993, 16. See Habermas, 1990b, 203 on the distinction between his discourse ethics and Kant's *monological* moral theory that subordinates law to morality and hence on its inapplicability to the social-political realm of intersubjective legal relationships.

[123] See Chapters 7 and 9.

[124] Habermas, 1975, 105: 'We cannot explain the validity claim of norms without recourse to rationally motivated agreement ... The appropriate model is the communication community of those affected who as participants in a practical discourse test the validity claims of norms ... The normative validity claim is itself *cognitive* in the sense of the supposition (however *counterfactual*) that it could be discursively redeemed—that is grounded in a consensus of the participants through argumentation.'

[125] Habermas, 1975, 108, 111.

[126] See McCarthy, 1996, 1086.

[127] On the counterfactual nature of the agreement that could result from real discourse in ideal conditions, see Habermas, 1971, 124. See also Müller, 1992, 69–71.

agree.[128] This would accommodate the advantages of formal procedures without renouncing the internal relation of the law to the morally right.[129] This was made possible by the tight link Habermas established between rational acceptability and *impartiality*: general assent can reasonably be expected from free and equal persons only for norms that give equal consideration to all.[130]

Despite this interesting conceptual interweaving of the core concepts of traditionally competing approaches,[131] the key connection in this model between *procedural correctness* and *rational acceptability* was not yet satisfyingly established. The distinction between direct and indirect rational justification remained indeed a main feature of the model; while it was possible to imagine that constitutional fundamentals require a direct justification on grounds that are rationally acceptable to all, specific outcomes cannot always be justified, either directly or indirectly. General acceptance of basic structures and processes may translate into a general consent of the governed to arrive at decisions, even when there are people who substantively and persistently disagree with them. An example of this is given by the main democratic decision-making procedure: majority rule.[132]

Habermas was aware of the tension created in his model by *unresolved moral-political disagreement* and dealt with it by setting negotiation and strategic compromise alongside deliberation and consensus as acceptable procedures of indirect justification. Such procedures were, however, clearly tailored to deal with *conflicts of interests* and did not take into account the fact that people who disagree in value commitments and judgements that are rooted in cultural and ethical differences are often unwilling to treat values like interests and bargain or compromise on them.[133] Habermas progressively acknowledged the existence of such intractable conflicts of value and of the fact that 'we have access to our needs, wants, inclinations, desires, interests, feelings and the like only under culturally shared interpretations employing value expressions.'[134] Since 1988, Habermas therefore elaborated, following Kant, upon an aspect of rational will-formation reducible neither to the impartial consideration of everyone's interests in universal matters of the right and the just (moral discourse) nor to the fair negotiation of compromises in matters of preferences (pragmatic discourse): it amounted to a specifically *ethical deliberation* in a Kantian sense about questions of value and the good that cannot be given universally valid answers, but that are deeply rooted in forms of life and history.

[128] It is important to note that discourse itself is not counterfactual or ideal; 'the justification of norms and commands requires that a real discourse be carried out, and thus cannot occur in a strictly monological form, i.e. the form of a hypothetical process of argumentation occurring in the individual mind.' (Habermas, 1993, 68). See also Apel, 1988, 141.

[129] See McCarthy, 1995, 462 who examines Habermas' conception of practical discourse with the aim of showing 'how a residue of the *Kantian dichotomy* between the noumenal and the phenomenal appears there in the form of tensions between a *situated reason* and the *transcendence of situatedness* required by his model of rational consensus.' This view seems to be supported by Habermas, 1999b, 25: 'Architektonik von Lebenswelt und objektiver Welt.'

[130] See Habermas, 1998a, 563.

[131] See McCarthy, 1996, 1087.

[132] See McCarthy, 1996, 1088.

[133] See Carens, 1979, 129 ff. See Chapter 8.

[134] See Habermas, 1981a.

The problem with this early account of ethical-political deliberation was that it did not take full account of the problems that *cultural diversity* raises for ethical consensus; the cultural variation of evaluative conceptions of the common good reduces the chances of achieving a reasonable consensus on such matters in pluralistic societies. Even when public discussion, rather than leading to rationally motivated consensus on shared values, instead sharpens disagreements by revealing particular values to be non-generalisable nor consensually orderable, Habermas argued that we can seek agreement at a *higher level of abstraction*: the moral point of view.[135] Of course, he conceded, 'the sphere of questions that can be answered rationally from the moral point of view shrinks in the course of development toward multiculturalism within particular societies and toward a world society at the international level.'[136] However, 'only if it could be shown that moral discourses must prove unfruitful, despite the growing consensus concerning human rights and democracy, ... would the deontological endeavour to uncouple questions of justice from context-dependent questions of the good life have failed.'[137]

That shift of the burden of proof is not without resemblance to Rawls' political conception and his idea of an overlapping consensus over matters of justice and the right.[138] For instance, Habermas insisted on the common political culture that must be presupposed for political integration in a multicultural society.[139] According to Habermas, constitutional patriotism amounts to the readiness of a people to accept disagreement over the application of basic rights without loss of confidence in the universality of these rights, because they understand the disagreement as being tied to struggles over constitutional identity.[140] There are, however, significant differences between Habermas' and Rawls' accounts of the 'overlapping consensus.'[141] First of all, unlike Rawls' reflective equilibrium that is the basic and single level of justification of a theory of justice and that privileges therefore one ethical perspective of norms and principles over others,[142] Habermas' ethical self-understanding is theoretically *subordinate* to his later derivation of an

[135] See Habermas, 1986, 206; Habermas, 1975, 107, 111. It is useful to distinguish in Habermas' account between *truth, justification* and *moral rightness*; whereas *justifications* of truth will most of the time lead to *rational acceptability* and then (not always, for truth is not an '*Erfolgskonzept*' [Habermas, 1999b, 50]), through a transcendental point of view, to *truth*, the same is not necessarily true of *moral rightness* where there is no clear equivalent to the objective world of truth from which it is possible to transcend our contextualised judgements (56 ff), since our moral judgements have no object or orientation but the opposition of other people's value orientations that conflict with ours. Habermas finds a way out of this deadlock, however, by saying (301 ff) that there is an equivalent to the objective world for judgements of moral rightness after all that is constituted by people's conviction that there is an ideal and inclusive social world that can transcend our judgements. In other words, although it is necessary to draw a difference between truth and moral rightness and between them and the (fallible) rational acceptability of the best justification, in practice this distinction becomes moot.

[136] Habermas, 1993, 91.

[137] Habermas, 1993, 91.

[138] See McCarthy, 1994, 56.

[139] See Habermas, 1998a, 632.

[140] See Michelman, 2000b, 1070.

[141] See McCarthy, 1996, 1100.

[142] See Waldron, 1999a, ch 7. See Chapter 4.

abstract system of rights through a discursive analysis of the presuppositions of democratic self-determination. Secondly, the reasonableness of the 'comprehensive doctrines' which belong to Habermas' version of the overlapping consensus corresponds to *communicative reason,* the burdens of which have reached a more reflective level of development.[143] Thus, the basis of the Habermasian ethical-political consensus is not merely hermeneutic and monological, but it also has a communication-theoretical basis.[144]

It remains, however, that, just as Habermas recognised that different political cultures might advance different interpretations of the same abstract system of rights, different subcultures might defend different interpretations of the same constitutionally embodied system of rights,[145] thus leading to pervasive disagreement about what could be a just and neutral procedure given the absence of prior agreement on what could be equally just and thus good for all.[146] Besides, even if Habermas supposed, like Rawls, that in a well-ordered[147] democratic constitutional state there would be sufficient concurrence on basic political principles to provide a framework for dealing with other persistent ethical differences,[148] this level of agreement about the heart of a community's constitutional tradition is too abstract and general to deal with most legal-political issues that founder on other basic ethical disagreements,[149] In short, the problem with this view is its tendency to regard questions of legal and political justice as purely moral questions, and thence to conclude that they must be debated primarily from the point of view of strict universalisability.[150]

ii. The Late Habermas and the Separation of the Moral from the Ethical

In his more recent work, and especially in *Between Facts and Norms*, Habermas has elaborated further upon the dialectic of the general and the particular. He now expands upon the differences between *moral* and *political or legal discourse.*[151] Unlike moral norms which claim to express what all human beings could rationally want, legal norms express the rational will of members of some determinate society and their shared form of life, self-understanding and collective identity.[152]

[143] This more reflective conception of *communicative reason* allows Habermas to *coherently* accept the existence of burdens of reason and of reasonable ethical-political disagreement while, at the same time, contending that an overlapping consensus is possible at a more abstract moral level. This is precisely the link that Rawls must deny in order to be able to defend his idea of an overlapping consensus through public reason (see Waldron, 1999a, ch 7).

[144] See Waldron, 1999a, 158. Hence Habermas' choice of the term '*Übereinstimmung*' and not '*Überlappung*'.

[145] McCarthy, 1996, 1114. See also Arendt, 1973, 225 and Arendt, 1982, 70 ff.

[146] See Rosenfeld, 1995, 1178–79.

[147] See on this supposition, Waldron, 1999a, ch 7.

[148] See Habermas, 1994a, 134.

[149] See Gaus, 1996, ch 10.

[150] See Michelman, 2000b, 1067. See for the same critique of Habermas' tight distinction between morality and ethics, thus separating the law from many of its ethical components, Alexy, 1996a and McCarthy, 1996, 1096.

[151] See Habermas, 1998a, 197 ff. See also Habermas, 1993, 16–17.

[152] Habermas, 1993, 153.

Thus, the spectrum of valid reasons in legal-political opinion-formation and will-formation includes *not only universal moral considerations of justice*, but also *ethical-political* and *pragmatic reasons* whose cogency is context-dependent and hence relative.[153] Despite these differences, morals, ethics, law and politics are mutually consistent and actually *complement* each other in Habermas' account,[154] thus confirming, at first sight at least, the possibility of persistent political-moral disagreement. In fact, as Habermas himself acknowledges:

> as experience has taught, even narrowly defined *questions of justice* often remain *controversial*, particularly in a heterogeneous society. And nothing changes in ongoing controversies when all participants jointly assume (or at least happen to agree in presuming) that moral questions, if framed with sufficient precision, have *just one right answer*.[155]

According to Habermas, political-moral disagreements may have a variety of epistemic sources that are analogous to Rawlsian '*burdens of judgement*'[156]; these sources render moral disagreement an inescapable form of conflict even among *reasonable* people and thus explain the persistence of *reasonable disagreement* about moral matters.[157] These burdens of reason amount, for instance, to differences and conflicts of value standards and of interpretive and evaluative standpoints,[158] different ideas of the good life, varying contexts of action and experience, socio-cultural variations in the cogency of different types of reasons, and divergences in forms of life generally.[159] Despite his progressive acknowledgement of the connexion between the three main types of political and legal disagreement, ie conflicts of interest, ethical conflicts and moral conflicts, Habermas does not seem to take political-moral disagreement as seriously as he realistically should and still founds his theory of democratic legitimacy on the possibility of a rational overlapping consensus on political-moral issues.[160]

Although Habermas often stresses the practical interweaving among different forms of discourse and compromise in rational political will-formation,[161] his new strategy is to represent them as analytically separate discourses.[162] Habermas' approach is now to state his attachment to the *primacy of the right over the good*:

[153] See Habermas, 1998a, 197 ff.
[154] See Habermas, 1998a, 566, 667.
[155] Habermas, 1996a, 1574. See also Habermas, 1996a, 1576: 'verstetigter Dissens' and Habermas, 1996a, 1576: 'Andererseits dürfen wir auch als Beteiligte die empirischen Evidenzen *nicht blauaugig ignorieren*.'
[156] See Habermas, 1994a, 133 referring to Rawls. See Habermas, 1999b, 59 for an account of some 'burdens of reason.'
[157] See Habermas, 1994a, 133 referring to Habermas, 1993. See also McCarthy, 1996; Lafont, 2005.
[158] See Habermas, 1994a, 108.
[159] McCarthy, 1996, 1121 note 121.
[160] See Habermas, 1996, 1579. See also Habermas, 1998a, 198.
[161] See Habermas, 1994a, 126: '*Every legal community* and every democratic process for actualizing basic rights is *inevitably permeated by ethics* [and ethical discourse].' See also Habermas, 1996, 1580.
[162] See Habermas, 1998a, 667. See the critique in McCarthy, 1996, 1104 and McCarthy, 1991b. See for the same critique, Bernstein, 1996.

'the standpoint of impartiality from which we can judge what is equally in the interest of all has to be institutionalizable in democratic procedures in a neutral manner, that is, independently of any specific context-dependent conception of the good.'[163] Such a sharp position on the part of Habermas is surprising given all the signals he gave earlier of their dialectical interdependence. The pervasiveness and combination of the right and the good in all legal-political issues derives from Habermas' use of formulas such as the 'common good,' 'equally good solutions for all,' etc. Thus, the primacy of the right cannot be as absolute as it would be in traditional liberal accounts; it can only refer in Habermas' account to the *relative priority* of deliberation from the perspective of justice over deliberation from an ethical one.[164] For instance, the standpoint of *impartiality* cannot be institutionalised, in Habermas' account, independently of a context-dependent conception of the good.[165] As Habermas recognises himself when he discusses issues of equality, even criteria that are neutral with respect to disputed notions of the good will reflect some shared conception of it. There is therefore no such thing as absolute ethical neutrality, but only a Rawls-like neutrality of grounds, ie neutrality relative to a shared political culture.[166] As Habermas concedes, legal norms ought to be equally good for all in regard to the common purpose of coexistence and toleration, but not always in regard to the consequences on people's particular lives.[167] It is not therefore implausible to think that the relative impartiality of law may clash with the absolute impartiality of morals in the case where someone invokes a conception of the good that has only recently been represented in a society.[168]

When applied to the legal realm, what such a sharp distinction between different forms of disagreement and of discourse is obliterating is that in deliberating upon particular laws, we are considering norms intended to bind members of our own collectivity. Consequently, debating the validity of legal norms under the aspect of political justice is not necessarily separate from discussing moral norms from a strictly universal moral point of view; this clearly suggests a dialectical model of legitimacy since 'legitimate law is at once a realization of universal rights and the expression of particular forms of life.'[169] Hence, law's legitimacy should be thematised under both aspects: the right and the good. Consequently, the justice of something that is equally good for all of us is not separable from 'self-understanding about the kind of society we want to live in' and vice versa: they are two dialectically interdependent aspects of the same problem, namely, which norms citizens want to adopt to regulate their life together. Therefore, in practice, political deliberation ought to be seen as a multifaceted communication process that allows for fluid transitions among questions and arguments of different sorts,[170]

[163] See Habermas, 1995a, 556–57. See also Habermas, 1996, 1582.
[164] See McCarthy, 1996, 1118. See also Alexy, 1996a, 1031.
[165] See for the same critique, Rosenfeld, 1995, 1177.
[166] See Habermas, 1995a, 557.
[167] Habermas, 1996a, 1573.
[168] See Rosenfeld, 1995, 1177.
[169] See McCarthy, 1996, 1112.
[170] McCarthy, 1996, 1105.

thus allowing the burdens of judgement that apply to ethical-political issues to extend to moral ones.[171] If questions of justice in the law should also be posed in terms of what is equally good for all, there is no reason why ethical-political disagreement should not often translate into *reasonable political-moral disagreement about justice and the right.*[172]

III. THE FACT OF DISAGREEMENT AND THE ONTOLOGICAL CHALLENGE

In this section, I would like to start by presenting the ontological challenge raised by the persistence of political-moral disagreement. I will then discuss its defeasibility, before turning to the political lessons one may draw from it.

1. The Challenge

It is important to distinguish the present inquiry into the *nature and persistence of disagreement* from further considerations about its implications for *moral ontology* and *epistemology*. There is indeed an important controversy in moral philosophy that addresses the implications of the existence of widespread and persistent reasonable moral disagreement about some of the most central and important concepts of contemporary moral and political life for the idea that morality is objective or at least accessible.[173] Whereas for non-objectivists, the lack of agreement indicates the absence of an objective moral truth,[174] objectivists argue that independently of how much disagreement there is in morality, it can be explained in a variety of ways that do not impugn moral objectivity.[175] My contention in this section is that the fact that we disagree fiercely, even reasonably, on matters of principle does not necessarily imply either the absence of any objective moral truth or the epistemological and methodological impossibility of accessing that truth and thus of realising who is right among us.[176] All it may prove is that values and views about these values may conflict.[177] The issues of *disagreement* and *moral objectivism* are separate and one may recognise and

[171] For this discussion, see Chapters 4 and 7.

[172] See McCarthy, 1996, 1089. See for such an acknowledgement, Habermas, 1996, 1574; Habermas, 1999b, 59, 304.

[173] See Gowans, 2000. See for a recent example of the difficulties raised for moral ontology by intractable moral disagreement, the exchange between Raz, 2003c; Korsgaard, 2003; Pippin, 2003; Williams, 2003; Raz, 2003d.

[174] See Larmore, 1990, 340–41: 'Scepticism about the nature of the good life is itself one of the items of reasonable disagreement.'

[175] Some moral objectivists argue that the existence of a right moral answer actually implies reasonable agreement: see Habermas, 1996a, 1576. See also Gowans, 2000, 16 who calls it the '*agreement indicator of objectivity*.'

[176] See also Gaus, 1996, 6 ff.

[177] See Hurley, 1989, 322 ff.

emphasise the importance of disagreement without falling into *scepticism, anti-realism, subjectivism* or other ontological considerations.[178]

In order to evaluate the extent of the controversy and take up the challenge, we need a conception of moral objectivity and of moral ontology more generally. A striking feature of contemporary debates in meta-ethics, however, is the proliferation of all kinds of moral realisms, anti-realisms, quasi-realisms, and an endless variety of combinations of them. Most of these debates can be traced back to a remarkable dimension of our practice of normative assessment, namely, the purported objectivity and unconditional validity of our normative judgements. In what follows, I will distinguish between three main pairs of oppositions: objectivism and subjectivism, realism and anti-realism, and cognitivism and scepticism. It is important to keep in mind, however, that these three categories may overlap.

First of all, *moral objectivism* and *subjectivism*. Objectivists make the claim that some moral judgements are true while others are false. By contrast, subjectivists argue that our moral judgements reflect our subjective views and cannot be said to be true or false.[179] They reject the idea of an objective fact of the matter which makes a moral judgement true or false, either as a whole in the case of subjectivists or only in its universalism in the case of relativists.[180] Secondly, *realism* and *anti-realism*. Moral realists try to explain the objectivity of our normative judgements by assimilating them to factual judgements. Accordingly, normative judgements are supposed to describe an order of moral facts that subsists entirely independently of human beliefs and attitudes. Moral anti-realists try to avoid the implausibility and the problematic consequences of such metaphysical assumptions by embracing different versions of the view that in making moral judgements we do not even purport to make claims about what is objectively right or wrong, but rather simply to give expression to our attitudes.[181] Finally, *cognitivism* and *scepticism.* While moral realists are cognitivists, in the sense that they claim that we can know what is true and what is not, moral anti-realists usually are non-cognitivists. This is what one refers to also as scepticism or even as expressivism. Scepticism corresponds to the claim that no knowledge can be gained on any moral issue and more broadly on any question involving values.[182] Scepticism can be global or local depending on the issues the knowledge of which is excluded.

[178] Waldron, 1999a, 164 ff; Raz, 1995a, 98 ff. See also Larmore, 1987, xiv; Larmore, 1990, 340. See also Scanlon, 1998, 334, 354 ff.

[179] See Waldron, 1999a, 164.

[180] On these distinctions, see Gowans, 2000, 24 ff.

[181] I will not distinguish precisely between moral realism and moral constructivism. See for such distinctions, Shafer-Landau, 1994, 335 ff. See more recently Lafont, 2004 for a realist reconstruction of moral constructivism. Moral constructivism is particularly difficult to situate. On the one hand, constructivists explicitly oppose moral realism. Thus, they agree with anti-realists that our normative judgements do not purport to describe a pre-existing moral order, heteronomously imposed on us independently of our practical reason. But, on the other hand, they do not want to renounce their claim to the objectivity of our normative judgements as moral anti-realists do. They are moral cognitivists and not moral expressivists.

[182] Raz, 1995a, 99.

It is important to keep in mind, however, that scepticism does not necessarily result in moral subjectivism and is limited to the epistemological issue.[183]

Besides emotivism, that starts from the common intuition that moral judgement has to do with feeling and attitude,[184] and the realist difficulty in accounting for moral commitments to action,[185] the main and most serious source of and argument for anti-realism is in fact the *recognition of the intractability of moral disagreement.*[186] Even if the existence of disagreement does not suffice *per se* to prove the truth of anti-realism, the latter remains a serious option in the face of disagreement for some authors in contemporary meta-ethics.[187] Thus, according to Mackie's 'argument from relativity' that is the most perspicuous formulation of the argument from disagreement[188]:

> [the numerous] radical differences between first order moral judgements make it difficult to treat those judgements as apprehensions of objective truths. . . . the actual variations in the moral codes are more readily explained by the hypothesis that they reflect ways of life than by the hypothesis that they express perceptions, most of them seriously inadequate and badly distorted, of objective values'.[189]

2. The Challenge's Defeasibility

The argument that links moral disagreement to moral realism or scepticism[190] may be very easily defeated and this for four reasons.

First of all, 'the simple fact of disagreement for a certain sort of belief cannot itself show that there is no *fact of the matter being argued about*,' as Moore puts it.[191] To think otherwise would be to confuse 'intersubjective agreement and objectivity'[192]; the objective and general existence of a fact[193] cannot be deduced merely from the existence of a relative and mutual agreement among parties and vice versa. This also applies to disagreement. Its reasonableness does not add any further weight to the anti-realist claim. From the expectation that reasonable people disagree, one need not draw sceptical conclusions about the correctness of

[183] See Mackie, 1977, 18.
[184] See Waldron, 1999a, 172 ff.
[185] See Mackie, 1977, 40 for an argument from 'queerness.'
[186] See Waldron, 1998a, 79. For an emotivist account of morality based on the fact of pervasive moral conflict and the limits of the Enlightenment's rationalistic project, see MacIntyre, 1988.
[187] See eg Mackie, 1977; Blackburn, 1985. See also Posner, 1998, 1690.
[188] See Brink, 1989, 197 ff.
[189] Mackie, 1977, 36–37.
[190] The same argument applies to the link made by some authors between essential contestability and moral scepticism, such as Gray, 1977. See for a more elaborate response, Connolly, 1983; Mason, 1993, 4. See Chapter 3.
[191] Moore, 1982, 1089–90. See for the same line of argument, Wellman, 1975; Hurley, 1985; Brink, 1989, 197 ff.
[192] Moore, 1982, 1089-90. See also George, 1997, 1389–90; George, 1996, 56–61.
[193] See Williams, 1985, 132 ff.

moral views; the burdens of reason need not imply the absence of moral truth nor the absolute impossibility of accessing it.

True, political judgements remain subjective in a sense, but they need not be regarded as arbitrary for that reason, contrary to what was the case for a long time in the tradition of political thought.[194] Political judgements cannot indeed but be *someone's own* judgements before they are communicated to others. As Arendt very accurately describes, 'in aesthetic no less than in political judgements, a decision is made, and although this decision is always determined by a certain *subjectivity*, by the simple fact that *each person occupies a place of his own from which he looks upon and judges the world*, it also derives from the fact that the world itself is an objective datum, something common to all its inhabitants.'[195] Although there may *be* an objective truth about justice, such truth never manifests itself to us in any self-certifying manner[196]; it inevitably comes among us as one contestant opinion among others.[197] No matter how often we use words like 'objective' to qualify claims of justice, claims about what justice objectively requires, ie sound judgements of justice, never appear in politics except as *someone's view.*[198]

Secondly, relativism and anti-realism raise a puzzle which is difficult to solve if one rejects moral objectivity. It is the difficulty one faces when explaining why moral claims appear to conflict in the first place.[199] As Williams argues in his discussion of the persistence of disagreement and the absence of convergence in morality as opposed to science, if anything attests the objectivity of ethics, it is precisely the experience of moral conflict: 'that there is nothing that one decently, honourably and adequately can do seems a kind of truth as firmly independent of the will and inclination as anything in morality.'[200] According to Williams, the point of the contrast between morality and science is that 'even if [convergence] happens [in morality], it will not be correct to think it has come about because convergence has been guided by how things actually are, whereas convergence in the sciences might be explained in that way if it does happen.'[201] If agreement and convergence do not strike us as being necessarily revelatory of the rightness or wrongness of our decisions, there is no reason disagreement should. In fact, who says disagreement also says potential agreement.[202]

[194] See Arendt, 1970, 229. See also Villa, 2000; Beiner/Nedelsky, 2001, x–xi.
[195] Arendt, 1998, 222.
[196] This should not be confused with a *disquotational* argument such as Dworkin's, 1986, 78–83. The fact that we oppose our own views of justice and disagree about them has *neither negative nor positive implications on their objective truth* and thus certainly does not make us expressivists or quasi-realists (see, however, Blackburn, 1981, 170–74). See Dworkin, 2003b and Dworkin, 2004a for a restatement of his original disquotational position.
[197] Waldron, 1999a, 199.
[198] See Williams, 1993, 119: 'Our [ethical] arguments have to be grounded in a human point of view; they cannot be derived from a point of view that is *no one's* point of view at all.'
[199] See Shafer-Landau, 2003, ch 14.
[200] Williams, 1981, 75. See also Williams, 1993, 132.
[201] Williams, 1993, 136.
[202] See Lafont, 2004; Lafont 2005.

Thirdly, the fact that the possibility of disagreement can derive from the fact of moral or value pluralism should not be confused with an argument for relativism.[203] Moral or value pluralism stands between moral relativism and moral absolutism or monism.[204] It avoids pure relativism by contending that some things are objectively bad whereas others are objectively good in both our individual and collective lives.[205] It is not absolutist, however, in the sense that no single conception of the good is valid for all individuals[206] and multiple goods cannot be reduced to a common measure or ranked in a clear order of priority.[207] This applies even more so to interpretive metaphysical disagreements that derive from what Raz refers to as the relative social dependence of some values.[208] True, these disagreements have been taken to show the untenability of the difference between moral pluralism and moral relativism or subjectivism.[209] What this critique ignores, however, is that once a value has emerged from its particular social context, it applies across the board and in a universal manner.[210] Besides, as Raz argues:

> the nature of the disagreements we are considering tends to affirm rather than challenge the objectivity of values, and the possibility of evaluative knowledge. These disagreements are contained within a framework of shared views: that being imaginative contributes to the excellence of a novel, that being loyal contributes to the excellence of a relationship, and so on. The disagreement is about the way the elements relate, about their relative importance, and the like. It is *bounded disagreement* that makes sense only if the agreement makes sense, and the agreement is that, regarding these boundary matters, people are justified in their claim to knowledge.[211]

Finally, we may well realise through disagreement that our beliefs are mistaken, but this recognition of our fallibility should not be confused with scepticism[212]; it amounts merely to the awareness of the conditions of knowledge and of their complexity, that depends on the correct exercise of skills and judgements.[213] Mackie acknowledges this point when he adds that 'it is not the mere occurrence of disagreements that tells against the objectivity of values. Disagreement on questions

[203] Larmore, 1996, 171 ff; Gray, 1996, 46.
[204] On this mixed account, see Gowans, 2000, 30 ff. On the distinction between absolutism, value pluralism and relativism, see Galston, 1999a.
[205] See Berlin, 1969b; Berlin, 1998, 2 ff ('there is a world of objective values'); Hampshire, 1983, 154–55; Galston, 2000, 878. See Waldron, 1999b. See also Mill, 1962, 173.
[206] See Finnis, 2001 and his ethical rationalism.
[207] Berlin, 1998, 2 ff: 'These collisions of value are the essence of ... what we are.' See also Gray, 1996, 25, 43–44, 113; Barry, 1990, xxxixx–xliv, 3-8.
[208] See Chapter 2. See Raz, 2003c and Raz, 2003d on this kind of widespread metaphysical disagreement.
[209] See eg Pippin, 2003; Williams, 2003.
[210] See Raz, 2003c, 22.
[211] Raz, 2003c, 51–52 (emphasis added). Contrary, to Raz, I argue there that even paradigms can be ousted and changed and that the agreement need not be bounded by the same paradigms. See Chapter 3.
[212] See Dworkin, 1996b, 113.
[213] Raz, 1995a, 100. See also George, 1999a, 185. See also on the distinction between epistemological scarcity, akrasia or relativism and cognitive normative pluralism, Gaus, 1996, 109.

in history or biology or cosmology does not show that there are no objective issues in these fields for investigators to disagree about.'[214] He does not, however, seem to see how his point about fallible speculations and the lack of adequate evidence applies even more clearly to the moral realm than to history or biology.

3. Learning from the Challenge

The existence of a *logical gap* between disagreement and there being 'no objective fact of the matter'[215] does not suffice to ensure the complete absence of connection between disagreement and the absence of objective truth. One still needs to think more about *procedures for resolving* disagreement[216] and the possibility of ending disagreement through *convergence.*[217] This requirement corresponds to the fact that our conception of reality in most sciences is closely associated with ways of establishing it, and of settling and ending disagreements, that are shared by a large number of people.[218] Ethics do not provide the *terrain* for 'all or nothing' observations and statements as natural sciences do; in the latter, experience can indeed establish the absolute truth or the falseness of an assertion. However, to simply state, as some realists do, that 'moral judgements are viewed as factually cognitive'[219] and that they can be assessed as true or false is not sufficient; it does not tell us, for instance, how morality may be a possible object of knowledge. This quality would require more than the mere capacity of being true or false.[220] Some realists contend in reply to this objection that 'moral aspects of the world may be detected as others by looking and seeing.'[221] This assertion is once again too simplistic; it does not provide us with an objective account of the subjectivity of perception in the moral field.[222] This is necessary since perception, as I argued earlier, is always subjective and one needs standards and measures to assess its results.

By contrast to other domains, therefore, ethics do not encompass an apparatus of method and epistemology that connects the idea of there being a fact of the matter with the idea of there being some way to proceed when people disagree[223]; each moral theory entails its own conception of what counts as a justification for the settlement of a particular conflict of views within the theory itself.[224] Thus, one may distinguish two levels of disputes: first-level disputes about the content

[214] Mackie, 1977, 36.
[215] Moore, 1982, 1089–90.
[216] Waldron, 1999a, 177.
[217] See Williams, 1993, 152.
[218] See Williams, 1993, 132 ff.
[219] Platts, 1988, 282.
[220] Waldron, 1999a, 179.
[221] Platts, 1988, 285.
[222] Waldron, 1999a, 179.
[223] See Berlin, 1969b, 3. See also Waldron, 1999a, 178; Fishkin, 1986; Gaus, 1996.
[224] See Williams, 1993, 152: 'Bodies of ethical thought can conflict with one another in ways that not only lack the kinds of explanation that could form a *credible theory of error*, but have too many credible explanations of other kinds.'

of political morality and second-level disputes about the proper way to settle first-level political disagreement.[225] The fact that access to the truth about morality and its nature is itself controversial makes it part of the substantive argument we have about substantive issues of morality.

The absence of a common methodology or epistemology undermines, as Dworkin argues, the plausibility of a purely meta-ethical sceptical claim.[226] But it should also lead realists to *caution* and qualification when advancing their claims as corresponding to moral reality.[227] The awareness of our moral fallibility should raise a sense of *critical rationality*. This attitude amounts to the realisation of the corrigibility and revisibility of all ordinary beliefs and of the need to re-examine them periodically in the light of disagreement.[228] This attitude towards fallibility may be extended to all value and moral judgements given the general vulnerability of values.[229] In short, therefore, if the diversity of opinions on justice should not necessarily undermine our view that there possibly are right answers, it should undermine 'our confidence that the right answer can [always] be *discerned* in any way that is politically dispositive.'[230]

CONCLUSION

Disagreement comes in all shapes and sizes. My aim in this first chapter was to discuss the notion and types of moral disagreement that will be discussed in the present book, in order to help in furthering the grasp of the significance of these disagreements in current political philosophy and to help to provide an understanding of the potential responses which can be given to it. My first concern was to distinguish the *notion* of disagreement from other forms of common conflicts with which it could be confused. I emphasised its intersubjective nature and contrasted it with moral dilemmas. I then discussed the fact that it opposes opinions and judgements, rather than mere interests and hence distinguished it from conflicts of interests. Finally, I emphasised the fact that disagreement opposes expressed opinions and should be contrasted therefore with mere moral differences or latent oppositions.

With respect to the different *types* of disagreement, secondly, I distinguished moral disagreements in general, ie disagreements on value judgements, from political disagreements over those moral matters that are of political concern. The present book's object is this very political-moral type of disagreement, ie disagreement over matters of political morality that run from principles of justice to questions of the right. Disagreement about the *law*, and especially legal rights, is

[225] See Waldron, 1998a, 81.
[226] See Dworkin, 2004a for such a view about Archimedean philosophy.
[227] Waldron, 1999a, 180 drawing on Moore, 1982, 1063. See also Sturgeon, 1994, 94.
[228] Raz, 1995a, 101.
[229] Raz, 1995a, 102–4.
[230] Waldron, 1999c, 50; Waldron, 1998a, 81 ff. See for the same view, Mill, 1962, 143.

the main type of political-moral disagreement the book is concerned with. It is a type of political disagreement since law may be regarded as an 'offspring of politics.' Besides, it usually raises moral and normative issues, since law reflects, in some but not all of its aspects, the aspiration to justice of a community of people who usually happen to think differently on matters of common concern. These normative political-moral disagreements about the law are *theoretical* legal disagreements as opposed to *normative* legal disagreements; the former are disagreements over what the law is, whereas the latter are disagreements over what it should be. Roughly speaking, moral matters of political concern do not encompass moral issues that do not arise in political debates such as issues of moral virtue, character, feelings and judgement. The line is difficult to draw, however. Given the general recognition of the intractability and significance of reasonable moral disagreement, and as a consequence of reasonable political-moral disagreement, I argued, contrary to two predominant liberal accounts of political justification, that it is implausible to deny the relationship between disagreement on issues of the ethical or the good and disagreement on the moral or the right. This would amount to restricting, on the basis of a neo-Kantian distinction, the good to the private sphere and the moral to issues of public welfare and redistribution exclusively, whereas one's political theory's principles are often derived from *comprehensive* moral doctrines that affirm political arrangements in the name of certain moral ideals.

Finally, I argued that considerations about the nature of moral and political disagreement do not authorise *ontological conclusions* about the nature of morality; neither anti-realist, subjectivist nor sceptical conclusions can be deduced from the existence and possibility of persistent and pervasive reasonable disagreement about justice. Political deliberations can only oppose individual opinions of what may be the objective truth about justice. In fact, one may even argue that agreement on moral matters calls for as strong an explanation as disagreement. If agreement and convergence do not strike us as being necessarily revelatory of the rightness or wrongness of our decisions, there is no reason disagreement should.

2

The Sources of Disagreement and Legal Indeterminacy

INTRODUCTION

The rule of the underdetermined is itself underdetermined.[1]

HAVING CLARIFIED THE notion and types of disagreement, it is time to turn to the next dimension of the nature of disagreement that needs to be examined: the sources of disagreement. There are different sources of disagreement, which may, depending on the concepts, constitute different layers of disagreement over the same conceptual matter. Disagreement over the justice of a legal rule may derive from different sources along a spectrum running from purely linguistic confusion through conceptual indeterminacy to purely normative contestation. If we are to assess the extent of disagreement and ascertain the best ways of responding to disagreement and coordinating our social actions, it is important therefore, first, to identify the exact *sources* of our conflicts. Then, we will also need to determine the relationship there is between political-moral disagreement in and about the law and *legal indeterminacy*; disagreement need not arise from legal indeterminacy, but when it does, its significance will differ and so will its remedies.

I. THE SOURCES OF DISAGREEMENT

It is useful to distinguish three main sources or layers of potential reasonable disagreement about justice. The first level of disagreement is *verbal* or *semantic*; agreement on the terms of a concept is a prerequisite for further conceptual or normative agreement or disagreement. The second level of disagreement is *conceptual*; it revolves around the broad meaning or delimitation of a concept.[2] It can take the forms of vagueness, ambiguity or abstractness, but also of contestations which are more central to normative concepts. Such cases of core contestability open the door to a third level of disagreement: *normative* disagreement, ie disagreement about the actual application of normative concepts and the evaluations they imply.

[1] Aristotle, 2004, 1137b29–30.
[2] See Waldron, 1994a.

1. Verbal Lack of Agreement

Before a dispute can be said to be a dispute over the same concept which the parties understand and share sufficiently to be able to argue over it, they might suffer from a *verbal misunderstanding*. They might not be arguing about the same concept, but merely about its wording. For instance, two people may use the word 'bank' and argue about it, but without realising that they are not using it to refer to the same concept; one of them uses it to refer to a sloping patch of ground and the other to a building where money is lent and borrowed. They are arguing about the concept-word, and not the concept of bank, for they fail to recognise that the concept has two meanings and do not therefore share the concept in a sufficient way.[3]

This first level of agreement and disagreement is *verbal* or *semantic*. When people appear to disagree about a concept, one needs to determine first whether they understand the meaning of the words of the concepts they use, whether they use them in the same way and whether they are not merely victims of a misunderstanding.[4] This kind of misunderstanding does not constitute 'disagreement' *à proprement parler;* it is merely a lack of agreement about *which* concept people are using and not of agreement about the *concept* itself despite the appearance. The absence of agreement corresponds to miscommunication and the lack of a shared concept.[5] An interesting case arises where our disagreement *cannot but be verbal* in this sense; in such a case, although we seem to disagree about the same thing, the condition of that thing being what it is cannot be *reasonably doubted*. This would be the case, for instance, when people are disagreeing about an established scientific fact,[6] in which case one of them is not talking about the same thing for his doubts are not reasonably defensible.[7]

2. Conceptual Disagreement

Once we are sure that people use a word to refer to the same concept, and thus understand that concept in a sufficient way to discuss it, disputes can still arise within the boundaries of the same concept and this can be the case when people disagree about the *meaning* of this concept.[8] These disputes are generally referred

[3] Accounting for the meaning of a concept is not equivalent to accounting for the meaning of a concept-word. See RAZ, 1998B, 254 ff; RAZ, 2004B, 324–25.

[4] See in an analogous direction, RANCIÈRE, 1995, 12–13 who distinguishes between *mésentente* (disagreement), *méconnaissance* (ignorance or illusion) and *malentendu* (misunderstanding). See also LYOTARD, 1983, passim.

[5] See MASON, 1993, 69 ff.

[6] See STAVROPOULOS, 1996, 126 who gives the example of the stipulation that water boils at 100 degrees.

[7] See STAVROPOULOS, 1996, 156.

[8] The use of the term 'semantic' or 'verbal' applies only to disagreement over the conventional criteria that are to be shared in order to link a word or phrase to a concept; other forms of conflicts or indeterminacies surrounding a concept's meaning are referred to as 'conceptual' and become 'normative' when they entail references to the normative content of the concept. STAVROPOULOS,

to as *conceptual disagreements*.[9] Concepts are indeed placed between the world, aspects of which they are concepts of, and words or phrases, which express those concepts and are used to talk about those aspects of the world.[10] Concepts should not therefore be associated too closely either with the nature of the objects they refer to in the world or with the meaning of the terms in which they are expressed.

In a conceptual disagreement, people disagree over competing *conceptions* of the same concept.[11] A conception amounts to what the concept is more precisely, ie a definition or deployment.[12] Dworkin's distinction between a concept and its conceptions, which I use here, opposes a 'more abstract idea' or 'plateau' to 'a particular substantive theory.'[13] Concepts and conceptions are just different levels at which more abstract or more concrete statements are made. Thus, both the concept of justice and its conceptions can be seen as part of the meaning of the term 'justice.' Conceptual disputes about the *meaning* of a concept should be distinguished from disputes over the *application* or the extension of a concept; the latter are not disputes about the rules regulating what constitutes the concept's correct applications, but disputes as to whether some particular case fits with those rules.[14] It is possible to distinguish two kinds of disputes over the application of a concept: empirical disputes and substantive or normative ones. First of all, conceptual disputes ought to be distinguished from *empirical disputes*, that do not arise about the concept itself but over the *things* to which a concept is to be applied and their compliance with the concept.[15] Secondly, the same distinction can be made when the application of the concept, the meaning of which is clear and shared, requires a *normative evaluation* of a situation, because the concept has appraisive function[16]; in such a case, the dispute is not conceptual, but *substantive*.

Some conceptual disputes are purely borderline in that they pertain to the limits of a concept's meaning, while others are more central to its meaning and can be deemed as pivotal.

1996, 125 ff refers to semantic or verbal disagreement as 'conceptual' disagreement and to conceptual or normative disagreement as 'substantive' disagreement. This derives from his reduction of concepts to the use of words and to a 'key semantic unit' in his alternative semantic approach to legal theory: STAVROPOULOS, 1996, 1 ff.

9 On the distinction between semantic and conceptual disagreement, see MILLER, 1983, 42.

10 RAZ, 2004B, 325.

11 I am here following the standard Fregean picture of concepts: concepts have meanings (ie the information that speakers associate with the concept and use to specify its content) and the relevant concepts have extensions (ie objects falling under them).

12 See FREEDEN, 2003, 52 ff.

13 DWORKIN, 1986, 71; DWORKIN, 2004A, 7.

14 This seems to be the distinction Hart draws between a 'concept' or the meaning of a term and its 'conceptions' or its applications. Hart accepts the possibility of disagreement over the conceptions or applications of a concept, but does not see how we could disagree on these without some agreement over the concept and its meaning. See also ENDICOTT, 1998, 293.

15 On this distinction, see MILLER, 1983, 40.

16 MILLER, 1983, 41.

a. Borderline Disagreement

Some conceptual disputes are purely *borderline* in the sense that the terms used to express the concept can be such that they make the meaning of the concept ambiguous, vague or abstract.[17] Borderline disputes usually imply that it is unclear whether the concept applies in a specific case that differs from its cases of clear application; one may therefore say that such disputes are disputes over the *limits*, however vague these are, of the correct application of a concept.[18] An example of dispute over the limits of the correct application of a concept due to that concept's lack of clarity may arise when people are disagreeing over whether all actions are either voluntary or involuntary; here, the dispute is clearly about the meaning of the concepts 'voluntary' and 'involuntary' and the criteria for their correct application, but the parties agree that there is a range of actions that is clearly correctly described as 'voluntary' or 'involuntary.' The concepts are unclear and the scope of their correct application is moot. One can distinguish three types of sources of borderline disputes[19]: ambiguity, vagueness and abstractness.

First of all, terms can be *ambiguous*. In such a case, a term has two predicates which look exactly like the term itself but which apply to different, though possibly overlapping, sets of objects. The meaning of each predicate amounts to a different way of identifying objects as within or outside its extension.[20]

Secondly, terms can be *vague*. Vagueness qualifies a predicate when there are objects or instances within the domain of the normal application of terms of this kind such that users are characteristically undecided about the truth or falsity of the association of one instance and its predicate and they understand the indecision to be a fact about the meaning of the predicate rather than about the extent of their knowledge of its objects or instances.[21] There are two forms of vagueness worth distinguishing. First of all, vagueness may derive from the use of *classificatory terms to divide up a sensory continuum*[22]; this is the case of the adjectives 'young' and 'old,' for instance. The difficulty of such cases is summarised at best by the *sorites paradox* or the paradox of the heap of sand. The *sorites* reasoning applies to the situation where a series of things is arranged in such a way that at one end there is a heap of grains and at the other just one grain which is obviously not a heap.[23] In between, however, the application conditions for the predicate 'heap' are not sharp enough to distinguish heaps from non-heaps on the basis

[17] On the lack of complete identity, despite intrinsic closeness, between a concept and the linguistic terms in which it is constructed, see Skinner, 1989, 7–8 and Farr, 1989, 27. See also Raz, 2004b, 324–25.

[18] See Dworkin, 2001b who talks about disagreement about borderline cases by reference to Hart's core and penumbra.

[19] Dworkin, 1986, 351.

[20] Waldron, 1994a, 512.

[21] Waldron, 1994a, 513.

[22] Waldron, 1994a, 516 ff. See also Kutz, 1994, 1004 ff.

[23] See Endicott, 1997, 38–39.

of the difference of a single grain; so, if one member of a series is a heap, so is the next. Secondly, another form of vagueness is referred to as '*family resemblance*.'[24] Such concepts are usually understood in terms of the application of other predicates that need not always all be there,[25] such as the term 'game' in the Wittgensteinian example.[26] This kind of vagueness arises whenever there is a term with a number of independent conditions of application, some but not all of which need be satisfied.

Finally, concepts can be expressed with *abstract* words, like 'reasonable,' such that people can be expected to disagree whether some application meets the abstract standard which the abstract word names. One should note that people may disagree over what the abstract standard requires, but this is another type of dispute than the one I am concerned with here and it is the kind of dispute to which I will turn later on: normative disagreement.

The distinction between these kinds of vagueness and borderline disputes demonstrates how dangerous it may sometimes be to explain vagueness in terms of the 'borderlines' of a concept's application the core of which is determinate.[27] People might indeed disagree on how to draw the circle around the determinate core or paradigm of a predicate and this is what one refers to as higher-order vagueness.[28] Moreover, sometimes vagueness and other forms of borderline conceptual disagreement are referred to as *linguistic* disagreement. It should be clear by now, however, that vagueness should be regarded more as a property of the *meaning* of words that is relative to users or other things than to the words themselves.[29]

b. Pivotal Disagreement

Borderline disputes are not the only conceptual disputes people might have over the correct application of a concept.[30] Some conceptual disagreements may also go deep into the *core of a concept*. These conceptual disputes are also referred to as *pivotal* disputes.

Authors differ as to what could be the sources of this kind of pivotal disagreement. Some, like Raz, argue that they are *criterial* disputes, ie disagreements over the criteria for the correct application of a concept.[31] Criterial disputes are

[24] See Endicott, 2000, ch 8.
[25] Waldron, 1994a, 517 ff.
[26] See Wittgenstein, 1991, § 66–67.
[27] See Endicott, 1997, 46 ff. See also Waldron, 1994a, 522 ff; Endicott, 1997, 60 ff; Kutz, 1994, 1006.
[28] See Endicott, 1997, 57: 'The most ironic feature of the *sorites* paradox is that the extent of the determinate is indeterminate.'
[29] See Waldron, 1994a, 520–21.
[30] See Dworkin, 2001b.
[31] This is, I take it, Raz's, 1998b argument against Dworkin's criterial attack on semantic theories and especially Hart's. Raz's critique aims at explaining criterially genuine disagreement about the *law* rather than about justice, but one may well regard his argument as having implications for disagreement over other concepts as well. See, actually, Raz, 2003c for a similar account of conceptual disagreement in the moral context. See also Dworkin, 2001b.

disputes in which people share only imperfectly the common rules or criteria for the correct application of a concept and therefore disagree about its correct application. Although criterial disputes can extend to central parts of the correct application of a concept, those who share the concept[32] assume, at least in the version that has been given recently by Raz,[33] that some minimal rules regarding its proper use,[34] such as paradigms or analogies, ought to be shared and *agreed upon*, unless people are mistaken. Disagreements are therefore restricted to cases in which some people suffer from epistemological barriers and are making claims which others are entitled to regard as wrong.[35] Thus, for instance, conceptual disputes over the central meaning of 'baldness' will be criterial, for people share undisputed rules and paradigms of the concept's correct application and someone claiming something different can only be making a mistake about those rules.

Other authors, like Dworkin, argue that there are concepts over whose central cases one can disagree without making a mistake and without having to share minimal criteria of application. These disputes are truly *pivotal* in that respect.[36] They are disputes that go to the core of the meaning of the concept as opposed to borderline disputes—in this sense they are not different from criterial disputes—but which put into question *any* preconception of a correct and shared application of the concept. This is the case of most disagreements over justice and other normative concepts of that kind. These concepts are also referred to as *essentially contestable concepts*. I will come back to this controversy in the third chapter where I will argue for the possibility of truly pivotal disagreements about normative concepts.

3. Normative Disagreement

Once verbal misunderstandings and conceptual conflicts are settled, or at least once their eventuality has been set aside, the next layer of potential disagreement is *normative* or *substantive* disagreement. Normative disagreements amount to disputes over the application of normative concepts, the meaning of which is clear

[32] In this sense, agreement in paradigm cases must be *general* for communication to be possible, but it need not be *absolute*: see ENDICOTT, 1998, 297.

[33] See RAZ, 1998B, 269: 'If you assert that a certain feature is a necessary feature of a concept and I assert that it is not, we will proceed by appealing to clear examples, to analogies or to agreed conceptual connections and will pursue their implications. When one defines "a table" as an item of furniture made to put things on, the typical response is not "this is not how the term is used" (though this response is true), but "by your definition a drawing board is a table, therefore the definition is mistaken." The sharing of the rule is assumed. It is not part of the argument.'

[34] On Ryle's distinction between 'use' and 'usage,' see MILLER, 1983, 45 ff.

[35] This derives from RAZ, 1998B, 263. On this communal view of what is the correct application of a concept and the mistake there is in not agreeing with the majority, see a combined reading of WITTGENSTEIN, 1991, I, 202 and 258. See on this interpretation of Wittgenstein's private language argument, LEICH/HOLTZMAN, 1981, 3 ff. See also Chapter 3.

[36] See DWORKIN, 1986, 41–42 on testing or pivotal cases as opposed to borderline cases and the example of a dispute about what art really is.

and shared. Normative concepts have an appraisive function in the sense that they require a *normative evaluation* of a situation.[37] Consider, for instance, a case where two people disagree about the rightness of a course of action such as abortion; it would be misleading to say that they are disagreeing about the meaning of 'right' or the concept of 'rightness.' Of course they could, but in most cases, the normative question 'what is right' is not equivalent to the conceptual question 'what do we mean by "right"?'.[38]

In the legal context, theoretical disagreement about the law corresponds to normative disagreement about the moral values and interests underlying legal concepts.[39] There may also be cases of normative legal disagreement about what the law should be and whether it should match one or the other moral value. One can distinguish two kinds of normative disagreement: epistemic and metaphysical disagreement. These two types of disagreement stem out of (but still differ from)[40] two sources of *moral pluralism* in our society: *social* pluralism and *value* pluralism.[41]

a. Epistemic Disagreement

Epistemic disagreement amounts to a difference of views about principles or concepts that is due to the limitations of our understanding, but that has a right answer that may be the object of knowledge.[42] It may be due to the *complexity* of our system of beliefs or to our *limited ability* to discern rightly among information,[43] in the absence of a methodology or epistemology clear enough to establish the right answer.[44] As Arendt argues, human judgement is fallible and is the object of numerous burdens, such as differences of perspectives, weighing or evaluation of the evidence.[45] As we will see, reasonable people can be expected to forge different opinions of the common good and justice and hence to disagree reasonably.[46]

Epistemic disagreement is common and most cases of ordinary disagreement about political-moral matters may be regarded as deriving from this type of '*limited understanding*' of political morality.[47] It is clearly related to the fact of social pluralism,[48] ie the intractable existence in modern Western societies

[37] Miller, 1983, 41.
[38] See Chapter 3 for a discussion of essentially contestable concepts and the convergence of conceptual and normative disagreement about those concepts.
[39] See Kress, 1990, 138.
[40] See Larmore, 1996, 12 ff, 154 ff. See Chapter 1.
[41] On this distinction, see Raz, 1995a, 316–17. See also Gaus, 1996, 155. See also Postema, 1996, 90–91.
[42] Raz, 1998a, 50–51.
[43] Gaus, 1996, 154.
[44] Hence the persistence of epistemic disagreement: Gaus, 1996, 156.
[45] See Arendt, 1970, 227.
[46] See Arendt, 1970, 225 quoting James Madison: 'when men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them.'
[47] Gutmann/Thompson, 1996, 25, 73. See also on the persistence of flawed understandings of moral notions, Scanlon, 1998, 359.
[48] See Posner, 1998, 1699.

and institutions of a plurality of inconsistent views on moral, religious, social and political issues where at most one view is true or correct and the others are mistaken. It differs therefore from *metaphysical* disagreement that derives from *value pluralism* or *moral pluralism stricto sensu*. According to this second form of moral pluralism, it is morality, and not society, that is pluralistic[49] and *heterogeneous*[50] when it asserts the validity of a plurality of irreducibly distinctive and competing values.[51]

b. Metaphysical Disagreement

Metaphysical disagreement can derive from the existence of moral conflicts and can in turn give rise to different forms of disagreement.

i. From Value Conflict to Metaphysical Disagreement

Metaphysical disagreement is rooted in conflicts of values,[52] whether these derive from the mere incompatibility or the actual incommensurability of values.[53] Among the different kinds of normative disagreement, metaphysical disagreement may be the most difficult one to settle, since all conflicting conceptions are potentially correct. While in the case of epistemic disagreement, one of the parties is necessarily wrong, parties to a metaphysical disagreement can all be right.

According to moral pluralism *stricto sensu*, fundamental values can be plural, conflicting, incommensurable in theory, and uncombinable in practice—a world in which there is no single, univocal and monistic *summum bonum* that can be defined philosophically as in the Platonic ideal, let alone imposed politically[54] as part of a 'cosmic jigsaw puzzle.'[55] As both sceptical and liberal writers acknowledge, value conflict is a central feature of our moral and ethical lives.[56] Social practice and history demonstrate that most moral theories accommodate various irreducibly distinct and competing values that are considered as valid,[57] despite pockets where coherent and consistent principles may be found.[58] This makes of moral pluralism a 'permanent moral state, arising not because of moral [epistemic and contingent] disagreement but as an *inescapable aspect of sound morality*.'[59]

[49] See Scanlon, 1998, 360.
[50] See on this concept and the distinction between moral conflicts that arise out of ignorance and morally irresolvable ones, Larmore, 1987, 131, 149 referring to the Weberian irreducible plurality of 'value-spheres.' See also Galston, 2000, 877 ff.
[51] See Raz, 1995a, 298.
[52] Gutmann/Thompson, 1996, 25, 73. See partly Raz, 1998a, 50. See also Benhabib, 1994a, 34.
[53] See Gaus, 1996, 155.
[54] See Berlin, 1998, 2 ff; Gray, 1996, 35. See also Kutz, 1994.
[55] See Berlin, 1998, 2 ff.
[56] See Mason, 1993, 16 ff. See, eg, Hampshire, 1983, 140 ff; Raz, 1986a, 395 ff; Nagel, 1979, 128.
[57] See Raz, 1995a, 316–17.
[58] See Raz, 1995a, 298.
[59] Raz, 1995a, 317.

Moral conflict confirms the assumption, therefore, that morality is not entirely determinate,[60] or more precisely that it is underdeterminate.[61]

Value conflicts can be ranged along a *scale of increasing intractability*; conflict may reflect the diversity, incompatibility or incommensurability of values.[62] First of all, not all moral diversity is conflictual nor does all conflictual diversity issue in incompatible ways of living and hence in disagreement.[63] As Berlin argues, 'we must not dramatize the incompatibility of values—there is a great deal of broad agreement among people in different societies over long stretches of time about what is right and wrong, good and evil.'[64] Secondly, alternative conceptions of the good can turn out to be incompatible and the moral answer to their conflict indeterminate; they are yet not incommensurable and one may talk of *truth value indeterminacy*.[65] This may occur when two generally mutually consistent values recommend, in some (but not all) circumstances, courses of action that cannot both be performed, or when they are simply inconsistent. Whereas in the latter case, the way out of disagreement is to *reject* one value for the other, the settlement of the former case does not require withdrawal from our commitment to one of the values but instead to seek some *ranking* of them and hence a compromise between them.[66] Finally, these values become incommensurable when the trade-offs become unavailable because there is no common currency[67]; incommensurability is also referred to as *comparison indeterminacy*.[68] These three forms of conflict of values, and hence of potential metaphysical disagreement, are logically distinct phenomena which need not imply each other and are not bound in a hierarchical way.[69]

ii. Types of Metaphysical Disagreement

Once value conflicts give rise to metaphysical disagreement, if they do,[70] it is interesting to examine what types of metaphysical disagreement can arise and how they correspond to the underlying conflicts of values.

First of all, it is useful to distinguish two different types of metaphysical disagreement derived from moral pluralism: principled disagreement as opposed to interpretive disagreement.[71] *Principled* disagreement derives from the conflict of principles and values which do not depend on social practices to arise or apply,

[60] Shafer-Landau, 1994, 332.
[61] See the second part of this chapter on these distinctions.
[62] See Lukes, 1991, 9 ff. See also Nagel, 2001, 106–7.
[63] See Gowans, 2000, 22–23.
[64] Berlin, 1998, 2 ff.
[65] Shafer-Landau, 1994, 333.
[66] See Chapter 8. See Wong, 1992, 768–69 on these two pictures of serious moral conflict.
[67] See Raz, 1986a on the incommensurability of values. See also Scanlon, 1998, 358.
[68] Shafer-Landau, 1994, 334.
[69] See Larmore, 1990, 350.
[70] See Chapter 1 on the passage from moral difference to moral disagreement.
[71] This distinction is made by Pippin, 2003, 86, although he uses it in a slightly different sense to oppose what I have referred to as epistemic and metaphysical disagreement.

whereas *interpretive* disagreement results from the conflict of principles and values which cannot arise but for social practices which favour their emergence and influence their application.[72]

In a sense, as Raz argues, the relative social dependence of some values and principles explains how value pluralism can be so widespread and persistent; their pluralism is due not only to the nature of the values themselves, but also to their context of emergence and application.[73] The relation of (social-dependent) evaluation to (universal) genre clarifies how there can be distinct ways of being good.[74] It is important, however, to clearly distinguish extensive social-dependent value pluralism from value relativism or subjectivism.[75] Once values have emerged conditioned by their social context, they apply across the board and universally, thus undermining any relativist implications of their social dependence.[76] Besides, the relative social dependence of values, and the interpretive nature of many of our metaphysical disagreements, also explains why our moral disagreements seem to increase in current pluralistic societies; the more diverse social contexts become, the more pluralistic values and our evaluative judgements become.[77] It is important in this respect to distinguish interpretive forms of metaphysical disagreement from epistemic disagreements that arise from social pluralism and social barriers to knowledge rather than from the social conditions of emergence of moral values. While most of our political-moral disagreements have traditionally been blamed on epistemic grounds, it may be that many of them also have metaphysical origins and cannot therefore be settled merely by regarding one single position as correct.

A second distinction opposes *multiple-principled* to *single-principled* metaphysical disagreement. While it is obvious how people holding different conflicting values may disagree when neither of them is wrong, it is also possible for them to disagree about a single principle or value and for both to be correct. Both their conceptions or interpretations may indeed represent two equally eligible aspects or conceptions of the same value-concept in the legal context which, sometimes or always, conflict with each other.[78] One could consider the concept of equality as an example of a concept or value of which both equality of resources and equality of welfare might be equally eligible conceptions or interpretations and appear reasonable to each or both parties, but can conflict with each other all the same, thus giving rise to single-principled metaphysical

[72] See Raz, 2003c, 50 ff on the opposition between these types of values and principles.
[73] See Raz, 2003c, 43 ff.
[74] See Wallace, 2003, 6.
[75] See Pippin, 2003; Williams, 2003 for the expression of this concern in reaction to Raz, 2003c.
[76] See Raz, 2003c, 22; Wallace, 2003, 3.
[77] See Hume, 1975, II, 191–92 on the relationship of mutual reinforcement between sociability, disagreement and coordination. See Chapter 5.
[78] See Raz, 2003c, 55 for a similar account of single value pluralism and single value metaphysical disagreement.

disagreement. Again, therefore, it is important not to conflate single-principled disagreements with epistemic disagreements.[79] As Raz argues:

> when people's disagreements about the nature of a value are irresolvable they are so because they have, or can develop, ways of understanding the value that all conform with the commonly understood features of the value, what I called the boundaries of agreement, but diverge in their view of how they fit together, how they relate to each other, about their relative importance, and whether they contribute to the value in dispute for one reason or another.[80]

II. FROM MORAL DISAGREEMENT TO LEGAL INDETERMINACY

The previous presentation of the various sources of political-moral disagreement in and about the law was punctuated by references to indeterminacy. Because the relationship between reasonable moral disagreement and legal indeterminacy is not a straightforward one, it is important to discuss it in detail. In the first section, I will summarise the debate surrounding legal indeterminacy. All these considerations will then require that I explain at length, secondly, what I hold legal indeterminacy to amount to. In the third section, I will discuss the relationship between disagreement about justice and legal indeterminacy.

1. The Debate

Renewed jurisprudential interest in legal indeterminacy may be said to originate mainly in the 1980s critical legal scholars' critique of liberal legal and political theories, and the latter's alleged commitment to legal determinacy and hence rational legitimacy. The sceptical challenge set by their *radical or global indeterminacy claim*[81] is that there is never a true answer to be found in the law. It follows, they argue, among other things, from the inherent indeterminacy of legal language, the pluralism of values incorporated in the law and the vagaries of legal politics that we can nourish legitimate doubts about the determinacy of any legal regime and its claim to authority. The *moderate (or local) indeterminacy claim* shares this diagnostic of legal indeterminacy and of its causes, but distinguishes itself from

[79] This seems to be Dworkin's position about conflicting conceptions of the same concept than cannot compete with each other or contradict each other in the legal context, unless they are mistaken. This is due to Dworkin's moral coherentism and his faith in reaching as much coherence between our moral principles and values as possible through substantive moral argument. See DWORKIN, 2001A, 86 ff. See Chapter 11.

[80] RAZ, 2003C, 55. See Chapter 3 for a discussion of the role of paradigms in recognising different equally eligible conceptions of the same concept.

[81] See especially RAZ, 1983, 81 and the counterclaim by DWORKIN, 1986, 84 and DWORKIN, 1978, 67. See also LEITER, 1995, 486 ff; ENDICOTT, 1996, 670.

this deconstructionist and radical indeterminacy claim on the basis of the extent of indeterminacy it argues there is in the law.

Most authors on both sides of the debate admit nowadays that the radical indeterminacy thesis cannot be maintained, and that the kind of indeterminacy we should be concerned with in the law is more *moderate*.[82] Conceding the radical conceptual claim of pervasive indeterminacy would entail that no legal system can exist. Besides, to falsify this claim, all one needs to establish is that there is at least one case in which one possible outcome is legally incorrect.[83] In response to the sceptical indeterminacy-based attack, even reduced to this more plausible and moderate critique, liberal defenders of a law-based political order may be divided into two camps. On the one hand, there is Ronald Dworkin who argues that a legal system is indeterminate only if moral and political principles are not allowed to count as legal arguments.[84] This is, on the one hand, because, according to Dworkin, there is no moral indeterminacy *per se* in the absence of moral pluralism and, on the other, because, according to him, morality is a central element of a legal argument and law's yardstick thus reducing legal determinacy to moral determinacy. In other words, because there are true moral answers, the law cannot be indeterminate. On the other hand, leaving Dworkin standing alone in this respect, more pragmatic liberals have now conceded that liberal legal systems may be moderately indeterminate without, however, being threatened accordingly.[85] Indeterminacy is indeed an inescapable consequence of the very nature of human language and social rules. It seems therefore that, with the exception of Dworkin, both 'orthodox' or mainstream and 'heretic' or critical legal scholars are now ready to accept that the law can never reach complete determinacy.[86]

Despite this seemingly definitive truce on the battlefield of legal indeterminacy,[87] I would like to argue that the fact of reasonable disagreement about matters of justice has important consequences in revealing the extent of legal indeterminacy. Taking moral disagreement seriously therefore implies taking legal indeterminacy more seriously as well. In the first chapter, I argued that no strict relationship could be established between disagreement and the absence of moral truth; in short, moral disagreement does not imply the kind of moral indeterminacy induced by the absence of moral truth or its plurality and, in return, this kind of *moral* indeterminacy does not imply moral disagreement. What I would like to argue in this section, however, is that reasonable moral-political disagreement does matter for our assessment of *legal* indeterminacy.

[82] See Kress, 1991, 202. See also Altman, 1990, 18 ff.
[83] See Solum, 1996, 491.
[84] See Dworkin, 1986, 65–101, 271–75. See most recently, Stavropoulos, 2004 for a defence of Dworkin's account of what he refers to as 'legal objectivity.'
[85] See Hart, 1961, 125; MacCormick, 1978, 5, 105–6, 114–15, 252–54; MacCormick, 1990; Raz, 1979, 75; Endicott, 1999 and Endicott, 2002b.
[86] See Lucy, 2000a, 285; Morgan, 2002, 520.
[87] See Altman, 1990 on the history and the exact terms of this truce.

2. The Notion of Indeterminacy

Indeterminacy is a complex notion and it is important to delineate its contours carefully before discussing its relationship to disagreement. First, indeterminacy should be distinguished from uncertainty. Secondly, the relationship between moral and legal indeterminacy should be carefully delineated. Finally, different types of indeterminacy ought to be presented and kept distinct.

a. Indeterminacy, Uncertainty and Objectivity

Indeterminacy designates the status of the cases where there is no single true (right) answer to the question of whether a moral rule applies or of whether there is law on some issue.[88] According to the traditional formulation of the indeterminacy claim, an indeterminate statement is *neither true nor false*.[89] This last statement should not be understood as meaning that there is a third truth-value in indeterminate cases.[90] It only emphasises that the facts of the case do not determine which truth value it has.[91] What it means is that it is indeterminate *whether* the statement is true or false.

It follows that indeterminacy should not be confused with *uncertainty*, which is clearly an epistemological matter rather than a meta-ethical one.[92] Uncertainty has to do with the indeterminacy of our *knowledge* of the law or morality rather than with the indeterminacy of the law or morality itself.[93] As such, I think that Kress is wrong to regard epistemic uncertainty as a form of epistemic indeterminacy.[94] The distinction between the epistemic and metaphysical origins of disagreement is crucial, but it does not cut a line across different forms of indeterminacy, but, on the contrary, between true indeterminacy and mere lack of clarity.[95] Of course, the existence of legal indeterminacy will have to be the object of a substantive

[88] See Endicott, 1996, 669; Endicott, 1997, 40, 46 ff: the trivalent 'true, false or neither true nor false' formulation of indeterminacy in law must be abandoned. Contra: Dworkin, 1996a, 1.

[89] See Brink, 2001, 3, 12 on the hiatus between indeterminacy *qua* no *right* answer and indeterminacy *qua* no *true* answer. Underdeterminacy being a kind of indeterminacy, indeterminacy in that case means that there are many true answers, but no right one. In other cases, indeterminacy means that there is no true and hence no right answer. In what follows, I will therefore refer to indeterminacy *qua* no single right answer.

[90] See, however, Dworkin, 1996a, 1 about the default position of indeterminacy and the need to argue substantively for it as for the truth or the falsity of the statement.

[91] Endicott, 1997, 58.

[92] See Dworkin, 2003b, 661.

[93] Of course, some authors conceive objectivity itself as being epistemic as opposed to ontological and as such as relying on judgement (Searle, 1995, 8–12). This epistemic approach is often applied to legal objectivity (see eg Marmor, 2001, 135–43). On these accounts, the true and the right answers become one, hence the reference to the right answer and not to the true answer in the context of legal objectivity by contrast to moral objectivity (see Brink, 2001, 3, 12).

[94] Kress, 1990, 138–39; Kress, 1991, 203. See also Leiter, 2001 on the opposition between epistemic and metaphysical objectivity.

[95] See Gaus, 1996, 154 who rightly distinguishes between the *inconclusiveness* of interpersonal moral justification (epistemic disagreement) and *indeterminacy*.

argument, which is itself submitted to epistemic limitations and which can therefore turn into an epistemic disagreement. The object of the argument will be different, however; in one case, the parties will disagree about the existence of a determinate answer, whereas, in the other, they will disagree about its nature rather than over its determinacy.

Indeterminacy means therefore that there is no standard or fact of the matter against which to test our judgements and this amounts, in other words, to the *absence of objectivity* or *of objective answer*.[96] Objectivity is usually taken to refer to the fact that the truth in a particular domain is independent of thoughts or beliefs or desires.[97] It is also a method of understanding, since 'for a domain to be objective, there should be some logical space between how we understand or judge or perceive or believe things to be and what discriminations we make among different objects and properties in the domain, on the one hand, and what the case is, on the other.'[98] In the legal domain, this would require, to quote Stavropoulos, that:

> there is space between lawyers' judgements, beliefs, and so on regarding what the law requires, on the one hand, and what it in fact requires, on the other, so that the larger the space, the stronger the objectivity that law can have.[99]

Of course, some legal philosophers reject the *connection between indeterminacy and objectivity* in the legal domain. They argue that something may be subjective without being indeterminate, on the one hand, and that something may be determinate without necessarily being objective, on the other.[100] Part of the problem stems, I think, from a semantic confusion that pre-empts the identification of objectivity with determinacy by virtue of an erroneous pre-definition of determinacy.

If one refers to the first prong of the objection, ie the possibility of being *subjective without being indeterminate*, it should be clear that it is not sufficient to say that a judgement about the taste of something establishes that something is 'decidedly chocolatey,' to borrow Stavropoulos' example, to be able to argue that this experience of chocolate is both subjective and determinate.[101] First of all, a judgement may be considered objective, according to the definition I mentioned before, if there is a distance between the judgement and the external and independent fact of the matter. In this case, there may be a chocolate fact of the matter that makes the *per se* subjective judgement objective and determinate. Besides, there is more to determinacy than 'decidedliness'

[96] I therefore take 'determinacy' and 'objectivity' to amount to the same thing. See also Brink, 2001; Leiter, 2001; Leiter, 2002. Contra: Stavropoulos, 2004, 317–18.
[97] See Stavropoulos, 2004, 316 by reference to Nagel, 1986, 4–7, 25–27. See also Raz, 1998b.
[98] Stavropoulos, 2004, 316.
[99] Stavropoulos, 2004, 317.
[100] See Stavropoulos, 2004, 317–18.
[101] See Stavropoulos, 2004, 318.

at the time of the decision. Determinacy implies referring to an external standard, and this in turn implies objectivity. This seems to be confirmed in fact by Stavropoulos' ulterior reference in case of judgements of colour to the condition that 'certain explanations of the nature of colour are right'; this is what makes the ulterior judgement of colour a determinate one, not the actual judgement or ad hoc determination of colour. The 'decidedliness' in this case therefore refers to an earlier standard of decision.

As to the second prong of the objection, ie the possibility of being *determinate without being objective*, it refers to the case where the law is established by what the judges think in a particular case.[102] The problem with this interpretation, however, is that it confuses determining what the law is on a particular question and establishing *before doing so* whether the law provides a determinate answer to that question, as established, for instance, by past legislation or past judicial decisions. The latter is what people usually have in mind when they refer to the law's determinacy: some kind of pre-decisional determinacy that constrains the determination of the law in each particular case.[103] The issue of legal indeterminacy is a pre-decisional issue, ie an issue that arises before the decision is made and as such ad hoc determination of the law cannot make up for the law's indeterminacy, except in respect of future decisions.[104] One may object that any form of legal pre-determination in that sense will always be subjective in the sense that it will be posited by collective judgement[105] rather than be independent from it as our prior definition of objectivity requires. However, this is to conflate moral subjectivity with legal subjectivity. Why should the standard for legal objectivity be the same as in the moral realm? After all, positive law is a creation of human interaction. As Stavropoulos argues, 'for a standard to be capable of playing that role, it must be set at least in part by something *external* to that which it is meant to govern.'[106] All that matters in the legal context is that there is a *pre-existing* truth standard for law that is independent from people's thoughts and judgements in each particular case, whether that standard is itself the product of earlier thoughts and judgements or not. This is enough for

[102] See Stavropoulos, 2004, 318.

[103] Part of the difficulty for critiques of the identification between legal objectivity and indeterminacy has to do with the fact that they take the reference to 'determinacy' to be dictated by a positivist conception of the nature of law that regards the law as posited and hence the legal as simply being *determined* as legal on the spot and whenever a decision is called for (see eg Stavropoulos, 2004, 318 ff). A counterexample would be Brink, 2001 who does not hold a complete positivist conception of the nature of law in the sense that his account of the correct application of law does not only rely on linguistic conventions, but who still argues for the identification of indeterminacy with objectivity.

[104] In fact, this is confirmed by Stavropoulos's, 2004 use of the term 'determinant' in the rest of his essay; he refers to the determination of law as the constitution of an independent standard of objectivity, through the role of values in law, for instance.

[105] This entails both the collective conventions of language that are used to identify the law and to establish the correct application of the law, and the actual judgements by legislators or judges through which the law is interpreted and applied.

[106] See Stavropoulos, 2004, 317.

the standard of truth to be regarded as external to the decision or judgement it governs, even if the distance between the standard and the next legal judgements is not very important. What matters, and is in fact common to most accounts of objectivity, is indeed the *possibility of error* and this is provided by an account of legal determinacy *qua* characteristic of what has been posited as a standard for later judgements.

b. From Moral to Legal Indeterminacy

Indeterminacy can be *moral* or *legal*. Moral indeterminacy designates the situation where there is no single right moral answer, while legal determinacy designates the case in which there is no single right legal answer. *Moral indeterminacy* can occur when there is no objective moral truth (indeterminacy *stricto sensu)*, but also when the latter is pluralistic and where many different true moral answers may be given to the same question (underdeterminacy). In what follows, I assume that there is an objective moral truth,[107] but that morality being pluralistic, conflicts of values may lead to moral underdeterminacy and hence to moral indeterminacy *lato sensu*. *Legal indeterminacy* is distinct from moral indeterminacy. Legal indeterminacy has characteristics of its own that flow from the nature of the legal system and legal norms' own semantic, conceptual or normative limits.

Even when legal norms refer to moral norms to mediate or coordinate among them to make them more explicit or concrete,[108] cases of legal indeterminacy need not be related only to moral indeterminacy.[109] Although moral indeterminacy and legal indeterminacy are not entirely coextensive, there is still an important overlap between them. As I said, legal indeterminacy can have moral origins, in the sense that moral conflicts will often be reflected within the legal rules which

[107] The kind of legal objectivity I have in mind does not necessarily imply taking a realist or cognitivist stance about morality. See Chapter 1.

[108] As I have argued in Chapter 1, it is important and quite inescapable to see moral principles as part of the law. Many moral and legal concepts reflect the same value or principle and it would be surprising and in fact impossible to understand legal concepts that mirror moral concepts as being purely descriptive of moral concepts and hence as 'quotational' (e.g. ALCHOURRON/BULYGIN, 1991B, 315–16). See DWORKIN, 2000A who argues that such quotational concepts would beg the question, as it is impossible to identify a value without having recourse to an evaluating and differentiating discourse. Besides, such concepts would fail to guide our conduct: see DWORKIN, 2004A, 8–9 and WILLIAMS, 1993, 129. See Chapter 3.

[109] I assume therefore that, once the law refers to them, moral concepts can be regarded as legal concepts and our reasoning with them as legal reasoning—legal reasoning being a special form of moral reasoning. This does not mean, however, that those moral concepts stop behaving like moral concepts and that our disagreements about them are purely legal or conventional. Of course, this implies that the law cannot be conceived as being entirely posited and conventional any longer, but this was never a requirement of the concept of law defended in this book (contra e.g. COLEMAN, 2001), which conceives the law *only ultimately* as a conventional coordination framework–any disagreement about legally used moral concepts will have to be eventually settled in the law's conventional framework of bargaining. Besides, the reference to moral concepts in the law and their *identification* are themselves conventional. All that matters is that there are cases in which the conventional identification and application of legal rules and their determinacy are granted. See Chapter 3.

have a moral point and aim at mediating these conflicts.[110] Moral concepts are also often generated in the law through the law's morally constitutive function, as in the case of the creation of legal rights for instance.[111] In many cases, however, the law has its own resources and means to make some moral indeterminacies more determinate. For instance, the law uses different meta-norms to solve conflicts of norms, such as rights.[112] It follows that something can be morally determinate but legally indeterminate, or morally indeterminate and legally determinate.

Thus, if Dworkin and Stavropoulos argue that a legal system is indeterminate only if moral and political principles are not allowed to count as legal argument,[113] it is because they do not acknowledge, on the one hand, the full extent of moral pluralism and underdeterminacy and hence of moral indeterminacy,[114] and, on the other, the extent of idiosyncratic legal indeterminacy. Although there is some truth in this intuition, it is important to distinguish *two levels of legal indeterminacy*: first-order and second-order legal indeterminacy. Even though the standard of many legal rules may be moral as a result of the moral nature of law and of the reference to many moral concepts in the law, positive law's *first-order* or *strict* determinacy is jeopardised when the meaning of a rule cannot be determined directly from its legal sources. This applies whether the moral concept or rule incorporated is morally determinate or not. This is because, in those cases, one of the law's main functions is to coordinate in the face of reasonable disagreement about morality[115] by making morality more explicit or concrete and hence, in some cases, to impose a certain degree of legal determinacy on cases of moral indeterminacy.[116] For instance, the constitutional principle of material

[110] Contra: RAZ, 2004C who argues that law cannot avoid being moral and can therefore only exclude and not incorporate morality. It can refer to morality, but this does not imply its incorporation into the law. Although it is right to see law as a moral creation, however, this does not imply that the law may not turn moral concepts into legal (moral) concepts by concretising or explaining them in further detail. For instance, the constitutional principle of material equality that concretises and explains the moral principle of equality in more detail is a legal principle that refers to a moral principle in the law; as such, its legal determinacy may reflect its moral determinacy, but it may also suffer from purely legal forms of indeterminacy. Contrary to what Raz is arguing, it is important to distinguish two levels in law's morality: first-order morality of the law *qua* moral entity and second-order morality of the law *qua* specification of morality. While first-order morality of law puts morality first in terms of empowering the law, and in that sense Raz is right, the second-order type of morality of law implies taking the question to a different level and hence including moral concepts in the law for it to improve moral norms' incisiveness. In a sense, therefore, 'exclusion' implies a minimal degree of 'inclusion.'

[111] See Chapter 12.

[112] On law's own conflicts that often transform and channel prior moral conflicts into legally resolvable ones, see VEITCH, 1999, 182 ff. See Chapter 12.

[113] See DWORKIN, 1986, 65–101, 271–75. See also STAVROPOULOS, 2004, 321–22.

[114] See SHAFER-LANDAU, 1997. See also HART, 1983, 6–7, 136–40; ALTMAN, 1990, 40.

[115] Since reasonable disagreement about morality may also occur for epistemological reasons only, moral determinacy does not imply the absence of reasonable disagreement and hence of concern for determinacy in the law.

[116] This disjunction between moral determinacy and legal indeterminacy in that context is not invalidated by the normative nature of law's positivity and hence determinacy. On the contrary, the normativity of legal determinacy emphasises the independence of legal indeterminacy and its importance even in the face of moral determinacy.

equality could be regarded as legally indeterminate for reasons of moral underdeterminacy due to the plurality of conflicting values attached to equality, but, even if it is not, it could also be regarded as legally indeterminate for reasons related to the language of the constitutional text in which the principle of equality is given a more concrete legal shape and more detailed conditions of application. Of course, *second-order* or *overall* legal determinacy will reflect the determinacy of the law as a whole which, in this particular instance, will be granted if the legally incorporated principle of material equality is morally determinate.[117]

c. Types of Legal Indeterminacy

When understood along the lines of the present account, legal indeterminacy can have both a *local* and a *systematic* sense.[118] The local sense is *semantic.* Legal indeterminacy may derive from the unclear meaning of *linguistic* formulations of legal rules: a word or a sentence is said to be indeterminate if, in some cases, there is no way to say unequivocally, whether the term applies or whether the sentence is true. Such a sentence has no truth-value, and there is no fact of the matter whether it is true or false, even though each word in the sentence has a meaning we can grasp.[119] This can happen because of vagueness, ambiguity or abstraction. By contrast, the systematic sense of indeterminacy is *metaphysical*. It is more worrying for legal theorists. It is about the capacity of a legal system as a whole to generate justifiable conclusions from a set of authoritative sources providing premises. In such circumstances, a case falls under two conflicting rules, which might not have an indeterminate meaning as such, but whose indeterminacy is due to the absence of an appropriate *conflict-resolving rule*.[120] Systematic indeterminacies in the law can have many sources; they can follow from argumentative or conceptual inconclusiveness[121] and even from moral indeterminacy and value conflicts.

There are two types of systemic indeterminacies, that should not be conflated unless one rejects value pluralism and the possibility of reasonable metaphysical disagreement in the law.[122] First of all, there is *underdeterminacy*. A system of law is underdeterminate or logically indeterminate if, in a substantial number of cases, more than one conclusion is justified by the authoritative legal sources. Underdeterminacy

[117] This applies to the case where moral concepts are used in the law and where the establishment of the law's correct application does not depend only on the posited terms, but also on their normative and contestable content. In other cases, where the correct application of law depends mainly on the posited terms, there is only one layer of legal indeterminacy: first-order or strict legal indeterminacy.

[118] See MARMOR, 2001, 112–34 who distinguishes in a similar way between semantic and metaphysical objectivity in law.

[119] See on the 'neither true nor false' expression of indeterminacy, RAZ, 1983, 73. See also COLEMAN, 1995, 33.

[120] RAZ, 1979, 72–74; ENDICOTT, 1996, 667.

[121] See Chapter 3. Hence the failure of MORESO's, 2001, 45–50 defence of inclusive legal positivism, which relies on clear core cases of application of our normative concepts. See also DWORKIN, 2002, 1678.

[122] See KUTZ, 1994; SOLUM, 1996, 489–90.

can amount to mere *indifference*. Both conclusions are compatible with each other and they are therefore commensurable. Underdeterminacy can also lead to conflict, however, when equally justified conclusions are *conflicting*. This is the case, for instance, when the origins of the underdeterminacy of law is the result of a metaphysical conflict between the values law embodies; in such cases, two incompatible decisions could be reached by emphasising different forms of value and there is no clearly preferable choice between the two. Secondly, there is *rational indeterminacy*. A system of law is rationally indeterminate if there is no appropriate justificatory relationship between conclusions of the system and normative premises of the system. While underdeterminacy or inconclusiveness is not a justificatory notion, rational determinacy is[123]; the possibility of drawing multiple conclusions from a set of legal premises need not mean that the conclusions derivable from the legal sources are rationally unsupported by those sources. On the contrary, all solutions may be equally legitimate and the object of a reasonable disagreement. But there may also be no rational justification for a legal conclusion.

3. The Relationship Between Disagreement and Legal Indeterminacy

Beyond the general conceptual truth of reasonable disagreement,[124] disagreements are contingent *matters of fact* that can or cannot take place despite the reunion of the necessary objective conditions. They also depend on subjective conditions such as the willingness to express one's opinions when they are different and to enter into a disagreement with others over them.[125] As such, disagreement should be distinguished from indeterminacy, which corresponds to the *meta-ethical condition* of some statements. The meta-ethical condition of indeterminacy can, however, be part of the conditions of disagreement. In that respect, although not all cases of indeterminacy lead to disagreement, disagreement often mirrors indeterminacy. True, there are *other non-indeterminacy related sources* of disagreement. One may think, for instance, of the epistemic barriers to knowledge and understanding of moral truths. In those cases, there is a single right answer and it is only an epistemological issue to establish it. It follows that the absence or existence of disagreement does not establish anything about the existence of indeterminacies or vice versa.[126]

It is a fact, however, that legal indeterminacy will often lead to disagreement. For instance, semantic legal indeterminacy and incorporated moral indeterminacy in particular will often generate legal disagreement.[127] When law is conceived as positive law, its objectivity corresponds to its positivity. The point of law's positivity

[123] See Kutz, 1994, 1002–3. See also Gaus, 1996.
[124] See Chapter 5.
[125] See Chapter 1.
[126] On the absence of relationship between disagreement and moral ontology, see Chapter 1. See also Waldron, 1999a.
[127] It could be because the law's language is unclear or because the law's concretisation or mediation of incorporated moral concepts and principles has generated moral indeterminacies of its own.

is indeed about ensuring determinacy. Positing law is largely about securing access to legal norms and to how to establish what the law is. Epistemological difficulties seem therefore to be more limited in the case of disagreement about the law than they are in the case of moral disagreement. When people disagree about moral concepts in the law, their disagreement will most of the time be related to the epistemological dimension of the moral concepts rather than of the corresponding legal concepts. What this implies is that the epistemological dimension of the corresponding legal concepts and concretising legal rules is less rarely going to be in the way of agreement than in the moral realm.

The more legal disagreement there is, in other words, the more extensive strict or first-order legal indeterminacy will appear.[128] Taking disagreement seriously therefore implies taking legal indeterminacy more seriously than in the past. This intrinsic relationship between disagreement and legal indeterminacy explains why the pervasiveness and persistence of reasonable disagreement about justice matters for the law's claim to objectivity and in turn for the rule of law. The fact that the law's determinacy and the role of the rule of law can be seen as part of the response to the pervasiveness and persistence of moral disagreement makes the sensitivity of the rule of law to disagreement about the law and legal indeterminacy even higher. As we will see later in the book, this actually explains why the impact of disagreement and indeterminacy on the rule of law is more complex than it seems at first sight.[129]

CONCLUSION

In order to assess the extent of disagreement and ascertain the best ways of responding to disagreement and coordinating our social actions, it was important in this chapter, first, to identify the exact sources of our conflicts and, then, to determine the relationship there is between political-moral disagreement in and about the law and legal indeterminacy.

As to the *sources* of disagreement, first of all, I distinguished three levels of potential disagreement. Depending on the concept, all three levels may be present in a case of disagreement, but they need not be. In brief, the first level of disagreement is *verbal*. Agreement on the terms used to refer to a concept and minimal mutual understanding are prerequisites for further conceptual or normative agreement or disagreement. The second level of disagreement is *conceptual*. It revolves around the meaning or delimitation of a concept as opposed to its applications. Conceptual disagreement opposes different conceptions of the same concept. It can be central and pivotal, or borderline and linguistic.

[128] Of course, in case of reference to moral concepts in the law, overall legal indeterminacy may be redeemed by moral determinacy, as explained before. Even in the latter case, however, disagreement may reveal its metaphysical origins and hence moral underdeterminacy and in turn overall legal indeterminacy.

[129] See ENDICOTT, 2000 on why indeterminacy is not a defect of the rule of law. See Chapter 4.

In the latter case, disagreement can stem from vagueness, abstractness or ambiguity. Conceptual disagreements of the former type can be criterial or purely pivotal as in the case of essentially contestable concepts. Cases of contestability open the door to a third level of disagreement: *normative* disagreement, ie disagreement about the moral values underlying the law. Normative disagreement may be of two types corresponding to two forms of pluralism: *epistemic* disagreement that arises out of social pluralism, ie the social and cultural burdens of judgement, and *metaphysical* disagreement that derives from value pluralism or moral pluralism *stricto sensu*, ie the heterogeneity and the inescapable conflict of values. Among metaphysical disagreements, I distinguished straightforward principled disagreements from interpretive disagreements; whereas the former derive from the plain conflicts of principles and values, the latter derive from the conflicts of principles and values that are triggered by specific social practices and contexts. Metaphysical disagreements can be single-principled or multiprincipled and it is important to distinguish the former from purely epistemic disagreements.

As to the *relationship between moral disagreement and legal indeterminacy*, secondly, I argued that, by contrast to uncertainty, legal indeterminacy refers to the status of cases where there is no single true and right answer to the question of what the law is on a particular issue. This implies the absence of an objective legal answer. In case of reasonable legal disagreement about issues of political morality, moral concepts that are used in the law are disputed and the question arises whether the law provides a determinate answer to the dispute. In such a case, unless the disagreement has metaphysical origins, morality is determinate. With respect to the law's determinacy, however, things are more complicated. At a first-order or strictly legal level, the law is indeterminate in the absence of a preexisting positive answer, but at a second-order or overall level, moral determinacy compensates for first-order indeterminacy. The point is, however, that whether or not there is moral indeterminacy in these cases, the law has its own sources of indeterminacy whose existence cannot be ignored.

Not only can legal indeterminacy in cases where the law refers to moral concepts give rise to legal disagreement about them, but legal disagreement actually reveals legal indeterminacy in many cases—contrary to what takes place in the context of moral indeterminacy where moral convergence and divergence need not reflect the existence or absence, or even the plurality, of moral truth. The rule of law is established precisely to deal with disagreement and ensure coordination. In these conditions, I argued, disagreement in and about the law, and the legal indeterminacy it reveals, constantly question and keep in check the very instrument of their settlement. More precisely, this chapter held the view that both Dworkin and pragmatist liberals have failed to take seriously the relevance of pervasive indeterminacy for the crucial notion of legal justification and the rule of law, as well as to exploit the powerful potential of recognising divergence and plurivocity as intrinsic to healthy legal institutions. Legal indeterminacy is a central dimension of legal practice; while Dworkin underestimates both the amount of moral and of legal indeterminacy, pragmatist liberals underrate the impact of moral indeterminacy on legal indeterminacy.

3

The Essential Contestability of Normative Concepts

INTRODUCTION

> It is part of our common political life, if anything is, that *justice is our critic and not our mirror*, that any decision about the distribution of any good—wealth, welfare, honours, education, recognition, office—may be reopened, no matter how firm the traditions that are then challenged, that we may always ask of some settled institutional scheme whether it is fair. Walzer's relativism is faithless to the single most important social practice we have: the practice of worrying about justice.[1]

WHEN DWORKIN SAYS that 'justice is our *critic* not our *mirror,*' he does mean to say, but not only, that the justice of an institution, practice or decision is not determined by the traditions or conventions of a community. In this passage, Dworkin criticises Walzer's relativist conception of justice,[2] according to which judgements of justice interpret 'the world of meanings that we share'[3] and must therefore fit the political and social practice and conventions of a particular community. In other words, Dworkin denies that we can share meanings in practice that completely answer questions of justice. What Dworkin is also hinting at here, however, is that justice, and especially political justice, is a critic of human practice that can be derived from *our* judgements, ie the *individual judgements* of *human participants* in this practice. What this implies is that our judgements of justice will tend to reflect the deep intuitions and abstract convictions from which we postulate[4] and construct features and principles of justice.[5] In this sense, it differs from reconstructing a divine or natural order the principles of which are to be discovered as we discover laws of physics by rebuilding them from concrete intuitions, examples or paradigms of

Part of this chapter was written as a response to Timothy Endicott's paper '"Our Critic not our Mirror": Why Justice is not an Interpretive Concept.' It was presented and discussed in Timothy Endicott's and John Finnis' seminar in legal philosophy in Oxford in November 2000 and I would like to thank all participants for their suggestions and critiques. Special thanks are owed to Timothy Endicott and Nicos Stavropoulos for their comments on an earlier version of this chapter.

1 DWORKIN, 1986, 219 (emphasis added).

2 See DWORKIN, 1986, 425 referring to his exchange with Michael Walzer in the *New York Review of Books*, 14 April 1983.

3 WALZER, 1935, xiv.

4 See on the pure postulation of concepts, REY, 1998, 98, 101–2.

5 See DWORKIN, 1986, 75, 425.

justice we think we share.[6] According to Dworkin, no such concrete exemplars or intuitions of justice in a particular case are 'safe from a judgement that shows that [they are] not an instance of the concept at all.'[7] On matters of justice, 'we should account to ourselves for our own convictions as well as we can, standing ready to abandon those which do not survive reflective inspection.'[8]

In this sense, justice, as well as other higher-order moral and political concepts such as fairness or democracy,[9] should be understood as '*interpretive*' concepts.[10] According to Dworkin, such concepts are concepts that we share 'not in virtue of sharing rules about the criteria for their correct application [as is the case for criterial concepts], but in virtue of agreeing that they name a real or supposed value, and that their correct application turns on the question of what that value, more explicitly stated and understood, really is.'[11] For Dworkin, only such an understanding of the concept of justice can account for the familiar and genuine deep disagreements about justice we have in our legal practice. These cannot be explained by theories that suffer from the 'semantic sting', ie theories that hold criterial semantics.[12] Participants do not only disagree over the *application* of the concept of justice or over its *limits*, but over the core *content* of justice itself and what makes a particular instance an application of the concept. They are, in other words, pivotal disagreements, which cannot simply be explained in terms of a mistake on criteria for the correct application of the concept.[13] My main contention in this chapter will be that justice and other normative concepts, ie concepts that embody a normative standard or value and whose correct use by this very essence involves value judgements,[14] can be understood along these lines.

[6] On this conception of our claims about justice, see DWORKIN, 1978, 160 ff.

[7] DWORKIN, 1986, 72, 75.

[8] DWORKIN, 1986, 172.

[9] See DWORKIN, 1986, 73 ff, 424–25 on the extension of his account of interpretive concepts like law or courtesy to other moral and political ideas. See MILLER, 1983, 39 for the choice of those concepts. They are good examples, for it is clear to anyone that their use implies, first, a certain level of evaluation and, second, a good deal of disagreement about what arrangements satisfy them.

[10] It seems to follow from Dworkin's account of interpretive concepts and of legal interpretation more broadly that he thinks that it is necessary to know what legal and moral concepts are and how we come to share them for us to understand how we make and interpret the law. DWORKIN'S, 1994B unpublished reply to Hart's postscript seems to endorse the view that his own theory of law entails a specific form of semantics. See also DWORKIN, 2001B, note 3, 2 and DWORKIN, 2004A. See also STAVROPOULOS, 1996, 129–36. This does not matter for the validity of Dworkin's attack on criterial semantics, however, for 'it applies to explanations of many concepts, whether or not they are associated with concept-words' (RAZ, 1998B, 259).

[11] DWORKIN, 2001B. This distinction between, on the one hand, what makes the concept the concept that it is and what we can share despite disagreement and, on the other, what it is to share or agree on a concept, is a distinction that was established in the 1960s by Putnam and other conceptual analysts. It is the same distinction that FODOR, 1998 tries to make when he criticises PEACOCKE, 1992 for keeping up too much with the epistemological side of grasping or possessing a concept.

[12] The many theories attacked by Dworkin for holding criterial semantics do not always see themselves as holding the latter (see ENDICOTT, 1998 for a paradigm-based account of Hart's concept of law). I will disregard these differences here and assume that they all agree with Wittgenstein's idea of 'agreement in judgements' and hence with Dworkin's description of criterial concepts.

[13] See DWORKIN, 1986, 74. See also DWORKIN, 2004A, 7. See Chapter 2.

[14] On the concepts of 'normative concept' or 'value concept', see BERLIN, 1969B, 6–7.

I will refer to them as '*essentially contestable*' concepts. The reason I distance myself from the 'interpretive' denomination is that the notion of contestability encompasses all the features of the Dworkinian 'interpretive' concepts, but without necessarily sharing their implications regarding the need for constructive interpretation.[15] Although I believe both ideas mirror each other,[16] it is possible to hold the latter without the former.

The traditional understanding of the way we use familiar normative concepts like justice is more cautious in its definitions of those concepts and does not account for the disputes we have over them as an element of what defines their correct application. On the contrary, it distinguishes clearly between, on the one hand, the *linguistic* and *conceptual analysis*, through which we identify and establish the rules we share for applying those concepts, and, on the other, the *normative discussion* of those identified and shared concepts, where we debate over the values embodied in the concepts.[17] What I would like to argue, following Dworkin, is that normative concepts like justice cannot be understood in the same way as descriptive concepts,[18] like 'book' or 'old,' that we share in virtue of sharing some rules about the criteria for their correct application.[19] To borrow Williams' analysis of thick normative concepts, detaching the descriptive from the evaluative components of such concepts, as other authors such as Hare suggest we do,[20] make it difficult for the disagreeing parties to converge on a pattern of behaviour that ought to guide their action.[21]

This chapter's discussion of contestable concepts will adopt the following structure. I will start by exposing what I mean by 'contestability'. Secondly, I will argue that disagreements over contestable concepts are neither mere disputes over their applications, borderlines or content nor purely substantive disputes, but at once conceptual and substantive disputes that go deep into the heart of conceptual meaning. Finally, I will explain why contestable normative concepts do not need

[15] This distinction allows me to avoid the pitfall of rejecting Dworkin's account of interpretive concepts as a wholesale account in virtue of the doubts one may nourish about his method of constructive interpretation; this is what ENDICOTT, 2005 does when he denies that judgements of justice are 'interpretive,' ie contestable in my account, and paradigmless in virtue of his analysis of Dworkin's 'sophisticated technology of interpretation.'

[16] See in particular DWORKIN, 1984B, 252 who describes the concepts of law and justice as 'contested concepts.'

[17] See eg BERLIN, 1969B. On the problem faced by such 'Archimedean' accounts of philosophy, see DWORKIN, 2001C and 2001B, as well as DWORKIN, 2004A. See also MILLER, 1983, 39 ff.

[18] There remains some work to be done on the distinction between *descriptive* and *normative* concepts. According to Dworkin, descriptive concepts are criterial or conventional and more normative ones are purely contestable. This distinction is established by a conventional or *super-criterial* settlement over the normative or descriptive nature of concepts, that is to say the fact that some concepts name a value that can be reasonably contested (see eg DWORKIN, 2000A).

[19] See MILLER, 1983, 39.

[20] See HARE, 1952, ch 6. For a critique, see DWORKIN, 2004A, 8–9.

[21] See WILLIAMS, 1993, 129 against Hare's distinction. See also WILLIAMS, 1993, 140–41 on 'thick' ethical concepts which are a union of facts and value and the application of which is both action-guiding and world-guided, thus limiting disagreement about the latter component to marginal cases. See also DWORKIN, 2004A, 8–9.

permanent paradigms or other forms of complete agreement over their meaning to be understood and shared.

I. THE CONCEPT OF 'ESSENTIALLY CONTESTABLE CONCEPT'

The concept of 'essentially contestable concept' owes its original formulation to Gallie in 1956.[22] Since then, the concept has been re-used or further developed in moral and political philosophy,[23] but also in legal philosophy,[24] thus giving rise to countless meanings.[25] In short, an essentially contestable concept is a *concept that not only clearly embodies and names a normative standard or value, the detailed content of which determines the correct application of the concept, but that is also disputable by different users*. It is therefore a concept whose 'correct use is for its correct use to be contestable.' This has two implications. First of all, there can never be an absolutely correct conception of a contestable concept. Secondly, a contestable concept always contains more potential components than can be included in any actual definition or conception of the concept. As a consequence, one contestable concept can give rise to manifold conceptions.[26]

In order to claim essential contestability, it is not sufficient to say that a concept is *normative*. Some normative standards can indeed be pre-established and incontestable. Nor is it enough to call upon the evidence of a concept's historical and cultural variability and of disputes over its correct application. Such empirical and contingent claims would be claims of mere *contestedness*. On the contrary, to claim that a concept is *contestable* is to argue that debates over the criteria of correct application of a concept are inconclusive.[27] This involves a philosophical judgement. Finally, to claim that a concept's subject matter is in its nature such that there are always good reasons for someone to dispute the propriety of any of its uses is to claim its *essential contestability*. The 'essentiality' of its contestability does not mean that the disagreements that surround its meaning are objectively irresolvable,[28] but that, on the one hand, disputes about the meaning of the concept go to the heart of the matter and can generate *rival paradigms and criteria of application* and that, on the other, it is part of the *very meaning and essence* of the concept to be contested and to raise questions as to its nature.[29] It is this third and *conceptual* claim that most people are making

[22] See Gallie, 1956.
[23] See Hampshire, 1959; Connolly, 1983; MacIntyre, 1973; Gray, 1977; Gray, 1978; Miller, 1983; Ricciardi, 2001.
[24] See Waldron, 1994a and 2002a; Dworkin, 1978; Dworkin, 1986; Dworkin, 1994b.
[25] See Gray, 1977, 339.
[26] See Freeden, 2003, 52–53.
[27] Most authors still refer, however, to essential *contested* concepts by reference to Gallie's, 1956 concept.
[28] See Lukes, 1974. I disagree on this point with Gray, 1977, 340 ff.
[29] See Waldron, 1994a, 529–30 on these two meanings added by the term 'essential.' See also Freeden, 2003, 53.

when they refer to essentially contestable concepts. Please note that for reasons of simplicity, I will from now on drop the 'essential' when talking about essential contestability[30].

According to Gallie, essentially contestable concepts are such that their criteria of correct application are multiple, evaluative and in no settled relation of priority with one another and that 'their proper use inevitably involves endless disputes about their proper use on the part of their users.'[31] In Connolly's refined version of Gallie's definition,[32] a concept is essentially contestable, (i) when it is *appraisive* in that the state of affairs it describes is a valued achievement which is initially variously describable[33] (normativity), (ii) when this state of affairs is *internally complex* in that its characterisation involves references to several dimensions of meaning[34] as opposed to judging something to be 'red'[35] (complexity), and (iii) when its *criteria of application*—whether shared or disputed—are themselves relatively *open*, enabling parties to interpret even shared criteria differently, both across a range of familiar cases and as new and unforeseen circumstances arise (a-criteriality). According to Waldron's more technical account, one may say that *contestability* refers to the fact that (i) it is not implausible to regard both 'something is P if it is A' and 'something is P if it is B' as alternative explications of the meaning of the predicate P; (ii) there is an element e* of evaluative or other normative force in the meaning of the predicate P; and (iii) there is, as a consequence of (i) and (ii), a history of using the predicate P to embody rival standards or principles such as 'A is e*' or 'B is e*.'[36]

There are two additional conditions Gallie added to this definition. They have led his account into serious difficulties and this why it is often accepted only without them.[37] These two additional criteria are (i) the derivation of essentially contestable concepts from an *original exemplar* whose authority is acknowledged

[30] This claim is implicit to Waldron's, 1994a account of contestability.

[31] Gallie, 1956, 169.

[32] See Connolly, 1984, 10 ff. Gallie specifies *five* basic criteria (Gallie, 1956, 171 ff), whereas Connolly provides only three. The two other criteria missing in Connolly's definition are the 'variously describableness' of contestable concepts and the fact that arguments over them are defensive as much as aggressive. These two criteria are implicit in the other three retained in Connolly's definition.

[33] See Connolly, 1984, 11. See also Hurley, 1989, 46.

[34] This point is related to the conceptual complexity of some concepts whose content is dependent on that of other concepts. This is the case for many normative and contestable concepts, and in particular for concepts like 'cruel' or 'dignity,' for instance. Interestingly, this interdependence constrains the extent of disagreement (and hence of indeterminacy) within the limits of other agreed concepts (see Hurley, 1989, 47). See on this question, Raz, 1998b.

[35] One may distinguish between (i) the complexity of a concept *qua* outcome, when it is the outcome or resulting state of affairs that is complex, (ii) the complexity of a concept *qua* question, when it is the question raised by the concept itself that is complex and (iii) the complexity of a concept *qua* value, when it is the value encompassed that is complex. See Waldron, 2002a on these different levels of complexity. See also Besson, 2003b; Besson, 2004b on these three levels of complexity in the concept of sovereignty.

[36] Waldron, 1994a, 513.

[37] On this point, see Gray, 1978, 389 referring to Gellner's review of Gallie. Contra: Bankowski/Christodoulidis, 2000, 24.

by all the contestant users of the concept and (ii) the probability or plausibility of the claim that continuous competition enables the original exemplar's achievement to be sustained in an *optimum fashion.*[38]

Gallie's motivation in adding the first of these two additional criteria was to distinguish the essential contestability of the same concept from the confusion of concepts and hence from a verbal misunderstanding; if people are to dispute the same concept, they have to share it and, in order to share it, a common view is that we need to agree on at least some central applications of it.[39] It is an important question and I will address it later on in this chapter. For now, it suffices to emphasise that the recognition of the essentially contestable nature of a concept is an *analytical* statement. It implies the possibility of conceiving a concept as normative, that is to say as encompassing a contestable value. It does not therefore protect against analytical mistakes or errors of judgement.[40] Some conceptions may be analytically wrong in the sense that they do not fit with the shared paradigms in the discussion. For instance, someone who conceives justice as a flying animal does not share any of the current paradigms of the concept of justice. However, Gallie's answer to this concern makes his additional condition ambiguous as to what is the true *source* of the dispute over contestable concepts or in other words as to *what it is* in such concepts that is contestable: the original exemplar or conceptions of it.

As to the second additional criterion, it is not much more convincing than the first one. True, the reference to essentially contestable concepts improves the quality of debates and their contestability increases the understanding of the values they encompass.[41] In fact, it is disagreement itself and political debate which render contestable concepts the way they are; as such, disagreement is built into their conceptual nature. Their centrality in political debates increases their contestability, but it is their very contestability that makes them a central and indispensable element of political debates. However, it is important to distinguish these contentions from the more objective statement that debate on an essentially contestable concept guarantees the emergence of *the best* conception of the concept. Although deliberation increases the statistical chances of obtaining a good decision, it does not guarantee its perfection.[42]

II. THE SOURCES OF ESSENTIAL CONTESTABILITY

In the second chapter, I distinguished three main potential sources of disagreement over normative concepts like justice: *verbal* lack of agreement, *conceptual* disagreement and *substantive* or *normative* disagreement. The aim of this section

[38] See Gallie, 1956, 180.
[39] See Wittgenstein, 1991, 242. See more recently, Raz, 1998b; Endicott, 1998.
[40] See Waldron, 2002a, 152.
[41] See Connolly, 1983, 213. See also Mill, 1962, 175. See also Arendt, 1973, 220.
[42] See Chapter 7.

is to assess which of them accounts best for essentially contestable concepts and the disagreements they generate. By the end of the discussion, the potential sources of disagreement about justice should therefore be clearer and the depth of the contestability of the concept of justice should become more explicit.

1. Verbal Lack of Agreement

Before their dispute can properly be called conceptual, that is to say amount to a dispute over the same concept, which the parties understand and share sufficiently to be able to argue over it, there could be a *verbal misunderstanding*. The parties might not be arguing about the same concept but merely about terms.

When people disagree about justice, however, they usually do not misunderstand each other to the extent that they should be taken to refer to different concepts.[43] It would be unacceptably superficial therefore to gloss such cases by claiming that our opponents are refusing to speak our language, for we usually have no difficulty understanding that contesting claims of justice actually raise questions *of* justice; they are *right* claims of justice even though they might not be *right*. For instance, a utilitarian may disagree with a liberal on the justification of restrictions on hardcore pornography without either of them contesting the fact that the other is referring to the same concept of justice by using the term 'justice.' Of course, if one them argued that 'the orbit of Venus is unjust,'[44] the other might start to wonder about their sharing of the concept through sharing the term. I will come back to the question of the minimal amount of understanding necessary for people to argue fruitfully about normative concepts like justice in the last section.

2. Conceptual Disagreement

Once we are sure that people use the word to refer to the same concept, disputes can still arise within the boundaries of the concept about its meaning; these disputes are generally called *conceptual disputes*. As I explained in the second chapter, some conceptual disputes are borderline, while others are pivotal.

a. Borderline Disagreement

Conceptual disputes are *borderline* when it is unclear whether the concept applies to a specific case that differs from its central cases of clear application. One can

[43] See Burge, 1986.

[44] See Dworkin, 2001b who argues that this claim can be ruled out on semantic or linguistic grounds for not being encompassed in the minimal paradigms of justice necessary for reasonable people to share the concept, unless this conception is dictated by the belief that God created the solar system, in which case the related conception of justice can be regarded as reasonable.

distinguish three types of sources of borderline dispute[45]: ambiguity, vagueness and abstractness. When people disagree about justice, it is interesting to wonder whether their disagreements can be deemed to remain borderline and more particularly to have linguistic origins such as vagueness. Some authors have argued that *abstract, normative and evaluative concepts* like justice or cruelty should be regarded as *vague*.[46] There are four arguments against the view that disputes over justice and normative concepts, more generally, can simply be explained in terms of vagueness.

First of all, disagreement over justice differs from disputes over vague terms for it is not restricted to uncertainties about *norms* for the use of *language,*[47] but expands into uncertainties about *moral and political norms* more generally. In this sense, disputes over justice cannot be identified with mere 'semantic defects.'[48] As Dworkin argues, this view 'confuses the cases in which a vague *term* is used, like "middle-aged" or "red," with the different case in which a *concept* is used that admits of different conceptions.'[49] Clauses such as 'fairness' or 'reasonableness' are vague 'only if we take them to be botched or incomplete or schematic attempts to lay down particular *conceptions.*' However, 'if we take them as appeals to moral *concepts* they could not be made more precise by being more detailed'[50]; to apply such abstract concepts, people must develop conceptions of those concepts that will concretise their abstract meaning. Such normative concepts are never incomplete, but only *abstract* so that their full force can be captured in a concept that admits of different conceptions.[51] In a sense, however, it is possible to picture the relationship between disputes due to vagueness and deeper conceptual and substantive disputes, not as a relationship of equivalents—for the reasons just exposed—but as a relationship of belonging; the accidental vagueness of the abstract concept of justice, if it can be established, would be only a small element of its deeper contestability.[52]

Secondly, for a term to be vague, there must be *undisputed paradigms*, that is to say instances where the term applies in a clear and uncontested fashion.[53]

[45] Dworkin, 1986, 351.

[46] Endicott, 1998, 300; Endicott, 2000, end of ch 4, ch 6.5, ch 6.7. Contra: Dworkin, 1996b, 136–38.

[47] See Waldron, 1994a, 512.

[48] Dworkin, 1986, 17.

[49] See Dworkin, 1986, 128 (emphasis added). I will not get into the argument here according to which (i) Dworkin's proposal of a rule of reconstruction fails for higher-order vagueness and (ii) that the other evaluative resources of the law, such as principles, called upon to show that law can be determinate despite linguistic indeterminacies (Dworkin, 1978, 134), are vague too. See Endicott, 1997 and Endicott, 2000, ch 8.

[50] Dworkin, 1978, 136. See also Gray, 1978, 392 against MacIntyre, 1973.

[51] Dworkin, 1978, 103 referring to Gallie's contested concepts.

[52] See Hurley, 1989, ch 3 who talks of a continuum of contestability with what she calls 'uncontestable' at one end (colours being the most obvious example) and essentially contested at the other. If colours that are uncontested are vague for Endicott, it is difficult to see how, without extending his conception of vagueness out of any proportion, contestable concepts could also be vague.

[53] These elements (eg paradigm and *sorites*) are cumulative conditions any argument about the vagueness of justice should satisfy. Very often, however, Endicott seems to make one argument without the other as in Endicott, 1998; Endicott, 2005; Endicott, 2000.

For instance, there must be clear cases of justice and injustice, which are regarded as true or false, as there are clear cases of baldness or old age to which the similarity of a situation can be measured in a continuum.[54] Higher-order vagueness makes it impossible to define borderlines around clear cases, but does not make paradigmatic instances of the concept moot; a man with no hair on his head will always be regarded as bald even if the question of the one more hair on his head is difficult to classify along the spectrum.[55] As we will see later, however, justice and other evaluative concepts do not often have fixed paradigms that are undisputed and indisputable.[56] We need such paradigms of justice to start deliberating, but can change them gradually in the course of the argument. Besides, for reasons that I will expose later when discussing the possibility of criterial disagreement over justice, I do not think that the fact that people may get a paradigm wrong and make *crazy claims* about the nature of a vague concept accounts sufficiently for genuine pivotal disputes about justice[57]; in those disputes, people simply do not assume that 'they are sharing common rules for the correct use of a concept which they might get wrong.'[58]

Thirdly, for a term to be vague in its common sense, it must be possible to construct a *sorites* paradox of the application of this concept.[59] I think that this is not possible for evaluative concepts like justice or cruelty. First of all, in order to construct a *sorites* paradox for justice, there must be at least one clear end of a sensory continuum and we lack such clear and undisputed paradigms for justice.[60] Secondly, I do not see how one more (n+1) of something can make a practice more just or more cruel in the same way as one more year makes someone older or one more hair makes someone less bald. This is because even the *quantification* of justice is controversial.[61] There are, in other words, no undisputed application conditions for the predicate 'justice' for we do not necessarily evaluate and compare cases of justice by counting single hairs, years or pigments in shades of blue.

[54] See ENDICOTT, 1998, 299, note 17.

[55] See ENDICOTT, 2000, ch 7.3 for a reformulation of the account of the application of vague terms: 'We can reject the complexities of the boundary model in favour of saying that the indeterminacies in the application of a vague word are indeterminacies in the similarities an object must bear to *paradigms*.'

[56] Contra: ENDICOTT, 2000, end of ch 2.

[57] See ENDICOTT, 1998, 299 for this claim.

[58] This is ENDICOTT's, 1998, 298 assumption.

[59] See ENDICOTT, 2000, end of ch 4.

[60] ENDICOTT, 2000, ch 4, note 42 gives the following example: 'Twenty-four-hour solitary confinement is cruel. So is 23-hour-59-minute solitary confinement. By a standard *sorites* series we can reach the conclusion that one minute of solitary confinement per day (or none at all) is cruel. Similar *sorites* paradoxes could be constructed for "courteous," "fair," "reasonable" and so on.'

[61] This is why I think that ENDICOTT's, 2000, ch 6.5 example of an evaluative *sorites* paradox that calls upon a soup in which it is clear and a paradigm case that 'a good batch of soup this size will have more than a teaspoon and less than a tablespoon of salt' is misleading, when one thinks of justice and uses of 'good' that are less descriptive than the use of 'right' the meaning of which people share, but over the applications of which they disagree. On the vagueness of normative terms when they are used in their descriptive sense only, see HARE, 1952, 114 and WILLIAMS, 1993, 141 on marginal disagreements over 'thick' ethical concepts such as cruelty.

Finally, I have been arguing so far as if there were a *sensory continuum* divided up by claims of justice. There might not in fact be such a continuum and justice might not be progressive at all; applications of justice are often indeed deeply incommensurable.

Finally, most problems of vagueness arise when we confront a continuum with terminology that has, or aspires to have, a *bivalent* logic.[62] In judicial decisions, in particular, judges are required to give an answer in such a two-valued logic.[63] Which logic applies to claims of justice? Except in the legal and judicial dimensions of judgements of justice, the bivalent logic does not necessarily apply to justice; many claims along a continuum may be just or unjust without creating any logical paradox.

b. Pivotal Disagreement

Borderline disputes are not the only conceptual disputes people might have over the limits of the correct application of a concept. Disputes over justice in particular can go deep into the core meaning of justice and are then deemed as *pivotal disagreements*. The question I left open in the second chapter is whether these disagreements need to be regarded as criterial, as when they apply to criterial concepts whose criteria of correct application can be misinterpreted and hence give rise to disagreement, but can never really be thrown into question by reasonable people,[64] or whether they are really central disagreements and can question any paradigm case or rule of correct application of the concept, thus giving rise to genuine pivotal disagreement.[65]

Criterial disputes are disputes in which people share only imperfectly the common rules or criteria for the correct application of a concept and therefore disagree about its correct application. According to this account of conceptual disputes, when people share a concept, they accept that there are what one may call 'common criteria' for its use, but they also accept that their own views of what these criteria are may be incomplete or inaccurate, because common criteria are diverse and are often opaque.[66] These disputes are therefore restricted to the cases in which some people suffer from epistemological barriers and are making claims

[62] WALDRON, 1994A, 516.

[63] See ENDICOTT, 2000, ch 4 on juridical bivalence.

[64] See eg RAZ, 1998B; ENDICOTT, 1998.

[65] See eg DWORKIN, 1986; DWORKIN, 2001B; DWORKIN, 2004A.

[66] This form of criterialism is a *sophisticated* one, by contrast to simple criterialism that associates the fact that people perfectly share criteria with their sharing the concept. See RAZ, 1998B, 263 drawing on BURGE, 1989 who argues against the purely *individualistic* view of language and of its use. It is interesting to note that Raz ignores another piece (BURGE, 1986) in which Burge rejects the view that sharing a concept requires a minimal agreement on and the undubitability of the criteria for that concept's correct and true application, thus rejecting the categorical value of paradigms and the plausibility of widespread 'crazy or purely speculative claims.' Thus, Raz only partially accepts Burge's radical rejection of individual and communal capacities by retaining the reference to a communal standard.

which others are entitled to regard as wrong or even as unreasonable.[67] To borrow Endicott's terms, such claims are 'crazy claims.'[68] Crazy claims are wrong for they do not recognise the criteria for the right application of a concept, but they are not unintelligible,[69] because, in spite of their mistake and because it is a mistake, they use the same concept.[70]

Other authors, like Dworkin, argue that there are concepts over whose central cases of correct application one can disagree without making a mistake and without having to share minimal criteria of application. These disputes are truly *pivotal* in that respect.[71] They are disputes that, on the one hand, go to the core of the meaning of the concept as opposed to borderline disputes—in this sense they are not different from criterial disputes—but which, on the other hand, put into question and might reject *any* preconception of a correct and shared application of the concept.[72] This is, I contend, the case of most disagreements over justice and other normative concepts of this kind. People who disagree about the justice of income tax do not disagree on some criteria for the application of the concept of justice, while assuming that they share a common rule for its correct use.

First of all, in our society, a striking feature of disputes about justice is that *no agreement* exists as to its central applications or common use.[73] Contrary to what happens to descriptive concepts like bachelorhood,[74] it is difficult to find paradigms of justice which are undisputed by reasonable participants in practice. This issue is also referred to as the issue of the *underdeterminacy* of the community standard. The number of disputing claims about justice is clearly too large for all these claims to be singled out as crazy.[75] Secondly, even if most people held a certain reasonable conviction about justice, it cannot be assumed that others

[67] This derives from Raz, 1998b, 263. On this common view of what is the correct application of a concept and the mistake there is in not agreeing with the majority, see a combined reading of Wittgenstein, 1991, I, 202 and 258. See on this interpretation of Wittgenstein's private language argument, Leich/Holtzman, 1981, 3 ff.

[68] Endicott, 1998, 295.

[69] See Endicott, 1998, 295 ff, 297.

[70] In this sense, the traditional criterial account of the meaning of concepts is saved. See also Raz, 1998b, 269 on the assumption that people are sharing the same rule even when they are making mistakes about it. See also Endicott, 1998, 297.

[71] See Dworkin, 1986, 41–42.

[72] In this sense, Raz, 1998b, 260 is wrong to hold this and Dworkin's view as implying that whenever people disagree about a concept's central and correct application (as opposed to borderline cases), then the concept is not criterial but interpretive. It is also the *way* in which they disagree, ie the fact that they do not share rules for the common use of a concept when they disagree about criteria for its correct and central applications, that makes it non-criterial. I believe that Endicott, 1998, 298 ff makes the same mistake when he defines pivotal cases as cases 'concerning the application of an expression that is one that each side in a dispute claims is a clear case' or 299, note 17 in which he says that 'there is no sharp distinction between pivotal cases and disputes in which one party is making a crazy claim.'

[73] Gray, 1978, 391.

[74] Thus, someone who rejects the paradigm that unmarried men are bachelors in making another claim about bachelorhood is obviously ignoring the definition of bachelorhood and is making a wrong or crazy claim. See Dworkin, 1986, 70.

[75] For the same argument, see Stavropoulos, 1996, 128 note 4 on the difficulty to explain the appearance of genuine disagreement either in terms of massive-scale deception or massive error.

ought necessarily and reasonably to share it and would be crazy not to. One would still have to establish the existence of a second-order intention to use a concept only as it is used in the community. This would amount on the part of the proponents of this view to produce the *substantive moral argument*—as opposed to a conceptual demonstration[76]—that the many people who hold some conviction about justice would be unlikely to be wrong.[77] Debarred from other conditions, what people *do* does not necessarily imply anything as to what others *should do*.

Disagreement about justice is not therefore restricted to the *borderlines* and limits of the correct application of the concept, where there is a range of actions which are clearly correctly described by the concept,[78] nor to *pivotal* cases where some of the parties misconceive the common rules for its correct application, but where by paying close attention to established use, it is possible to find an acceptable classification for contested actions.[79] In other words, disagreement about justice does not fit the traditional categories of *conceptual* disagreement. It follows therefore that either justice, and other normative concepts, cannot be regarded as criterial concepts and must be defined as of another type of concepts, disputes over the core of which can still be regarded as conceptual despite the fact that disputants do not share criteria for their common use, or disputes over them are not conceptual but of another kind, a third kind of disagreement to which I will now turn.[80]

3. Normative Disagreement

Normative disagreements amount to disputes over the application of normative concepts, the meaning of which is clear and shared. In the case of disagreement over concepts of justice, this analysis does not seem entirely convincing, however.

True, there are cases in which the parties are evaluating differently the results of applying a shared standard of justice.[81] However, it turns out more often that, in those cases, the parties are *also* applying different criteria of justice or at least weighing them differently. Normative concepts like justice have more than an appraisive function; they also share some descriptive function in virtue of which they can indicate a certain feature of an arrangement that ought to be favourably

[76] See on the shortcomings of such a demonstration in the case of justice and other normative concepts, Miller, 1983, 47–48. See also Dworkin, 2001b who rightly argues that it is difficult to imagine the case in which after a majority of people has identified justice with efficiency, others would have to change their individual criteria for the correct meaning of justice over which they previously agreed. This reasoning might apply to what we do when we use descriptive terms like 'arthritis,' to take one of Burge's examples of non-individualistic individuation of our mental states, that are more likely to be exhausted by the common usage of the concept.

[77] See Dworkin, 2001b.

[78] See Miller, 1983, 44 on the concept of 'voluntary' as opposed to that of 'just.'

[79] See Dworkin, 2001b on the Razian example of 'table' as opposed to 'just.' See also Dworkin, 1986, 44–45; Dworkin, 2004a, 9 ff.

[80] See Dworkin, 2004a, 5–13 on the relationship between conceptual, normative and descriptive types of disagreement.

[81] Miller, 1983, 41. See also Benhabib, 1994a, 27.

evaluated.[82] As a result, when people disagree about the features of an arrangement in virtue of which it is to be called just, they are also often disagreeing about the meaning of the concept 'justice.' In that sense, one may say that normative concepts are characterised by their peculiar *reflexivity*; what counts as just always requires a moral judgement as to what justice is.[83]

It seems, therefore, that disagreements over justice are both *normative* and *conceptual,* in a way that imports substantive disputes into conceptual ones.[84] Because these further disputes will bring evaluative judgements into the determination of the correct definition and application of the concept, there are sufficient reasons to distinguish conceptual disputes over the meaning of a descriptive concept like 'red' from conceptual disputes over the normative standard of 'just.'[85] These disputes cannot, however, be identified with purely *normative* disagreements either, given their important conceptual component. Disagreements over essentially contestable concepts like justice can therefore be explained in terms that are both conceptual and normative.

III. MINIMAL AGREEMENT IN UNDERSTANDING AND DISPUTABLE PARADIGMS

Even if normative concepts like justice are contestable concepts, and most disputes over them can be regarded as pivotal, there remains a sense in which for those disputes to be pivotal there should be *some* measure of agreement about the meaning of these concepts for the disputants to understand and share the concepts. Or else, the risk is that they will talk at cross-purposes using the same term to refer to different concepts and hence that they will succumb to verbal disagreement.[86] Without a previous degree of agreement about the connexion between the concept-word and the concept and hence about the minimal meaning of a concept, therefore, there can be no further conceptual or normative disagreement over the concept. Dworkin refers to the need for this minimal agreement in understanding as the *fulcrum of disagreement,*[87] but differs from other authors as to what can count as a *sufficient* fulcrum of disagreement for people to be able to share and discuss a concept. It is precisely this degree of sufficient conceptual understanding that I would like to discuss in this section.

There is a very common position nowadays according to which the possibility of agreement and disagreement does not only imply a pre-existing verbal understanding of the kind I discussed in the second chapter, but according to which

[82] Miller, 1983, 42.
[83] See Gray, 1978, 393. See Waldron, 2002a on the rule of law.
[84] See Miller, 1983, 48; Gray, 1977 and 1978, 391. See also Dworkin, 2004a, 5–13.
[85] See Hare, 1952, 114.
[86] See Endicott, 1998, 294.
[87] Dworkin, 1986, 42 ff; Endicott, 1998, 283. See also Bourdieu, 2000, 56: 'Pour être en désaccord sur une formule politique, il faut être d'accord sur le terrain de désaccord.'

understanding itself implies not only *agreement in definitions*, but the possibility at least of *agreement in judgement.*[88] On this account, because there cannot be disagreement without this strong sense of agreement, all disagreement can amount to is verbal lack of agreement, borderline conceptual disagreement or maybe even unreasonable criterial disagreement; people are simply passing each other without understanding each other for they are using the same concepts to designate different things.[89] As a response to this now common view, Dworkin's attack on 'semantic theories,' ie theories which recognise and conceptualise the law merely on the basis of shared semantic criteria, contends that these theories cannot accommodate the centrality in our legal practice of *theoretical* disagreement at the core (and not only on the borderlines) of what the law is.[90] Legal positivists, who are the target of this critique, have reacted to the approach that reduces legal positivism to a merely semantic theory, either by denying the semantic nature of their theories or else by demonstrating their ability to account for pivotal and theoretical disagreement along the lines I discussed before.[91]

It will be my purpose in this section to discuss remaining arguments of the second kind, and in particular those pertaining to the degree of minimal understanding required to share normative concepts, the disputable nature of these concepts' paradigms and the relationship between sharing minimal paradigms and the belief in their conceptual truth.

1. Minimal Agreement in Understanding

Contestable concepts usually have a *clear minimal meaning,*[92] in the sense that the rule for their correct use is to elicit a specific value judgement from anyone applying or implementing the proposition in which they appear.[93] In a society torn by conflicts of values, however, different people will hold different views of the actual value embodied in the concept and hence of how the concept is to be

[88] See Wittgenstein, 1991, 242: 'If language is to be a means of communication there must be agreement not only in definitions, but also (queer as it may sound) in judgements. This seems to abolish logic, but does not do so.' See also Beiner, 1983, 141 ff who refers to Gadamer's 'universal horizon of language' and who insists that, in order to disagree about a concept, parties must at least share criteria about how to apply the concept thus implying the possibility of agreement. See also Davidson, 1984, 196–97: 'Since knowledge of beliefs comes only with the ability to interpret words, the only possibility at the start is to assume general agreement on beliefs. ... The method is not designed to eliminate disagreement, nor can it: its purpose is to make meaningful disagreement possible and this depends entirely on a foundation—some foundation—in agreement.'

[89] See Hurley, 1985, 66 ff.

[90] See Dworkin, 1986, 37, 43–47. See a restatement of the argument in Raz, 1998b, 261.

[91] See Raz, 1998b, passim and Endicott, 1998, passim.

[92] Agreement over the normative and contestable nature of the concept need not be expressed or even conscious, for people may be wrong over the true nature of a concept or use it in a descriptive way in some contexts. What needs to be conscious, however, is an *agreement to disagree*, ie an agreement over the possibility that people's disagreement over such concepts is legitimate and reasonable and does not amount to misusing the concepts.

[93] See Waldron, 1994a, 527 on this super-criterial agreement. See also Dworkin, 2000a.

applied correctly. In this sense, it is not always easy to see how they can share the same concept, and not merely be confusing concepts. Gallie himself was sensitive to this concern and tried to provide an answer by inserting the condition of the existence of an original exemplar all participants should recognise and share.[94] Even if this goes too far, normative concepts usually give us a little more help than they seem and do this in different ways.

First of all, contestable concepts push in the direction of a particular dimension of evaluative significance and away from other dimensions. Each of these concepts has quite a *specific evaluative meaning*. This does not prevent people from disagreeing about the criteria for the concept's correct application, but it restricts the evaluative scope of those criteria. Thus, when two people disagree about whether social justice consists in a distribution according to desert or a distribution according to need, they still appear to concur in thinking that 'justice' refers to a manner of distributing goods among persons.[95] Of course, this evaluative meaning may become disputed and change over time. Secondly, an evaluative concept may have an element of relatively fixed *descriptive meaning*[96]; it is in virtue of this descriptive function that the concept can indicate that it is a certain feature of an arrangement that ought to be favourably evaluated.[97] A prohibition on cruel punishment is not an all-purpose invitation to make value-judgement about punishment.[98] Thus, in ordinary language, the descriptive meaning of 'cruel' invites us to focus our evaluation specifically on the degree or quality of the suffering experienced by someone and perhaps on the disposition and attitude of those inflicting it.[99] Again, the descriptive dimension of an evaluative concept may change and the global constitution of the concept too[100]; the evaluative meaning of the concept can be retained and is used in order to alter the descriptive meaning and establish a new standard.[101] Despite these two dimensions of the minimal understanding of normative concepts, the latter remain essentially contestable. Thus, in the case of cruelty, we know that the concept has negative and condemnatory connotations and that it tells us something about the gravity of the suffering experienced. However, people will differ as to whether cruelty is simply a matter of the intensity of suffering, or whether it also refers to the malice, inhumanity or disrespect with which the suffering was inflicted.[102]

94 Gallie, 1956, 180–81.
95 Miller, 1983, 43. See also Waldron, 1994a, 528.
96 See Waldron, 1994a, 528. Some 'thin' ethical concepts, as opposed to 'thick' ones, to borrow Williams', 1993 terminology, do not have a descriptive component that is world-guided, in addition to their evaluative component.
97 Miller, 1983, 42.
98 This issue draws our attention to the importance of sharing *minimal* paradigm examples of the concept we want to share rather than just any set of paradigms, for there might be an overlap between the paradigms of different concepts, such as for instance the paradigms of a 'morning star' and those of an 'evening star'.
99 Waldron, 1994a, 528.
100 See Hare, 1952, 119 ff.
101 Hare, 1952, 119.
102 See Waldron, 1994a, 528.

It should be clear by now how people who use the words 'justice' or 'democracy' can share a *minimal* understanding of these concepts and cannot be said to confuse two concepts, despite the fact that their disagreements can go deep into the meaning and the rules for the common use of these concepts.[103] A remarkable fact, however, is that they do not agree wholly about the meaning of those terms and the shared minimal element of meaning does not exhaust the word's core meaning for either party.[104] This minimal understanding that is required for people to be able to share a concept and disagree over it corresponds to the rough agreement and minimal overlap of (the boundaries of) our personal convictions that is necessary for us to share the interpretive attitude. It constitutes the plateau of our disagreements and different postulations or conceptions.[105] It is crucial to distinguish this form of *minimal understanding* that is sufficient for responsible ratiocination and disagreement by a competent speaker from another form of understanding that is identified with the *full understanding of ordinary linguistic meaning.*[106] As Dworkin argues:

> The fulcrum of disagreement lies in a shared set of paradigms and a shared understanding that the application of the concept in question is to be governed by the best interpretation, in the sense described above of those paradigms.[107]

2. The Disputability of Paradigms

Paradigms are central to the use of essentially contestable concepts; they enable their users to share the minimal understanding necessary to kick off a discussion and start a disagreement over those concepts.[108] Paradigms are instances in which the requirements of the practice seem obvious and uncontroversial; they are 'clear cases used as an object of comparison.'[109] Paradigms emerge *in the course of discussion* as 'a kind of plateau on which further thought and argument are built.'[110] According to Dworkin, they are part of the pre-interpretive material and of our deep convictions about justice and are 'concrete examples any plausible interpretation must fit'; thus, an 'argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case.'[111] Thus, 'it is paradigmatic for us now that punishing innocent people is unjust, that slavery is unjust, that stealing from the poor for the rich is unjust.'[112]

[103] See Hare, 1952, 94 ff on how evaluative concepts like 'good' can be used and shared without sharing criteria for their correct application as we do need to for the use of terms like 'red.'
[104] Miller, 1983, 44.
[105] See Rey, 1998, 98.
[106] See Burge, 1986, 715.
[107] See Dworkin, 1994b, 14.
[108] Endicott, 1998, 298.
[109] Endicott, 2000, ch 7.3.
[110] Dworkin, 1986, 70.
[111] Dworkin, 1986, 72.
[112] Dworkin, 1986, 75. See also Endicott, 2005, who uses this example of a paradigm of justice.

In practice, however, people do *reject paradigms of justice*[113] and normative concepts, as opposed to what happens to paradigms of descriptive concepts,[114] and no such paradigm can be said to be undisputed and agreed upon overall.[115] Any uncontroversial statement of a concept, such as a paradigm, reflects a conception of it and cannot be described as conceptual, although it is natural for people to regard it as 'in the way of conceptual'[116] and although some paradigms can be seen up to a certain extent as having 'a kind of conceptual flavour.'[117] Thus, some theories of justice do contest much of what their contemporaries take as paradigmatic. For instance, 'it is a standing argument against utilitarianism that it cannot provide a good account of these central paradigms [eg punishing innocent people is unjust]; utilitarians do not ignore that charge as irrelevant, but on the contrary use heroic ingenuity to try to refute it.'[118] These theories remain theories *of justice*, however, for the work of philosophers of justice is not to redefine paradigms, but to defend 'controversial theories that go well beyond paradigms into politics.'[119]

It is therefore the characteristic of paradigms of normative concepts like justice to be disputed and to change.[120] It is sufficient to share some evaluative and descriptive convictions about a concept for us to understand and share it, even if it is in order then to dispute those guidelines and change them in a way that justifies other convictions better. In this sense, paradigms are tentative and temporary cases of clear and correct application of a concept that we cannot but include in our convictions as a shared starting point and try to justify, but which at the same time may be disputed and abandoned later if this is reasonably justified. There are paradigms of justice, but they are not indisputable and can all be revised, although they are *not all* revisible *at once nor at the same time*.[121]

[113] See MILLER, 1983, 42, note 13: 'There is no exemplary democratic state or just society which all users of these concepts would acknowledge as such.'

[114] Paradigms of normative concepts are different in this sense from 'cases in which, as philosophers say, a concept holds "by definition," as bachelorhood holds of unmarried men': DWORKIN, 1986, 72. In this sense, I think that ENDICOTT's, 1998, 294 arguments about epic poetry do not apply to justice; it is easy for him to make a case for the existence of undisputed paradigms of abstract concepts on the basis of persistent paradigms of descriptive concepts over which there is a consensus and on the basis of the few crazy and mistaken claims which can be made about them.

[115] See GRAY, 1978, 390.

[116] DWORKIN, 1986, 70.

[117] DWORKIN, 1986, 72.

[118] DWORKIN, 1986, 75.

[119] DWORKIN, 1986, 75–76.

[120] It is very important to keep in mind the revisible feature of paradigms over which there is some pre-interpretive 'agreement' when facing the critique that such pre-interpretive agreement amounts to a concession to a *minimal form of conventionalism*. This has indeed been one of the main critiques and misunderstandings of Dworkin's theory (see eg MOORE, 1998, 323). The critique does not grasp that the pre-interpretive 'agreement' is not a real converging agreement that would be subordinated to the threat of pervasive disagreement, but merely a logical precondition to further agreement or disagreement that is given in some cases, but not in others. Dworkin refers to this agreement as an agreement of conviction that is the result of the overlap of opposed conceptions on some minimal paradigms; it is an agreement about the fact that something is a paradigm of another, rather than about what it is.

[121] See COLEMAN's, 2001 argument against Dworkin's attempt to undermine the conventionality thesis through the semantic sting argument. See also VEITCH, 1999, 112.

Paradigms are not timeless[122] therefore and should not be confused, as they are by some authors,[123] with (historical) foundations, criteria or central exemplars that make the argument possible in the first place.[124]

Of course, one can concede that paradigms may be disputed and change, but doubt the capacity of a concept to remain the same in case of a change of paradigms. This concern about *conceptual change* is understandable.[125] There are certainly limits to the renewal and adaptation of a concept through its paradigms. Beyond a certain level of change, the concept itself has changed, although the same concept-word may be used.[126] These limits are not the same for all concepts, however. In the case of essentially contestable concepts, the absence of undisputed paradigms and criteria for their correct application implies a broad margin for conceptual renewal. The only limits lie in the constitutive elements of the minimal understanding necessary to share the concepts. Of course, in case of radical change of referent, as when all paradigms change at once, the concept itself may be said to have changed. Such radical changes remain very rare, however.[127]

3. Shared Paradigms and Conceptual Truth

Faced with this account of the essential contestability of normative concepts, some authors maintain that it does not explain sufficiently how, if we disagree (without being mistaken) about what constitutes *core* applications of a concept, we can share it at all. On the traditional account of the minimal agreement required to share a concept, one will recall, people must share *fixed rules or criteria for the correct use of the concept*, but can be mistaken about them, hence cases of genuine (criterial) disagreement despite agreement about the concept's common use.[128] This account's mistake is to conflate the requirement of *understanding* that is necessary for us to share the concept we are discussing, with the requirement of *agreement* and *recognition of the truth* of the meaning-giving statements or characterisations we understood.[129] The class of true thoughts at stake

[122] Dworkin, 1986, 71.
[123] See eg Endicott, 1998.
[124] Waldron, 1994a, 533. See also Gray, 1978, 390 on this 'genetic fallacy' and the failure to distinguish between the present functioning of a concept and its history.
[125] See Skinner, 1989 and Farr, 1989.
[126] See Raz, 2004b.
[127] See Raz, 2001a, 171–72. An example of such a conceptual change is that of the concept of 'manufacture'.
[128] See Raz, 1998b, 269. See also Hart, 1994, 126. See also Endicott, 1998 who identifies paradigms with *linguistic rules* establishing whether something is rightly referred to as justice. To the extent that Endicott, 1998 identifies paradigms with the Wittgensteinian agreements in judgements, his account of paradigms can be identified with my account of criteria for a concept's correct application. See for an analogous point, Moore, 1981 and Moore, 1998, 314 on 'paradigm case argument' semantics, ie semantics according to which one finds the meaning of a word by finding the paradigmatic exemplars shared by the linguistic minority who uses the word.
[129] This is Burge's, 1986 argument against criterial and positivist semantics.

here is made up of 'those necessary truths which are intuitively central to giving the meaning of an empirically applicable term or to providing an explicit general understanding of such a concept.'[130] An example of such truths is the criterial[131] claim that 'sofas are pieces of furniture made and meant for sitting.' In this account, therefore, the *meaning* of a concept is identified with its *truth*, hence the impossibility to explain genuine and pivotal disagreement without blaming it on mistakes.[132]

The way we share the meaning of a concept is usually through dialectic attempts to arrive at so-called *normative characterisations*; these are statements about what Xs are that purport to give basic, essential and necessarily true information about Xs.[133] They are ordinarily established through reflection on *archetypal applications* or good examples of the concept. The agreement reached on those characterisations is not a decree, however, and its influence is based on *persuasion* that is subject to disputes and cognitive checks.[134] True, in order for the apparent rejection of the relevant statements derived from synonymies (eg sofas are pieces of furniture made to be seated on) to be a sign of mistake resulting from incomplete understanding, those statements must be able to claim *authority*. However, the kind of authority developed in the course of the dialectic definition of normative characterisations does not guarantee an ability to answer all doubts. The potential agreement stemming from persuasion supports the force of norms for *understanding*, but the *truth* of those normative characterisations cannot rest only on this kind of agreement. Indeed, people could agree about the truth of paradigms in being collectively mistaken.[135] The authority of normative characterisations could only rest on their ability to reply to challenges, but usually there is no method for demonstrating that every possible relevant challenge has been answered and thus for establishing undubitability,[136] especially in the normative context.[137] Therefore, even where social practices are deeply involved in individuating mental states and meanings, they are often not the final arbiter. This is 'because the sort of agreement that fixes a communal meaning and norms for understanding is itself, in principle, open to *challenge*'[138] and hence to progressive

[130] BURGE, 1986, 699.

[131] In spite of his rejection of an individualistic account of meaning, RAZ, 1998B, 263 does not reject a criterial account of meaning, but adapts it to the fact that we share common criteria for the correct use of a concept. BURGE, 1986, 700 seems to disagree with this distinction and associates what Dworkin refers to as to the 'semantic sting' with criterial assumptions about understanding.

[132] See eg RAZ, 1998B; ENDICOTT, 1998.

[133] BURGE, 1986, 703.

[134] BURGE, 1986, 704.

[135] See LEICH/HOLTZMAN, 1981, 7 arguing against the non-cognitivist 'majoritarian account' of Wittgenstein that interprets his 'private language argument' as stating 'that there is no sense in which the majority of speakers of a given language can go wrong in such judgements; for them [their own perception of reality or] appearance and reality are not distinguishable.' See PEACOCKE, 1981, 72. See for an analogous view, BURGE, 1986 and 1989.

[136] See BURGE, 1986, 706.

[137] *A contrario* from BURGE, 1986, 709 on sofas.

[138] BURGE, 1986, 707.

change.[139] Thus, understanding some minimal meaning-giving characterisations is not equivalent to and does not necessitate acknowledging it as true. It is sufficient, however, to be able to apply the term correctly and to give approximations to standard characterisations.[140]

Even if a concept's cognitive value and its linguistic meaning are not purely individualistically held, they do not vary in the same way. The non-individualistic individuation of both mental states cannot be held against their distinction. Whereas the *level of persuasion and agreement* is easy to reach and establish in the second case, it is less so in the first one. For instance, it is easy to establish to someone, who would negate that we are talking about justice, that we *are* in fact when referring to the quality of the distribution of goods to people and that we *are not* when claiming that abstract art is unjust or that birds flying by are constitutive of justice, exactly in the same way as we can establish to someone who refers to a table with three legs that he is not using the concept of table in a way that is sufficiently consensual for us to understand and share it. However, it is much more difficult to prove to a utilitarian who is referring to efficiency as the way to ensure a just distribution that he is wrong to use justice in this way and is therefore not referring to justice at all; he is referring to justice for he shares the minimal consensual understanding that concern for a distribution is an element of justice, but it is not possible to make the conceptual and absolute claim that he is right or wrong in doing so.

Thus, neither sort of minimal understandings presented, and especially not the minimal understanding required for reasonable discussions and disagreements, necessarily requires *belief* in the normative statements derived from synonymies[141] and hence the undisputable nature of paradigms. One should distinguish between the understanding of the conventional linguistic meaning of a concept and the belief in the truth and the cognitive value of this concept,[142] and hence question the scope of the mistakes people can be accused of when not sharing this belief.

CONCLUSION

The object of this third chapter was to address the issue of conceptual *cum* normative disagreements that arise when we are faced with a certain brand of normative concepts, so-called *essentially contestable concepts*. Its aim was to explain and argue generally in favour of the *essential contestability* of normative political and legal concepts like the concept of justice, law or democracy. It is a claim linked to Dworkin's interpretivism, but it is possible to defend essential

[139] See Berlin, 1969b, 19.
[140] Burge, 1986, 716.
[141] Burge, 1986, 715.
[142] Burge, 1986, 716 ff.

contestability without any interpretive presuppositions. An essentially contestable concept is a *concept that clearly embodies and names a normative standard or value, whose detailed content determines the correct application of the concept, but is disputed by different users*. These concepts are such that their correct use is to disagree about their correct use. The 'essentiality' of a concept's contestability does not mean that the disagreements that surround its meaning are irresolvable, but that, on the one hand, disputes about the meaning of the concept go to the heart of the matter and can generate *rival paradigms and criteria of application* and that, on the other, it is part of the *very meaning and essence* of the concept to be contested. In brief, an essentially contestable concept is a *normative, complex* and *a-criterial* concept.

In order to establish the essential contestability of claims of justice, I had to show from what *sources* disputes over justice could and could not stem. I argued that these disputes are neither purely verbal nor purely conceptual. They cannot be identified with cases of conceptual vagueness or ambiguity; they do not amount to conflicts over the limits of application of normative concepts, have no undisputed paradigms and cannot be explained in terms of the *sorites* paradox. Nor can they be confused with criterial disagreements over core applications of a concept, for such disputes assume that there are rules over a concept's correct applications that people ought to share and are mistaken if they do not. In other words, disputes over justice are conceptually pivotal; they go deep into the heart of a concept and question all its rules of correct application. However, disagreements over justice are not purely normative; justice has an appraisive function, but disagreement over justice may also concern its conceptual elements such as the feature of an arrangement that ought to be appraised. Since disputes over justice are not purely *substantive*, but are partly *conceptual* too, normative concepts like justice cannot be confused with criterial concepts and are better described as contestable concepts.

Finally, as to the critique that if all central applications of a concept are contestable and this without making a mistake, then this concept cannot be shared and understood properly, it conflates the *minimal understanding* that is sufficient for reasonable discussions with the requirement of a full understanding. What it also confuses is the requirement of understanding meaning-giving statements of the concept to be able to share it with the requirement of belief in their truth or their undubitability; the level of agreement and persuasion necessary for someone to share an understanding with others is much lower than the level required for her to believe in the truth of the central applications of a concept she understood. There is therefore nothing in a claim that understands a concept sufficiently, but that contests some of its central applications, judgements and *paradigms*—as we all do about justice in practice—that makes it necessarily *crazy* or mistaken. Minimal agreement on paradigms is required to start disagreeing, but these paradigms may be abandoned gradually, albeit not all at the same time, in the course of discussion, thus allowing disagreement to go to the extreme depth of the contestable concept.

4

The Reasonableness of Disagreement

INTRODUCTION

> I do not believe that any two men, on what are called doctrinal points, think alike who think at all. It is only those who have not thought that appear to agree.[1]

DISAGREEMENT ABOUT JUSTICE is not only pervasive, as I have established in prior chapters, but it is also reasonable and hence persistent.[2] The aim of this chapter is to establish what the reasonableness of political disagreement consists in, why it matters and how it affects the legitimacy of the response one traditionally gives to disagreement, independently of the latter's type or object. Reasonableness should indeed be understood as a *cross-cutting characteristic of disagreement*. It is a broad concept that applies at *any level of disagreement*.

In order to assess the significance of the reasonableness of disagreement, I need to start by defining what we mean by reasonableness. In the following section, I will address the issue of the significance of reason and reasonableness. The third section will look at some of the limitations of reason and their extent. Finally, in the last section, I will discuss the implications of the latter and the alternatives to reasonable agreement and mutual reasonable justification.

I. THE NOTION OF REASONABLENESS

Reasonableness amounts to the free and open exercise of the basic capacities of reason[3]; it is the capacity and propensity to act (think, feel, . . .) only and always for undefeated reasons.[4] Being reasonable amounts, in other words, to thinking and conversing in good faith and applying, as well as one can, the general capacities of reason that pertain to every domain of inquiry.[5] This section aims at deconstructing this definition and understanding the different choices it implies. After three methodological caveats and before discussing different illustrations, I will present four main distinctions.

[1] Paine (1792), 1958, 282–83.
[2] See Raz, 1995a, 104; MacCormick, 1999b, 1581; Waldron, 1999a.
[3] Larmore, 1999, 601–2.
[4] Gardner/Macklem, 2002.
[5] Larmore, 1999, 600.

1. Three Caveats

Before one attempts to define and refine the notion of reasonableness, three methodological *caveats* are in order.

First of all, *contestability*: it is worth observing at the outset how difficult it is to define the notions of 'reason,' 'reasonableness' and 'reasoning,' despite the fact that they are crucial standards of many of our decisions.[6] The definitions one gives of reasonableness are inevitably highly controversial and the object of important (reasonable) disagreements.[7] This 'legacy of confusion' should not come as a surprise since 'reasonableness' is an *evaluative concept* and as such an essentially contestable one.[8] 'Reasonableness' is a higher-order value which is exemplified in considering a balance of first-order values; no wonder then that first-order disagreement spreads into the second-order balancing of first-order values. It is also a value that is very context-sensitive. There can only be agreement over the general and underdetermined concept and conceptions of the latter will necessarily clash.[9]

Secondly, *circularity*: there is a close relationship between the significance of reasonableness in a theory, on the one hand, and the definitions which are given of it,[10] on the other. This results in a certain amount of circularity in the sense that any definition of reasonableness depends on the role given to it within a wider theory, but this role itself depends on the notion of reasonableness chosen. This non-vicious form of circularity is the logical consequence of the essential contestability of the concept of reasonableness; any conception must be founded on some evaluation of the value embodied in the concept and, in most cases in our context, this amounts to reasonableness' role and significance in politics. Thus, for instance, the narrowness of Rawls' content-based or normative conception of the reasonableness of our political judgements succeeds in ensuring a substantial normative agreement among reasonable people.[11] Rawls' definition of the reasonableness of people as corresponding to their tendency to cooperate and agree provides him indeed with the condition of reasonable agreement about justice required by his constructivist account of justice.[12] The overlapping consensus on principles of justice is a consensus of reasonable views, but reasonable views amount to the views of those who are committed to finding some acceptable terms of political cooperation and hence a political agreement!

Finally, *context-dependence*: the notion of reasonableness used within the law, or even within different legal domains, might differ from the notion used in morality

[6] See MacCormick, 1999b, 1594.
[7] Waldron, 1999a, 163. See also Wertheimer, 1999, 174: 'Reasonable people can disagree as to whether reasonable people can disagree.'
[8] Klosko, 2000, 20. See also Oakeshott, 1991, 99.
[9] See Perelman, 1977, 40.
[10] See Klosko, 2000, 20.
[11] See Christiano, 2000, 516 following Waldron, 1999a on this point.
[12] See Simmons, 1999, 765. See already Singer, 1972, 86 ff. See more recently Lafont, 2005 for a similar critique of this ambiguous feature of Kantian constructivist accounts like Rawls' or Habermas.'

and politics more generally. In this sense, reasonableness is a *context-based* value and concept[13] and this should be kept in mind. As we will see, for instance, the notion of reasonableness used within the law is often more actualist than probabilistic; this is due to law's function of *determinatio* and furtherance of certainty that could not be accommodated by a standard of reasonableness that varies too much according to subjective circumstances.[14] I will concentrate here on the reasonableness of our *political judgements of justice* within or outside legal reasoning, as a general issue in politics, and not on other standards of reasonableness that are used within the law itself.[15]

2. Four Distinctions

There are four distinctions worth drawing to understand what is at stake in the reasonableness of disagreement about justice: the distinction between reasonableness and rationality, the distinction between public reasonableness and private reasonableness, the distinction between person-based reasonableness and content-based reasonableness and the distinction between actualist reasonableness and probabilistic reasonableness. These four distinctions should not be taken as distinct alternatives; they are related to each other in an increasing order of specificity. For instance, the actualist account of reasonableness is also a person-based account of public reasonableness.

a. Reasonableness and Rationality

Most contemporary moral and political philosophers distinguish reasonableness from rationality.[16] The standard of reasonableness is usually regarded as more accommodating than the standard of (instrumental) rationality; it leaves latitude for differences of opinion and for rival views of what it is that reason demands.[17]

This is, for instance, Rawls' approach when he distinguishes, as Kant does,[18] the moral commitment to seek and to abide by fair principles of cooperation, particularly when people tend naturally to disagree in their conceptions of human flourishing, from the rationality of the single and unified agent's intelligent pursuit of her own ends through her power of judgement and deliberation, apart

[13] See MacCormick, 1999b, 1594.
[14] See for such a notion Gardner/Macklem, 2002, 18.
[15] See Chapter 12.
[16] This distinction is primarily used by Anglo-American scholarship. It corresponds roughly to Habermas' distinction between *communicative* and *instrumental* rationality (see Habermas, 1998a, 4–5). See Chapter 1.
[17] See for this position Rawls, 1993, 48 ff; Gaus, 1995, passim; Scanlon, 1998, 22–33, 191 ff.
[18] See Rawls, 2000, 164 according to whom Kant's '*vernünftig*' could mean 'rational' when it refers to 'furthering our interests in the most effective way' and 'reasonable' when it refers to the 'readiness to listen to reason' in the sense of being willing to listen to and consider the reasons offered by others. See Chapter 1 on Habermas.

from considerations of fairness.[19] According to him, both basic ideas are distinct and independent[20] and they do not derive from each other. They are not entirely at odds, however, since the rational guides the individual in ordering and securing her own ends, while the reasonable allows her to recognise the independent validity of the claims of others. Rawls distinguishes three kinds of reasons: explanatory reasons, agents' reasons and grounding reasons.[21] The first reasons are part of an explanation of why someone acted as he did; they can be psychological, but they may also refer to repressed or unconscious motives. They coincide with agents' reasons when the agents are truthful and sincere and do not act for repressed or unconscious motives; these second reasons are the reasons such agents would acknowledge as their reasons. Finally, grounding reasons are of two kinds: reasons of rationality that show an act to be rational, and justifying reasons that show an act to be reasonable.

According to Finnis,[22] by contrast, the distinction runs conversely in that the standard of rationality is more accommodating than that of reasonableness. According to him, compliance with all the requirements of practical reasonableness amounts to the acknowledgement of the normative standards existing prior to human choices.[23] Practical reasonableness requires that 'in all one's deliberating and acting, one ought to choose and in other ways will choose those and only those possibilities the willing of which is compatible with integral human fulfilment—that is the fulfilment of all human beings and their communities, in all the basic human goods.'[24] By opposition, rationality is an ambiguous term which may refer to full reasonableness, but it may also have another distinct sense. In the latter and thinner sense, rationality refers to rational motivation in the sense that its object has been envisaged by practical intelligence and has rational appeal even if it is in some sense motivated ultimately by feeling or emotion rather than by reason, the feelings or emotions having to some extent fettered and instrumentalised reason.[25]

What remains quite obscure in both accounts, however, is what it is about rationality that is less accommodating than reasonableness[26] or the reverse. What they seem to be emphasising is that it is utopian to refer to a single-minded deliberator, whose capacities, when described in such a narrow and limited way, cannot constitute the qualities of an ideal complete human agent. It would therefore seem more proper to identify rationality with a broader sense of reasonableness in politics.[27]

[19] Rawls, 1993, 48–58.
[20] Rawls, 1993, 51.
[21] Rawls, 2000, 166.
[22] See for another distinction, Finnis, 2001, 1, 10, 18: 'Reason, when not subordinated by less intelligent powers, aligns one with the truths overlooked or defied by egoism.'
[23] Finnis, 2001, Introduction.
[24] Finnis, 2001, 10.
[25] Finnis, 2001, 18. See also Finnis, 1996, 596.
[26] See Raz, 1995a, 104 ff; Gardner/Macklem, 2002; Larmore, 1999, 601.
[27] See Gardner/Macklem, 2002. See also Gaus, 1995, 235 who sees the distinction between instrumental rationality and epistemic rationality as moot and understands rationality as providing reasons for belief as well as for action.

This does not, however, amount to identifying reasonableness with rationality or reducing the former to the latter.[28]

b. Public Reasonableness and Private Reasonableness

In recent liberal writings, reason, reasoning and reasonableness in politics appear as applications of *public reason*. It is important therefore to clarify what the distinction between private and public reason amounts to.

One may start by wondering about the *origins* of the distinction. It belongs to a distinctively *post-Enlightenment* or *post-metaphysical* type of approach. On a plausible interpretation of the Enlightenment, all reasons are by definition public, since the true and valid results of one person's reasoning will be equally true and valid for everyone. In modern and deeply pluralistic societies, however, doubt has arisen as to whether what is good reasoning for one must be good reasoning for all. As a consequence, mutually acceptable public reasoning must therefore be of a distinct kind. On this account, an agent invokes a public reason when this reason can be rationally accepted by everyone, using standards or procedures rationally acceptable *to* everyone as opposed to being rationally acceptable *tout court*. It is interesting to note, however, that traces of a divide between private and public reasoning can already be found in great Enlightenment philosophers such as Kant and Hobbes. Kant thought that, whereas private reasoning is reasoning directed to a limited audience, sharing common beliefs and roles, public reason constitutes an unconstrained and *epistemically superior* discourse leading to truth and enlightenment by thinking from the standpoint of everyone else. For Hobbes, public reason offers *political rather than epistemic advantages*; people's private reasoning yields conflicting judgements of right and wrong and the solution is to appoint an arbitrator whose private reason becomes the public reason.

One may also wonder *what* public reason amounts to. The opposition between private and public reasoning does not *in principle* amount to an intrinsic difference of *content* between private and public reasons. Public reason is about *the way* or *the method* through which we reason together in politics and give reasons to each other: it amounts, in other words, to a constraint of publicity. It has to do with the idea of a justification *to* others by contrast to the idea of justification *tout court*. The distinction does not then necessarily imply that there is a *special public standard of justification*, like a standard to be invoked by those occupying official public roles such as that of judge or legislator. On the contrary, public reason should be *inclusive* of all reasons.

This is exemplified by Habermas' account of reasonableness. He refers to the 'public sphere' to show that the exchange of reasons may entail any reasons, but that it must be done in public. Contrary to Rawls, therefore, he does not link the need for interpersonal justification and hence for rational consensus, on the one hand, to the limitation of public reason to a certain type of reasons, on the other;

[28] See Gardner, 2001a; Gardner/Macklem, 2002.

for Habermas, the process of exchanging reasons publicly will transcend disagreement.[29] I will come back to the validity of this idea later on in this chapter. By contrast, in Rawls' account of the burdens of reason, an action justified according to one's own private moral beliefs and reasons may well be unjustified according to another person's. To escape the pervasive reasonable pluralism and disagreement that would follow from his person-based account of reasonableness and the burdens of reason in the public sphere, Rawls holds that it is necessary to invoke a different set of reasons, public reasons, that apply to all indifferently. This move to a normative *content-based* account of reasonableness in the public sphere enables him to save his account of political liberalism and of minimal principles of justice we should all share from reasonable pluralism and disagreement[30]; this is crucial for his account of political legitimacy and mutual justification. Rawls' emphasis on content corresponds, however, to a further divide one finds within the notion of public reasoning itself and the validity of which it is important to assess. This divide reflects the distinction between an empirical and a normative conception of public reason; it corresponds to the opposition between a *person-based* account of reasonableness (attitudinal account) and a more *content-based* one (cognitive account).

c. Person-based Reasonableness and Content-based Reasonableness

There is a certain amount of confusion among authors as to the subject they refer to, sometimes indifferently, in the application of their 'test' of reasonableness.[31] It is very important therefore to determine the right type of reason which should apply to politics and democratic deliberation. After a general presentation of the distinction, I will discuss the person-based and content-based accounts of reasonableness.

i. The Distinction in General

Raz denounces the introduction of 'one notion of reasonableness when another is needed,' in the writings of 'leading contractualists' in particular.[32] Raz himself, however, has not always been that clear about his use of the concept of reasonableness. For instance, in one of his discussions of the relationship between toleration and reasonable disagreement, he intends to emphasise mainly the reasonableness of a 'person's *beliefs*.' The difficulty lies in the fact, however, that he starts his discussion by generally referring to matters in which reasonable *people* disagree.[33] Thus, for instance, he refers to the fact that I may easily discover by exercising my critical rationality that the other is wrong and that I am right, without

[29] See Chapter 1.
[30] See Waldron, 1999a, 152 ff. See also Chapter 1.
[31] Raz, 1998a, 34 ff on the 'reasonable-view condition.' See also Wertheimer, 1999, 172–73.
[32] See Raz, 1998a. See also Lafont, 2005.
[33] Raz, 1995a, 104 and 106.

however impairing the rationality of the other's position.[34] This contention is irreconcilable with a conception of unreasonableness merely qualifying *beliefs* since such a conception would regard something as *un*reasonable if it is, according to Raz, 'in relation to the evidence available to experts patently false.'[35]

What this illustration shows, therefore, is that the concept of reasonableness may have various meanings depending on its *subject*[36]; it may qualify, on the one hand, *beliefs* or, on the other, the action of *believing* them, the *persons* who believe them and/or how they *behave*. In this sense, it can be either cognitive or attitudinal. In this chapter, I will oppose the *person-based* or *empirical* account of reasonableness to the *content-based* or *normative* account of reasonableness.[37] This distinction corresponds to the distinction between a weaker and a stronger sense of the notion of reason.[38] According to this distinction, a reason is good, not only if it is convincing (so that it is an *operational* reason), but also if it is a consideration that *really* counts in favour of the thing in question[39] (so that it is an *achievement* reason).[40] This mirrors the standard distinction in epistemology between a weak and a strong sense of justification. In the weak sense, someone is justified in believing something if her reasons are good so that they could be convincing to any reasonable person (ie epistemically responsible), whereas, in the strong sense, someone is justified only if her reasons actually track the truth (ie if they are the right reasons).[41]

ii. The Person-based Account of Reasonableness

The concept of reasonableness can rely on our ordinary conception of reasonableness as applied to *people*. Reasonable people are those who think and converse in good faith,[42] and apply, as well as they can, the general capacities of reason that pertain to every domain of inquiry.[43] This *agent-related* account[44] is the least controversial conception of reasonableness one may think of. It emphasises the 'epistemic responsibility' of people, on the one hand, by contrast to the 'intellectual defect'[45] that makes unreasonable people stubborn and unyielding, on the other.

[34] Raz, 1995a, 105.
[35] Raz, 1998a, 34.
[36] See on these distinctions Raz, 1998a and Waldron, 2000a. See also Klosko, 2000, 20 ff.
[37] See on this distinction, Waldron, 1993d distinguishing between (i) reasonable in the sense of willing to come to terms with others in good faith (persons) and (ii) reasonable in the sense of possibly being the upshot of a conscientious and unbiased application of epistemic capabilities (propositions).
[38] See already Horkheimer, 1947, 11, 4, 23 on the opposition between 'modern subjective reason' and 'pre-enlightenment objective reason.'
[39] See Scanlon, 1998, 19.
[40] See Lafont, 1999, ch 7.
[41] See Fogelin, 1994.
[42] On the association between the reasonableness of people and their good faith, see Waldron, 1999a, 112. See also George, 1999a, 191 about people's goodwill or reasonableness. See also Larmore, 1999, 600.
[43] Larmore, 1996, 168.
[44] See Gaus, 1995, 245.
[45] Raz, 1998a, 34. See also Gaus, 1995, 235 ff.

This conception of reasonableness qualifies the action of *believing* or holding a view. In this sense unreasonableness merely qualifies an attitude in given circumstances, as it is influenced by personal history, education, experience of social and political life, evidence and so on. On this account, it might even be unreasonable to hold a rational view in given circumstances or vice versa. Those who act wrongly because of a reasonable mistake, in that they believe in good faith that they have a reason to act they do not have, can be regarded as reasonable; their behaviour is therefore justified within the limits of a direct criminalisation of the behaviour.[46] This is why the person-based or believing-based account of reasonableness is also referred to as an *attitudinal* or *empirical* account. This conception implies multiple concessions to the individual's actual perspective. First of all, the reasonableness is determined by consulting the actual beliefs of the members of the public and not the ones they would have if they were better informed. Secondly, it accepts the individual's actual way of reasoning, however defective. Thirdly, it accepts as given the particular level of evidential and inferential adequacy that the individual sets. This is what is meant, for instance, by the 'procedural' character of reasonable deliberation; in the light of human values, interests and purposes, one must consider all that is relevant, and assume an impartial stance in assigning relative weight or importance to different contextually relevant values or interests. People will therefore differ in how they assign such weights and carry out the balancing.[47]

iii. The Content-based Account of Reasonableness

Another conception of reasonableness concentrates on the reasonableness of *beliefs*, ie of their content rather than of the fact of holding them. This account is also called the *normative* account of reasonableness; a view is reasonable only if it is based on good reasons, that is reasons that would be embraced by every member of the public if they reasoned well and encountered no epistemic limitations. This form of *ethical rationalism* refers to the fact that 'beliefs are usually judged unreasonable if they are, in relation to the evidence available to the experts, patently false.'[48] The unreasonableness of an agent constitutes in this sense a 'cognitive vice.'[49]

It follows from this content-based understanding of reasonableness that perfectly reasonable people can have unreasonable beliefs; this may happen through a rational education system teaching unreasonable views. It also flows from the content-based account that in political matters there can be *no legitimate reasonable disagreement*[50]; not only does the lack of reasonableness of people mean that

[46] Raz, 1995a, 105. I do not draw the distinction Gardner/Macklem, 2002 draw between being justified (having a reason for action) and being excused (not having a reason for action, but a belief in such a reason).

[47] MacCormick, 1999b, 1582.

[48] Raz, 1998a, 34. See for an example of this strong sense of reasonable as taking its meaning from the *telos* of reason, namely *truth*: Finnis, 1980 and 1998.

[49] Raz, 1998a, 36.

[50] See eg Finnis, 1998, 368–70.

they will not be able to agree, but reversely the lack of universal consensus is necessarily due to the participants' unreasonableness. The problem is that such an account of reasonableness is implausible in present conditions of pluralism, as exemplified by the multiple hard cases in contemporary moral debates. An example might help. It is indisputable that modern feminism and Christian fundamentalism are views about society which are intelligible in the light of the burdens of modern reason, although each of us might disagree with at least one of them. Yet, according to the content-based account of reasonableness, at least one of these views is unreasonable in the context of determining the role of women in society.

What this example shows is that reasonableness so understood would no longer be a characteristic that actual human beings could possibly have. Whereas it seems possible to give an account of what makes people reasonable in the first sense of epistemically responsible, it does not seem possible to give an account of what makes people infallible in this second sense of reasonableness.[51] Who would agree that people we generally regard as reasonable, such as famous philosophers, necessarily speak the right? What the example also reveals is how this second conception of reasonableness does not help us in any relevant way to understand the respect that we traditionally owe to the *rationality of self-directing agents*. First of all, *respect* for the reasonableness of people does not follow from the worthiness of their views, but from their 'goodwill' in attempting to think through a question as well as they can.[52] Secondly, it is not necessary for mutual justification that reasons be good reasons; all that is required is that they appeal to citizens and are *accessible* to all of them.[53] Thus, a view will be reasonable only if it results from a process in which a person applies the best she can the general capacities of reason in her context and given the different burdens of reason which apply to her. What would be the point of mutual justifiability if it only meant acceptability by those with good reasons? Of course, reasonable people often embrace wrong decisions and beliefs. Hence the a priori attraction of a more normative approach or at least of a more actualist one within a person-based account of reasonableness.

d. Actualist Reasonableness and Probabilistic Reasonableness

There is a second type of distinction to draw within the person-based conception: it distinguishes between *actualist* and *probabilistic* accounts of reason.[54] This distinction corresponds to an old debate about the role of probability in practical reasoning. Imagine, for instance, that I explain to someone that I am cancelling

[51] See Scanlon, 1998, 32.

[52] See George, 1999a, 191 ff; George, 1997, 1398. See also on the limits of respect for people's goodwill, Gutmann/Thompson, 1996, 73 ff.

[53] Macedo, 1991, 30.

[54] Gaus's, 1995, 249 distinction between agent-relative and belief-relative reasonableness should be refined and understood as an opposition between an agent-relative actualist and an agent-relative probabilistic account of reasonableness.

my barbecue because it is going to rain. If the sun ends up shining, did I really have a reason to cancel the barbecue? People's intuitions diverge sharply on this point. Some think that, to the extent that reason and value go hand in hand, the reasons for doing anything correspond to the *actual* or *true value of doing it*, meaning the action's values as things turn out. 'Reasonable' has a very strong sense here, that relies on the *telos* of reason, ie truth about the matter. On this view, justification and reasonableness necessarily involve giving *good reasons*.[55] There is, at first, some important appeal in rejecting the possibility that wrong beliefs be necessarily deemed reasonable or justified. After all, how would it be possible to be truly reasonable in the long term if one is systematically wrong?[56]

The problem with this account, however, is that we may not know in advance of consummate rational inquiry which proposition is true and which not; truth does not directly spawn a notion of reasonableness that is helpful for politics and we have no reason to trust any of the conceptions of the right that is put forward as the authoritative one, unless we are persuaded. Moreover, moral epistemologies and theories of public justification are open to rational dispute and are not therefore in the requisite sense publicly justified.[57] Furthermore, a regime which is publicly justified, although on the basis of wrong reasons, has, on account of its being reasonable from every point of view, some of the advantages of a purely voluntary association.[58] Finally, a normative and actualist approach to reasonableness would sever the link between liberalism and anti-paternalistic thinking; if social arrangements are enforced against the actual reasons of citizens, then this is within a normative framework and because of the superiority of the theorist's understanding of the reasons there are for those people to embrace this regime.[59]

It follows, therefore, that it is better to go straight to the *probable value*, assessed at the time of acting, to divine the force of reasons. On a probabilistic account, the reason for an action lies not in its actual consequences, but in its probable consequences adjusted according to the probability, assessed at the time of action, that they will eventuate. The probability at a given time is a function of the then-available reasons for the agent who is being judged by that standard to *believe* that it will eventuate; probability is to be equated with *epistemic probability* or *foreseeability* according to the evidence available to each person. On this account, a view is reasonable at any given time if it is capable of representing the upshot of a conscientious use of human intellect and unbiased application of epistemic capabilities. On a probabilistic account, further, a mistaken belief that one has a reason, which happens, however, to be epistemically probable, constitutes more than an excuse (what it would amount to in an actualist account); it becomes a true justification and the person who presents such a justification

[55] See Gaus, 1995, 249.
[56] See Gardner, 2001a; Wertheimer, 1999.
[57] See Rawls, 1993, Introduction.
[58] See Nagel, 1991, 36.
[59] See D'Agostino, 1992, 158.

is reasonable.[60] Such justifications only *hope* to persuade the reasonable by giving what the parties could acknowledge as good reasons if they are not mistaken.[61]

3. Three Illustrations

After this presentation of different types of reasonableness, it is useful to take a look at those which leading moral and political philosophers have chosen and how they have argued for them. It is important to note, before examining different accounts in detail, that those who have the most difficulty with using a person-based and operational account of reasonableness seem to be contractualist theorists whose accounts of political legitimacy and moral rightness tend to be joined; they are exposed to the failure of political legitimacy by the mere fact of reasonable disagreement.[62] In this section, I will look into the conceptions of four contractualists: Rawls, Habermas and Gutmann and Thompson.

a. Rawls' Partisan Conception of Public Reason

As I argued in earlier chapters and sections, Rawls' conception of reasonableness is *ambiguous*. It comprises two seemingly antithetical basic dimensions.[63] The first one is his support for 'the willingness to propose fair terms of *cooperation* and to abide by them provided others do.'[64] On this account, a person's view is reasonable when she is prepared to modify it, or the actions she takes on that basis, in order to allow for social cooperation on terms of freedom and equality with others who may well hold different views.[65] According to Rawls, 'reasonable persons affirm only reasonable comprehensive doctrines.'[66] The second basic aspect is 'the willingness to recognize the *burdens of judgement* and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime.' In this sense, 'reasonable' also means intelligible in the light of the circumstances in which human reasoning is usually exercised.[67] This last sense of reasonableness corresponds to the person-based and probabilistic account I have been arguing for.

The problem is that views which are reasonable in this second sense need not be reasonable in the first content-based sense of reasonableness. For instance, someone might have intransigent and fundamentalist views that are intelligible in the light of the burdens of modern reason, which she does not feel like amending

[60] See Nagel, 1986, 218: '[Justification is a] normative concept: arguments that justify may fail to persuade; and arguments that persuade may fail to justify.'
[61] See Raz, 1995a.
[62] See Lafont, 2004 and 2005.
[63] Rawls, 1993, 48 ff, 54.
[64] Rawls, 1995a, 247.
[65] See Waldron, 1993d, 5. See also Raz, 1998a, 36.
[66] Rawls, 1993, 59. See also Klosko, 2000, 23.
[67] Waldron, 1993d, 5.

to reach fair terms of cooperation. This disposition might make this person unreasonable, if the view held is untrue, even if everything else in her life points the other way.[68] On this account, therefore, what Rawls describes as 'reasonable' are not beliefs that are possibly incorrect but permissibly derived from limited information, background and evidence given the *burdens of reason*, but beliefs that result from '*ideal reasoning*' in morally and epistemologically ideal circumstances, as when he insists that reason mandates a belief in human freedom and equality.[69]

As Hampton rightly argues, the difficulty with Rawls' account derives from the two senses in which he indifferently refers to reasoning, as real or as ideal, where the second sense does not fit his neutralist approach to justice and thus the conception of person-based reasonableness he needs to apply his test.[70] Of course, Rawls could argue that the values of equality and freedom are so powerful that the burdens of judgement are not sufficient to make it reasonable for people to reject them. This position is, however, hardly plausible in view of the controversiality of these notions.[71] This idea of minimal principles or standards that ought to be used by reasonable people when they argue is focused on the kind of basic consensus one would only find in specific liberal communities where the principles of tolerance and civility are generally accepted and not contested. Such a conception of reasonableness has therefore no bearing on intellectual virtues[72] and too much *moral content* is built into it.[73] As such, it cannot accommodate the capacities of ordinary human beings; it requires too much of them.[74]

Rawls' conception of reasonableness is either *circular* or too *partisan*. Indeed, we will not know what range of views to count as reasonable until we have ascertained the demands that fair terms of cooperation are going to make on particular views; but we do not know what terms of cooperation are fair until we have ascertained what can be established as a matter of overlapping consensus.[75] In other words, to escape circularity, Rawls' conception of reasonableness can only be partisan, since it factors in precisely the willingness to cooperate and overlap that his theory of liberalism needs.[76] I argued in the first chapter against his separation

[68] See Waldron, 1993d. See Rawls, 1993, 60, note 14.

[69] Hampton, 1995, 296 ff, 305–6.

[70] Hampton, 1995, 310 ff. In fact, this ambiguity is confirmed by Rawls' attempt to circumvent the type of reasons that belong to public reason and cut off comprehensive moral reasons: see Chapters 1 and 7. By contrast, an ethical rationalist like Finnis, who clearly defends a content-based and actualist conception of reasonableness, need not exclude religious arguments or other comprehensive moral reasons from the scope of public reasoning. See Finnis, 1998, 369–70; Finnis, 2000a; Finnis, 2001.

[71] Hampton, 1995, 303 ff.

[72] On the confusion in Rawls' use of 'reasonable' and 'public reason,' see Finnis, 1998, 363; Waldron, 1993d and 2000.

[73] See Simmons, 1999, 766.

[74] See with respect to Habermas' discourse ethics, but also to contractualist theorists more generally, Lafont, 1999, ch 7; Lafont, 2004; Lafont, 2005. See also Raz, 1995a, 96, contending that Rawls' approach is barren in societies like ours where 'the degree of existing diversity is just too great.'

[75] Waldron, 1993d, 6. See Klosko, 2000, 21. See also Gaus, 1996, 293 on Rawls' 'populist consensualism.'

[76] See Waldron, 1993d, 5.

of debates about justice and the right, on the one hand, from discussions of comprehensive moral theories and the good, on the other. His partisan notion of reasonableness can be seen as another way to exclude areas of morality from the scope of reasonable disagreement.[77] The problem is that, if the only consent that matters for justice is the consent of those who have the right reasons, the Kantian constructivist claim, that underlies Rawlsian contractualism and according to which the validity of norms is a function of the agreement of all those to whom the norms apply, would turn out to be false and somehow superfluous.[78]

b. Habermas' Transcendental Conception of Reasonableness

This critique of Rawls' account of 'reasonableness' does not seem prima facie to apply to Habermas. His conception of reasonableness is Kantian and hence *person-centred*. Faced with the challenge of reasonable disagreement, Habermas has not fallen into the trap of exchanging his communicative conception of rationality for a more instrumental and content-based one.[79] The contrary would have rendered his account of discursive acceptability superfluous and required supra-human capacities from participants in public discourse.

It seems, however, that Habermas' consensus-based theory of rational justification and truth and hence of political legitimacy and justice cannot but be undermined by his own conception of reasonableness.[80] Habermas' way out flows from the particular *process* of *exchange of reasons* and hence from the kind of *burdens of reason* at stake in his *communicative* theory. A more reflective conception of *communicative reason* allows Habermas to *coherently* accept the existence of burdens of reason and of reasonable ethical-political disagreement while, at the same time, contend that an overlapping consensus is possible at a more abstract moral level. He avoids the problem by abandoning an epistemic concept of truth and the moral right for a purely transcendental one.[81] In such an account of truth and moral rightness, although fallible people may *not reach a rational consensus on truth* in realistic conditions[82] or may *reach one but on a false conclusion*, the need for certitude and unity will transcend all these potential mistakes through a learning process.[83]

The problem is, however, that this transcendental conception of truth and justice might not work any better than the purely epistemic one. If one may concede that a more realist account of truth redeems the credibility of Habermas' communicative theory, more work needs to be done about his discourse ethics and his account of political legitimacy.[84] Moreover, the account of political legitimacy

[77] See Waldron, 1999a, 152–53.
[78] See for Rawls' inspiration of free public reason, Kant, 1965, 593.
[79] See Habermas, 1998a, 4–5. See also Lafont, 1999, ch 7; Lafont, 2004.
[80] See for a similar critique, McCarthy, 1996; Lafont, 2002 and 2003.
[81] Habermas, 1999b, 52 ff, 300 ff.
[82] Habermas, 1999b, 53.
[83] See on these different distinctions, Habermas, 1999b, 49, 54, 56, 230 ff, 271 ff.
[84] See Lafont, 1999; Lafont, 2004; Lafont, 2005.

that is joined to his theory of moral correctness is not a realistic account of political legitimacy in conditions of reasonable pluralism.[85] By maintaining rational acceptability as the condition of moral rightness and political legitimacy, Habermas not only jeopardises the existence of standards of moral rightness, but also the possibility of adopting legitimate political and legal decisions in a pluralistic society.

c. Gutmann and Thompson's Reciprocal Conception of Public Reason

Gutmann and Thompson, in their recent wide-ranging work on deliberative democracy and disagreement, establish the principle of *reciprocity* as the central condition of deliberation, ie 'the capacity to seek fair terms of cooperation for its own sake.'[86] This principle follows the consideration that even '*reasonable* persons can disagree' and amounts to enjoining them to 'reason together to reach mutually acceptable decisions' that may be 'accepted in principle.'[87] With respect to their notion of reasonableness, Gutmann and Thompson argue that 'citizens who reason reciprocally can recognize that a *position* is worthy of moral respect even when they think it morally wrong.'[88] Similarly, 'citizens remain open to the possibility of respecting reasonable *positions* with which they disagree.'[89] Besides, according to the two authors, when we are guided by the principle of reciprocity, we 'recognize and respect *one another as moral agents*.'[90] The authors seem therefore to be using a person-based and attitudinal conception of reasonableness.[91]

It remains, however, that, even if the two authors eschew much of the exclusive liberal apparatus of *public reason*, they do not reject it but partially reformulate it when they allow that 'in deliberative democracy the primary task of reciprocity is to regulate public reason, the terms in which citizens justify to one another their claims regarding all other goods.'[92] Citizens must reason beyond their narrow self-interest and consider what can be justified to people who reasonably disagree with them.[93] Following the contractualist model of 'exclusion of the unreasonable,'[94] therefore, deliberative democracy as it is promoted by Gutmann and Thompson 'does not address people who reject the aim of finding fair [and reasonable] terms for social cooperation.'[95]

In other words, the two authors do not seem to have managed to dispense with the partisanship of Rawls' content-based account of reasonableness through their

[85] See McCarthy, 1996; Lafont, 2004; Lafont, 2005.
[86] Gutmann/Thompson, 1996, 52 ff.
[87] Gutmann/Thompson, 1996, 55.
[88] Gutmann/Thompson, 1996, 2–3, 83.
[89] Gutmann/Thompson, 1996, 354.
[90] Gutmann/Thompson, 1996, 14.
[91] See Wertheimer, 1999, 173; Gutmann/Thompson, 1999, 268 ff. Contra: George, 1999a, 191.
[92] Gutmann/Thompson, 1996, 55.
[93] Gutmann/Thompson, 1996, 2, 255.
[94] See Macedo, 1999, 7 ff. See for a virulent critique of this exclusionary trend, Fish, 1999, 88 ff.
[95] Gutmann/Thompson, 1996, 55.

account of reciprocity; a participant in a debate fails to respect reciprocity if her arguments 'appeal to any authority whose conclusions are impervious, in principle as well as in practice, to the standards of logical consistency or to reliable methods of inquiry that themselves should be mutually acceptable.'[96] This principle will exclude from the realm of public reason those people who talk gibberish, but also people who view religious texts as moral sources. Thus, the ambit of the reasonable is defined by conceptual fiat that is not itself submitted to debate and reason and cannot therefore be reconciled with the principle of tolerance and mutual respect.

II. THE SIGNIFICANCE OF REASON

As it already transpires from the previous discussion, the notion and the significance of reason and reasonableness are closely related issues. Until we are clear as to why we are to reason, we cannot know what reasonableness involves. If what matters in being reasonable is truth, then a normative account of reasoning should prevail, whereas if what matters is stability and acceptability, then a more empirical account should be retained. But, reversely, it is difficult to know why reasonableness matters without a preconception of what it could mean to be reasonable. One should therefore always be ready to revise one's definition of reasonableness in the light of the aim one pursues and vice versa. Thus, although one contends as a contractualist that reasonableness ought to be understood as a normative and cognitive virtue and that reasonable disagreement is inconceivable, one may have to revise this position in view of the implausibility there is in making the validity of a norm depend on the agreement of a few deemed reasonable agents, while reasonable acceptability has in principle to do with the agreement of all those subject to the norm.[97]

Beyond the general liberal ground for referring to reason, it is possible to distinguish three main reasons for valuing reasonableness in politics and public reasoning: stability, truth and mutual justification. As I will argue, however, it is important not to overstate the importance of the reasonable to the detriment of the role of the unreasonable in our political motivations.

1. The Value of the Reasonable

In the liberal creed, reason is the tool by which the liberal state governs; whatever the religious or moral views of people, they are expected to deal with one another in the political arena through rational argument and reasonable attitudes. Besides, the legitimating arguments directed at individuals in order to procure

[96] Gutmann/Thompson, 1996, 56.
[97] See Lafont, 2004. See also Waldron, 1993a, 56–57.

their consent must be based on reason. Implicit in this commitment is the Enlightenment idea that *reason is common to all human beings.*[98] All liberals construct their theories, whatever their differences, in such a way that they take them to be justified by reason. The idea that we can improve our society through reasoning has been a fundamental liberal belief. Still, liberals differ on the specific grounds of the significance of reason in their accounts of political legitimacy. Among these specific grounds, one may mention stability and cooperation, the search for truth and, finally, mutual justification.

a. A Pragmatic Legitimation: Stability and Cooperation

Hobbes and more contemporary political liberals, like Rawls, hold, at a very basic level, a *pragmatic* view of legitimation through public reasoning: on this view, it is only if we accept and play by a common public reason that we can live together in peace and toleration. For Hobbes, the basis of public reason is political; it is not true or better reasoning, but it is reasoning that we all embrace for political purposes of *stability*. When each person relies on her own private reasoning, disagreement results; if we are to live together in peace, we require common public reasoning about what norms call for in particular cases. The sovereign provides this common and public reason.[99]

More recently, the Rawlsian account of public reason is also underlied by the same basic idea. The question Rawls raises is the following: 'How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?'[100] As a response, Rawls argues that 'political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to common human reason.'[101] A stable modern order requires that citizens in some way put aside their conflicting private judgements together to arrive at shared political principles or institutions.

The central thought to public reason is that agreement about fundamentals of justice may be possible among reasonable people despite the fact that agreement on other serious issues pertaining to comprehensive moral doctrines is not possible. This is achieved in conditions of reasonable pluralism by insisting on the possibility of an idealised *overlapping consensus* on constitutional essentials[102] and on the application of the *principle of avoidance* that prescribes a neutral attitude on the part of authorities as to many decisions that are left to private reason. On this view, public reasons that must be accepted by every member of the public are

[98] Se Hampton, 1997, 180 ff.
[99] See Hobbes, 1999, ch 37.
[100] Rawls, 1993, 3–4.
[101] See Rawls, 1993, 137.
[102] See Rawls, 1993, 12.

common or consensual and not merely convergent ones as in a *modus vivendi.*[103] In other words, it is not sufficient that we each have our own reasons that converge in supporting a policy, but we should share those reasons.[104] A public reason is shared in a robust sense if it is a reason for each of us in virtue of its being a reason for all and not the reverse. It is not a reason that I for my part or you for your part should find persuasive, but a reason *for us*.

b. An Epistemological Legitimation: the Search for Truth

By contrast, Enlightenment authors like Kant have offered an *epistemological* justification of public reasoning. According to Kant, the discovery of truth results from the exercise of free public reason and not from private reason. He argues that:

> the public use of one's reason must always be free, and it alone can bring about enlightenment among men. The private use of reason, on the other hand, may often be narrowly restricted without particularly hindering the process of enlightenment. By the public use of one's reason I understand the use of it as a scholar before the reading public. Private use I call that which one may make of it in particular civil post or office which is entrusted him.'[105]

In the contemporary conditions of disenchantment, the faith in the epistemic virtues of reason has faded. Doubt has arisen whether good reasoning necessarily leads to truth. There is, however, a related moral concern that is still as vivid in post-metaphysical liberal thought and I will turn to it now.

c. A Moral Legitimation: Mutual Justification

For many liberals, 'the moral lodestar of liberalism is the … project of public justification.'[106] If we are to *respect* the moral sovereignty of others in conditions where we have no perfect access to moral truth, we may only impose moral or political claims on them that interfere with their freedom, when these can be justified *to* them, ie cannot be reasonably rejected by them. Justifying an act to someone typically involves showing it to be prudentially rational, morally acceptable or both. In this sense *what is justified is reasonable and what is reasonable is justified.*[107] In this sense, justification should not be confused with the prior level of moral rightness.[108] To understand how reason and justification matter in politics, it is important to start by examining individual justification.

[103] See Rawls, 1993, 147.
[104] Contra: Gaus, 1996, 138 ff.
[105] Kant, 1991, What is Enlightenment.
[106] Macedo, 1991, 78.
[107] The challenge for liberals is therefore to develop an account of public justification that can accommodate the reality of reasonable disagreement. See Chapter 7.
[108] See Lafont, 1999; Lafont, 2004. See also Chapter 1.

i. Individual Justification

If a belief is justified or reasonable because of its supporting reasons, it is not enough that such reasons are available to the believer; the belief must be based on them and there must be a connection between the belief and the relevant considerations. Of course, the fact that one belief causes another does not show that it is a reason for it. It must also be a good reason. But good reasons are relative to a system of reasons, and not to a purely external range of true values. It follows from this kind of weak externalism of justifications that there is a sort of *relativism of reasons*. We can have perfectly good reason to believe what is false and have no reason at all to believe what is true. This does not imply, however, the relativism of *truth*. Indeed, reasons are not simply mirrors of facts; they concern the functioning of cognitive systems and the appropriate connections drawn between the elements of those systems.[109]

Because people are primarily private reasoners in the sense that they can deliberate on their beliefs without or at least before engaging in a conversation, the justification of any specific belief does not *per se* depend on intersubjective justification. In fact, the reverse is true: participation in political justificatory discourse presupposes that participants enter with beliefs supported by individual reasons. When a person seeks to justify her beliefs to others, she ordinarily supposes that she has good reasons for them in the first place.

ii. Public Justification

If people are primarily private reasoners, one may wonder why bother with public justification and public reason. There are two main reasons one may put forward for public justification.

First of all, a person develops her system of reasons and beliefs *through interaction with others*. It is only if she can successfully interpret most of what others do that she can understand herself as inhabiting a social world with intelligible others. Although one can deliberate on one's own, one's judgements cannot be definitive. In order to be a deliberator, indeed, one must be a member of a community in which one's beliefs are *intelligible to others*. Thus, all reasoning is ultimately social; even personal justification is influenced by social cognitive resources and responsiveness to others.[110] Interpersonal justification is dynamic and ultimately necessary for personal justification itself.

Secondly, *moral commitment*, especially beliefs about justice, call for public justification and reason because they combine two features: demandingness and culpability. Morality is a system of demands or requirements. But its specificity is that if people fail to comply with their moral requirements, they can be blamed and should feel culpable. There is indeed always a suspicion attached to any case in which the judgement of one person prevails over the contrary judgement of

[109] See GAUS, 1996, 39.

[110] This is also true of non-rational forms of political motivation and justification: see EHRENZWEIG, 1973, 225 on the relationship between individual and political psychology. See also FREUD, 1940A, 73.

another simply because it *can* and thus without adequate justification *to* all that it *should*. Justification to others seeks to refute the suspicion of subjection; to do this, we must take the standpoint of others into account and only that which could be simultaneously accepted by all. According to Kant, our humanity amounts simply to the power of reason and thought and to the power of moral judgements and sensibility. Thus, to treat persons as ends in matters of justice and never as means only is to conduct ourselves in ways that are publicly justifiable to their and our common human reason, and of offering such justifications as the occasion demands.[111] This view is echoed by Larmore who holds that 'to respect another person as an end is to insist that coercive or political principles be just as justifiable to that person as they are to us. Equal respect involves treating all persons, to which such principles are to apply, in this way.'[112] It follows that genuine *moral authority* depends on public reason and reasoning from the standpoint of others.[113] This principle is also known as the *liberal principle of non-imposition.*[114] As Waldron puts it:

> liberals demand that the social order should in principle be capable of explaining itself at the tribunal of each person's understanding. … These commitments generate a requirement that all aspects of the social world should either be acceptable or be capable of being made acceptable to every last individual.'[115]

There are two main ways of understanding the liberal requirement of public justification of principles of justice.

First of all, there is the *actual assent thesis*. According to this view, public justification must lead to actual consensus among reasonable people. Since all judgements are epistemologically equivalent, for one person to override the judgement of another can only be a brute assertion of her own view that is inconsistent with the commitment to public reasons. The problem with this approach, despite its appeal, is that people withhold their assent on unreasonable grounds sometimes. Hence, some idealised conditions must be accepted so as to allow public justification to reasonable people only. One way to do so is to place an emphasis on the reasonableness of the people who reject or accept the belief that is to be justified.

Secondly, there is the *reasonable view thesis*. The possibility of reasonable agreement lies at the core of the so-called 'reasonable-view condition,' according to which there are 'principled reasons to avoid relying on disputed principles only if the dispute is among people whose views are reasonable.'[116] This approach is central to doctrines of legitimate political action in modern Kantian contractualism such as Rawls', Nagel's[117] or Scanlon's. It is expressed most clearly in Scanlon's

[111] Rawls, 2000, 192.
[112] Larmore, 1990, 349.
[113] See Gaus, 1996, 129.
[114] See Macedo, 1991, 51; Waldron, 1993a; Larmore, 1990, 339.
[115] Waldron, 1993a, 127.
[116] Raz, 1998a, 32.
[117] See Nagel, 1987, 221; Nagel, 1995, 50 and a critique by Raz, 1995a.

account of contractualism according to which the right principles to govern a practice are those which '*no one could reasonably reject,*' given the aim of finding principles which could be the basis of general agreement among persons similarly motivated.[118] A more precise rendering of the contractarian procedure is the following: principles of justice regulating the basic structure of society should be those which no one could reasonably reject as a basis for informed, unforced general agreement. This reasonable acceptability may have to be ensured at an idealised hypothetical level as in Rawls' account of the original position or at a more concrete level as by Habermas' account of discourse ethics.

2. The Limits of the Reasonable

The problem with the 'reasonable-view' approach is that it leads to an '*exclusion*'[119] of all unreasonable and 'intractable' beliefs in political considerations.[120] This exclusionary approach is based 'on the fact that people are *rational self-directing agents* who ought to be treated as such.'[121] Lack of reasonableness prevents people from being self-directing and able to respond to reasons and thus to take part in the legitimating enterprise of authority. Many critiques and objections can be raised against the reasonable-view thesis and the liberal requirement of reasonableness. I will limit myself to discussing three of them here.

The first critique derives from the Kantian contention that every person counts morally as such and that *each person's life is of moral consequence*. Therefore, if the situation of those with unreasonable views is to be influenced just as much by political actions as others', they cannot be ignored.[122] Politics should take people as they are and be accessible to them, without expecting them to change so as to become totally rational and open to reasonable persuasion.[123] There is no general requirement to be reasonable.[124] According to a second critique, holding unreasonable views does *not necessarily reflect the lack of moral virtue.* There is no link between the potential immorality and repugnance of some views and actions that are erroneous, on the one hand, and the fact of holding them, on the other.[125] It follows that the 'unreasonableness' of some people or of their political positions should not limit the way public action should be modified in the light of their currency.[126]

[118] See Scanlon, 1998, 110.
[119] This expression is used by Raz, 1998a, 34.
[120] See even Gutmann/Thompson, 1990, 65.
[121] Raz, 1998a, 34 restating the contractualist reasonable-view condition.
[122] Raz, 1998a, 33. See also Audard, 1994, 269.
[123] Raz, 1995a, 96.
[124] On the absence of a general requirement to be rational, except for some people in some special roles such as officials or judges, see Gardner/Macklem, 2002; Wingo, 2003, 43 ff. See Chapter 11.
[125] Raz, 1998a, 33–34.
[126] See Waldron, 1999a, ch 7. See also Hampton, 1995.

Finally, by reference to political psychology, it is difficult to separate clearly *non-rational influences on rational political judgements* from purely rational ones. We are led to act or to abstain from acting by reasons, but reasons often rely on beliefs or emotions.[127] Disagreement over justice and culture owes as much to reason as to pulsions[128] and some burdens of judgement and reason, such as differences of perspective, can be retrieved in those origins as well. Political motivation may therefore also be explained in non-rational terms, such as symbols, rhetorical means or ideology.[129] The same may be said of modes of political legitimacy. It would therefore be erroneous to see reason as the easy remedy for moral and political disagreements over moral principles that do not always originate in reasonable conflict in the first place.[130] These considerations should therefore allow us to improve and balance the *political response* to disagreement by not overstating the role of reason and discourse.[131] It is crucial to emphasise the *complementary roles of rational and non-rational explanations* of political convergence and legitimacy.[132] To borrow Pascal's phrase, 'two excesses: to exclude reason, to admit nothing but reason.'[133]

III. THE BURDENS OF REASON

On the person-based and probabilistic account of reasonableness, a view is reasonable if it is capable of representing at any given time the upshot of a conscientious use of human intellect and unbiased application of epistemic capabilities. The difficulty with this conception is that, although it underlies the importance of reasonableness for the mutual justification of our political and legal decisions, it also jeopardises the latter's plausibility in current conditions of reasonable pluralism and reasonable disagreement. I conceded that a content-based and normative approach to reasonableness would avoid this difficulty, but only at the price of offering a very implausible account of human reasoning capacities, on the one hand, and of making the idea of reasonable acceptability on the part of those subject to the decisions a completely superfluous exercise, on the other. We seem therefore to be faced with a difficult and intractable dilemma: reasonableness matters for reasonable acceptability and hence as a ground for the legitimacy of our political and legal decisions, but, at the same time, the limitations of reason and hence persistent and pervasive reasonable disagreement make this position untenable.

[127] See Freud, 1995b, 377; Lohmann, 1988, 61.
[128] See on the composite nature of the sense of justice, Ehrenzweig, 1973, 183.
[129] See eg Wingo, 2003, 35 ff; Freeden, 2003, 120–21. See Chapter 1.
[130] See Audard, 1994, 269 and Raz, 1998a, 33, 47.
[131] This is already something Freud was concerned with in his *psychology of conflict* (Mentzos, 1976, 116); according to him, the law can be seen as the cultural response to rational and non-rational conflicts, but it is important not to overstate the role of reason in solving our disagreements given their mixed origins. See Freud, 1995a, 374; Lohmann, 1988, 58.
[132] See Müller, 1999, 32.
[133] Pascal, 1966, 85.

The limited nature of reason has been advocated most famously by Rawls. Faced by what he calls the diversity of comprehensive moral doctrines and the fact that this diversity may only be overcome by oppression, Rawls looks for an explanation elsewhere than in the irrational character of people or other reasons he dismisses as too 'easy.' Rawls focuses then on the possibility of 'reasonable disagreement' or disagreement 'between reasonable persons.'[134] Rawls' starting point is 'why does not our conscientious attempt to reason with one another lead to reasonable agreement? It seems to do so in natural science, at least in the long run.'[135] Rawls' answer is articulated under the phrase '*burdens of judgement*'[136] or burdens of reason. These burdens are 'the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life.'[137] Under these conditions, 'it is not expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion.'[138] All this renders disagreement on issues of political morality reasonable given the difficulties of arriving at them.[139]

Rawls distinguishes different burdens of reason.[140] First of all, *conflicting evidence*: the evidence and information bearing on a case can be conflicting and complex. Secondly, *difference in experience*: to some extent, the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole life up to now.[141] This may differ from one individual to the other. Thirdly, *difference of weight*: even when we fully agree about the kinds of considerations that are relevant, we may disagree about their weight. Fourthly, *difference of force*: often there are different kinds of normative considerations and values of different force on both sides of an issue and it is difficult to make an overall assessment. Fifthly, *conflicting priorities*: in being forced to select among precious values, or to restrict some of them in view of the requirements of the others, we face great difficulties in setting priorities and making adjustments. Finally, *hard cases:* to some extent all our concepts are indeterminate. This can happen for different reasons, as I argued in the second chapter, and in particular linguistic and conceptual ones, but also normative ones. These sources of reasonable disagreement 'stand in marked contrast' to sources of *unreasonable disagreement* that play a role in political life, but a lesser one[142]; these other factors are prejudice, self-interest, irrationality and stupidity.[143]

134 Rawls, 1995a, 247.
135 Rawls, 1993, 55.
136 Rawls, 1993, 57. See also Macedo, 1991, 45 on these 'infirmities of the human condition.' See also Habermas, 1994a, 133 referring to Rawls; Habermas, 1999b, 59.
137 Rawls, 1993, 56.
138 Rawls, 1993, 57.
139 See Larmore, 1996, 170.
140 See Rawls, 1993, 56–57 who lists six burdens of judgement. See on these burdens, Wenar, 1995, 41.
141 See eg Habermas, 1994a, 108.
142 Rawls, 1995a, 249.
143 Rawls, 1993, 55, 58.

If one rejects Rawls' separation of debates over the right from discussions of the good, as I did in my first chapter, and one discards Rawls' content-based account of public reasonableness, as I did in this chapter, burdens of reason apply as much to comprehensive philosophical disagreement about the good as to political discussions and debates over justice and the right.[144] In such cases, there is no universal common rule of reason that is applicable to both arguments and according to which one of the arguments is less convincing than the other.[145] In fact even Rawls recognises quite paradoxically that 'a lack of unanimity is part of the circumstances of justice, since disagreement is bound to exist even among honest men who desire to follow much the same political principles.'[146] Elsewhere, he also hazards the suggestion—without dwelling on it—that 'different social and economic interests may be assumed to support different liberal conceptions' and to 'give rise to ideals and principles markedly different from those of justice as fairness.'[147]

IV. THE IMPLICATIONS OF REASONABLE DISAGREEMENT

If the common denominator of reason has failed, many implications follow that need to be discussed. First of all, the absence of reasonable grounds of agreement need not lead to the development of a sceptical stance, quite the contrary. Secondly, the ideal of reasonable justification of political and legal decisions to all those subject to them fails and political legitimacy needs to be asserted on alternative grounds. Finally, contrary to the traditionally jurispathic function of the law, the realisation of reasonable pluralism about justice within and outside the law needs to be reassessed as beneficial to legal reasoning and the rule of law in general.

1. The Challenge of Internal Scepticism

The ontological challenge created by disagreement and the external scepticism I discussed in the first chapter should be distinguished from a more internal challenge and form of scepticism according to which what matters is not so much whether *disagreement* has ontological or epistemological implications or not, but whether *reasonable* disagreement has implications for the motivations of participants and their beliefs as to the rightness of their own beliefs.[148] Although

[144] See GAUS, 1997, 216–17. See Chapter 1.
[145] See CANEY, 1996, 286 on Nagel's failure to see that reasonable people disagree over matters of justice as much as they do over matters of the good. See for the same conclusion, CLARKE, 1999, 633–34, 636–37, 639. See Chapter 1. See LYOTARD, 1983, 9.
[146] RAWLS, 1971, 223.
[147] RAWLS, 1993, 167.
[148] See PIPPIN, 2003, 101.

concerns of that kind may seem legitimate at first sight, they are generally misplaced. The consequences of respect for the views held in reasonable disagreement should not weaken the *trust* we have in our own views and do not therefore necessarily lead to *scepticism* or, worse, *relativism*.

Although we disagree reasonably with others, we may rightfully believe that, despite being controversial, our own views are better supported by experience and reflection than those of our opponents. We can determine that our opponents' views are reasonable when understood against their own background of existing beliefs, but still regard them as false from our own viewpoint.[149] To call our beliefs into doubt, we need a stronger positive reason that they might be false than the mere fact of reasonable disagreement. Generally, indeed, we have good reason to believe more than what reasonable agreement with others can secure.[150] Reasonable agreement and convergence does not strike us as being necessarily revelatory of the rightness or wrongness of our decisions.[151] Thus, it is wrong to say that in affirming our own controversial views we are taking 'a sectarian route' of believing it 'as a matter of faith,'[152] there being no further reason to take them to be not only reasonable but also true. There is no inconsistency between believing in the truth of one's conception of justice, while thinking that others who disagree are wrong, but not unreasonable given our limited access to truth[153] and the burdens of reason.[154]

The acknowledgement of reasonable disagreement need not therefore lead to a radical and somehow incoherent[155] epistemic attitude of scepticism according to which I am as likely to be right as my opponent.[156] True, the fact that someone reasonably disagrees with me may, in appropriate circumstances, call for an attitude of critical rationality. Critical rationality may well lead me to reassess my position and realise that the other is wrong and that I am right or the reverse. If we did not believe that one of the answers over which we disagree reasonably was better than the other,[157] we would not be puzzled and disagree in the first place.[158]

[149] RAZ, 1995A, 105 referring to NAGEL, 1987, 235: 'I may think that it would be reasonable for someone else either to believe or not to believe *p* on the evidence available to me . . . yet find that I do believe it. Perhaps in that case I must also judge that it would not be reasonable for *me*, as I am, not to believe it on that evidence.' See also HAMPTON, 1995, 305 referring to RAWLS, 1995A.

[150] LARMORE, 1996, 172–73. Contra: GOWANS, 2000.

[151] See WILLIAMS, 1993, 136. See Chapter 1.

[152] For such a view, see COHEN, 1995.

[153] LARMORE, 1994, 78.

[154] LARMORE, 1994, 78. See also LARMORE, 1990, 342.

[155] This attitude would indeed lead to the absurd result that I would have to believe (the truth of) my views while regarding them as not more likely to be true than the opposite views; this implies a logical separation between a belief and the belief that one's belief is justified.

[156] See on this view, RAZ, 1995A, 106 ff.

[157] What is required is not only a normative rejection of moral relativism, scepticism or anti-realism, but a clear adhesion *on the part of participants* in the political process to the existence of some standards of moral correctness. These may flow from an objectivist stance, but not necessarily, as they may also be accommodated by a constructivist or emotivist approach to morality. See Chapters 1 and 7.

[158] See DWORKIN, 2003B, 661.

As Bayle famously noted, 'we know too much to be sceptics, but too little to be dogmatists.'[159]

This is particularly important in the context of the political response that ought to be given to reasonable disagreement about justice. Although reflective participants in the decision-making procedure realise as observers that they might not necessarily converge on a single reasonable conception and hence that reasonable agreement can no longer be the goal of their deliberations,[160] this realisation does not impair their willingness to participate in a reasonable exchange of opinions and hence to try to convince each other. Politics is the sphere of the unsettled; there is therefore no contradiction in seeing the essential contestability of some political concepts while making the strongest case available for one of the positions at stake.[161] This explains, as we will see, why the mutual accommodation of our differences and the compromise of reasonable opinions may not always strike the parties to a disagreement as the right thing to do.[162] This also explains why, as we will see, even once the majority has decided in one direction, the minority may still believe it was right, despite abiding by the majority's reasonable position, and hence why it may attempt to win more voices in the next round of deliberations. Although the diversity of reasonable opinions on justice should not undermine our view that there are right answers and that we may express our own reasonable opinions, it should affect our confidence that the right answer can be *discerned* in any way that is always politically dispositive, thus giving rise to caution and respect for diverging reasonable views. As Raz has recently argued, 'it is important that we should not exaggerate what we can establish by force of reason.'[163]

2. From the Inconclusiveness of Public Reason to Alternative Modes of Political Legitimation

Political liberalism, and its strong principle of rational justification, is defeated if a single reasonable individual rejects its principles. Yet, only the most optimistic would suppose that our society does not contain a significant number of reasonable people who cherish beliefs that lead them to reject liberal principles.[164] Reasonable disagreement therefore renders public justification and the liberal principle of non-imposition an unobtainable ideal. It is necessary then to find a mode of justification of our political and legal decisions that does not claim to be

[159] See Popkin, 1955, 64–67.
[160] See Chapter 7.
[161] See Connolly, 1983, 227.
[162] See Chapter 8.
[163] Raz, 2003d, 156.
[164] See Raz, 1998a, 36.

supported by reasonable agreement on the 'right' solution, but that can at least claim to provide 'not too bad' a response that can *legitimate* the judgement.[165]

As Raz has recently argued, one of the aims of any account of the political use of reason in pluralistic societies should be to establish where the writ of reason does *not* run. What matters politically is that we can establish channels for reasonable distributive decisions to be made when the content of those decisions need not be superior to reasonable alternatives propounded by others in the population.[166] Our reasonable disagreements do not leave us completely without political resources. On the contrary, their reasonableness implies duties of mutual respect and the willingness to converge on and abide by a different but reasonable view, from which modes of legitimation alternative to agreement can be deduced.[167] It is with the discussion of such alternative modes of political legitimacy that the third part of the present book will be concerned.

For now, let me mention three main alternative modes of political legitimation one may think of. First, some authors have argued for less stringent decision-making methods such as toleration and mutual accommodation, which, I will argue, are far from being convincing responses to disagreement.[168] Secondly, some liberals, who are keen on maintaining the liberal principle of public justification to reasonable people, have opted for an interest-based and non-rational account of political justification that avoids epistemological difficulties and more generally shortcomings pertaining to reasonable pluralism.[169] The difficulty with this view is its concern for contingent interests whose relevance to ultimate issues of justice is unclear. Finally, other liberals have looked into political and legal justification as something entirely distinct from individual justification, by either distinguishing impersonal political legitimacy from personal justification or developing a multipersonal account of justification.[170] This is the path I will follow in the book, arguing for it on grounds of minimal equality and coordination in particular.[171]

3. The Benefits of Reasonable Pluralism and the Living Rule of Law

The reasonable persistence of disagreement leads to a deep entrenchment of reasonable pluralism in politics. This has implications for *legal reasoning*; the latter can no longer be regarded as a unifying defence against moral disagreement. On the contrary, reasonable disagreement pervades our political and legal decisions. This has two main consequences I would like to emphasise in a general fashion.

First of all, the *place of reasonable conflict in the law* has to be acknowledged in our political and legal settlements. Instead, the law's function is often taken to

[165] See Lyotard, 1983, 10.
[166] Raz, 2003d, 156.
[167] See Chapters 7 and 8.
[168] See Chapters 7 and 8.
[169] See Wingo, 2003. See also Waldron's preface to Wingo, 2003.
[170] See Kutz, 2000b. See also Gaus, 1996.
[171] See Chapters 7 and 13.

be jurispathic, thus channelling disagreement into compromisable conflicts of interest or commensurable values. 'Law stages conflict,' Veitch argues, thus making it difficult to see the true origins of conflict and the place of law within this framework of conflict.[172] We should become more aware of the importance of moral conflict in legal reasoning and accommodate it as a jurisgenerative force in its own right, rather than claim the absolute objectivity and rationality of legal settlements. Secondly, the point of politics and the law is also to *keep our differences alive*. Reasonable disagreements are indeed fertile forms of controversy that are the expression of the irresolvable plurality of views in any free and diverse community.

Given that the ideal of rational public justification of public rules is simply unattainable, it is important to openly face the *paradox of the rule of law*. Law aims at resolving disagreement, but disagreement resists, thus keeping the ideal of the rule of law in check. There is, in other words, a relationship of *mutual reinforcement and limitation* between disagreement and law; disagreement reinforces the need for law but also limits it when it goes too far, while law limits disagreement but also reinforces it when it goes too far, thus giving rise to the need for law, etc.[173] The rule of law is an ideal rather than an absolute requirement.[174] Moreover, it is not an ideal whose implementation can ever be perfect and in fact it should remain an incremental ideal[175]; it is only by being constantly questioned that it can be strengthened in its minimal but essential achievements. Hence the idea of a *living rule of law*. Not only does the rule of law constitute a response to disagreement in ensuring convergence on common rules, but disagreement is in return an essential feature of a healthy rule of law. Disagreement about the law and the legal indeterminacy it reveals are not only a necessary evil to be tolerated and accommodated by the rule of law, but a *desirable* feature. Knowing precisely where we stand is not always the point of a provision: instead, the point may be to ensure that certain reasonable debates take place in our society rather than to settle them entirely. This is particularly true of constitutional provisions which aim at restricting and governing legislation, as we will see.[176] Substantive conflict is

[172] See VEITCH, 1999. See also WALDRON, 2004A on the idea of the rule of law as a 'theatre of debate.'

[173] This dialectical relationship between law and disagreement can already be found in FREUD's, 1995B, 367 political psychology. He contends, for instance, that we should work at reconciling our contradictory needs in the long run, so that culture and law are no longer regarded as oppressive and so that coordination does not suppress what makes it necessary and possible in the first place, ie our disagreements. This idea was also developed in political theory by ARENDT, 1968A, 178. See also WALDRON, 2000C, 202–3.

[174] It is an open question to determine which is the maximal threshold or degree of legal indeterminacy that can be accepted. See ALTMAN, 1990, 53 ff. According to DWORKIN, 1986, 257, the answer to that question depends in part on the answers one gives to questions of normative political philosophy and in particular questions about the ethical and political purposes that are served by the rule of law and the importance of those purposes in the overall scheme of worthy human aims. See RAZ, 1979, 226 ff.

[175] See ENDICOTT, 1999, 1 on the unattainable nature of the rule of law.

[176] See Chapter 9.

not a defect in a legal system, but a sign of its *continuity with the plurality of public values the legal system embodies and mediates.*[177]

This realisation is actually one of Arendt's most important contributions to political theory. Arendt sees the law as a response to the excesses of disagreement that is, however, dependent itself on disagreement for its constitution and development. As she argues, 'the public realm in a republic is constituted by an exchange of opinion between equals and this realm would simply disappear the very moment an exchange becomes superfluous because all equals happened to be of the *same opinion.*'[178] It will be the object of the third part of the book to discuss adequate political and legal responses to disagreement, which can combine the need for legitimate convergence in the face of the dangers of disagreement, on the one hand, and the need for reasonable pluralism given the benefits of disagreement, on the other.

CONCLUSION

In this chapter, I tried to show why disagreement about justice can not only be very deep and go to the core of our political and legal concepts, as this flows from the first two chapters, but that it is also persistent in many cases due to its reasonableness. I hope to have established what reasonableness amounts to, why it matters, what its limitations are and what this implies, ie what the consequences of reasonable disagreement are for the ideals of public reason and public justification.

Among the different competing conceptions of reasonableness that I presented, I argued for a *person-based* and *probabilistic* one. It accounts best, given our epistemic limitations, for the respect we owe to other people as sovereign moral agents. On this account, reasonableness amounts to thinking and conversing in good faith and applying, as well as one can, the general capacities of reason that pertain to every domain of inquiry. According to this account, a person may be held reasonable even when her beliefs are wrong if she has come to believe what she does through the exercise of her reason and in all good faith. One should keep in mind, however, that the concept of reasonableness is a contestable and context-dependent one; as such its definitions are always *controversial*. The definition of the concept also depends on the kind of value and role we give to reasonableness.

I then presented different reasons why reasonableness matters in politics and why public reasoning is a good thing. Among them, and beyond the general ground that reason is a common denominator to all human beings, the most defensible ones are *stability* and the *liberal principle of mutual justification*. The need for mutual public justification of political decisions is based on the interpersonal nature of individual beliefs and intelligibility, as well as on moral author-

[177] Kutz, 1994, 1020; Waldron, 2004a.

[178] Arendt, 1970, 93 (emphasis added); Arendt, 1968a, 241. See also Arendt, 1970, 76, 225; Arendt, 1998, 57–58. Many others have echoed Arendt's insight: Boyer, 1995, 2; Rancière, 1995; MacIntyre, 1981, 253. See also Watkins, 1957.

ity. Both stability and mutual justification call for *rational consensus* rather than mere convergence or a *modus vivendi*. I then turned to different *burdens of reason* that set limitations of the significance of reason and confirm the persistence of reasonable disagreement. These burdens encompass the different epistemological and metaphysical limitations I argued were at the origins of normative disagreement about justice in the first chapter. These burdens affect not only our debates over the good, but also our discussions over matters of justice and the right.

Finally, I looked at the implications of the limitations of reason for political legitimacy. One of the main implications is that the *ideals of public reason and mutual public justification* are difficult to attain, whether they are interpreted strictly or more loosely. This has three main consequences worth restating. First of all, while the diversity of reasonable opinions on justice should not undermine our view that there are right answers and that we may express our own reasonable opinions, it should affect our confidence that the right answer can be *discerned* in any way that is always politically dispositive, thus giving rise to caution and respect for diverging reasonable views. Secondly, *alternative modes of political legitimation* to reasonable justification should be proposed. A consequence of the limitations of public reason is that we should improve and balance the political response to disagreement by *not overstating the role of reason* for both political motivation and political legitimacy. Finally, we should realise not only how difficult it is to suppress reasonable disagreement, but also how counterproductive this can be. *Legal reasoning* and the *rule of law* can in fact benefit from the persistence of reasonable disagreement about moral matters within the law.

Part Two: The Significance of Disagreement

This second part of the book addresses the significance of persistent reasonable disagreement about justice in social and political life. To do so, it is important to establish, in a first chapter, how pervasive reasonable disagreement is, or, in other words, what its exact *extent* is. As I mentioned in the first part of the book, there are both advantages and disadvantages to pervasive and persistent reasonable disagreement. The second chapter will discuss some of these *disadvantages* and assess the importance of responding to them in ways which do not entirely suppress the *benefits* of disagreement, but merely channel them.

The first chapter examines different claims made for and against the pervasiveness of disagreement and aims at establishing the exact *extent of disagreement*. It starts by discussing the different arguments made about the extent of disagreement through the state of nature fiction by social contract theorists like Hobbes, Rousseau and Kant, but also by Hume. It then confronts these results with current non-fictional objections to the pervasiveness of disagreement. The second chapter examines the existence of *coordination problems* that arise out of disagreement and the need for coordination on matters of common concern. It argues that law provides the best way of facilitating political coordination on matters of justice and that, in fact, coordination constitutes one of law's central functions. The chapter also claims that coordination conventions can accommodate core conceptual disagreement about the law and hence make the most of the benefits of disagreement while channelling it to respond to its dangers.

5

The State of Nature Fiction

INTRODUCTION

> We must not dramatize the incompatibility of values—there is a great deal of broad agreement among people in different societies over long stretches of time about what is right and wrong, good and evil.[1]

THE QUESTION RAISED by Isaiah Berlin's contention in this quote is that of the extent of reasonable disagreement about justice. As we saw in the first part of the book where we discussed the types and sources of disagreement, reasonable disagreement about justice is bound to be deep and persistent in socially and morally pluralistic societies. It remains, however, to establish how pervasive it is or could be. This has to do not only with the degree of value pluralism, but also, and most importantly, with the degree of social pluralism and the scope of epistemological burdens of reason in practice. It is only once we understand how pervasive reasonable disagreement is or can be that we will be able to assess its significance and discuss the response that ought to be given to it.

A long tradition in philosophical jurisprudence[2] insists that, while the law's ultimate aspiration may be justice, its proximate aim and defining task is to supply some formal constitutive structure as a framework of practical reasoning designed to unify public political judgement and coordinate social interaction.[3] This is mainly because, according to them, reasonable disagreements about justice are so widespread that coordination is not possible without entering such a framework and formal constitutive structure. This is the very situation of pervasive disagreement which the *state of nature* fiction aims at capturing. The state of nature postulates a pre-legal and pre-political state in which human beings have to coexist and usually tend to disagree widely with each other. In this chapter, I would like to discuss this fiction and what it implies for the extent and significance of disagreement. Given that we are nowadays born into states and legal

Many thanks to Jeremy Waldron for his comments and critiques on earlier papers on Hobbes', Rousseau's and Kant's approaches to disagreement and the law, on the basis of which this consolidated chapter was written.

1 BERLIN, 1998, 2 ff.

2 See POSTEMA, 1986; POSTEMA, 1996, 89 ff.

3 POSTEMA, 1996, 80.

systems, it can help to evaluate the extent of disagreement and its significance in the absence of a state and a legal system. It is only if we imagine how much we would disagree were we not deliberating and deciding in the current legal framework, that we can judge what the exact extent of disagreement could be and how significant it generally is.[4] In this sense, the state of nature fiction not only explains why we converge onto the creation of a political and legal system in conditions of persistent and pervasive reasonable disagreement about justice and how this a-political and a-social state already entails the ideal of a future society.[5] It also explains what we would lose did we not have that political and legal system.[6]

Very few political authors use the state of nature fiction nowadays, although utopian and dystopian fictions remain a useful analytical device which is sometimes used in political and legal theory.[7] This has not prevented people from arguing for or against the pervasive nature of disagreement in practice and it is interesting in this chapter to contrast the state of nature fiction with other more empirical and prosaic modes of analysis of the extent of reasonable disagreement about justice. In fact, I will argue that both elements are needed to provide a full assessment of the pervasiveness and significance of disagreement. The present chapter is structured as follows. In the first section, I assess the argument for the pervasive character of moral disagreement made on the basis of the state of nature fiction and discuss its different elements through four authors' views of the extent and significance of disagreement in the state of nature. In the second section, I address non-fictional objections to the extent and significance of disagreement in current Western democratic societies.

I. THE FICTION AS ARGUMENT

1. General

Social contract theorists, and other later authors like Hume, share a fiction they develop in different ways: the state of nature. The point is to imagine, as an

[4] This kind of comparison between what advantages there are in having the rule of law and legal authority, on the one hand, and what life would be without them, on the other, is still crucial to many political and legal theoretical accounts. In fact, the concept of law can be understood as an *aspirational* concept, that is to say as an entity which aspires to and claims certain moral benefits, such as social coordination or political legitimacy in conditions of reasonable pluralism. See eg RAZ, 1990 on the normal justification thesis and the idea that authority is justified when one is likely to comply *better* with one's reasons if one abides by its directives *than on one's own*. See Chapter 13.

[5] See ALTHUSSER, 2003, 22 on the contrast between social contract theorists' account of the state of nature and Montesquieu's account of human profound sociability that pre-empts any discussion of a pre-social state and hence of a state of nature.

[6] See WALDRON, 1999D, 173. See also KANT, 1991, 83, 145 on this dual nature of the state of nature fiction.

[7] See Chapter 11 for a discussion of the utopian, realist and dystopian approaches to integrity and coherence in the law.

analytical device, a situation in which people would live without government and without laws. By doing so and, more particularly, by exposing the extent to which they would disagree, the origins and justification of government and legislation should become clearer. For Hobbes, as for Locke, Rousseau and then Kant, and later for Hume, the state of nature is a purely fictional construction. Yet the state of nature is an idea which is of practical and heuristic importance since it expresses an understanding of what we gain by living under government and the rule of law and what we would lose if we were to abandon the task of sustaining a political order in favour of each person acting on his own conscience and his own convictions.[8]

I have chosen to discuss three social contract theorists: Hobbes, Rousseau and Kant, and an opponent to social contract theory, who, however, refers to and uses the state of nature fiction: Hume. The reasons behind this choice are the following. First of all, these authors see conflicts of opinions, and not only conflicts of interests, as one of the sources of disagreement in the state of nature by contrast to Locke.[9] Secondly, all four authors share the view that reason could not bring people together in case of disagreement. They have different reasons to believe this depending on their meta-ethical views,[10] but whether it is on grounds of value pluralism, epistemological burdens or scepticism, they all regard state of nature disagreements as reasonable disagreements. By contrast, Locke, for instance, sees disagreements as the product not only of conflicts of interests, but also, in most cases, of irrationality.[11] Of course, for the rest, they tend to differ diametrically. This is the case, for instance, of the reasons they give for people's acceptance of the social contract or covenant[12] or of the modes in which they argue civil society and government should be organised in response to the threat of reasonable disagreement.[13]

In this first section of the chapter, I would like to dissociate the state of nature accounts of the different authors I will be discussing into three elements: their account of the state of nature *stricto sensu*, their account of the extent of disagreement in that context and, finally, their account of the significance of disagreement in those conditions. The approach is transversal and will attempt to set the different authors' positions in a dialogue.

[8] See Hobbes, 1999, ch 18, 128.

[9] See Locke, 1988, S. 8, 272: 'In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of Reason and common Equity.' See also Hampton, 1997, 54.

[10] See Hampton, 1986, 11 ff.

[11] See Locke, 1960, 396: 'For though the Law of Nature be plain and intelligible to all rational Creatures; yet Man being *biased by their Interest*, as well as *ignorant* for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.' See, however, on the possibility of reasonable disagreement for epistemic reasons due to the difficulty of moral reasoning on the basis of unwritten laws in Locke's account, Waldron, 1999b.

[12] In this respect, and very schematically, Kant regards the adhesion to the social contract and civil society as a moral duty, while Hobbes and Hume regard it as an inescapable albeit contingent way to escape the state of nature. See Chapter 13 on coordination-based duties to obey the law.

[13] In this respect, and at the risk of being oversimplistic, Kant's republican model of political organisation and Rousseau's epistemic populism are much more democratic and liberal than Hobbes' account of the absolute and undivided sovereign or Hume's account of legal authority.

2. Setting the Scene: the State of Nature

a. Hobbes' State of Nature

Like other social contract theorists, Hobbes entertains the *hypothesis of a state of nature* in which men live without government or legislation.[14] According to him, the state of nature is a fiction, as 'it may peradventure be thought there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now.'[15]

Given the exigencies of human survival, the Hobbesian state of nature amounts, as in Kant's later construction of it and by contrast to Locke's, to a *state of war 'of every man against every man.'* This conflict of all against all is not mitigated by people fighting only when they think important values are at stake, ie in case of reasonable moral disagreements about justice. Quite the contrary; Hobbes believed that people acting on their own judgement of good and right was not a distinct, but a central *part of the war of all against all*. We fight for our survival and the value-judgements we are disposed to make naturally reflect the exigencies of our survival. Thus, private judgement on matters of public concern amounts to war because individual judgements are likely to be (i) contrary to one another and (ii) taken seriously enough to be fought over. For Hobbes, as for Hume later on and by opposition to Kant for instance,[16] the same thing explains both features: private judgements about rights, property and justice pertain to the exigencies of individual survival and the circumstances of human life are such as to provoke mortal anxiety, diffidence and competition in this regard.[17]

Disagreement about the good and the right, in its close relation to a generalised state of war, may therefore be regarded as central to Hobbes' construction of the state of nature and hence to his political theory. Hobbes' conception of disagreement is principally based on *rationality* and pertains to *moral* issues.[18] Beyond the pervasive possibility of *conflict of interests and profit*,[19] what people disagree about in the state of nature can also and will often be *matters of common concern* about which they reasonably entertain conflicting moral opinions and beliefs. This point is of central importance for Hobbes' account since it makes the recognition of the authoritative will of an absolute sovereign necessary in matters of *common* concern and discourages any further use of one's own private *moral* judgement

[14] I will restrict myself to the analysis of the *Leviathan* except for a few references to other works when relevant.

[15] Hobbes, 1999, ch 13, 89.

[16] See Waldron, 1999b, 46.

[17] See Waldron, 1999b, 46.

[18] See Hobbes, 1999, ch 14, 91–92: 'And because the condition of Man is a condition of Warre of every one against every one; in which case *everyone is governed by his own Reason*; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes.'

[19] See Tuck, 1999, xxv.

in civil society for fear of returning to the natural state of war. Moreover, there is nothing in Hobbes' account which makes disagreement *unreasonable*[20]; people are equally reasonable in the state of nature, but constantly make judgements about elements they take to be external given the predominant false realism's 'burdens of judgement' and these judgements will necessarily differ given their intrinsic subjectivity.[21] Epistemic *certainty* is not attainable[22] and the single answer, ie the *conventional* right reason, needed to ensure the end of war and insecurity, is to be obtained from an 'Arbitrator, or Judge, to whose sentence [the parties] will both stand.'[23]

Despite focusing on the pervasiveness of reasonable moral disagreement grounded on subjective moral beliefs, Hobbes also constantly refers to the controversial notions of *natural right* and *natural laws*. The way in which Hobbes uses the term '*natural right*' is similar to Grotius' view that the fundamental law of nature is the mutual recognition of the basic rights possessed by human beings and in particular their rights to defend themselves against attack and to acquire the necessities of life. Thus, Hobbes explains fundamental conflicts of belief as part of the natural state in which each individual makes his own judgements about everything including the desirable means to his own preservation and which he is recognised by everyone else as having a universal and *natural right* to do.[24] This natural right to preserve oneself implies a *basic, although exiguous, agreement* in the state of nature about the foundations of a moral theory, ie universal principles the truth of which is evident even to the meanest capacity,[25] and thus the possibility of a minimal moral consensus.[26] However, this basic agreement does not generate a settled moral order in the state of nature yet, since there is still *radical secondary disagreement* about everything else, as for instance the actual circumstances and scope in which people are justified in preserving themselves.

Many have tried to reconcile Hobbes' metaphysical contentions about false realism and disagreement with his account of the laws of nature.[27] Most of

[20] See Gauthier, 1995b, 29.

[21] Hobbes, 1999, ch 5, 32–33.

[22] I agree with Gauthier, 1995b, 23–24 that Hobbes' analogy between the certainty and infallibility of Arithmetique and the rectitude of pure Reason which one can aspire to is slightly misleading since there is no ground for thinking, given Hobbes' ontological premises, that all exercises of rationality will exhibit the same certainty as Arithmetique. See also Tuck, 1988, 31 on epistemic uncertainty and reasonable disagreement.

[23] Hobbes, 1999, ch 5, 33.

[24] Hobbes, 1999, ch 14, 91.

[25] Hobbes may thus be understood as rejecting Montaigne's *strict relativism* (see Montaigne, 1958) given the fact that there are limits to the diversity of moral beliefs and that human beings do agree about certain things. See Tuck, 1996, 187 on Hobbes' *moderate relativism*.

[26] Postema, 1986, 50.

[27] See Tuck, 1996 who argues that Hobbes can have it both ways in his moral philosophy, conceding something to scepticism about the objectivity of values and yet not concluding that, morally speaking, anything goes. See also Habermas, 1998a, 121.

them have been unsuccessful. There is one, however, that is more plausible than the others.[28] It places Hobbes' views within the sceptical background of the late sixteenth century and conceives of a reasonable man recognising the fragility of his own beliefs from the very *absence* of objective and rational standards in cases where there is disagreement with other people. The wise man will thus realise that insisting on the truth of his beliefs in every case will lead him to constant conflict and astray from his own preservation. Our own commitment to self-preservation will therefore teach us that using our natural right to everything and our own judgement about what conduces to preservation in conflictual cases is self-defeating; we will see that we should deprive ourselves of the capacity to act on our independent and contentious judgement, as long as others do the same.[29] This interpretation has the merit of revealing Hobbes' broader project of encouraging an entire society of sceptics to coordinate its renunciation around a single figure in order to create a single set of moral rules for society.

True, identifying the 'right' of nature and the 'law' of nature with considerations of self-preservation does not fit well with other passages where Hobbes stresses that 'Law and Right differ as much as Obligation and Liberty.'[30] The answer to this dilemma distinguishes between having a right to one's own judgement and renouncing it. On the one hand, the *right* of nature is a right to use one's own power and judgement about and for self-preservation that is renounceable, and not a bare right to self-preservation or a bare right to renounce it. On the other, the *law* of nature can be regarded as a 'theorem concerning what conduceth to the conservation and defence,' to borrow Hobbes' words, which establishes a 'causally necessary'[31] relationship between survival, that is not, as we saw before, an omnipresent desire among men, and the renunciation of the right of nature *when possible*.[32] This interpretation fits well with Hobbes' contention that 'a Law of Nature (*Lex Naturalis*), is a Precept or a general Rule, found out by Reason, by which a man is *forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same*.'[33]

b. Rousseau's State of Nature

Rousseau's political writings are often associated with the simplistic view that reduces moral and political disagreement to conflicts between individual interests and preferences (constitutive, when aggregated, of the will of all) and with the 'naturally' unanimous conception of the common interest (constitutive of the

[28] See Hampton, 1986, 30.
[29] See Tuck, 1999, xxxii.
[30] Hobbes, 1999, ch 14, 91.
[31] See Hampton, 1986, 48–50.
[32] See Tuck, 1999, xxxiii.
[33] Hobbes, 1999, ch 14, 91.

general will).[34] This may be rightly so.[35] There is scope, however, in the *Social Contract*[36] for further interpretation and for the development of an account of the extent and significance of genuine moral and political disagreement.[37] This account may in particular be reconstructed on the basis of Rousseau's account of the state of nature.[38]

By opposition to Kant's account of the transition from an *instable* state of nature to the civic condition and to Hobbes' account of the *tragic reality* of a state of nature characterised by the omnipresence of *conflicts*, Rousseau's reconstruction of the state of nature[39] amounts more to the utopian reconstruction of an apolitical *paradise* than to the dystopian depiction of pre-political warlike and real conditions of the social contract.[40] In the absence of moral and human relationships, individuals are neither good nor bad in their original state,[41] hence the myth of the solitary 'Bon Sauvage.'[42] In fact, in view of the lack of social interdependence in Rousseau's original state, it is not in the *state of nature stricto sensu* that one will trace back the origins and the nature of passions and of moral disagreement.[43] These have to await Rousseau's depiction of the pre-political state, as it is only then that social contacts and frictions start giving rise to disagreement. What makes human beings violent and their relations conflictual in the *pre-political state*, and hence requires them to associate through a social contract, is related to the hazards of *sociability*. Sociability or, more precisely, the conditions of *social interdependence* of individuals[44] are indeed a natural evolution of the state of nature. It implies in particular (i) that individuals have basic needs that they aim to satisfy and that the satisfaction of these needs and interests depend on the actions of others whom they are living with as neighbours. This means (ii) that if each acted solely with the aim of advancing his

[34] See for concerns similar to mine, WALDRON, 1999A, 92. See also GROFMAN/FELD, in ESTLUND/WALDRON/GROFMAN/FELD, 1989, 1335.

[35] Rousseau's *Social Contract* is a complex and sometimes inconsistent work. It attempts to reconcile diametrically opposed political tendencies of that time, such as theories of natural law with theories of sovereignty (see DERATHÉ, 1970, 339 ff), contractualist and voluntarist theories with republican ideals (see PARRY, 1995 on Rousseau's 'consistent paradoxes'), individualism with collectivism (see RILEY, 1982), etc. See BARRY, 1995, 49–50.

[36] I have limited myself to analysing the *Social Contract* for it is Rousseau's sole work meant to stand for itself in a *universal* way.

[37] See on the idea of interpreting Rousseau by making it the best it can be, WALDRON, in ESTLUND/WALDRON/GROFMAN/FELD, 1989, 1322; WALDRON, 1990A, 49 ff.

[38] See ROUSSEAU, 1963, 247: 'Parmi les plus graves écrivains, à peine en trouve-t-on deux qui soient du même avis sur ce point.'

[39] I distinguish here between the state of nature and the pre-political state although Rousseau refers to both of them as the 'state of nature.'

[40] ROUSSEAU, 1963, 291: 'J'avoue que les événements que j'ai à décrire ayant pu arriver de plusieurs manières, je ne puis me déterminer sur le choix que de par des *conjectures*.'

[41] See FETSCHER, 1968, 140–41.

[42] See TODOROV, 1985, 12–13.

[43] See DERATHÉ, 1970, 138–39 on Rousseau's almost stoic and ataraxic approach to the state of nature.

[44] COHEN, 1986B, 276.

or her own interests, all would do less well than if their individual actions were being *coordinated.* Rousseau presumes that (iii) individuals in the pre-political state have the capacity to recognise their mutual dependence and the benefits of coordination. The difficulty is, however, (iv) that people typically *disagree*, pursue particular interests that oppose each other,[45] and hold conflicting views about the claims that they can legitimately make on one another and on the best way to coordinate their actions.[46]

Social interdependence and the need for coordination bring along issues of distribution and justice and hence occasions of conflicts and instability, owed mainly to the clash of individual interests, first, and then, progressively, to the various epistemic barriers to the use of reason. By opposition to what has long been said, Rousseau not only acknowledges the existence of interest-based disagreement in politics, but also the centrality of epistemic disagreement about the common good, both in the state of nature and in the political state, from the time of the conclusion of the social contract to day-to-day decision-making processes.[47] Thus, with respect to the scope of disagreement, Rousseau does not, despite what many critiques infer from his writings, defend an overoptimistic view of the epistemic virtues and capacities of the reasonable citizens to address competently questions of the general good in large and populous societies and hence of the possibility to settle most moral disagreements very easily.[48]

In this respect, it is important to understand that the 'natural right' in Rousseau's conception cannot be compared to a body of natural *law* (*of reason*) in the Kantian sense.[49] Indeed, human beings do not by (their) nature, ie by immediate and spontaneous inclinations, act *for the sake of* their *common utility*. However, it is true that they tend naturally to act *in conformity with* their common utility and this may be regarded as constitutive of the *natural right*.[50] Thus, Rousseau distinguishes two principles in human nature that are prior to reason and independent of sociability, but are constitutive of the natural right[51]: self-preservation (*amour de soi*) and pity (*pitié*). While self-preservation is the inclination of each individual to do his own good, pity is the natural disinclination to hurt or harm others. These two principles of the natural right explain how in the pre-political state people will tend to act in their own interest, thus often propounding views and taking actions which conflict with others.'

[45] Rousseau, 1997, II, 1.
[46] Cohen, 1986b, 277.
[47] Rousseau, 1997, II, 6.
[48] See Rousseau, 1997, II, 9. See Waldron, in Estlund/Waldron/Grofman/Feld, 1989, 1323.
[49] Derathé, 1970, 151 ff.
[50] Derathé, 1970, 163–64.
[51] Gourevitch, 1997, xii.

c. Kant's State of Nature

Kant's political and especially legal philosophy is a product of his late work.[52] His concern with the relationship between disagreement and the law, and more particularly the issue of the extent of disagreement does not therefore seem central to his theory. Although it might sound innovative,[53] Kant is one of the first classical political thinkers with Hobbes and Rousseau to have established a link between the existence of widespread moral and political disagreement and the primary *raison d'être* of a legal system.[54] He contends that all of us have a fundamental and rational duty to abandon propounding our individual and potentially conflicting conceptions of the right[55] and to agree on a common view of it posited by law.[56]

A brief survey of the general *background* and *premises*[57] of the Kantian concept of the right is in order, before addressing issues pertaining to the state of nature and the constitution of civil government. Kant's theory of the right is part of his metaphysics of morals, ie of a system of a priori cognition of moral principles without any practical considerations.[58] This conception corresponds to Kant's *dualist* approach to the world according to which the latter is at the same time phenomenal in its practical appearance and noumenal in its pre-existing self.[59] This also applies to human beings as composed of an internal

[52] See ARENDT, 1982, 9. On the lateness of Kant's work on this issue as a justification for some of the numerous *incoherences* to be found between Kant's *Groundwork of the Metaphysics of Morals* and the *Metaphysics of Morals*, see SULLIVAN, in KANT, 1996, vii; REISS, in KANT, 1991, 16–17, 24–25. The basic references of this chapter are mostly drawn from the more recent *Metaphysics of Morals*, except when earlier writings have not been reorientated.

[53] For a more traditional account of Kantian constructivism in political theory, see RAWLS, 1971, 251–57, contra: RAWLS, 1993, 99–107. See WALDRON, 1996, 1541 ff about the different uses of Kant in modern political and legal thought.

[54] See WALDRON, 1999C, 35 who regards Kant's 'postulate of moral disagreement' as constitutive of the 'circumstances of politics.' See also RANCIÈRE, 1995, 115, 150.

[55] KANT, 1991, 145, who refers to this fact as to the people 'being *judges of their own cause.*'

[56] KANT, 1991, 137; KANT, 1996, 89–90: 312: 'it is not experience or any kind of factual knowledge which makes public legal coercion necessary. On the contrary, even if we imagine men to be as benevolent and law-abiding as we please, the *a priori* rational idea of a non-lawful state will still tell us that before a public and legal state is established, individual men, peoples and states can never be secure against acts of violence from one another, since each will have his own right to do *what seems right and good to him*, independently of the opinion of others. Thus the first decision the individual is obliged to make, if he does not wish to renounce all concepts of right, will be to adopt the principle that one must abandon the state of nature in which everyone follows his own desires, and unite with everyone else (with whom he cannot avoid having intercourse) in order to submit to external, public and lawful coercion. He must accordingly enter into a state wherein that which is to be recognized as belonging to each person is allotted to him by law and guaranteed to him by an external power. In other words, he should at all costs enter into a state of civil society.' All references to Gregor's 1996 translation are followed by page number of volume 6 of the Prussian Academy edition of Kant's works.

[57] See KERSTING, 1992, 347 who contends that the fate of Kant's philosophy of right is connected to his moral philosophy's and lies precisely where Kant's moral philosophy is most vulnerable: the reality of transcendental freedom.

[58] See SULLIVAN, in KANT, 1996, viii ff.

[59] See REISS, in KANT, 1991, 17.

noumenal self and an external phenomenal identity in interaction with others. A priori principles also apply to human external relationships. Since the essence of human beings is their *freedom*, they cannot be held to obey anyone but themselves. However, individual freedom is limited by the freedom of others. It is the limited nature of human external freedom that constitutes the foundation of the *right*: the right is the *universal and natural law of reason* according to which I can only attribute myself the same rights as I would to others.[60] The right is thus the single rational and uncontroversial ultimate law one can think of, according to which the only limits I set to my freedom are the ones I would set to others' in the same situation.[61] Thus, whereas the doctrine of (moral) virtue concerns the universalisable exercise of internal motives, the doctrine of *right* is concerned only with duties of *outer freedom*, ie each individual's capacity to obey the law.[62] Kant's legal and political theory remains, however, part of his metaphysics of morals since it is a way to establish criteria to solve public conflicts of interests in a universal manner[63]; this is done by the doctrine of right that therefore amounts to the outer shell of the moral realm and to a kind of metaphysics of universalised politics.[64]

One finds a good description and discussion of the kinds of disagreement that pervade human relationships in Kant's depiction of the *state of nature*. Kant borrows the Hobbesian ideal[65] of the existence of a fictitious state of violence and injustice in which human beings live in a non-lawful condition before the actual creation of the civil state; this non-historical hypothesis[66] is a mere idea of a priori reason[67] aiming at demonstrating why there is a need for law and a civil state,[68] hence the sometimes circular justifications of one or the other state.[69] The state of nature fiction explains why we have a legal system, but it also explains what we would lose did we not have that legal system.[70] Kant's

[60] A conduct is right if its maxim can 'coexist with the freedom of everyone in accordance with a universal law': KANT, 1996, 41, 246.

[61] See MÜLLER, 1998, 260.

[62] POGGE, 1988, 410–11 who sees in this distinction that appears for the first time in the *Metaphysics of Morals* a potential response to the deep controversy surrounding the alleged emptiness of the categorical imperative.

[63] See KERSTING, 1992, 343 according to whom Kant recreated 'the *old unity of morals and politics* in a revolutionary new conceptual framework.'

[64] See REISS, in KANT, 1991, 20-21; SULLIVAN, in KANT, 1996, xii.

[65] KANT, 1965, 601, A 752, B 780: '*As Hobbes maintains*, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law, which limits our freedom solely in order that it may be consistent with the freedom of others and with the common good of all.' See KERSTING, 1994, 187. See, however, the later opposition to Hobbes in KANT, 1991, 73, 84–85, 137.

[66] KERSTING, 1992, 352: 'The natural condition is for him not an anthropological thought-experiment, but one in the philosophy of the right.'

[67] See KANT, 1991, 79, 140, 143.

[68] KERSTING, 1994, 189.

[69] In this sense, the argument corresponds to what MacCormick regards as an *ex post facto argument* in Hart's historical and sociological account of the establishment of a system of positive law, that would therefore be more correctly regarded as *heuristic*: MACCORMICK, 1981, 108.

[70] KANT, 1991, 83, 145.

state of nature differs therefore from Rousseau's in two respects: it is fictitious and it is not a state of innocence.[71]

According to Kant, 'experience teaches us the maxim that human beings act in a violent and malevolent manner, and that they tend to fight among themselves until an external coercive legislation supervenes.'[72] The conflicting conditions of the state of nature, and of human relations generally, can be derived from a radical human propensity towards conflict; this follows in particular from human 'unsocial sociability.' According to Kant, history shows us that man is not only sociable in a certain (no doubt unlimited) willingness to restrain his own inclinations for the sake of others, but also anti-social in the sense that he tends to take his own thinking very seriously and thus to direct everything according to his own ideas.[73] This mutual antagonism in human nature is the means that *nature* employs to bring about the development of all human capacities,[74] insofar as in the long term antagonism becomes a cause for instituting a law-governed social order; 'man wishes concord, but nature, knowing better what is good for his species, wishes discord.'[75] As for Hume, therefore, disagreement, and human wrongdoing more generally, is in the Kantian conception interestingly regarded as one of the key features of human progress and social development,[76] even if in the long run differences of opinion might lead to perpetual war unless people converge on a common view on certain difficult issues.[77] Thus, despite its dangers, Kant contends that *teleological* thought, based on our ability to discern purposiveness in the world and to relate it to the idea of providence, is irresistible; war must be regarded as part of a large-scale functional story and as the momentaneous heteronomous triumph of nature over autonomy that is then meant in the long run to be eliminated by human righteous establishment of law.[78]

d. Hume's State of Nature

Long admired and glossed over by moral and political theorists, Hume's theory of justice has not been given the place it deserves in legal theory. Hume's insights in

[71] See Reiss, in Kant, 1991, 27.
[72] Kant, 1991, 137.
[73] Kant, 1991, 44.
[74] Reiss, in Kant, 1991, 38.
[75] Kant, 1991, 45.
[76] This *discrepancy* between the *short term* where human wickedness is a constructive reality that should be handled politically and the *long term* where it is to be eliminated by coerced sociability and obedience to the law corresponds to Kant's distinction between the phenomenal reality and the noumenal world that pervades his entire political theory, leading to many *paradoxes*.
[77] One can easily put aside the critique of Kant's '*vicious realism*' or 'moral cynism' that is referred to by Kant as the contention that 'someone may reply that such scruples about using force in the beginning, in order to establish a lawful condition, might well mean that the whole earth would still be in a lawless condition' (Kant, 1996, 122, 353); this sort of consideration does not indeed 'annul that condition of right,' since at the time when an unjust settlement is being envisaged, one cannot justify such action on such an ends-justifies-the means basis.
[78] Kant's teleological approach to human wrongdoing and disagreement reduces the scope for *moral pessimism*. Contra: Pogge, 1988, 424.

jurisprudence are just as valuable as his contributions to moral epistemology and philosophy.[79] This is not surprising given the fact that Hume wrote in a tradition of moral philosophy which embraced jurisprudence as an important component; like Hobbes, Hume regards *justice* as an essentially *juridical* virtue, a concept that cannot be separated from the concept of law and the need for certain basic social institutions and conventions.[80] Hume's discussion of justice is particularly relevant to jurisprudence in that it approaches justice and the law as conventional constructions built upon other such constructions and over which further constructions will be built through preserving them.[81] This conventionalist approach can be read as a gradual and progressive response to *persistent reasonable disagreement* about first, what our common interest is, and secondly, what justice consists of, and finally about what ought to be done to enforce them when disagreement begins to arise at this further institutional stage. Storey after storey, as by genealogy,[82] from basic commercial promises until complex coordination on public institutions, the laws of 'civil' as well as 'natural' justice 'are built on the very same foundation of human convention'[83] and collective inventions.[84]

Not only do different conventions and types of disagreement build upon one another, but the need for conventions and disagreement are dialectically bound[85];

[79] A caveat is in order with respect to the degree of coherence we should look for in Hume's writings. This point has to do with the relationship between the *Treatise* and the two *Enquiries:* do the latter works essentially contain restatements of philosophical positions developed in the former, or had the nature of Hume's philosophical thought changed in the meantime? Despite Hume's reservations at the beginning of the *Enquiries*, I have decided to regard Hume's work as a coherent whole. I believe that the *Enquiries* do not present an alternative system of thought, but merely less well-integrated fragments of the original system. I will assess them and refer to them occasionally for a more balanced presentation of a position that is not consistently addressed in the *Treatise* or merely for reasons of concision and simplicity. Another question which should concern us here is the relationship between Hume's *epistemology* and theory of mental understanding and his *moral and political theory*. According to Kemp Smith's famous approach to Hume's moral theory, the latter's epistemology appears as a necessary prolegomenon to his moral theory and his political theory as an application of that moral theory to some areas of human life. I will then work on the assumption that Hume's theory of judgement, which is first developed in relation to belief in general, can then be usefully applied to moral judgements and more specifically to judgements about justice and political allegiance.

[80] See eg HUME, 1978: 'Our property is nothing but those goods whose constant possession is establish'd by the *laws of society*; that is by the *laws of justice*.'

[81] On this geneaological account, see POSTEMA, 1986, 84, 87.

[82] See for the use of this expression, BAIER, 1988, 776 ff.

[83] HUME, 1978, 543.

[84] See HUME, 1978, 491. On the fundamental element of social artifice in Hume's theory, BAIER, 1988, 757 ff. One should note with Baier that Hume has not only extended Hobbes' creationism to the convention or contract itself and hence to the obligation of justice, but he has not overlooked the fact that some moral virtues are not artificial and can still be regarded as natural, although they are not any of the virtues at stake in the political debate that is the object of the present chapter. In fact, Hume's account of natural virtues and qualities is the basis for his account of social artifices, for only through our natural family bonds and cooperative abilities can we converge on justice. In that last respect, Hume is closer to Kant than to Hobbes.

[85] See for a modern account and development of this dialectic relationship, BOLTANSKI/THÉVENOT, 1991.

the primary sources of disagreement are to be found in the need to agree and converge, in the same sense in which the sources of the latter need to agree and converge are to be found in disagreement.[86] Thus, the necessity *and* the success of social cooperation lie in the foremost dimension of human nature, that is our sociability. In this sense, Hume comes very close to Kant's teleological approach to disagreement. Hume's distinctive contribution to the state of nature tradition, however, is his rejection of the contractualist model of political obligations. It lies also, and despite his sceptical rejection of the pretensions of 'natural reason' be it of the law or of private judgements, in his confidence in the collective rationality of common opinion and established practice of cooperation on justice, as opposed to the individual establishment of this rule by the Hobbesian Sovereign or the pure arbitrary of collective determinations as in the Benthamite model of utility. Hume uses the fiction of a state of nature as an *analytical device* to help isolate the factors that combine to generate the structuring institutions of society and to display the fundamental human needs which these institutions satisfy. But he clearly maintains that the needs in question are inescapably social.[87] Like Kant, indeed, he argues that it is the essential sociability of human beings that both creates the need for the artifice of justice and makes possible its invention and establishment. Unlike Montesquieu,[88] however, Hume does not disparage the state of nature as a ridiculous fiction and quest. Human sociability explains indeed the inescapable nature of society, but it also explains how the reasons for convergence can be interfered with by reasons for divergence.

In order to understand the centrality of disagreement and its consequences in Hume's account, it is important to restate first in what *natural circumstances* he thinks human beings are evolving and what is his conception of *human nature*.[89] The conventions of justice and law, on Hume's account, arise amongst individuals in a primitive 'wild and uncultivated' condition, whose dominant motivations issue from the interested passions. Although Hume's strategy and use of the state of nature fiction[90] parallels that of Hobbes to some extent,[91] his conception of human nature and of the circumstances creating the need for justice and coordination stand in sharp contrast with the Hobbesian doctrine. Albeit partly motivated by self-interest and not complete altruists, human

[86] The issues of the *occurrence* and of the *significance* of disagreement overlap and relate dialectically to each other. See Waldron, 1999a on this question. See also Chapter 6.

[87] In this sense, the state of nature is a true *fiction*. See Forbes, 1975, 78.

[88] See Montesquieu, 1997, Letter no 44: 'Je n'ai jamais ouï parlé du droit public qu'on n'ait commencé par rechercher soigneusement quelle est l'origine des sociétés: ce qui me paraît ridicule. Si les hommes n'en formaient point, s'ils se quittaient et se fuyaient les uns les autres, il faudrait en demander la raison et chercher pourquoi ils se tiennent séparés. Mais ils naissent tous liés les uns aux autres; un fils est né auprès de son père et il s'y tient: voila la société et la cause de la société.' See also Althusser, 2003, 26.

[89] See Hume, 1978, xvi for the importance of a science of human nature for his political and moral theory.

[90] See Hume, 1978, 493 on this fiction.

[91] Hume, 1975, II, 184. See also Gauthier, 1982, 11.

beings are fundamentally social and benevolent and, more importantly, prone to social interaction,[92] and this from the very beginning in the fictitious state of nature.[93] If a purely solitary life for humans were possible, the need for justice would never arise.[94] Human beings, beyond the most primitive, are wholly dependent upon broad patterns of social interaction.[95] These driving forces toward survival combine with natural social appetites uniting men, women and offspring in the *natural family* to bring people together in social union. Furthermore, 'man, *born in a family*, is compelled to maintain society from necessity, from natural inclination and *from habit*.'[96] The result is that we all participate in social interaction instinctively without giving it a thought.[97] In other words, Hume founds our social bonds on a psychological and quasi-physiological sentiment shared by all, without the necessity to call upon reason or benevolence. Our essential sociability and interdependence may be observed at three levels: action,[98] sentiment[99] and thought.[100]

At this stage, it is useful to introduce briefly Hume's *epistemology* and conception of *moral understanding and judgements*. According to Hume, the contents of the mind are divided exhaustively into two categories: impressions, which occur when we experience the external world, and ideas, which are the copies of our impressions used in thinking and imagining. Impressions themselves fall into two categories, those of sensation and those of reflection. The latter include desires and emotions and these are generated by prior impressions and/or ideas. Among ideas, Hume's main distinction is between the ideas of memory and those of the imagination in a familiar sense. Having set the scene, Hume advances his main maxim: 'That all our simple ideas in their first appearance are derived from simple impressions, which are correspondent to them, and which they exactly represent.'[101] There is no a priori truth, but simply a fact about our experience. In this sense, Hume can be regarded as an *empiricist* for whom knowledge derives from observation and experience only,[102] and not from the study of nature nor

[92] Hume, 1978.
[93] See Hume, 1978, 487. See Stroud, 1983, 194. See also Fate Norton, 1993b, 155 drawing on Hume, 1978, 219.
[94] Hume, 1975, II, 191–92.
[95] Hume, 1975, II, 206; Hume, 1975, II, 210; Hume, 1978, 485–86. See Forbes, 1975, 105, ch 4 on society being the 'natural unit' for Hume. See also Miller, 1981, chs 1 and 4.
[96] Hume, 1978, 486. This dialectic between the internal and external dimensions of sociability can be found in Darwin's later work and is used in a very similar sense in Freud's account of moral and political psychology. See Freud, 1995a, 458, 474.
[97] Hume, 1978, 116: 'All those opinions and notions of things to which we have been *accustomed* from our infancy, take such deep root that 'tis impossible for us by all the powers of reason and experience to eradicate them' (emphasis added).
[98] Hume, 1975, I, 89.
[99] Hume, 1978, 363, 489.
[100] See Hume, 1975, II, 241: 'Particular customs and manners alter the usefulness of qualities, they also alter their merits.'
[101] Hume, 1978, 4.
[102] See Harrison, 1981, Preface.

from natural reason, contrary to the opinion of natural law forerunners of Hume and other ethical rationalists. One should note that, even though Hume's theory of justice and morality does not flow from human nature directly, in the sense that justice is not a natural virtue, the capacity for justice and moral reasoning is natural since all human beings are capable of invention and reflection.[103]

Since people feel and imagine in the same ways at a minimal level, the reason for people's disagreements must lie elsewhere.[104] Hume's contention is that it lies in the *different circumstances* in which they find themselves,[105] but mostly in *differences in their understandings*, reasoning and judgements.[106] Because there cannot logically be disagreement over 'justice' yet, since justice is an artificial creation meant as a response to disagreement, disagreement over 'justice' is in fact disagreement over what is the best allocation of resources in the state of nature.[107] In Hume's own terms, 'such disputes may not only arise concerning the real existence of property and possession, but also concerning their extent.' In such a case, the parties will invoke *substantive judgements* and will end up disagreeing *about value*.[108] Disagreement over the best allocation of resources can have multiple *sources*. It can follow from a mere conflict of *private interests*,[109] but it may also consist in a genuine opposition of *opinions* over what ought to be done in the *public interest* given people's deeply embedded sociability. Indeed, 'though the *public interest* in itself be always one and the same, yet it becomes the source of as great dissensions, by reason of the *different opinions* of particular persons concerning it.'[110] Human beings may value the same qualities and principles, but their views of these qualities and principles will vary.[111]

3. Introducing the Problem: the Extent of Disagreement

a. Hobbes' Account of the Extent of Disagreement

According to Hobbes, moral disagreement will quickly become pervasive and will necessarily lead to violence as long as people are not politically organised in a way that reduces this risk. Of course, one may wonder why, if each party is acting

[103] See Baier, 1988. See also Forbes, 1975, 59–60. See also Fate Norton, 1993b, 148 ff.
[104] Miller, 1981, 41.
[105] See Forbes, 1975, 107 on the *different* views of the *same* principle of utility due to *different* social circumstances.
[106] Hume, 1975, I, 85. There is no contradiction here, since 'from observing the variety of conduct in different men, we are enabled to form a greater variety of maxims, which still suppose a degree of uniformity.' See Miller, 1981, 102 ff.
[107] See Hume, 1978, 507.
[108] See Williams, 1993, 133–34. See Chapter 1.
[109] Hume, 1978, 491.
[110] Hume, 1978, 555 (emphasis added). See also Hume, 1975, II, 195–96.
[111] On Hume's sociological relativism, see Forbes, 1975, 109, 115 ff.

sincerely and dissenting only when she thinks important values are at stake, people are ready to fight over them.

Hobbes insists throughout *Leviathan* that all human beings are roughly *equal in physical and mental abilities*, so that there are no natural masters and no fundamental differences between any groups of people such that some of them are naturally subordinate to others.[112] Thus, even if there are real differences in talents and skills in the human community, no one is so much better than others that his superiority naturally entitles him or her to rule over them. Hobbes then argues that people in the state of nature have a *natural right* to act in any way apt *to ensure their own preservation*. This right and their rough equality makes them all largely but not exclusively interested in material aspects of their individual preservation and prompt to make individual judgements about common moral issues such as property rights, for instance, that they regard as pertaining to the exigencies of their survival.[113] As a result, in their attempts to achieve their preservation, their private judgements and beliefs over their particular rights in doing so will *inevitably clash*, thus leading, given the mortal anxiety, competition and diffidence inherent to the circumstances of human life,[114] to a *state of war* of every man against every man.[115] Hobbes speaks further of 'a general inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death. . . . Because man cannot assure the power and mean to live well, which he hath present, without the acquisition of more.'[116]

The interesting point, however, is that this right of every man to anything and the constant state of war that derives from it 'is no more than his own conservation requireth, and is generally allowed.'[117] Indeed, 'the Desires and other Passions of man, are in themselves no Sin. No more are the Actions, that proceed from those passions, till they know a Law that forbids them: which till Lawes be made they cannot know: nor can any Law be made, till they have agreed upon the Person that shall make it.'[118] As a consequence, 'during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such warre, as is of every man against every man. . . . So the nature of War consisteth *not in actuall fighting*; but in the known disposition thereto, during all the time there is *no assurance to the contrary*.'[119] This permanent state of insecurity makes 'the life of man, solitary, poore, nasty, brutish and short.'[120]

[112] Hobbes, 1999, ch 13, 86–87.
[113] See Hobbes, 1983, 26–27: 'My first enquiry was to be, from whence it proceeded, that any man should call any thing rather his *Owne* than *another mans*.'
[114] See Hobbes, 1999, ch 13, 88: 'In the nature of man, we find three principall causes of quarrel. First, Competition; Secondly, Diffidence; Thirdly, Glory.'
[115] Hobbes, 1999, ch 13, 87–88.
[116] Hobbes, 1999, ch 11, 70.
[117] Hobbes, 1999, ch 13, 87–88.
[118] Hobbes, 1999, ch 13, 89–90.
[119] Hobbes, 1999, ch 13, 88–89.
[120] Hobbes, 1999, ch 13, 89.

b. Rousseau's Account of the Extent of Disagreement

According to Rousseau, individuals in the pre-political state have the capacity to recognise their mutual dependence and the benefits of coordination. The difficulty is, however, that people typically *disagree*, pursue particular interests that oppose each other,[121] and hold conflicting views about the claims that they can legitimately make on one another and on the best way to coordinate their actions.[122] Thus, if people cooperate with one another it is not out of an altruistic desire to help others, but rather out of the self-interested recognition that their own survival puts them in need of others.[123] This leads to conflicts about the division of common property,[124] for instance, and, more generally, conflicts inevitably keep arising between what each individual, as his own judge, holds as right for himself to do, thus leading to perpetual conflict and to a state of war.[125]

A difficulty that needs to be resolved, however, is why pervasive disagreement about the right and instability can be that pervasive by reference to Rousseau's account of natural law and the natural order of reason? Here lies the difference between Rousseau's account of the natural right, on the one hand, and the traditional approach to the natural law of reason and the Kantian one in particular, on the other. When the self-sufficient individuals of the state of nature become more sociable and hence materially and psychologically irreversibly dependent on one another, they cease to spontaneously conform to the duties of natural right. It is only when, eventually, human beings acknowledge the ends in conformity to which they had acted by nature and therefore submit to them knowingly, that the law they follow is not natural *stricto sensu* any longer but becomes the *natural law of reason*[126] (*droit naturel raisonné*). There are three reasons for this.

Primarily, most individuals are simply not sufficiently able to take an active interest in the lives of other people spontaneously or for grounds of reason. The real question in the pre-political state is not therefore: what is the (naturally) just thing to do, but how will human beings be moved to do it?[127] Despite the distinct existence of a natural and universal order of justice,[128] according to which 'what is good and conformable is so by the nature of things and independently of human conventions,'[129] human beings in the pre-political state cannot be guided to justice and agreement either by directly receiving *divine justice* or by

[121] Rousseau, 1997, II, 1.
[122] Cohen, 1986b, 277.
[123] See Trachtenberg, 1993, 3.
[124] In the state of nature, everything is common: Rousseau, 1997, II, 6. See on property as the 'source of a thousand quarrels and conflicts,' Barry, 1995, 39 ff. One should note, however, that there is nothing Lockean in Rousseau's pre-political state about provisional or spontaneous moral or property rights.
[125] Rousseau, 1963, 308. See Fetscher, 1968, 140–41.
[126] Derathé, 1970, 165; Gourevitch, 1997, xi.
[127] Gourevitch, 1997, xiii.
[128] Justice that comes from God seems to amount to the same as the universal justice that emanates from reason alone. See Rousseau, 1997, II, 7.
[129] Rousseau, 1997, II, 6.

reason alone. First of all, although 'all justice comes from God and he alone is its source, . . . if we were *capable of receiving from so high*, we would need neither government nor laws.'[130] 'No doubt,' secondly, 'there is a universal justice emanating *from reason alone*.'[131] However, in the pre-political state, 'the voice of duty' does not take priority over 'physical impulsion and rights' or over 'appetite' and 'man, who until then had looked only to himself' does not yet 'see himself forced to act on other principles, and to *consult his reason before listening to his inclinations*,'[132] hence the pervasiveness of conflicts of interests and moral disagreement.[133]

Secondly, many principles of justice are too general and its aims that are too remote are equally beyond the reach of the people; 'each individual, appreciating no other scheme of government than that which bears directly on his particular interest, has difficulty perceiving the advantages he is supposed to derive from the constant privations required by good laws. For a *nascent people* to be capable of appreciating sound maxims of politics and of following the fundamental rules of reason of State, *the effect would have to become the cause*, the social spirit which is to be the work of the institution would have to preside over the institution itself, and men would have to be prior to laws what they ought to become by means of them.'[134] In other words, we become moral agents by virtue of being citizens alone and have no choice in this respect.[135] There is, in Rousseau's view, no alternative to politics.[136]

Finally, 'this justice [emanating from reason alone] to be admitted among us has to be *reciprocal*. Considering things in human terms, the laws of justice are vain among men for want of natural sanctions; they only bring good to the wicked and evil to the just when he observes them towards everyone while no one observes them toward him. Conventions and laws are therefore necessary to combine rights with duties and to bring justice back to its object.'[137] Hence in Rousseau's theory and by opposition to the jusnaturalist tradition, natural law or the law of reason, although it prevails over civil laws, does not apply prior to them.[138] Thus, even if justice emanating from reason may guide the wise in the pre-political state, 'men as they are' have become sociable and therefore do not, on the one hand, heed *disinterested reason* and need, on the other, conventions

[130] Rousseau, 1997, II, 6.
[131] Rousseau, 1997, II, 6.
[132] Rousseau, 1997, I, 8.
[133] See Todorov, 1985, 15–16.
[134] Rousseau, 1997, II, 7.
[135] Gourevitch, 1997, xv.
[136] See Todorov, 1985, 17 on the absence of alternative and the impossibility to go back to the state of nature.
[137] Rousseau, 1997, II, 6. One might carelessly interpret this passage in a Kantian way although it seems contradictory for Rousseau to see the only thing lacking from the pre-political state as being the *reciprocal* use of reason, when he says that one of the central elements gained by individuals from the transition to the civil state is the use of *reason* itself.
[138] Derathé, 1970, 165. See also Riley, 1995, 16 ff on the distinction between a (Kantian) universal moral law and a more particular (hence 'general') law of reason: the general will.

and sanctions, ie laws and a government, in order to make justice *reciprocal* and establish the *principles of the political right* as opposed to the *natural right*.[139]

c. Kant's Account of the Extent of Disagreement

If it is not the demands of individual survival or other material interests that engage us in pervasive disagreement with one another and hence in a war against one another on matters such as rights, justice and private property,[140] as they do according to Hobbes, Kant needs to offer another explanation for the violence and insecurity that derive from the expression of conflicting opinions in the unlawful state and for the consequent need for public law.[141] If one refers to Kant's dualistic conception of the world, a justification of the pervasiveness of moral disagreement and violence should aim at surviving any realistic, phenomenal and anthropological assumption made about human nature.[142] According to Kant,[143] indeed, 'it is not experience or any kind of factual knowledge which makes public legal coercion necessary. On the contrary, even if we imagine men to be as benevolent and law-abiding as we please, the *a priori* rational idea of a non-lawful state will still tell us that before a public and legal state is established, individual men, peoples and states can never be secure against acts of violence from one another, since each will have his own right to do *what seems right and good to him*, independently of the opinion of others.'[144]

At first sight, however, it seems difficult to reconcile, on the one hand, the idea of a state of perpetual war[145] arising from the expression of conflicting moral judgements about the right with, on the other, the ideal of a human capacity for objective a priori moral reasoning and the aptitude to judge in more or less the same way, according to the natural right.[146] Kant shares indeed a conviction common to all versions of *cognitivist* philosophy that normative issues are objectively true or false, right or wrong, etc and are capable of being recognised as such by a *common human reason*.[147] It seems therefore to follow from Kant's conception that, contrary to what takes place in other social contract theorists' accounts of

[139] Gourevitch, 1997, xiv.
[140] Williams, 1983, 168.
[141] See Kersting, 1994, 189; Kersting, 1993, 325. See also Waldron, 1999b, 46.
[142] Williams, 1983, 168; Sullivan, in Kant, 1996, xv; Reiss, in Kant, 1991, 27–28. On Kant's hostility to anthropology: Kant, 1996, 212, 466. No doubt attention to human nature is necessary for thinking about application, enforcement, and inculcation of virtue, but it should not be involved in the foundation or definition of virtue itself: Kant, 1991, 11, 217.
[143] This late position is a sudden turnabout in Kant's legal theory; he rejects his earlier view that the state's primary role is to suppress what he called the 'wickedness in human nature': see Kant, 1996, 8, 238; Sullivan, in Kant, 1996, xv.
[144] Kant, 1991, 137.
[145] Kant, 1991, 98.
[146] See also Pogge, 1988, 414 who tries to avoid the problem by restricting the role of positive law to the coordination of issues where there is no right answer that reason and its natural laws can establish.
[147] See Kersting, 1994, 180.

the state of nature, it is not possible for him to contend that people may disagree reasonably over matters on which reason offers some material guidance without undermining any adequate basis for public morality.[148] It would, however, be paradoxical for Kant to attempt to explain the endless disputes that characterise the state of nature on the sole basis of difficulties that may be settled by an arbitrary stipulation[149] or a strategic compromise.[150] Moreover, most of the time such problems of coordination will not raise pervasive and violent disagreement that would call for the kind of coercive response provided by the constitution of a legal system.[151]

The paradox is only apparent, however. There is an important distinction in Kant's legal theory between *formal concepts* of the right and their *application* or *interpretation*.[152] This distinction is particularly acute in Kant's theory of the private right of provisional property.[153] The conception of the private right, ie mainly the right as it is according to each individual's legitimate conception in the state of nature, is based on the a priori moral notion that everyone may acquire (provisional) property rights.[154] Therefore, in the state of nature people already share the laws of property that rule these acquisitions at least 'in relation to their *form*.'[155] However, the *concretisations* of the different rights of property the concepts of which are shared can be controversial even among reasonable people acting in goodwill.[156] This is confirmed by Kant's discussion of the *indeterminacy* of the original acquisition of an object.[157] In the state of nature, anybody 'can acquire something external by taking control of it or by contract,' but in each case it will be in accordance with individual conceptions of the right,[158] the interpretation of which might differ from one individual to another leading to open legal controversies.[159]

These disputes are not therefore difficulties regarding which there is no right answer to be *rationally* discovered. On the contrary, one of the parties is most certainly right, for instance about her right of first occupancy, but there is *no*

[148] Waldron, 1996, 1548. See Pogge, 1988, 414 advocating this view. See also Rawls, 2000, 15.
[149] Waldron, 1999c, 55–56, 48 referring to the opposite interpretation of Pogge, 1988, 414, according to whom the natural laws of reason (interpersonal consistency, universality and a more teleological thriving of reason) may solve all disagreements over the right except problems of *indeterminacy* and *coordination*, such as the side of the road one ought to drive on.
[150] See Gaus, 1996, 183.
[151] Waldron, 1999c, 49.
[152] Waldron, 1999c, 47. See Kersting, 1992, 352; Kersting, 1994, 190.
[153] On the close relationship between the right and property rights in Kant's legal theory, Kersting, 1994, 185 ff; Kersting, 1992, 352 ff.
[154] See Sullivan, in Kant, 1996, xiii.
[155] Kant, 1996, 37–56: 245–70.
[156] Waldron, 1999a, 47–48. See in the same sense Locke, 1999, 396.
[157] Kant, 1996, 53: 266: 'The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole original external acquisition) the hardest of all to solve.' See Kersting, 1993, 332.
[158] Kant, 1996, 6, 312.
[159] Kant, 1991, 112–13, 137. See also Kersting, 1993, 332; Kersting, 1994, 190; Murphy, 1970, 111.

common basis for the parties to determine and agree on which answer is right[160] and no impersonal mediator or recognised '*judge*' to issue an agreeable answer.[161] Hence Kant's qualification of these 'endless disputes' as being 'of a merely *dogmatic reason*.'[162] The material principle of reason does not provide enough guidance in the state of nature to overcome *epistemic indeterminacy* and the various conflicts of reasonable interpretations of the right.[163] On a similar line, the existence of important moral disagreements and limits to the natural law of reason may be confirmed by Kant's account of the benefits of the '*public* use of man's reason.'[164] According to Kant, 'the private use of reason may quite often be very narrowly restricted.'[165] Thinking for oneself only achieves the promises of maturity that the Enlightenment attached to it, when one's thoughts are exposed to the 'test of free and open examination'[166] and communication. It follows from this conception that distinct individuals in the state of nature will try to conceive the right as it seems best to them. These conceptions might, however, often remain partial and thus controversial,[167] as long as they are not confronted to each other by the 'principle of publicness'[168] in a civil community[169] and through an 'enlarged mentality,' to borrow the terms used in Arendt's interpretation of Kant[170]; according to this account of political mentality, the capacity of political judgement amounts to 'representative thinking: thinking in the place of everyone else.'[171]

This situation leads to pervasive *disagreements* or '*disputes over rights*.'[172] As a result, the state of nature can be understood as a state of *war*[173] for the 'monopoly of interpretation over equally justified but incompatible opinions'[174] about the right of reason. According to Kant, 'before a public and legal state is established, individual men, peoples and states can never be secure against *acts of violence* from one another.'[175] But how can one explain the constant threat of conflicts between individuals and the use of force as the necessary result and only settlement[176] of

[160] Waldron, 1999c, 49. See also Rawls, 2000, 205.
[161] Kant, 1991, 137; Kant, 1965, 601 who speaks of a 'tribunal.' See Kersting, 1994, 190.
[162] Kant, 1965, 601, A 752, B 780.
[163] See Kersting, 1994, 191.
[164] Kant, 1991, 55.
[165] Kant, 1991, 55. See also Arendt, 1982, 40–42, according to whom critical thinking implies *communicability* and a community of man; this kind of 'publicity test' at other people's contact may enhance the learning process and help in reaching more impartiality. See also Kant, 1991, II, 62, 433.
[166] Arendt, 1982, 32, 42. See also Kant, 1965, 9; Kant, 1991, 237, 247. See also Müller, 1999, 186–87.
[167] Waldron, 1996, 1552–53. Kant's acknowledgement of the adequacy of incomplete standards of reasoning may justify a less optimistic interpretation of his views about the virtues of public debate to rationally solve *all* disagreements. See O'Neill, 1986, 538.
[168] Arendt, 1989, 46, 48–49.
[169] Pinkard, 1998, 164.
[170] See Beiner, 1983, 12 ff.
[171] See Beiner, 1983, 14.
[172] Kant, 1991, 137: '*ius controversum.*' See Kersting, 1994, 190: 'Rechtskontroversen.'
[173] Kant, 1991, 174.
[174] Kersting, 1992, 352.
[175] Kant, 1991, 137.
[176] Sullivan, in Kant, 1996, xv.

persistent moral disagreement?[177] Kant does not explicitly address the issue, but links it to the mere fact that people 'cannot avoid living side by side with all others.'[178] One may distinguish two grounds for fearing actual violence as a result of moral disagreement.

First of all, one should mention the *scarcity of resources* and the derived *substantive urgency* of some principled claims of property. Given the Kantian account of a provisional natural right to acquire external resources[179] and the material necessity to do so in the face of the scarcity of goods, it is entirely conceivable that people fight over what they think is their own property.[180] This is the material consequence of the indeterminacy[181] of the principles of appropriation and use of things[182] discussed above; as long as there is no common basis on which to agree to settle that kind of disagreement, 'no one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him.'[183]

A second justification of the close relationship between moral disagreement and the use of force may be found in Kant's account of the *centrality of justice* and of the right use of freedom. Since people have the feeling that without justice 'there is no longer any value in human beings living on earth,'[184] it is not surprising that they take what (they think) is right very seriously and are ready to fight for it[185] independently of the opinions of others.[186] The intimate relation between justice (even provisional justice), violence and the duty to leave the state of nature[187] stems from Kant's contention that 'if external objects were not even *provisionally* mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.'[188] This special link between right and violence can be traced back to Kant's conception of justice itself, since the right sets limits to the impact of a person's external actions on the external freedom of others[189]; according to this conception, 'if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (ie wrong), coercion that is opposed

[177] See SULLIVAN, in KANT, 1996, xiv.
[178] KANT, 1996, 86, 307.
[179] See in particular KANT, 1996, 41, 246.
[180] This argument does not amount to the experience-based explanation of natural violence that we rejected before; the moral interpretation of one's right of property is indeed necessarily related to one's need for resources. See WALDRON, 1999C, 50.
[181] See KANT, 1996, 53, 266.
[182] See KERSTING, 1992, 352.
[183] KANT, 1996, 86, 307.
[184] KANT, 1996, 105, 332.
[185] See WALDRON, 1999C, 51.
[186] KANT, 1991, 44, who writes about the human 'unsocial characteristic of wanting to direct everything in accordance with [one's] own ideas.'
[187] See KERSTING, 1994, 187.
[188] KANT, 1996, 90, 313.
[189] KANT, 1996, 25, 231: 'Right is connected with an authorization to use coercion.'

to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.'[190] If individuals have different opinions about what is right, then it naturally follows that they will think it is legitimate for them to use coercion in different directions in order to defend themselves and their own distinct conception of the right.[191]

d. Hume's Account of the Extent of Disagreement

According to Hume's conception of human nature, disagreement has terrible consequences that need to be remedied. It is human sociability that makes this remedy *both necessary and possible*. My object is now to see *how* human sociable nature and disagreement make the conventional remedy of justice *necessary*.

As long as social cooperation is limited to the narrow circle of family relations, the respect of the natural virtue of benevolence is sufficient to prevent and solve persistent reasonable disagreement. But as commerce expands and the society becomes more complex, a need arises for a method by which strangers, lacking the regular and intimate contact which breeds trust, can bind themselves to actions at distance.[192] Hume mentions three main circumstances in human life that lead to conflict and therefore call for some remedy: (i) the scarcity of material goods and resources necessary for survival, which places people in competition with one another, (ii) the partiality of people and their indulgence of their more direct self-interest and (iii) the fact that goods can be wrested fairly easily from one set of hands to another.[193] It is interesting to note that, whereas in the *Treaty* Hume mostly shows what are the consequences of the failure to cooperate which *positively* call for a remedy, in the *Enquiry*, Hume distinguishes *negatively* six cases in which justice would not be necessary: natural super-abundance, universal fellow-feeling, extreme scarcity,[194] excessive rapaciousness, lack of equality between human beings and self-sufficiency.[195]

Given these three conditions or so-called '*circumstances of justice*,' human beings are liable to come into conflict with one another over the allocation of material goods.[196] This tendency to conflict is not prevented by paying any heed to claims of possession and the situation can only lead to widespread conflict over these possessions and disagreement over what is to be done with them. According to Hume, people will fight for their survival and the value judgements they

[190] Kant, 1991, 134.
[191] Waldron, 1999c, 52: 'If people disagree about which actions wrongfully hinder freedom and which ones do not, then according to Kant they are *already* disagreeing about the occasions on which force may be used.'
[192] Hume, 1978, 519–20. See for a similar contemporary account of the limits of altruism in conditions of scarcity, Taylor, 1987, 111.
[193] Hume, 1978, 484–88.
[194] Hume, 1975, III, I.
[195] See Gauthier, 1982, 18.
[196] See Waldron, 1999a, 101–2; Audard, 1995, 19. See Chapter 6.

are disposed to make will naturally reflect the exigencies of their survival. Thus, individual judgements on matters of public concern will amount to war because individual judgements are likely to be (i) contrary to one another, for the reasons I discussed in the prior section, and (ii) taken seriously enough to be fought over. For Hume as for Hobbes, and by opposition to Kant who had to argue for a conceptual account of the pervasiveness of disagreement distinct from practical conflict,[197] the same thing explains both features: individual judgements about property and justice pertain to the exigencies of individual survival and the circumstances of human life are such as to provoke competition in this respect.[198]

Under these circumstances of justice, arises progressively a severe and disastrous competition for scarce resources among people whose motivation, under necessitous circumstances, is dominated by 'avidity,' the 'insatiable, perpetual and universal' desire to acquire 'goods and possessions for ourselves and our nearest friends.'[199] First of all, *avidity* is the product of limited benevolence and the selfish desire for riches and power. Although benevolence is based on sympathy, Hume's account of sympathy explains the natural limits of benevolence; the need for a mirror of one's own mind may well be fully satisfied by having at hand one's family and close friends.[200] To the extent that competition for survival is inevitable, the principle of sympathy is likely to induce a rather fierce *partiality* towards those in one's private circle. The pursuit of material interests need not therefore be the result of human selfishness and possessive individualism *à la* Hobbes,[201] but can flow from the partiality in human benevolence.[202] Secondly, in addition to avidity, the peculiar power of the *drive for material goods* is best explained by reference to sympathy once again. Indeed, 'nothing can give us an esteem for power and riches, and a contempt for meanness and poverty, except the principle of *sympathy*, by which we enter into the sentiments of the rich and the poor, and partake of their pleasures and uneasiness.'[203] This satisfaction, which 'is nothing but a second reflexion of that original pleasure, which proceed from him,' according to Hume, 'becomes one of the principal recommendations of riches, and is the chief reason, why we either desire them for ourselves, or esteem them in others.'[204] Finally, Hume argues, in 'large and polish'd societies, there is a strong temptation to violate the rules of justice for personal gain. While for any person the losses resulting from an act of injustice will outweigh the gains, as we saw before, the problem in large and complex societies is that the losses are relatively distant in imagination whereas the gains are immediate. This is the reason why men so often act in

[197] See on this precise issue, Waldron, 1999b, 46.
[198] See Waldron, 1999b, 46.
[199] Hume, 1978, 491–92.
[200] Hume, 1978, 481.
[201] See Miller, 1981, 112. Contra: Gauthier, 1979, 36.
[202] Hume, 1978, 602.
[203] Hume, 1978, 362.
[204] Hume, 1978, 365.

contradiction to their known interest; and in particular why they prefer any trivial advantage, that is present, to the maintenance of order in society, which so much depends on the observance of justice.'[205]

4. Judging the Situation: the Significance of Disagreement

a. Hobbes' Account of the Significance of Disagreement

Having described the terrible consequences of pervasive moral disagreement in the state of nature on Hobbes' account, it is crucial to measure their significance for individuals in the state of nature and the reaction that they create. One should in particular wonder: why would people naturally fear violence and death?

According to Hobbes, men are to abandon the state of nature by renouncing their right to all things, that is in effect renouncing their own private right of judgement about what conduces to their preservation and other moral matters.[206] The only moral judgements not implicated in the war of all against all therefore are basic and universally accepted judgements of *natural law*; these judgements counsel us to seek self-preservation through *social peace* where it is possible, by restraining our own individual judgements and our natural right to anything aimed at one's individual preservation. As Hobbes describes the situation, 'because the condition of Man is a condition of Warre of every one against every one; in which case everyone is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; it followeth that in such a condition every man has a Right to everything; even to one anothers body. And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man of living out the time, which nature ordinarily alloweth him to live. And consequently it is a precept or a generall Rule of Reason, *That every man ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain*

[205] Hume, 1978, 535.

[206] By contrast to other accounts of the social contract, such as Kant's for instance, Hobbes' does not clearly state whether or not people can be *forced* into convening with others. It is possible to construe the social contract not in the light of an optional commitment, but in light of the (common) reasons (of self-preservation) that would make such a commitment *morally necessary* (on the basis of the core moral consensus about the natural right to self-preservation). Hobbes indeed insists that the extent of one's political obligation is determined, not by the terms of the contract, but by the reasons there were for signing it in the first place. See Hobbes, 1999, ch 21, 151. I disagree with Waldron, 1999b, 58 who distinguishes Kant's compulsory conception of the social contract from Hobbes' by emphasising the mutual and relational importance of the Kantian contract by contrast to the individualistic justification of political obligation on Hobbes' account; if it is true that a Hobbesian individual's reasons for entering the social contract are always in the end individualised reasons of survival, the submission and compliance of others is necessary for individual preservation too. This seems to be the meaning of the first law of nature when it dictates seeking social peace and coordinating our judgements in order to do so. See Chapter 13 for a similar semi-voluntary account of coordination-based authority.

it, that he may seek and use, all helps, and advantages of Warre. The first branch of which Rule containeth the first and Fundamentall Law of Nature; which is to seek *Peace and follow it*. The Second, the summe of the Right of Nature; which is *By all mean we can to defend ourselves.*'[207]

A further question to be raised is the following: if people naturally seek self-preservation and peace when possible, why does the state of nature not provide sufficient conditions to do so? As discussed above, to seek peace amounts to recognising the fragility of our beliefs and renouncing our natural right to everything in pursuit of our private judgements about self-preservation. Even if they realised the futility of war and the advantages of peace *in the state of nature*, individuals could not have negotiated a truce among themselves producing a cessation of overt violence and a limited form of cooperation.

This is because, first of all, even if they share the basic and universal rule of nature that orders us to seek self-preservation through social peace *when possible*, this is not always feasible before there is an absolute and common power to enforce this rule and ensure that the other parties cooperate.[208] This consequence corresponds to Hobbes' contention that it might even endanger one's own security to cooperate, since 'he that should be modest . . . and performe all he promises in such time and place where no man els should do so, should but make himselfe a prey to others and procure his own certain ruine, contrary to the ground of all Lawes of Nature, which tend to Natures preservation.'[209] Thus, 'if a Covenant be made, wherein neither of the parties performe presently, but trust one another; in the condition of meer Nature, upon any reasonable suspition it is Voyd: But if there be a common Power set over them both, with right and force sufficient to compell performance; it is not Voyd. . . . And therefore he which performeth first, does but betray himselfe to his enemy; contrary to the Right (he can never abandon) of defending his life, and means of living.'[210] Paradoxically, however, it seems that to establish a power than can make us all keep our covenants, we must covenant to set it up in the first place and thus all agree to seek peace above all in the state of nature already.[211] Hobbes replied to this paradox by these (famous) words: 'the Lawes of Nature oblige *in foro interno*; that is to say, they bind to

[207] Hobbes, 1999, ch. 14, 91–92.

[208] See for a game-theory-based reconstruction of this principle, Hampton, 1997, 43 ff. See also Gauthier, 1969 and 1982. I disagree with the application of the Prisoner's Dilemma or of other rational utility-maximiser models to Hobbes' political theory. I will come back to this issue later. If I reject such reconstructions, it is mainly because, first of all, the Hobbesian individual does not hold his preferences and personal utility to be canonical and may well nourish other considerations that pre-empt his own preservation interest. In Hobbes' account individual psychology is *pluralistic*; thus, even if self-preservation is a pre-eminent element, other desires and aims, such as charity or benevolence, may take precedence over it. Secondly, I also disagree with the rational utility-maximiser account of Hobbes' theory because even when he seeks self-preservation, the individual does not necessarily aim at increasing his personal utility, but only at avoiding disaster. See Ryan, 1996; Hoekstra, 1997, 621.

[209] Hobbes, 1999, ch 15, 79.

[210] Hobbes, 1999, ch 14, 96.

[211] Ryan, 1996, 226. See on this paradox, Hume, 1975, II, 306; Hampton, 1997, 80 ff.

a desire that they should take place: but *in foro externo*; that is, to the putting in act, not alwayes.'[212] Thus, if upon making a contract a person finds that the other party has indeed performed, and that it is safe to perform himself, then he is obliged *in foro externo* too.

Beyond the issue of distrust and security, secondly, one may well wonder why if the laws of nature are part of the basic agreement about the universal and natural right to do anything aiming at self-preservation and hence more broadly at social peace when possible, they do not bind (*in foro externo*) *all* individuals in the state of nature and order them to hold their peace agreements there already,[213] thus settling the issue of security. The first reason for which people do not apply the first law of nature in the same way is that beyond the core agreement on the right to self-preservation that is evident 'even to people with the meanest capacity,' people might still reasonably disagree on secondary elements such as the *way* to achieve peace or their own preservation through the implementation of this agreement. This reasonable disagreement may also arise from the fact that the interest in self-preservation is *not canonical* or systematically pre-emptive of other interests and aims such as altruism or charity. A second reason is, according to Hobbes, that until they become sovereign and absolute commands, the (other) laws of nature, among which the third law of nature dictates the holding of covenants, fail to draw rational individuals to agreement, because each *holds* them to mean what she pleases so that 'in the differences of private men, to declare what is Equity, what is Justice and what is morall Virtue, and to make them binding, there is need for the Ordinances of Soveraign Power.'[214]

b. Rousseau's Account of the Significance of Disagreement

Throughout the *Social Contract*, Rousseau is at pains to emphasise the dangers of disagreement and even designates it as 'the *inherent and inevitable vice* which relentlessly tends to destroy the body politic from the moment of its birth.'[215] According to him, 'the more concord reigns in assemblies, that is to say the closer opinions come to unanimity, the more the general will also predominates; whereas long debates, dissensions, disturbances, signal the ascendancy of particular interests and the *decline of the State*.'[216] Interestingly for our purposes from a state of nature perspective, Rousseau goes as far as identifying disagreement about the common good as constituting the main cause for the *need for laws*; in ideal circumstances of consensus, 'a State thus governed needs very few Laws, and as it becomes necessary to promulgate new ones, this necessity is universally seen.'[217]

[212] Hobbes, 1999, ch 16, 110.
[213] See Hampton, 1986.
[214] Hobbes, 1999, 138.
[215] Rousseau, 1997, III, 10. See also Derathé, 1970, 235.
[216] Rousseau, 1997, IV, 2.
[217] Rousseau, 1997, IV, 1.

At a certain stage, individuals presumably face an increasing difficulty in the pre-political state: 'the stronger is never strong enough to be forever master, unless he transforms his force into right, and obedience into duty.'[218] Thus, when individuals 'reach the point where the obstacles that interfere with their preservation in the state of nature prevail by their resistance over the forces which each individual can muster to maintain himself in that state, then that primitive state can no longer subsist and human kind would perish if it did not change its way of being.'[219] Hence the aggregation of all forces into one association, ie the *social contract*, through 'the total alienation of each associate with all of his rights to the whole community.'[220] There is a reason for this individual alienation to be total and this reason is intrinsically related to the pervasive character of moral disagreement in the pre-political state; 'since the alienation is made without reservation, the union is as perfect as it can be, and no associate has anything further to claim: for if individuals were left some rights, then, since there would be no common superior who might adjudicate between them and the public, each, *being judge in his own case* on some issue, would soon claim to be so on all, the state of nature would subsist and the association necessarily become tyrannical or empty.'[221] In other words, to hold rights back, on a Lockean model, would be to retain the means by which dissent is produced and therefore to maintain the separation between the person and the community.[222]

This passage is crucial for our purposes since it shows that if the requirements of *self-preservation* and self-love call for social and political cooperation, what makes the social contract and a total individual alienation to the whole necessary is not the badness of human nature or any Hobbesian factual contentions about it,[223] but the inescapable reality of *moral disagreement* and the perpetual instability[224] and threat to freedom that this fact causes in the absence of a common and independent judge to settle the right in each case.[225] However, Rousseau's account differs slightly from Kant's on this issue, since although they both acknowledge the centrality of moral disagreement for the impulse to join the civil state, the decision cannot be one of *reason* and *right* for the Rousseauean pre-political individuals. Pre-political individuals are not reasonable in the sense that they are able to act so as to do what is right *tout court* (even only in their own eyes) by opposition to what is right only for them[226]: 'in the state of nature where everything is

[218] Rousseau, 1997, I, 3.
[219] Rousseau, 1997, I, 6.
[220] Rousseau, 1997, I, 6.
[221] Rousseau, 1997, I, 6.
[222] See Barry, 1995, 45.
[223] See in an analogous direction, Rousseau, 1963, 291.
[224] Rousseau, 1997, II, 6.
[225] Rousseau, 1997, II, 1: 'the *opposition of particular interests* made the establishment of societies necessary.'
[226] See on the ambivalence of the two types of reason (self-interested and disinterested reasons) in Rousseau's account of the transition to the civil state, by contrast to previous jusnaturalist accounts of discursive reason, Fetscher, 1968, 68–69.

common, I owe nothing to those to whom I have promised nothing. I recognize as another's only what is of no use to myself.'[227] Therefore, when the Rousseauean individuals associate in the social contract, it is because reasonable moral disagreement is threatening individual preservation and autonomy,[228] and not because it is incompatible with the general right of reason.[229]

There seems at first sight to be a paradox in the fact that, in the original contractual situation, the motives needed by individuals to relinquish particular will and self-interest and to embrace the general will and the common good cannot exist at the time the compact is made, but can only be the result of the socialisation and common morality that society alone can create.[230] If this might be a paradox for a self-efficacing Hobbesian account of the transition to the civil state that also aims at justifying the general will even once people have such a will, it is not the case for Rousseau's theory. Beyond individual interest in social interdependence, what also constitutes a source of the 'common good morality' that issues from the contract and motivates individuals in the Rousseauan pre-political state to conclude a social contract is the protection of their freedom and autonomy in circumstances of disagreement, thus introducing in the contractual situation itself an *anticipation of the general will*.[231]

c. Kant's Account of the Significance of Disagreement

Once the pervasiveness and the existence of direct violent consequences of moral disagreement has been established, one may still wonder why, in Kant's account, moral disagreement and its coercive consequences are so significant. In other words, why is the use of force to settle moral disagreements a bad thing?[232]

One may well argue that conflicts usually get solved one way or the other, if the claims defended are inconsistent. The use of force might even be 'as effective [a] mechanism for ensuring mutual consistency as [external] law.'[233] However, this kind of argument cannot hold in view of Kant's approach to justice; force, as a contingent means, may only solve conflicts that *will* happen, as empirical facts, and is not about what *ought* to happen,[234] ie the exclusion of all possible future conflicts.[235] The reason for the unacceptability of the state of nature cannot be that such a conflictual state of things is simply unpleasant; it follows from what has been said before of Kant's metaphysical approach that all *contingent*

[227] Rousseau, 1997, II, 6.
[228] See on the difference between Rousseau and Kant, Derathé, 1970, 247.
[229] See Fetscher, 1968, 140–41. In this respect I disagree strongly with Viroli, 1988 who considers Rousseau's theory of the social contract as a research for a *rational* solution to the problem of the *absence of order* among human beings.
[230] Riley, 1982, 110.
[231] Cohen, 1986b, 282 ff.
[232] See Chapter 13.
[233] Pogge, 1988, 412.
[234] Pogge, 1988, 412.
[235] Pogge, 1988, 416–17.

parameters such as happiness should be precluded from the establishment of both the antagonistic nature of the state of nature and its banishment.[236] People always have 'different views on the empirical end of happiness and what it consists of.'[237] One should therefore turn to *moral* justifications of the necessity to banish the use of private violence to settle disagreements.

According to Kant, people cannot unilaterally impose valid duties on others 'for a unilateral will cannot put others under an obligation that they would not otherwise have.'[238] This is the consequence of the principle of universality of the right, according to which any personal obligation is part of a system of mutual respect.[239] It implies therefore that obligations may only result from a reciprocal[240] and 'omnilateral will.'[241] Kant's argument against the use of individual violence as a way to settle moral disagreements and to establish what is right is that, in its conflictual characteristics, the state of nature does not provide any way of imposing obligations in an omnilateral way. The requirement of omnilaterality derives from Kant's conception of *external freedom*.[242] According to this account, justice and the right are concerned with the reciprocal limits set to the impact of the exercise of one's external freedom on another's; if coercion is used to protect an individual and controversial view of external freedom, others' external freedom might not always be protected according to the universal right and to *justice*.[243] Finally, if one bears in mind Kant's view that without justice 'there is no longer any value in human beings living on earth.'[244] the violation of external freedom, and hence of justice,[245] by a unilateral use of coercion amounts to denying any relevance to *morality* and internal freedom. The justification for avoiding the use of violence in case of moral disagreement is therefore simply that, according to Kant, using coercion to unilaterally protect one or the other view is *morally wrong*. 'War is not the way in which anyone *should* pursue his rights,'[246] says Kant.

d. Hume's Account of the Significance of Disagreement

Once Hume has established that disagreement leads to pervasive conflictual consequences, he still has to show how this is a problem that needs to be solved.

[236] See Waldron, 1996, 1556; Williams, 1983, 168; Sullivan, in Kant, 1996, xv; Pogge, 1988, 412–13.
[237] Kant, 1991, 73, 70.
[238] Kant, 1996, 52, 264, 44, 255.
[239] See Kant, 1996, 24, 231.
[240] Kant, 1991, 137; Kant, 1996, 44, 256: 'I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provided me with the assurance that he will behave in accordance with the same principle with regard to what is mine.'
[241] Kant, 1996, 51, 263.
[242] See Pogge, 1988, 412.
[243] Kant, 1991, 134.
[244] Kant, 1996, 105, 332.
[245] In this regard I agree with Waldron, 1999c, 55, who dismisses the contention that justice is capable of being merely internal on the model of Hobbes' *foro interno*. Such a conception would not fit Kant's fundamental distinction between internal and external freedom and his limitation of the realm of justice to external actions. See Kant, 1996, 24, 231.
[246] Kant, 1996, 123, 354.

According to Hume, it is human sociability that makes the resolution of the problem posed by disagreement *both necessary and possible*.

To understand why people's concern should extend beyond their own interests and beyond the conflicts which result from their partiality and avidity, it is important to recall Hume's views about human sociability. Hume regards the need for society as basic to human nature, basic enough to overcome the conflictual consequences to which it leads in the first place.[247] Thus, the most fundamental condition of social survival lies in securing and expanding the stock of material goods for individual enjoyment and thereby establishing conditions for productive and mutually beneficial *cooperation*. The foremost threat to social cooperation essential to human survival and improvement is perpetual violent challenge to the stability and certainty of possession of material goods. This challenge and problem of social coordination needs to be met by establishing a scheme of general fixed rules stabilising and securing possession.

This drive for regularity and stability not only forces one to regiment one's feelings, but it also requires that the chosen policy or rule be a common and public one which alone makes conversation and communication possible. As Hume argues, 'every particular person's pleasure and interest being different, it is impossible men could ever agree in their sentiments and judgements, unless they chose some *common point of view* from which they might survey their object and which might cause it to appear the same to all of them.'[248] Just as we correct immediate perceptual experience by reference to a common point of view, so too we should correct our sentiments and judgements to conform to the customs and practices which constitute our common life.[249] And it is to this principle of sympathy and the deep psychological need for coherence that we should appeal in order to explain 'the great uniformity we may observe in the humours and turn of thinking of those of the same nation,' rather than to climate or geography as others have suggested.[250] Thus, Hume explains our agreement in moral judgements by saying that the latter should express the judgements we *would* render *were* we to take up the point of view of the *judicious spectator*. Given the persistence of reasonable disagreement, there is no hope of reaching agreement, if we all insist on viewing matters only as they appear to us from our own personal point of view. 'In order, therefore, to prevent those continual *contradictions*, and arrive at a more stable judgement of things, we fix on some steady and general point of view; and always in thoughts place ourselves in them, whatever may be our present situation.'[251]

Thus, there arises progressively a need for convergence on a common procedure 'by which I may impose a restraint upon myself and guard against

[247] Hume, 1978, 363.
[248] Hume, 1978, 591. See also Hume, 1978, 581.
[249] Hume, 1978, 581–83.
[250] Hume, 1978, 316–17. See eg Montesquieu, 1989.
[251] Hume, 1978, 581.

this weakness.'[252] 'The only difficulty is therefore to find out this *expedient* by which men cure their natural weakness, and lay themselves under the necessity of observing the laws of justice and equity, notwithstanding their violent propensity to prefer contiguous to remote.'[253] Hence, our convergence on the adoption of a formal and authoritative administration and monitoring of justice, as well as on civil laws in order to 'fix all the questions with regard to justice.'[254] Similarly to Kant's views on the *public* use of reason, Hume argues that we only learn about ourselves and our sentiments or *opinions*[255] through commerce and communication with others.[256] 'By our continual and earnest pursuit of a character, a name, a reputation in the world, we bring our own deportment and conduct frequently in review, and consider how they appear in the eyes of those who approach and regard us. This constant habit of surveying ourselves, as it were, in reflection, keeps alive all the sentiments of right and wrong, and begets, in noble natures, a certain reverence for themselves as well as others, which is the surest guardian of every virtue.'[257] Without the confirmation of the thoughts of others, we do not know properly what we (ought to)[258] think.[259]

This is the solution Hume has found to his sceptical paradox that demonstrates the severe limitations of reason and hence that most of our natural beliefs on which all common life depends can be given no rational foundation, but yet shows that it seems insane to reject them. In order to find an alternative to transcendent, a priori reasoning, when dealing with persistent reasonable disagreement, Hume makes way for custom and 'the reasonings of common life.'[260] It is 'custom to which I attribute all belief and reasoning.'[261] General rules and principles are neither purely private nor universal, but constitute social practices defining a common point of view on a shared world. It is our natural affection and need for company and conversation that demands that our judgements and beliefs conform to the common point of view defined by custom.[262] In a sense, therefore, it is *human fundamental sociability* that, on Hume's account, first, leads to disagreement, then calls for a remedying order and, finally, makes stabilising conventions possible.[263]

[252] Hume, 1978, 537.
[253] Hume, 1978, 537.
[254] Hume, 1975, II, 286.
[255] Hume, 1978, 317.
[256] See Forbes, 1975, 106.
[257] Hume, 1975, II, 276.
[258] The 'ought' here does clearly not carry any moral weight, for it refers simply to what is appropriate in the circumstances.
[259] Hume, 1978, 293; 1975, II, 241. See also Postema, 1986, 96; Forbes, 1975, 108–9.
[260] Hume, 1975, I, 41.
[261] Hume, 1978, 115.
[262] Hume, 1978, 489, 581–83.
[263] See on Hume's use of human nature as the foundation of morality, Fate Norton, 1993b, 148 ff.

II. SOME NON-FICTIONAL OBJECTIONS

1. From the Conceptual Truth to the Fact of Disagreement

Although most contemporary authors would agree with the persistence of a certain amount of reasonable disagreement about justice in virtue of its reasonableness, opinions diverge as to the exact extent of disagreement, and more generally of moral and social pluralism. I have argued in the first part of the book for the reasonableness of political-moral disagreement and spelled out some if its implications for the persistence of disagreement. Given the growing diversity in people's social and cultural background in our Western societies,[264] the reasonableness of disagreement can only also be a warrant of its pervasiveness. The same can allegedly be said of the extent of social pluralism and epistemological types of disagreement, for the existence and depth of which I have argued in the first part of the book. What remains to be assessed, therefore, is the precise extent of social and moral pluralism and the impact this can have on the significance of disagreement.

Whereas the state of nature fiction came up with a priori rather than historical or empirical arguments for the extent of potential disagreement,[265] most contemporary objections are clearly empirical.[266] They concentrate, in other words, on the *fact* of disagreement rather than on its *conceptual truth in ethical life*,[267] that is to say on how much disagreement there really *is* rather than on how much there *can be*. It follows from the conceptual truth of reasonable disagreement, however, that it is not invalidated by the absence of disagreement *on some issues* and *at particular times*. As Williams argues, practical convergence in the moral realm need not reflect moral coherence and can take place for wrong reasons, contrary to what takes place in the realm of the sciences where convergence reflects how things really are.[268] It therefore follows that not much can be deduced in terms of the actual extent of potential disagreement from the empirical observation of convergence. Disagreement could potentially derive from the same moral situation in other circumstances. Moreover, as we have just seen thanks to the state of nature fiction, the amount of practical convergence there is can only be measured according to the amount of disagreement there is in the first place. As Hume argues, indeed, without disagreement, we would not need to converge. It seems difficult, therefore, to make the negative extent of disagreement depend

[264] See Freeden, 2003, 94 ff on globalisation and the alleged 'end of ideology.'

[265] See Williams, 1983, 168; Sullivan, in Kant, 1996, xv; Reiss, in Kant, 1991, 27–28. On Kant's hostility to anthropology, Kant, 1996, 212, 466. No doubt attention to human nature is necessary for thinking about application, enforcement and inculcation of virtue, but it should not be involved in the foundation or definition of virtue itself: Kant, 1991, 11, 217.

[266] See Gowans, 2000, 18 ff on the distinction.

[267] See Williams, 1993, 154–55. On the contrast between the *fact* and the *conceptual and normative issue* of reasonable pluralism, see Mouffe, 2000, 18 ff.

[268] See Williams, 1993, 136. See Chapter 1.

on the positive extent of convergence. The more agreement there is, the more disagreement there could potentially be or the more disagreement there has been in practice.

Thus, reasonable disagreement need not be all-pervasive to be a problem; what matters is that it *can be* sufficiently pervasive to give rise to some important negative and positive consequences. Hobbes captures this idea very well, when he argues that 'the nature of War consisteth *not in actuall fighting*; but in the known disposition thereto, during all the time there is *no assurance to the contrary*.'[269] Historical and empirical accounts of the extent of disagreement do, however, provide useful insights in the context of the elaboration of a response to disagreement. In fact, I would like to argue that both elements are needed to provide a full assessment of the pervasiveness and significance of disagreement. It is therefore important to review some of these empirical objections here.

2. Some Empirical Objections

One of the first observations one may make on grounds of historical or empirical evidence is that people tend to agree on rather *general values and concepts*. For instance, most people would agree that we need to protect private property, but would disagree about the exact ways of doing so. It is true that most disagreements only arise when the exact contours of moral principles and rights are discussed, or even in some cases when those rights and principles are applied. It remains, however, that most of the time we need to go further than convergence on general principles. When we legislate, for instance, we need to make sure we get into the details of the different principles and rights which the law, and more particularly the constitution, guarantees, and this is bound to raise disagreements. As Kant has shown, even if private property is commonly agreed upon, agreement on the details of the prohibition on stealing would be consistent with a great deal of moral disagreement. Of course, one may argue, like Raz, that disagreement over applications are *agreed upon disagreements* as it were, ie cases left open on purpose for further debates.[270] I will discuss the role of this kind of intermediary level of agreement in the context of general legal guarantees of fundamental rights in the third part of the book.[271] The difficulty is that we can never foresee all potential further disagreements on general agreed concepts and principles, thus making it unlikely that we would necessarily agree on disagreeing further *in all cases*. Besides, whether or not those disagreements are agreed upon does not take away the fact that they are disagreements and hence call for an evaluation of the significance of this kind of pervasive and persistent disagreement.

[269] Hobbes, 1999, ch 13, 88–89.
[270] See Raz, 1998a.
[271] See Chapter 10.

Secondly, the converse observation one may make when faced with empirical evidence is that people tend to agree more on concrete applications of certain principles than on a highly general theorisation of them. This is what Sunstein refers to as *incompletely theorised agreements*.[272] In those cases, convergence is achieved by not wholly theorising the conflict; the parties converge before seeking agreement on all the theoretical commitments that underlie their judgements in a concrete case.[273] Despite their advantages in many areas of legal decision-making, and in particular in adjudication, I do not think that such workable agreements can escape complete theorising at the legislative level. They cannot therefore avoid deep reasonable disagreements in those cases. Think, for instance, of a case where all would agree a woman's right to equality has been violated; by the time the decision has been taken, the issue will arise of how this decision will be interpreted as a precedent and how it may be turned into a legislative rule, thus raising issues of theorisation and generalisation of the principle applied in the case and in turn generating disagreement. In fact, Sunstein has recently acknowledged this himself, when he argues that:

> there are substantial differences between deliberation on a court and deliberation in politics generally. The argument I have sketched has everything to do with role-related constraints on judicial behaviour. In politics, citizens occupy a distinctive role, and while it is generally good for them to economize on moral disagreement, there is nothing like a rule to this effect.[274]

A third observation and argument one may venture is that there are *particular issues* on which people tend to disagree less than others,[275] either for social or for moral reasons. This is the case, for instance, of issues pertaining to family life and hence to family law, but also more generally of property law and basic principles of private law. Another area is criminal law and issues pertaining to violations of personal integrity and personal life. Although this is an important observation that contributes to making the scope of reasonable disagreement more relative, things are not always as simple as they appear to be. First of all, although people may agree on central issues in those fields, they will tend to disagree about borderline cases. This is the case, for instance, of agreement on the wrongness of rape in general despite disagreement on the wrongness of marital rape. The problem is, however, that these borderline cases are often so common that they become centre stage. It follows from this example that many laws which seem at first sight to reflect plain and uncontested moral beliefs, do establish, in their complex details, procedural and presumption-related elements which are not uncontroversial, but over which we would rather coordinate than not. One may

[272] Sunstein, 1999, 123 ff.
[273] On the related issue of the discursive dilemma, see Pettit, 2001b; Pettit, 2003b. See also Chapter 11.
[274] Sunstein, 1999, 147.
[275] See Chapter 6.

think, for instance, of convergence on the need to organise criminal sanctions for cases of illegal abortion, even though one disagrees with the exact scope of illegal abortion. Secondly, as Hume argues, the need for convergence on certain issues triggers divergence on them. Thus, although we need to converge on basic issues of social organisation, we tend to disagree even more about them for that very reason. True, this is not the case on a smaller scale and in particular at the level of family organisational matters. However, the analogy between private or family-based sociability and public or large group sociability reaches its limits with the size of the group. Hence the very limitations of the extent of agreement beyond matters pertaining to the private and familial sphere.

Fourthly, another observation one may make rightly contends that not all *moral differences* will give rise to moral disagreements. People might live according to conflicting views of justice, without yet opposing conflicting beliefs about it to each other.[276] There are indeed reasons for not always wanting to enforce one's views by enlisting political power on their behalf; the emergence of political conflict over moral matters depends indeed on *history, material circumstances and elements of the political culture such as restraints of civility*,[277] that often interrupt the passage from mere doctrinal differences to politically relevant moral conflicts. Moral conceptions are normative views, however, and as such, they are action-guiding and usually give rise to the expression of conflicting opinions or even to conflicting actions. Moreover, there are moral differences over which we will not refrain from disagreeing, mostly because they relate to issues which matter to us such as issues of distributive justice, in particular. Think, for instance, of a case in which people have different views of how public revenues should be spent and distributed. Whatever they understand as being the cultural and social norms in the matter, they will not refrain from disagreeing over those issues if they regard them as pertaining to their own direct wellbeing and survival, to borrow state of nature theorists' jargon. Finally, as we will see, reasonable disagreement about justice may even be regarded as a positive political attitude to take in some cases, thus questioning some of the social and cultural limits to actual disagreement over our moral differences. In this sense, agreements of this kind are usually local and temporary, or at least fragile enough to be questioned at any time. Compare, for instance, the agreement people seemed to have reached on abortion in Western European countries at the beginning of the twentieth century and the current degree of controversiality of the issue. The absence of disagreement on the issue at the beginning of the twentieth century might be explained, besides the explanation related to the lesser degree in social pluralism there was then, in terms of the strong pressures for agreement and conformity set by dominant religious groups and the blank rejection of minority views on the issue, such as women's views in particular. Too strong a political and legal unity on difficult moral issues such as abortion may often cover deep potential disunity.

[276] See Green, 2001.
[277] See Green, 2001, 96. See Chapter 1.

Finally, Raz warns against a common tendency among political and legal theorists to see all the worst political disagreements as intractable disagreements over principles or moral issues; not all important *social and political differences* involve differences of values.[278] Although this is true and we should not overstate our moral disagreements, it is important to realise that many of our important political differences do stem either from differences of values or from differences in conceiving them. Besides, as Williams argues, most empirical disagreements will usually lead to theoretical and normative disagreements.[279] Take the example of a conflict over the distribution of social goods. The conflict will start by being empirical, but will quickly turn into a theoretical disagreement about which distribution is more just. This is also something Hume observes, as he argues that, even when disagreement is *practical* in the sense that it is close to desire and action, the parties will invoke more *substantive judgements* and will end up disagreeing *about value*.

CONCLUSION

This chapter assessed different claims made for and against the pervasiveness of disagreement and aimed at establishing the exact extent of disagreement. The state of nature fiction was central to social contract theories like Hobbes', Rousseau's and Kant's, but also to later accounts of law and politics, as for instance Hume's theory. It was developed mainly to measure the exact extent and significance of disagreement and hence to prepare the ground for an account of the response to disagreement and more particularly for a complete theory of law. Accounts of the state of nature therefore constitute precious indications of the extent of reasonable disagreement about justice before we start coordinating our conflicting conceptions of justice politically and legally.

Whatever their meta-ethical grounds are, and if one puts aside the differences in their approach and analysis, all state of nature theorists discussed in this chapter converge on a key element of human behaviour: human sociability and the social generation of disagreement and instability. According to them, as soon as human beings start to socialise, which is inevitable, and whether one regards them as being naturally good or bad, reasonable disagreement about justice and matters of common concern arises, whether for metaphysical or epistemological reasons, and, in the absence of an umpire or common arbitrator, quickly becomes pervasive enough for social relations to grow unstable or even violent, whether the actual use of violence is a reflex of survival or a requirement of justice. Hume is the first, however, to draw the link between the socio-genesis of disagreement, on the one hand, and the desirability and potentiality of convergence implied by the sociability of human beings, ie the very cause of their disagreement, on the other.

[278] Raz, 1998a, 26. See also Green, 2001.
[279] See Williams, 1993, 133–34. See also Chapter 1.

This in turn implies that the extent and significance of disagreement are closely linked; the more disagreement there is, the more significant it is in view of the need to converge, but the more need to converge there is due to human sociability, the more disagreement there will be. In fact, this reinforcing circle has been confirmed lately by the rise in the amount of disagreement due in part to the increasing social pluralism that characterises interconnected and interdependent contemporary Western societies; the more global sociability becomes, the more disagreement there will be and in return the more global convergence and sociability will be needed, thus increasing the amount of disagreement, etc.

After discussing the various elements of the state of nature account of the extent of disagreement, I turned to more recent non-fictional objections to the pervasive character of disagreement. I concluded that reasonable disagreement about justice is here to stay and in proportions large enough to require accommodation and call for concern. Although disagreement is not omnipresent, its pervasiveness is a result of growing social and cultural diversity and hence of increasing epistemological and metaphysical burdens of reasons. Disagreement amounts to more than a simple and contingent fact, however, as it is also a *conceptual truth* about ethical life.[280] What matters therefore is not so much how much disagreement there really *is*, but how much there *can be*. First, practical convergence need not reflect any actual moral coherence and does not pre-empt the likelihood of future disagreements, and secondly, convergence is usually a reaction to disagreement. The lack of assurance that our moral differences will not turn into disagreement, to borrow Hobbes' terms, is enough to make the extent of disagreement a concern and justify its significance. Of course, moral differences should not be overstated as many of our conflicts are purely empirical. Besides, all our moral differences need not necessarily give rise to actual disagreements. Furthermore, we tend to agree more on rather general principles and values. However, most of our differences can turn into theoretical and normative conflicts, especially when our differences pertain to particular issues of social and political distribution that go beyond the private sphere and affect our collective wellbeing and survival. This was already what state of nature theorists diagnosed when they set up their fiction.

As a result, the significance of reasonable disagreement is not invalidated by the absence of disagreement *on some issues* and *at particular times*. Reasonable disagreement need not be all pervasive to be a problem; what matters is that it is sufficiently pervasive to give rise to some important negative and positive consequences. There can be other competing justifications for law's authority and legitimacy; disagreement-based and coordination-based accounts of law need not cover all grounds for the latter's normativity, although disagreement and coordination provide the latter's *main* grounds.

[280] See WILLIAMS, 1993, 154–55.

6

Disagreement as a Source of Coordination Problems

INTRODUCTION

> If we can show (1) that securing coordination is good, and (2) that the law is better at securing coordination than alternative methods, and (3) that its doing so has no adverse effects (or none serious enough to outweigh the advantage of doing so), then we can conclude that it has the task of securing coordination.[1]

DISAGREEMENT MATTERS BECAUSE the idea is that somehow, for various types of issues and goals over which people disagree such as issues of justice in particular, there needs to be a concerted course of action to achieve them effectively[2] and that it is therefore better to live in accordance with a single set of rules rather than none: we may think not only of the need for action-in-concert in different realms of modern life such as the protection of the environment or security,[3] but also of most other activities where a single rule to guide individual conduct is needed. We need in other words to *coordinate* and thereby to know what to expect from other people and have them know what to expect from us. The problem is that we disagree on what those coordination rules ought to be and hence need to coordinate on them.[4] As Waldron argues, 'the need for a common view does not make the fact of disagreement evaporate.'[5] In short, therefore, and as Hume argues,[6] *disagreement* is what explains the need for *politics* and rules since we need to *coordinate* on justice and the common interest.[7] However, the *need for coordination* also helps elucidate in return why we *disagree*

I discussed a very early version of this chapter with Jeremy Waldron in June 2000 and would like to thank him for his precious comments and reactions. Some of this chapter's arguments were also presented in Wojciech Sadurski's seminar in legal philosophy at the EUI, Florence in March 2004 and I would like to thank all participants for their critiques and comments.

1 RAZ, 1998D, 10.

2 See RAZ, 1995A, 349 according to whom the law has the ability to achieve 'goals which individuals have reason to pursue but cannot do so effectively on their own, because their realization requires coordinating the actions of a large number of people.'

3 See ARENDT, 1973, 173–74; ARENDT, 1968A, 197 ff. See also WALDRON, 2000C, 197 on Arendt's constitutional politics.

4 See WALDRON, 1999A, 101–2.

5 WALDRON, 1999A, 106.

6 HUME, 1978, 489, 581–83. See also BOLTANSKI/THÉVENOT, 1991.

7 See CHRISTIANO, 1999A, 181; BARBER, 1984, 120 ff.

in the first place.[8] Disagreement and the need to coordinate are dialectically bound and, to quote Waldron, *two faces of the same reality: the circumstances of politics.*[9]

In fact, part of the point of political organisation is to produce single decisions when there are serious disagreements regarding the matters to be decided. It has long been a tradition in philosophical jurisprudence[10] —from Cicero[11] to the present day, this includes theorists as different as Aquinas, Bentham,[12] Hobbes, Puffendorf,[13] Locke and Hume—to contend that, while the law's ultimate aspiration may be justice or something else, its proximate aim and defining task is to supply a framework of practical reasoning designed to coordinate social interaction.[14] This approach has been revived and has gained attention in recent writings in jurisprudence that explain law as providing solutions to coordination problems.[15] It constitutes a particularly insightful account of democratic law-making and of democratic authority; coordination is not only a way out of state of nature types of disagreement, but also a crucial tool of political and legal decision-making in contemporary democracies.[16] In a democracy, we are our own authorities and hence constantly have to coordinate our conflicting actions and opinions.

For various reasons, large numbers of us believe that we should act together in those areas where our goals can only be achieved if we *play our part* in a common framework of action, and not by merely accommodating the positions with which we disagree and by being tolerated in ours.[17] This need for action in concert should not be taken too literally to mean actions which are necessarily to be performed collectively in a practical sense, since behaviours which are of common interest and over which we need to coordinate our views, such as the pro-

[8] If there seems to be an infinite regress when contending that disagreement about common matters creates the need to coordinate on them, that the need to coordinate on these matters explains disagreement about how to do so, and that, finally, disagreement about how to coordinate explains why we need politics to coordinate these different views, etc, it is only apparent and natural. See also MACKIE, 1977, 170–72 on the relationship between conflict and coordination. See also BENJAMIN, 1990, 31 on the circumstances of compromise and by reference to Auerbach's contention that 'how people *dispute* is a function of how they *relate*.'

[9] See WALDRON, 1999A, 101–2 on the dual *circumstances of politics*, ie, on the one hand, the need for a concerted course of action on many issues and, on the other, disagreement about both these issues and the course of action to be taken in case of disagreement about them. Waldron draws on Rawls' 'circumstances of justice,' that are modelled on Hume's 'circumstances of justice'; these are, on AUDARD's, 1995, 19 account, the 'existence of subjective and *opposed interests* within an objective situation of *scarce resources* and *necessary cooperation*.' See Chapter 5.

[10] See POSTEMA, 1986 and POSTEMA, 1996, 89 ff.

[11] CICERO, *De Officiis*, Liber Secundus, 42.

[12] See POSTEMA, 1986, ch 9 and POSTEMA, 1989.

[13] See PUFFENDORF, 1964, II, 2.7.

[14] POSTEMA, 1996, 80.

[15] See eg FULLER, 1969B; FINNIS, 1980; GANS, 1981; POSTEMA, 1982; GREEN, 1983; RAZ, 1999B; LAGERSPETZ, 1995; RAZ, 1995A; POSTEMA, 1996; RAZ, 1998D; COLEMAN, 1998; MARMOR, 1998; WALDRON, 1999A; GREEN, 1999; WALDRON, 2000A; COLEMAN, 2001; KUTZ, 2001A; SHAPIRO, 2002; PETTIT, 2002A; KUTZ, 2002A; GARDNER, 2002; BRATMAN, 2002.

[16] See HAMPTON's, 1997 coordination-based analysis of Hobbes' and Locke's accounts of the social contract.

[17] See Chapter 7. See also GOWANS, 2000.

hibition of murder, may be in the end performed by just one person. Action in concert is not easy, however, and people disagree about how to secure it; the task of coordination conventions is precisely 'to cut off all occasions of discord and contention,'[18] ie to define a framework for social interaction regarding matters on which there may be wide dissent on the merits. This may be done through the establishment of a legal system. People in an organised society will therefore need to establish and follow legal rules to coordinate better on one of the options at stake (third-level coordination), but different views of what these rules and rules over matters of public interest *tout court* could be, and of what the matters on which we need to coordinate are, will also have to be coordinated through various political procedures such as the majority rule (second-level coordination). Finally, the point in and the scope of coordination itself, and the general structure and authority it should be given, need coordination at a very basic level and this may be done through different types of governing conventions (first-level coordination). These different degrees of disagreement, and hence of different coordination conventions, build upon one another and correspond to Hume's coordination pyramid,[19] which I described in the previous chapter.

In this chapter, I would like to lay the foundations of a further argument I will develop at the end of this book. According to that argument, part of the respect[20] we should have for the law and hence part of the justification of the law's authority is a result of the law's facilitation of concerted,[21] cooperative, coordinated or collective action[22] in circumstances of reasonable disagreement. Before getting to that stage of argument, however, I need to establish that there is a need to coordinate and assess how it plays out. Then only will I be able to argue that law, and politics more generally, are indeed a good way, and sometimes the best way, to help secure our need for concerted action in circumstances of reasonable disagreement.[23] My objective in the present chapter is therefore to reply to the three

[18] HUME, 1978, 502.

[19] See HUME, 1978, 543. Many authors, however, do not seem to have grasped this progression and different stages in Hume's argument. See, for instance, TAYLOR, 1987, 156 ff who does not see why, if laws of justice are conventions, we would need a government and positive laws to enforce them. What Taylor misses is that the need for each institutional stage arises from the defects in the institutions or conventions of the previous stage—defects which paradoxically are due largely to the *success* of these institutions in more complex environments.

[20] See WALDRON, 2003A on the relationship between *respect* for law and the latter's *authority*. See Chapter 13.

[21] I will use the terms 'coordination,' 'cooperation,' 'collective action' or 'concerted action' interchangeably in this chapter, although the more appropriate, but also narrower term, at least in the game theoretic context, is the first one. Hence I disagree with the distinction some authors like SHAPIRO, 2002, 394 draw between 'coordination' and 'cooperation' and later between 'coordination conventions' and 'shared cooperative action plans'; Shapiro wrongly assimilates coordination with Lewis' coordination conventions and pure coordination problems. See for a similar critique, GARDNER, 2002, 499 and BRATMAN, 2002, 515–16. In fact, SHAPIRO, 2002 himself seems to be at pains to keep the distinction, as he later uses the terms 'cooperation' and 'coordination' interchangeably.

[22] Coordination problems represent only one form of strategic interaction likely to arise in social contexts and in particular in the legal context. See SCHELLING, 1963, ch 7.

[23] See for a similar approach and order of questions, WALDRON, 2003A; RAZ, 1990, 5.

questions raised by the quotation with which I started. I need to assess, first, the validity of the claim according to which we *need to coordinate* in the face of disagreement. A second objective is to establish the *essential contribution to the coordination problem* that could be made by politics and the law in particular. Finally, I hope to be able to assert, in the last section, that coordination constitutes in fact one of the *law's main functions*, thus laying the foundations for a coordination-based account of the law's authority.

I. COORDINATION PROBLEMS AND WHY WE NEED TO SOLVE THEM

In what follows, I would like to explain why we need to coordinate. To do so, I will discuss, in the first section, what could be the grounds of this need to coordinate and what makes coordination possible. The second section will discuss different game theoretical models of coordination problems and propose a revisited version of the classical political coordination problem. Finally, in the last section, I would like to explain why these coordination problems need to be resolved.

1. The Need for Coordination

Coordination problems do not just appear in societies where people are too weak or too wicked to care for one another. They are pervasive in human communities.[24] Stated simply, decent life in society and the successful pursuit of important ends and projects, whether individual or common, depend on complete forms of interpersonal interaction and social coordination.[25] In this respect, Hume humorously notes that human beings 'cannot even pass each other on the road without rules.'[26] Interestingly, however, most models and discussions of coordination presuppose that the need,[27] the moral interest or even, for some, the moral reason to coordinate is established. In the few accounts where the need for coordination is explained, it is by reference to a caricatured and war-like state of non-coordination.[28]

[24] See FINNIS, 1980, 231–32: 'Intelligence and dedication, skill and commitment thus multiply the problems of coordination, by giving the group more possible orientations, commitments, projects, priorities and procedures to choose from.'

[25] POSTEMA, 1996, 89.

[26] HUME, 1975, II, 210.

[27] The term 'need' is itself relatively vague, thus increasing the difficulty. See, however, WALDRON, 2003A who also refers to the 'need' for authority and coordination. The difficulty is made even worse by the interchangeable use of terms such as (objective) 'desirability' or 'interest' to coordinate. See eg WALDRON, 1993E, 22 who speaks of the *moral interest* to coordinate and have coordination institutions. Although he interchangeably uses the terms 'interest' and 'reason' in that context, it is important to note that not all moral interests to coordinate will be sufficient to give rise to reasons to do so. See Chapter 13.

[28] See eg NEVES, 2000. See GAUS, 2002 for this critique of WALDRON's, 1999A Hobbes-like and dystopian account of the need to coordinate.

It is important at this stage of the argument, therefore, to understand better what the need to coordinate refers to, before discussing the problems it then runs into and the way to solve them. It is crucial to determine why people need to coordinate before we can understand what the problems with coordination are and how normative this need can be. To do so, I will first address the question of *why* we need to coordinate in the face of reasonable disagreement. After the exposition of different accounts of such a need, it will be important to turn to the question of *how* such necessary coordination is possible in circumstances where reasonable disagreement can presumably extend to the need to coordinate.

a. The Desirability of Coordination

There are two main explanations of why we should seek stability and coordination when we disagree reasonably about justice and the right: a moral explanation and a psychological one.[29]

Primarily, there is the *moral interest* to coordinate. According to Finnis, the *composite* nature of *morality*, that is due to it being made of different types of values that are not always easily reconcilable, explains the importance and the need to concert about them and coordinate; 'we can say,' he argues, 'that people who share substantially the same concept (eg of the human right to life, or to fair trial) may nonetheless have different conceptions of that right, in that their specifications . . . differ, partly because the circumstances they have in mind differ and partly because specification normally involves choices, by some authoritative process, from among alternatives that are more or less equally reasonable.'[30] Without necessarily adopting an approach to politics based on the common good, it is obvious how this account of the diversity of our conceptions of justice and the right, which echoes the account of social and moral pluralism developed in the first part of the book, explains the need for coordination. The moral necessity to coordinate derives from the importance of *securing justice and the right* in the face of reasonable disagreement about them. Again, there are two reasons one may distinguish here.

First of all, *justice is partly a matter of cooperation*. Although we may often be able to ensure justice on our own and according to our individual conceptions of justice, there will also be cases where we feel that things would go better from the point of view of justice, if others were following the same goals as us or adopted the same conceptions of them.[31] This is not only the case where concerted action is actually needed to achieve justice, but even in cases where people could do justice individually. Take the example of murder, for instance; I surely can abstain

[29] See Hampton, 1997, 73 who mentions rational grounds of self-interest and moral grounds of general wellbeing. This does not exclude other ways of explaining the need to coordinate. See Wingo, 2003 on the importance of realising the coexistence of rational and non-rational motivations for political stability and convergence.

[30] Finnis, 1980, 219.

[31] See Waldron, 1993e, 23. See also Postema, 1997.

from murdering in certain conditions on my own and hence achieve justice, but overall justice would be better achieved if we could coordinate on what is murder and what is not, for instance in the context of abortion or of self-defence. Of course, this does not mean that any particular coordination scheme will necessarily further substantive justice in a concrete case more than non-coordination, as we will see.

Secondly, there is the *need to have single political rules and organisation*.[32] This approach is largely inspired from Kant's conception of the right as requiring a mutual and reciprocal definition, through the establishment of a civil society and through the law, of what will be right and just for the community.[33] This need to coordinate on a conception of justice corresponds to the *need to coordinate on the use of force and coercion*; according to Kant, indeed, the right to coercion is associated to the right to do what is just. As I explained in the previous chapter, the problem in the 'state of nature' is that people differ in their interpretations and conceptions of the right and the just, and thus are entitled to use coercion in opposed and conflicting manners, thus transforming the state of nature into a state of insecurity and conflict. This dimension of the need to coordinate should not be underestimated and will appear in particular in cases where the practical performance of an action does not require coordination, but where its organisation itself does, as we will see.

There is also the *psychological* call for stability. The need to coordinate can also be understood as an individual and then collective *psychological need for stability and security*. Such a need can be deduced from the conflict-ridden psychological nature of people that leads to external conflicts. On a Humean model, it calls for a common settlement and mutual coordination, first, through informal family conventions and taboos on the model of Darwinian[34] or Freudian Ur-societies[35] and, later on, through similarly constructed political institutions and procedures.[36] By reference to what I said about Hume's constructive approach to social institutions and convention, and what I explained about Freud's analysis of political psychology in the first part of the book, political coordination conventions are merely extensions of solutions to coordination problems from the micro-social to the macro-social context.[37] The experience of settling similar problems in the family provides a salient precedent for solution of similar problems at the macro-social level.[38] Thus, as Hume suggests, from a combination of a large number of such smaller interactions, there could arise a community-wide scheme.[39]

[32] See Waldron, 1993e, 22.
[33] See Hobbes, 1999, ch 31.
[34] On Hume's early Darwinism or Darwin's late Humeism, see Baier, 1988, 778. On Hume's sociological realism, Forbes, 1975, 71 ff.
[35] Freud, 1940a, 190 on the Oedipus complex and the organisation of primal tribes. See also Müller, 1992, 120 ff; Müller, 1999, 11; Goodrich, 1995.
[36] See Hume, 1975, II, 190; Hume, 1978, 486.
[37] Hume, 1978, 486 ff; 1975, II, 192.
[38] See Postema, 1986, 101.
[39] See Hardin, 1982, 195–97.

This accounts for the origins and justification of conventions in an *endogenic* way[40]; they arise gradually, and acquire force by a slow progression, by our repeated experience of the inconveniences of transgressing them[41] and from the repetition of the disadvantages that are to be corrected. The reflections involved in the emergence of the sense of common interest and need for cooperation are not formed at once, but 'in fact arise insensibly and by degrees.'[42]

b. The Possibility of Coordination

Now that we have established why we need to coordinate, it is important to turn to the issue of the possibility to do so in circumstances of reasonable disagreement about whether and how to coordinate about justice.[43] This is a particularly important question, because an implication of the circumstances of disagreement in politics, and of coordination models more generally, is that the disagreement that calls for coordination never seems so severe that people disagree about the need to coordinate itself or prefer to pull out of the system of coordination altogether.[44] The need to overcome disagreement through coordination on a single view about what is just in a precise matter is, in most relevant cases, reasonably incontestable. Of course, people may disagree over the best way and procedure to achieve coordination, and not only about the different substantive alternatives to be coordinated, but this disagreement is usually said to find a settlement in a higher-order form of coordination.

According to Hume, as I explained in the previous chapter, it is human fundamental sociability that makes the resolution of the problem posed by disagreement *both necessary and possible*. The primary sources of disagreement are to be found in the need to agree and converge, but the sources of the latter need to agree and converge are to be found in disagreement. In a sense, therefore, it is *human fundamental sociability* that, on Hume's account, first, leads to disagreement, then calls for a remedying order and, finally, makes stabilising conventions possible. The special genius of Hume's account of politics lies in the realisation of the fact that, while the *necessity* for coordination lies in the disastrous consequences of disagreement and the strategic interdependence of social behaviour, it is also there that the possibility of *success* of coordination is founded.[45]

Thus, although it is human sociability in its diversity which leads to reasonable disagreement and hence to the need for coordination, disagreement over the need to converge is not irresolvable; human nature is fundamentally uniform enough to guarantee at least '*convergence on the need to converge*' on whatever pattern of

[40] See Boltanski/Thévenot, 1991, 70.
[41] Hume, 1978, 490.
[42] Hume, 1978, 503.
[43] On this problem, see Finnis, 1989, 99.
[44] On this implication, see Christiano, 2000, 518. See also Chapter 13.
[45] See Gauthier, 1982, 12: 'What then, indeed, is justice but the reminder of human weakness?.'

action[46] or 'convergence at the core of disagreement' to borrow Boltanski and Thévenot's terms.[47] Some also speak either of a basic, immediate and pre-reflexive agreement to agree or disagree[48] or of reflexive agreement,[49] although this minimal convergence and coordination need not and cannot in fact be referred to as an agreement *stricto sensu.*[50] Coordination does not need agreement to take place, but only conflict, convergence on the need to coordinate and the practical salience of one solution over the others despite disagreement over its merits.[51]

2. Coordination Problems

Despite the importance of the need to coordinate on many crucial matters, coordination is not always guaranteed. Putting aside the few cases in which it is, other cases divide between cases of almost effortless coordination and cases where '*coordination problems*' arise. Before presenting the different potential coordination problems one might encounter and choosing the ones which are the most susceptible to capture the nature of our political conflicts about justice, I should start by introducing the *game theoretical* structure and describing some of the difficulties of collective action.[52]

a. General Considerations of Collective Action

To approach the law as a way to settle and mediate our conflicts over matters of justice and thus to coordinate our actions clearly echoes rational choice and game theoretical models of collective choice understood technically as 'coordination problems.' In fact, most early jurisprudential attempts in that direction were overtly inspired by game theory. This has generated mixed reactions and a confused response that has often led to disqualifying and disparaging far too quickly the entire idea of coordination-based analysis of law and disagreement.[53] To understand why, it is important to present what the game theoretical coordination models amount to and to assess whether it is possible to redeem some of their crucial insights in propounding a revised account of coordination problem models which fits more closely political and legal reality.

[46] See on Hume's use of human nature as the foundation of morality, Fate Norton, 1993b, 148 ff.
[47] See Boltanski/Thévenot, 1991, 26.
[48] Bourdieu, 1994, 124 ff.
[49] See Wintgens, 2001, 275.
[50] Hence the idea of '*Grundkonvergenz*' by contrast to '*Grundkonsens*' in German. See Müller, 1999 and 2002 on this idea of '*Grundkonsens*' or basic agreement on a constitutional structure for the possibility of further agreements and disagreements.
[51] See Hume, 1978, 490 on the *salience* of coordinating conventions that should not be confused with an *agreement* on these conventions' content. This is not a distinction Waldron, 2000a, 1847 draws at all.
[52] I assume that readers already understand what is at stake in that kind of theoretical coordination problems. See for further details on game theory, Luce/Raiffa, 1957.
[53] See Finnis, 1989 on this difficulty.

The application of game theoretical models to political issues was, at first at least, very successful and this may be due to their simplicity and reference to common sense. Each player to a coordination game is indeed presupposed to be seeking to maximise the satisfaction of her own interests or preferences in relying on her prediction of others' choices. C*ritiques* of these models' transposition to the political context quickly developed, however. Beside their sometimes distracting effect when applied to the thought of writers such as Hobbes or other social contract theorists,[54] they have also been attacked on their main premises.[55] A prime objection is that it is often difficult to see how rational choice theory, that relies on maximising and rationalising one's interests, could be of any value as a guide to making moral decisions.[56] This main shortcoming may be remedied, however, and a revised account of collective choice can be put forward to explain coordination about conflicting conceptions of justice.[57] As to other more secondary critiques, this is not the occasion to go into them in depth.[58] In what follows, however, I will restrict myself to using game theory as a pure model rather than as a guide for practical decision-making. When the model is approached in this way, most of the critiques miss their target and this for two reasons. First of all, this model of legitimacy is purely normative and does not aim at reflecting reality. Secondly, it helps to see why some claims about the law are redundant.[59]

In short, game theory aims at dealing conceptually with situations where individuals make decisions being aware that their choice may (and usually will) be affected by the choice of other players.[60] Game theory therefore addresses strategic choices whose outcomes depend on the choices of all those involved;

[54] See Hampton, 1986. See also Hardin, 1982, 90 on the fact that not all individuals, even in the Hobbesian state of nature, are possessive individualists; people may want to collaborate independently of their self-interest and this may explain why people conclude a social contract in spite of their recurring Prisoner's Dilemmas.

[55] See Baert, 1998, 165 ff.

[56] See Raz, 1995a, 352 agreeing with Finnis on this point. See also Ullmann-Margalit, 1977, 16 rejecting methodological individualism and emphasising the collectivist nature of the concept of social norm: 'although game theory encompasses many insights over the explanation of social norms, this undertaking cannot entirely be carried out in this narrow framework.' See also Taylor, 1987 who criticises the individualistic model of conceiving collective action in his conclusion.

[57] See Hardin, 1982, 124, according to whom very little collective action is narrowly rational and motivated by self-interest and most cases are motivated by moral principles.

[58] Here are the few most important critiques which have been made against game theory. First of all, the *assumption of individualistic rationality* and maximisation of benefits is not always ensured in practice. Besides, it is too acultural to be plausible. Secondly, the model tends to reconstruct and rationalise behaviours ex post facto, which were not necessarily rational in the first place. This is a strong critique when the model is applied to the law and legal rules are seen as facilitating coordination. Finally, the model is also criticised for its *internalism*; there is a problem of congruence between theory and reality since the model relies on the epistemological assumption that the validity of a theory depends on its predictive power. The reverse danger for game theory is to become too externalist, and thus to lose all reference to intentionalism. For this critique of the coordination model when applied to the law, see Green, 1983, 308 on the conflict between appearance and reality.

[59] It is interesting, for instance, to note that the model will explain the critiques which are made against it better than the critiques themselves. This can be verified in Dworkin's critique of conventionalism (Dworkin, 2004a) or the critique of the role of sanctions in the law (Gaus, 2002).

[60] Baert, 1998, 154.

it constructs ideal type models which anticipate rational decisions for each player in a game where others also make choices and where each needs to take into account others' choices. Coordination problems are a special kind of strategic interaction. It is the interdependence between people's choices which makes coordinated action an interesting model for political collective action[61] and for the legal guidance of collective action in particular.[62] In a more political sense, therefore, solving social coordination problems will amount 'to secure the social conditions whose achievement depends on the conduct of a number of people, and when, should enough of them not behave in a way conducive to the achievement of the desired conditions, there is no reason (or no sufficient reason) for others to behave in that way either.'[63]

Some games are *cooperative* in the sense that the participants pursue their opinions of what is the best outcome for the group as a whole, whereas other games are not. The latter are among the most common games and they focus on the maximisation of purely individual interests.[64] Another related distinction separates games that are about *pure collaboration*, such as pure coordination games, from others that are purely about *conflict*; some games are *mixed,* such as Prisoner's Dilemmas or partial conflict coordination games. Finally, some games are said to be of *variable-sum* whereas others are of *constant-sum*; in the first case, the total reward is the sum of all strategies, whereas in the second case, any gain amounts to a loss for someone else. Among the different games developed by game theories, the three coordination problems that are most relevant for my purpose in assessing the existence of coordination problems in our society and the need to solve them through law, are the Prisoner's Dilemma (PD), pure coordination problems (PCP) and partial conflict coordination problems (PCCP). All three are variable-sum games. For clarity purposes I will consider simple *two-person* cases covering choices by a 'Row-chooser' and a 'Column-chooser,' each choosing between *two options.*[65] In each cell of the matrices presented, Row-chooser's preference or pay-off is stated first, and Column-chooser's second. The pay-offs are valued ordinally in each case and for each player as follows: 1>2>3>4. What is called a Nash equilibrium in the game theoretical jargon refers to a pair of strategies where each represents the best strategy, given the other's strategy.

A caveat is in order at this stage. The reduction of the hypothesis to *dyadic* and *static* coordination games should not be taken to mean that real coordination

[61] See on the issue of collective action and coordination in politics, SCHELLING, 1960; LEWIS, 1969; TAYLOR, 1987; HARDIN, 1982; SUGDEN, 1993.

[62] See on the issue of collective action and its relationship to the law, FULLER, 1969B; FINNIS, 1980; GANS, 1981; POSTEMA, 1982; GREEN, 1983; RAZ, 1999B; LAGERSPETZ, 1995; RAZ, 1995A; POSTEMA, 1996; RAZ, 1998D; COLEMAN, 1998; MARMOR, 1998; WALDRON, 1999A; GREEN, 1999; WALDRON, 2000A; COLEMAN, 2001; KUTZ, 2001A; SHAPIRO, 2002; PETTIT, 2002A; KUTZ, 2002A; GARDNER, 2002; BRATMAN, 2002.

[63] RAZ, 1998C, 168.

[64] See BAERT, 1998, 158.

[65] On other non-bivalent coordination problems in politics, and especially in the legislature and the executive, more than in adjudication, see ENDICOTT, 1999, 15.

problems in the legal and political realms can be reduced to such games.[66] On the contrary, it is important, beyond the hypothesis, to understand that most cases which are of interest to the law imply *complex* and *dynamic* coordination issues among millions of people and iterated situations of coordination; the result of our discussion can be applied to these cases by thinking in terms of interconnecting pairs of simple coordination problems in an iterated process of coordination. This is particularly important, I will argue in the third part of the book, for a dynamic account of the rule of law, as well as for the proposed coordination-based account of the law's authority and in particular the justification of civil disobedience. Only dynamic coordination accounts can accommodate the need for change and progress in the law and hence the possibility of a multitude of salient equilibria.[67]

b. The Prisoner's Dilemma

A Prisoner's Dilemma is a situation in which the rational actions of rational people inevitably lead to conflict. Even though the cooperative outcome is best for the two of them considered collectively, it is individually rational for each of them not to cooperate.[68]

	coop	**defect**
coop	2,2	4,1
defect	1,4	3,3

Figure 1a: Prisoner's Dilemma (PD)

When many Prisoner's Dilemmas are joined together, we have an iterated game or a *supergame*; in the case of an infinite supergame, a 'tit for tat' strategy is rational, thus imposing cooperation unless others defect, in which case we should defect in the next game. One should note that it is rational for participants to cooperate in such a case, only if each can be assured of the cooperation of others.[69] In the case where the supergame is finite, then the last game becomes a PD and the rational decision to defect in that last game makes everybody defect from the start of the supergame. When it is infinite, as most authors would have it, it has as a consequence a more cooperative attitude on the part of participants.[70] This theorem is

[66] The point of this argument is to reject the fallacy of *composition* that extends to group models figuring individual rationality, thus ignoring the size problem, for instance, and the mutual influence between individual preferences and the collective structure. See for the alternative critique of the *static* and non-iterated approach to collective action problems, TAYLOR, 1986; HARDIN, 1984. In the legal context, see GAUS, 2002, for a similar critique. See also HARDIN, 1982, 195–96 on the dyadic mode of coordination among many people and its amalgamation; according to Hume, justice does not depend on the value of a precise interaction, but on the whole effect of all conventions tied together in a specific dynamic.

[67] See GAUS, 2002 reinterpreting WALDRON, 1999A.

[68] See HAMPTON, 1997, 44.

[69] See HAMPTON, 1997, 71.

[70] See TAYLOR, 1987, 62 claiming that an iterated PD game can explain the creation of the state through natural cooperation, rather than through the stipulation of a social contract. See on the implausibility of a one-shot PD game in the realm of cooperative action, HARDIN, 1982, 13.

also known as the *folk theorem*; it says that in a repeated PD game, a player has a guaranteed pay-off at least as large as what that player is able to get when all the other players are opposed.[71]

	coop	**defect**
coop	1,1	4,2
defect	2,4	3,3

Figure 1b: Iterated Prisoner's Dilemma (IPD)

Prisoner's Dilemmas account very well for situations of conflict, but they lack the dimension that coordination problems should have if they want to be plausibly applied to politics.[72] Politics is mostly about coordination; participants have a common interest and very often favour coordination over conflict,[73] but they only differ in their preferences for one or the other outcome of coordination. Such coordination problems are better accounted for, therefore, by *coordination games*; in a coordination game there is at least one coordination equilibrium, defined as an outcome where the combination of the players' actions is such that no one would be better off if any one player acted differently.[74] Some coordination games entail conflict whereas others do not.

c. Pure Coordination Problems

Pure coordination problems are pure collaboration games where it is in the interest of the two players to collaborate. In these cases, there are two equilibria and the parties, who are indifferent as to which one is to be chosen, need a further rule or convention in order to choose it. To illustrate this kind of game, suppose you and I wanted to achieve coordination on which side of the road to drive on, where you preferred the right side and I preferred the left side. Both of us would be better off if one of these sides were chosen and none of us thought driving on the left or on the right a better solution, provided that the other party adopted the same one and each of us knew this about the other.[75]

	do X	**do Y**
do X	1,1	2,2
do Y	2,2	1,1

Figure 2: Pure Coordination Problem (PCP)

This pure conception of coordination problems may be found in Finnis' early accounts of law's authority in particular. According to him, political coordination

[71] See Rawls, 2000, 63.
[72] See Taylor, 1987, 18 on problems of collective action and the fact that they are better modelled as coordination games than as PDs. See also Schelling, 1963, v.
[73] See Finnis, 2001, 18.
[74] See Lewis, 1969, 24.
[75] See Waldron, 2000a, 1838. See, however, Hampton, 1997, 72 who contends that this case is a case of partial conflict.

problems are simply problems to which there are 'two or more available, *reasonable and appropriate* solutions, none of which, however, would amount to a solution unless adopted to the exclusion of the other solutions available, reasonable and appropriate to that problem.'[76] This definition corresponds to what Waldron calls Finnis' 'focal' meaning of authority and the law, according to which the central cases of law cannot possibly be grasped without reference to a wrong or misconceived understanding of practical reasonableness[77]; such a conception undermines any possibility of understanding the function of authority in respect to conflicting views which are perhaps not objectively rational or reasonable from a content-based perspective,[78] but which are so in the eyes of their beholders and on which they need coordination because they do not see their views as equally eligible to solve their mutual problem.[79] This last class of cases is central to authority and the law, as Finnis has recently acknowledged.[80]

It is clear that a community needs to solve pure coordination problems, but also that the cases which satisfy these specifications are very different from the central cases in which coordination is required in daily community life.[81] Politics are more conflictual than that[82] and people usually care and disagree about what they will coordinate on and do not merely regard (at least at the beginning) their mutual options as being equally eligible or indifferent.[83] This asymmetry between the options' eligibility derives from their genesis since alternatives do not appear out of nowhere or playfully; they are the fruit of the exercise of human intelligence and are suggested as improvements to which one cannot be indifferent.[84]

d. Partial Conflict Coordination Problems

A third type of collaboration-oriented coordination problem captures this partially conflicting dimension. In this type of game, participants prefer either of the coordinative outcomes to non-coordination, but they differ in the particular coor-

[76] Finnis, 1980, 232.

[77] See Waldron, 2000a, 1836 ff; Finnis, 1980, 15. See, however, some passages where Finnis seems to believe that solving partial conflict coordination problems where people hold reasonable but unequally eligible views of the common good is central to the concept of legal authority: Finnis, 1980, 218–21.

[78] On Finnis' ethical rationalism, see Chapter 4.

[79] See Green, 1983.

[80] See Finnis, 1989. See also Finnis, 2001, 18.

[81] Hence critiques of the conception, which understands the law as a coordination convention, are mistaken, when they focus on pure coordination problems like the side of the road on which one ought to drive. See eg Shapiro, 2002 or Marmor, 1998.

[82] See Schelling, 1963, v. This agonistic dimension of political discussions over justice is well captured by Luhmann, 1989, 140.

[83] See Waldron, 1999a, 103–4 who refers to Hampton, 1986, ch 6 on Hobbes. See also Hampton, 1997, ch 3. See also Marmor, 1998, 519 who insists that his contentions on the arbitrariness of coordinative conventions do not imply their indifference. He refers to Lewis's, 1969 condition of the 'arbitrariness' of rules to be conventions, ie the condition that there must be at least one other alternative rule that people could have followed instead, achieving the same purpose.

[84] See Waldron, 2000a, 1843 for this argument.

dinative outcome they prefer.[85] Game theorists used to call this game simplistically the 'Battle of Sexes,' by reference to the situation where the husband prefers to go to a boxing match while his wife prefers going to the ballet, but where they most of all want to spend the evening together rather than each going to his or her favourite entertainment alone.[86]

	do X	**do Y**
do X	1,2	3,4
do Y	4,3	2,1

Figure 3: Partial Conflict Coordination Problem (PCCP)

In a revised reading, partial conflict coordination problems match the kind of questions and conflicts over *matters of common concern* or *interest* that we meet in politics,[87] ie questions of justice which admit of several answers. Even if the members of the group disagree about the substantive merits of the different options, each nevertheless regards common action by the whole group on any one of the options as a better outcome than his acting unilaterally on the option he thinks more just irrespective of what the others do. True, different members' conceptions of the options might differ in quality and might even be intransitive, but members of the group would still regard it as preferable to coordinate on one of them than on none. Thus, something is a question of common concern in a community, by reference to Waldron, if it is better for the group that a single answer be accepted on that issue among its members than for each person to deal with the question on her own, as well as she can, as far as it affects or interests her, and to act unilaterally on the basis of her own answer.[88]

This new reading of partial conflict coordination problems in politics implies important changes in the partial conflict coordination model's general approach. It emphasises the importance of the coordination model for situations where there is a *conflict* over the *common interest*[89] as opposed to *individual interests*. The model must be adapted to reflect on cases where people have *different views and beliefs of the public interest or the right*, but still wish, as members of a '*team*' would, to coordinate on one of them for the sake of having a common interest.[90] The idea of public common concern is not tied rigidly to the self-interest of the persons affected that would then be satisfied by cooperative action in the case

[85] See SCHELLING, 1963, 58 ff.

[86] See LUCE/RAIFFA, 1957, 90–94 and ch 6.

[87] This transformation is what the main critiques of the coordinative enterprise in politics seem to miss. See, for instance, GREEN, 1983 and RAZ, 1995A, 352 criticising Finnis' *pure* coordination model of legal authority and RAZ, 1998D criticising Postema's *pure* coordination model of the rule of recognition. See also HERSHOWITZ, 2003, 207–8; COLEMAN, 2001, 94–95; SHAPIRO, 2002; KUTZ, 2001A; KUTZ, 2002A.

[88] See WALDRON, 2003A, 49.

[89] See SCHELLING, 1963, v on this neglected side of game theory.

[90] See for a similar move, FINNIS, 1980; FINNIS, 1989; FINNIS, 2001, 18; WALDRON, 1999A, 101–5; WALDRON, 2000A; WALDRON, 2003A. See also RAWLS, 2000, 61.

where a common and *shared* interest, such as security, cannot be achieved individually but only together.[91] On the contrary, partial conflict coordination games revised as suggested include situations where there is, on the one hand, no necessary convergence or sharing of individual interests and, on the other, other interests at stake than individual interests *stricto sensu*, such as interests in the justice or the fairness of the outcome of the coordination exercise.[92] The partial conflict coordination model is therefore transposed from an economic model of rationalising and maximising individual and self-interested preferences into a *model of rational collective and cooperative action* over what we ought to do together.[93] To take Waldron's recent example:

> it may be better, for example, that a group of people act together to save the dolphins than that each follow unilaterally the course he thinks appropriate so far as dolphins are concerned, even though the *interests* of none of the people concerned are promoted by the common strategy.[94]

This in turn has implications, as we will see, with respect to the conditions in which coordination can take place. Since the matters at stake are matters of common concern, people might be more willing to cooperate than when they coordinate over their own private interests. What it also means, however, is that there is more at stake in these cases than *individual rationality* and *maximisation of individual preferences*. In conditions of reasonable disagreement about justice, some might even argue, as we will see, that they would rather not coordinate than commit a grave injustice. In this sense, and although I am not distinguishing strictly between coordination and collective action in this book, the proposed revised account of partial conflict coordination problems in the political and legal context comes closer to so-called accounts of collective action.[95] On those accounts, indeed, it is not always irrational for people not to coordinate and there is scope therefore for refusing to coordinate in case one nourishes reasonable fears of injustice,[96] and thus especially scope for sanctions as coordination incentives and not only as salience markers.[97] This also explains how partial conflict

[91] See RAZ, 1990, 7–9. See on such models of collective action, HARDIN, 1982; TAYLOR, 1986.

[92] See FINNIS, 1989, 100.

[93] For such a model of *cooperative* action, see SUGDEN, 1993, 72, 84. On this model, individuals do not pursue an instrumental and *individualistic* conception of rationality, but they do not follow a morality of pure *altruism* either. It is more about enjoining each individual to do her part *as a member of a team* or a *plural subject* (in GILBERT's, 1990 terms) in achieving outcomes that are good for the single body of which they are members as opposed to a goal that is just the shared personal goal of the participants (GILBERT, 1990, 9; see also BRATMAN, 1992 and 1993).

[94] WALDRON, 2003A, 49.

[95] See also WALDRON, 1999A, 201, 239 ff.

[96] See eg BOUDON, 1996 on some of the cognitive implications of coordination over public goods and matters of common concern.

[97] See GAUS, 2002 for a critique of what he takes to be WALDRON's, 1999A position in this respect. See also GREEN, 1983, 317 ff.

coordination problems can make sense of what Finnis argues pure coordination problems cannot, ie not wanting to be played for a 'sucker' by non-cooperators.[98]

3. The Resolution of Coordination Problems

It follows from the previous two sections that partial conflict coordination problems about justice are pervasive in daily community life and threaten people's ability to organise fruitful cooperation that is necessary for all sorts of valuable activities.[99] One may conclude that people are justified in generating a *remedy for coordination problems* when they think coordination is practically necessary and central to the pursuit of justice and the common interest.[100] Before we look at how we can ensure coordination on matters of common interest, it is important to examine in more detail the reasons why we should solve coordination problems. After all, although we converge on the need to coordinate on justice *in general*, as we saw before, we need not regard coordination as desirable when we face reasonable disagreements about justice and partial conflict coordination problems.[101]

To reply to these concerns, I will, first of all, present the moral case for a *determinatio* in matters of justice. Then, I will turn to the distinction between the moral case for solving partial conflict coordination problems and the authority of coordination. Finally, I will discuss the importance of conscious coordination and of the knowability of the priority of coordination over the individual merit of the coordinative decision.

a. The Need to Solve Coordination Problems and the Moral Case for Determinatio

There are purely *rational* grounds for solving coordination problems because they threaten each person's ability to satisfy her own self-interested preferences. But most importantly for our purposes here, there are also *moral* grounds for such a remedy because these problems have a severe negative impact on the wellbeing of all of us. It is our *common interest* that is at stake and we differ on how to achieve it best. The matter can be as important as many issues of public concern can be and something needs to be done about it and, if so, in a concerted way. Indeed, 'until a particular choice is made, nothing will in fact be done.'[102] Furthermore,

[98] See Finnis, 1989, 102. I will come back to the requirement of conscious coordination in the next section and will draw its consequences for the law's authority and civil disobedience in the third part of the book.

[99] In this sense I believe that Marmor, 1998, 520 ff is wrong when he conflates law and chess by contending that we need a conventional account of the rule of recognition that does not presuppose the *prior existence of a coordinative problem*.

[100] See Hampton, 1997, 72–73.

[101] The need to solve a coordination problem does not exactly amount to the same as the need to coordinate that gave rise to the coordination problem in the first place. Coordinating and hence solving a coordination problem are not effortless and imply individual sacrifices in terms of one's own pursuit of justice. See Chapter 13.

[102] Finnis, 1980, 232.

according to some authors, in some forms of human community, that something be done 'is not just a matter of optional advantage, but is a matter of right, a *requirement of justice*.'[103] Thus, for those authors, conflicting but reasonable views of how to reconcile 'aspects of justice with one another, . . . and to reconcile human rights with each other'[104] ought to be coordinated. According to this approach, when we are faced with the diversity of our opinions on how best to implement those duties, coordination is required by those very moral duties or else we will not be able to abide by any of them.[105] This is, for instance, the outcome of the Kantian model of the compulsory nature of the legal community in virtue of the requirements of justice and of disagreement on those requirements.[106] In circumstances of reasonable disagreement about justice, individual conceptions of justice conflict, but the requirements of justice on each of us remain intact and a collective decision has to be taken when justice requires collective action. This implies that coordinating about justice, even in circumstances of justice, can be understood as a *derivative requirement of justice*. Just like the general need to coordinate, therefore, the need to solve coordination problems is an important moral requirement.

The moral case for the resolution of coordination problems through a coordination device is expressed at best by reference to St Thomas of Aquinas' concept of *determinatio*[107] and the recent references that have been made to it in the jurisprudential context.[108] A *determinatio* is the act of setting a more concrete and categorical requirement of a principle for a specific class of cases, that is guided both by a sense of what is practically realisable and by a recognition of the risk of conflict with other principles or values, themselves concretised by other *determinationes*. As such, the determination of rules constitutes the way to solve conflicts of conceptions and opinions about those rules by making a particular rule *salient* and by coordinating on a *single and commonly acknowledged focus.*[109]

Since, as we will see in the next sections, this kind of *determinatio* amounts to what the rule of law is taken to achieve, the case for the resolution of coordination problems through legal determination may also be referred to as *normative legalism* or even as *normative positivism.*[110] The normative or ethical legalist or

[103] Finnis, 1980, 232.
[104] Finnis, 1980, 232.
[105] See Kis, 2002 for such an account of our natural duties to cooperate and abide by institutional rules. See also Shapiro, 2002, 424 on convergence on substantive goals despite divergence of beliefs and values.
[106] See Waldron, 1993e. See also Chapter 13.
[107] See Finnis, 1985, 23–25.
[108] See eg MacCormick, 1990, 548 ff.
[109] On the notion of salience and *focal point of coordination*, see Schelling, 1963, chs 3 and 4. See also Lewis, 1969.
[110] On the concept of 'normative positivism' and the terminology, see Waldron, 2001a. Some prefer to call it *ethical positivism* to distance themselves from a theory that identifies laws with norms (Campbell, 1996, 79). The problem with a reference to ethics is that it connotes normative standards for personal behaviour as opposed to normative standards for evaluating institutions. Another expression may be found in MacCormick, 1985, who argues for a 'moralistic case for a-moralistic law' and in MacCormick, 1990, 551, 558 who argues for an 'ethics of legalism.'

positivist main claim is that the *values* associated with law and the rule of law, ie publicity, fairness and accountability, can best be achieved if the ordinary operation of such a system does *not require people to exercise moral judgement* in order to find out what the law is, since when they do, they disagree and cannot coordinate.[111] In other words, propositions about the law are necessarily evaluative,[112] while propositions of law and the legal practice ought as far as possible to be descriptive, posited and determinate.[113] This normative approach to legal theory and especially of legal positivism is not new. On the contrary, it was already Hobbes' and Bentham's, both positivists who gave great prominence in their political and legal philosophy to the evils that might be expected to afflict societies whose members are unable to disentangle their judgements about what is required or permitted by the law of their society from their individual judgements about justice and morality. The debate has recently been revived among different factions of legal positivists, but the discussion of the different fine-grained arguments for and against these methodological and meta-theoretical stances will have to be left for another occasion.

b. From the Need to Coordinate to the Reasons to Solve Coordination Problems

Just like the general need to coordinate, the need to solve coordination problems is an important moral requirement. What this means *in each individual case*, however, will depend on further elements and in particular on each participant's own convictions and, more importantly, other legitimating elements of the coordination procedure such as its fairness in particular. If we coordinate on others' conception of justice, we defer to a conception which we do not regard as just and which need not be just. As such, we should look for other elements of individual justification of our decision. It is very important therefore not to conflate the moral case for the resolution of coordination problems with the *individual reasons*

[111] See eg Postema, 1982, 328 ff; Postema, 1986, ch 9; Waldron, 1999a, 166–68 and 2001a; MacCormick, 1985; MacCormick, 1990; Campbell, 1988; Campbell, 1996; Perry, 1997, 129–31 and 2001; Murphy, 2001. Raz, 1983, 216–18 and 1998b may possibly fall into that category, but he has not officially acknowledged it and Dickson, 2001a offers a way to rescue the Razian account into traditional methodological positivism, by distinguishing it from directly evaluative jurisprudence.

[112] The terms 'normative' and 'evaluative' are used interchangeably here to refer to value judgements. Beyond the mere distinction between the banal sense of evaluation (the use of purely meta-theoretical and non-moral values like simplicity, coherence, etc) and its stricter sense, the term 'evaluative' seems, however, to be used quite inconsistently in the debate. Raz, for instance, uses it both to refer to normative and moral judgements (Raz, 1998b, 267–68), on the one hand, and to non-normative judgements of importance, on the other (Raz, 1995a, 235). Dickson, 2001a argues that these two uses are not inconsistent and qualifies them by referring to directly evaluative (strictly speaking, normative) and indirectly evaluative (somewhere between descriptive and normative) judgements. A similar distinction is made by Endicott, 2002a, 243 ff; Green, 1996, 1713.

[113] Of course, in some cases, the law refers to moral concepts and thus brings evaluation and hence a potential amount of indeterminacy into the law. As long as this is done conventionally and the ultimate coordination over the issue follows law-making conventions, it is possible to refer to posited law. See Chapter 2.

there are for abiding by the determination rule or, in the legal context, with law's authority.

Both are related since it would be difficult in most cases to imagine having individual reasons to abide by the rules of an authority that we do not regard collectively as being justified in resolving coordination problems. The existence of individual reasons for action requires more, however, than a general justification of coordination. We need to assess what it is in coordination mechanisms that gives rise to individual reasons to abide by the coordinating rule, but also what it is that makes participation in a coordination effort compulsory in the first place. These are what one may refer to as the *circumstances of authority.*[114] Establishing their existence takes us further than a general justice-based requirement to coordinate our conceptions of justice. For instance, the reasons imposed have to correspond to existing individual reasons, which need not necessarily be the case of all coordinating reasons. Besides, authoritative reasons should be able to exclude ordinary reasons without having to weigh and balance the former reasons and this need not be the case when we face a coordination problem. Finally, authoritative reasons should allow individuals to abide by their own reasons better if they follow the former than on their own and any form of coordination in case of disagreement need not always, prima facie at least, lead to that result. All these questions will be addressed in a separate chapter on the authority of law where I argue for coordination-based obligations to obey the law.

c. Conscious Coordination and the Reasonableness of the Options

Not all outcomes of coordination and cooperative schemes proposed for the sake of the common interest are good ones,[115] but this does not mean that cooperation is not justified in itself.[116] The goodness of coordination is not relative to the goodness of the action that is coordinated. There may therefore be bad coordination cases as they may be bad states or bad dimensions of authority, but this does not take the justification away from coordination itself. There may be cases where we might think that coordination on one of the options is worse than the absence of coordination.[117] Given the fallibility of human judgement, however, it would undermine the entire case for coordination in conditions of reasonable disagreement about justice to make its justification depend on the participants' judgement of the goodness or justice of the coordinated upon decision. In most cases, we would rather coordinate and have a single answer that we do not individually regard as optimal, rather than none.[118]

[114] See Green, 1989b, 803 on the distinction between the different justifications of authority such as coordination and claims about how any authority should ideally operate. See Chapter 13.

[115] See Raz, 1998d, 13; Waldron, 2000a; Endicott, 1999, 15.

[116] This is, however, the conclusion Raz, 1998d, 13 draws from the fact that some cooperation 'went into the creation of the nuclear arsenal in various countries.'

[117] See Waldron, 2000a, 1847 on this case.

[118] See Chapter 7.

At the same time, however, what counts when assessing the need to resolve coordination problems is clearly that people regard an issue as needing not only coordination, but *conscious coordination.*[119] People must be aware of the existence of a coordination problem and of the readiness of others to coordinate.[120] What this does not require, however, and I will come back to this in the last part of the book, is that people are aware of their decisive role in the coordination scheme and of how many people are already cooperating; all they need to know to start cooperating, by virtue of the *generalisation argument*, is that there is a coordination problem, a coordination scheme potentially at work and that others have started coordinating thus making them beneficiaries of cooperation.[121] As Hume argues, this leads one to form a resolution not only to conform *if* others do, but to conform *on the supposition* and *expectation* that they do or will do.[122]

Conscious coordination does not only imply consciousness of others' cooperation, but also of one's own cooperation. Law (or any other coordinating convention, at this stage of the argument) can only contribute to facilitating coordination if all those whose pursuit of justice is to be coordinated believe that coordination is necessary and that law is making a proper contribution to the solution of a coordination problem, *independently* of their disagreement over the relative justice of each of the schemes of coordination. Coordination problems, and especially PCCPs, can and should only be important and central to politics *if people converge about the central need to solve them*; coordination should indeed only be ensured where it is morally important, ie where participants judge that it should trump their disputes over the substantive merits of the options at stake, and not be tributary to the different participants' moral equations.

It follows therefore that the following cases may arise when people are confronted with a coordination problem. In pure coordination games, there will usually be convergence on the need to solve them and the priority of coordination over the solution's merits is easily established. It might happen, however, in a partial conflict coordination problem, that the parties disagree on the prior importance of coordination, for one regards the other option as totally unreasonable and worse than no coordination at all. In such a Partial and Unreasonable Coordination Conflict Problem (PUCCP), the need to coordinate is not that clear and the law cannot be thought to be doing the work that it ought to do if at least one of the parties concerned believes that it is not doing that work.[123] Finally, it might, however, also be the case that despite their disagreement over the justice of the respective alternatives, the parties agree that coordination is more crucial to

[119] See Waldron, 2000a, 1845 on this expression.

[120] This requirement need not be regarded as epistemologically heavier than the knowability requirement in Raz, 2003b. To identify a public authority as a prima facie legitimate authority in one's own case often implies the awareness of its public nature and of its potential impact on others' conduct. See also this chapter's last section and Chapter 13.

[121] See Chapter 13.

[122] Hume, 1975, II, 306. See Postema, 1986, 116.

[123] See Waldron's, 2000a, 1836 critique of Finnis.

justice than the relative injustice of the respective reasonable options over which they disagree. In such a partial conflict case, people can clearly converge on the existence of an important coordination problem and its need to be solved despite their disagreement on the merits.[124]

	do X	**do Y**
do X	1,3	3,2
do Y	4,2	2,1

Figure 4: Partial and Unreasonable Conflict Coordination Problem (PUCCP)

It is important, therefore, to emphasise that the key feature to conscious coordination seems to be the reasonableness of the coordination options in the eye of each participant, as opposed to their justice given the circumstances of coordination. One may also add other elements such as the consciousness of the fairness of the coordination procedure. These reservations about the importance of *consciousness* in coordinating and of the *knowability* of our coordination intentions is particularly important for the law's coordination-based authority. It explains in particular why coordination-based obligations to obey the law cannot be general, but also why they usually are semi-voluntary obligations depending on the prior acceptance of a certain social role and coordination scheme, as we will see.[125]

II. LAW AS A WAY OF CONTRIBUTING TO SECURING COORDINATION

Partial conflict coordination problems suggest a lot about law's contribution to politics. After having argued in the first section that there is a need to coordinate and, when we face coordination problems, a need to solve these coordination problems, the time has come to make my second argument: law is better at securing coordination than alternative methods. In this section, I will argue why generally speaking the law may be understood as providing the best response to all levels of coordination. This is the case not only from the start where we need to *coordinate on the need and ways to coordinate* on collective matters by establishing a political and legal system (first-level coordination), but also later on in daily politics when the law actually contributes to *coordination in matters of public interest* either by coordinating opposite views about whether and how to coordinate a precise matter, ie easing the choice of the option people will have to choose (second-level coordination), or by, finally, providing people with the legal description of the option they ought to choose when cooperating, by, for instance, associating sanctions to it (third-level coordination). These three levels of coordination are distinguished for the sake of clarity, but there may be many more levels and layers of coordination within these different levels of

[124] See Waldron, 2000a, 1847 on the need to distinguish the *agreement* on whether coordination is more important than the merits, from the *disagreement* on the merits of the particular options.

[125] See Chapter 13.

coordination,[126] and this among citizens, citizens and officials, and among officials themselves.[127]

1. On Legal Coordination in General

Four conditions for coordinated action can be gathered: sharing a goal, mutual openness about it, strategic responsiveness of the actors to each other and individual participatory intentions, ie the intention to do one's part of a collective act.[128] More particularly, in order to secure coordination and thus avoid the danger of each participant attempting to play his part in his favourite scheme (in terms of the common interest) without regard to the part that the others are playing, we need to share knowledge with the others about what scheme will be regarded by them as the *salient point of coordination*, and we need *collective assurance* that that is the scheme in which the others will play their part.[129] In other words, what is needed to coordinate is for one of the options to be marked for all the other participants to see as *the one for everyone to follow* in the confident expectation that others will do the same.[130] There are different ways of marking a salient point of coordination. It is interesting in this respect to consider the gradual transition in complex democratic societies from, first, natural to collective coordination, and then, secondly, from informal collective coordination to formal and in particular legal coordination.

a. From Natural to Collective Coordination

Natural or *internal*[131] coordination requires the parties to locate some salient fact about one of the equilibria that makes it stand out. But, as we saw before, there will not often be such a salient coordination equilibrium in the many conflicts where people are not indifferent to the options at stake.[132] As Postema argues,

[126] See Green, 1983, 302 who mentions *n-levels of coordination*. Not all levels of coordination need to be present, however, and most of the time they will be imbricated in an undiscernible way. See Chapter 7.

[127] See Postema, 1982, 182 ff. See Chapters 9, 10 and 13.

[128] See Kutz, 2000b on these conditions, before he goes on to reducing them to the overlap of individual participatory intentions and thus wrongly abandons the condition of mutual expectations and assurances of participation.

[129] Waldron, 2000a, 1839–40.

[130] Waldron, 2003a, 53. See also Raz, 1990, 7.

[131] See Taylor, 1987, 21–23 on the opposition between internal and external solutions to coordination problems.

[132] In this sense, I agree with Marmor, 1996 and 1998, 518–19 who criticizes Gilbert's, 1989, 340–41 conception of the 'arbitrariness' of a coordination convention that is grounded only on the parties' indifference to the result over which coordination is achieved. The 'arbitrariness' of the convention, as required by Lewis', 1969 definition of a coordination convention, implies merely that the reasons for having a convention in the first place are more important for us than the reason for preferring an alternative course of action and encompasses therefore partial conflict coordination conventions as well as pure coordination conventions.

'among human beings social coordination and cooperation are neither spontaneous nor are they guaranteed by our rationality, moral judgement, or goodwill, even on that rare occasion when they are in ample supply.'[133] There are in brief four obstacles on the road to cooperation[134]: the lack of incentives to cooperate (problem of motivation), the absence of knowledge of others' pattern of interaction (problem of identification), the moral disagreement about which pattern is the best (problem of certainty) and, finally, the lack of assurance that others will cooperate (problem of compliance).[135]

In order to overcome these four obstacles, it should be clear that solutions to coordination problems must be *external* or *collective*. Most people in a territory must approve of and participate in it so that constructive interaction can begin.[136] Such peaceful[137] and collective marking of the one option to follow can occur in *many ways* and is commonly referred to as a *convention* that can be expressly agreed upon or be more informal.[138] In Hume's terms:

> when this common sense of interest is mutually expressed and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a *convention* or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition that something is to be perform'd on the other part.[139]

The description given by Hume of the development of coordination conventions has now become a classic description of the *resolution of coordination problems*. Coordinating *conventions* are solutions to these problems, usually where most of the bargaining is tacit[140]; they amount to *regularities of behaviour*, patterns of coordinated interdependent actions, arising from this kind of strategic situation, such that the reason that the participants conform to the regularity of behaviour is that it is *common knowledge* that most persons conform and that most persons *expect* most other persons to conform too.[141] As Hume argues, 'two men who pull the oars of a boat, do it by convention, tho' they have never given promises to each other.'[142] The point is that for such conventions or regularities of behaviour to

[133] Postema, 1996, 89.
[134] See Postema, 1996, 90. See also Alexy, 2003c.
[135] I will not examine Postema's arguments for the sources and pre-emption thesis, since I agree with Raz, 1998d, 10 that the generic argument for social cooperation is not an argument *for* these theses, but an argument *from* them. See Chapter 13.
[136] See Hampton, 1997, 73.
[137] On warfare as a way to generate a coordination convention, Hampton, 1997, 83.
[138] See Lewis, 1969 on the different types of conventions. See also Schelling, 1963 on the possibility of reaching a convention despite lack of communication.
[139] Hume, 1978, 490 (emphasis added).
[140] Formal agreements can indeed also be constitutive of coordinative conventions. See Lewis, 1969 on these different forms of conventions. When Hume refers to 'agreements,' he is thinking of tacit conventions rather than of promises and formal contracts. On the importance of communication, see Schelling, 1963, 101–2.
[141] See Lewis, 1969 for a modern account of coordination problems and conventions.
[142] Hume, 1978, 490.

arise, there must already be a general scheme of action on which the mutually interdependent expectations can focus. What is stake, therefore, is the way in which mutual expectations of cooperation can be founded and guaranteed, without the help of a prior promise or contract, since the need to abide by the former has itself to be founded in a convention that does not lie on express consent and agreement.[143]

A common objection made to this account of the progressive development of a cooperative scheme of behaviour is that it moves too quickly from the mutual expression of *willingness* to participate to an immediate cooperative *behaviour* in accord with this scheme.[144] One may, however, bridge the gap between conditional intentions of cooperation, where the provision that others will concur in the scheme must be satisfied before one undertakes the action, and intentions-in-choice-and-action in which they would automatically resolve and which only involve suppositions as to the behaviour of others.[145] Hume argues, for instance, that 'the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part.'[146] Once the mutually referential intentions are formed, Hume contends, 'no more is requisite to induce any one of them to perform an act of justice, who has the first opportunity.'[147]

Thus, it is wrong to argue that what guarantees and founds mutual expectations of cooperation for Hume is that, unlike ordinary coordination problems where there is an ambiguity between two cooperative patterns, his coordination problem is unproblematic because there is only one possible pattern of actions which would successfully coordinate the behaviour of the parties. I think that this account of the *predominance* of a coordinating convention confuses the salience of one of the potential patterns of coordinated action with the case where there is only one pattern of cooperation in consideration.[148] There can indeed be true ambiguity or even conflict as to which pattern of behaviour ought to be chosen, but the parties might still prefer coordination over not coordinating at all, see one of the patterns as salient for some (random) reason and thus spontaneously coordinate according to this dominant convention.[149]

[143] HUME, 1978, 490.
[144] See POSTEMA, 1986, 112 ff.
[145] See HUME, 1975, II, 306.
[146] HUME, 1978, 490.
[147] HUME, 1978, 498.
[148] See for such an argument, GAUTHIER, 1979, 7 who refers to Hume's example of the two oarsmen who pull the oars of a boat by common convention for common interest, without any promise or contract; in that case, there are only two possibilities, ie to row or not to row, and provided the other rows, each party will prefer to row than not to (HUME, 1978, III, II, III). See eg SCHELLING, 1963; LEWIS, 1969; HAMPTON, 1997; WALDRON, 2000A.
[149] In this sense, Hume does not need to deny that the coordination problem at stake in the state of nature is a partial conflict coordination problem or a pure coordination one to hold that the coordinating convention of justice is a dominant one.

b. From Informal to Formal Coordination

Some coordination conventions are *informal*, such as custom.[150] Social cooperation in a broad sense can regularly be achieved without the law or other formal procedures; for instance, speaking the same language and following informal rules of polite conduct are cases of complex social cooperation without which there can be no social life, to which the law usually does not contribute and on which it is in fact based.[151] An example of the significance of informal rules of politeness in solving (pure) coordination problems is given in the case where a telephone conversation is cut off and where it is useful for each party to know who should call back; a convention of politeness that establishes that it is the original caller who ought to resume the call solves the problem by coordinating the parties.[152]

Informal modes of coordination do not always work, however, due to the vagaries of daily politics.[153] Besides, there is very little common language or politeness can do to solve partial conflict coordination problems over the right or justice in large groups,[154] since reasonable parties very often feel strongly and disagree about one or the other outcome and will not accept any option to solve their conflict, especially when they are not sure of others' cooperation.[155] In matters of common interest, coordination problems therefore require a *third institution or party*[156] to *externally* enable people to achieve coordination, get the *assurance* necessary to make cooperation rational and provide *sanctions* that encourage cooperative behaviour in situations[157] where it would otherwise be either irrational or at the very least unwelcome.

A political community will therefore want to develop *formal* and *public procedures* for settling on one of the options as the one to follow and for making it

[150] See GREEN, 1983, 312 ff. See HUME, 1978, III, 1, ii, 490. See POSTEMA, 1982, 176 ff; LEWIS, 1969, 35 on tacit conventions; SCHELLING, 1963, 56–57.

[151] RAZ, 1998D, 13.

[152] See for this example, COLEMAN, 2001, 92; MARMOR, 1998, 519.

[153] See FINNIS, 1980, 245. See for the same view, GREEN, 1983, 314.

[154] See TAYLOR, 1987, 12, 105.

[155] In this sense I agree with SCHELLING, 1963, 65 and LEWIS, 1969 who hold that the salience of the convention's solution need not be the best solution or what they call the most *rational* one; reasonable people often disagree about what it should be and salience is therefore a matter of arbitrary decision between reasonable options. See also HARDIN, 1982, 92. See also HARDIN, 1982, 190–91 on the complex reality of the convention's establishment that mostly occurs through accidents as in the Humean model. Contra: SUGDEN, 1993, but his rejection of non-rational salience is purely contingent and is in any case defeated at the end of his argument by the instrumentalist conception of rational choice.

[156] See on the separation between official and private coordination owed to the law's mediation: POSTEMA, 1982, 184. See also HUME, 1978 who contends that despite the people's tendency to coordinate on justice and collective matters, the proximity and local self-interests make such cooperation irregular in large groups and calls for the law and a government to make sure that progress in the matter is made.

[157] On sanctions as a parade to the cognitive requirement of Lewis' model of coordinative conventions, see HARDIN, 1982, 173–74. See also TAYLOR, 1987, 26–29 on sanctions that constitute one of the central elements of external solutions to coordination problems, such as property rights or norms.

salient.[158] The form of collective and formal remedy that is often the most adequate and efficient one involves the constitution of a political authority[159] and the consequent establishment of a *legal system.*[160] Authoritative procedures are necessary for, although the parties prefer either of the coordinative outcomes to the non-coordinative ones, things can still go badly when people disagree fiercely; what is needed then is for one of the options to be marked according to a definite procedure for all the members to see as the one for everyone to follow in the confident expectation that others will do the same, that is to say as being constitutive of the law for all of us.[161] This may be considered as one of the functions of law-making procedures: not so much to solve coordination problems as this will still depend on people's individual behaviour, but to make particular options *salient* or *authoritative* in pure or partial conflict coordination problems about what is the best option.[162]

Coordination through law presents many advantages compared to other formal and public modes of salience-marking and this makes it one of the most common responses to disagreement. First of all, the law makes salience clearer and more subtle than other modes of coordination; it possesses all the means of *publicity* necessary to ensure both salience and flexibility. Secondly, it provides all necessary levels of coordinated procedures to implement the salient option in a general and non-discriminatory way[163]; in this sense, it can hold people closely accountable to whatever decision was taken. Those different elements, also known as the constitutive elements of the *rule of law*, ie publicity and accountability, make the law a distinctive source of coordinative guidance.[164] The rule of law may therefore be regarded as an efficient way to resolve the three main *problems of social coordination and cooperation* I presented earlier; the issue of practical knowledge and identification may be solved by the *determination* function of law, the issue of certainty by the *enforcement* function of law and the issue of compliance by the *organization* function of law.[165]

2. First-Level Coordination: the Constitution of a Legal Order

In this section on first-level coordination on the constitution of a legal order, I will, first of all, present the argument for the coordination-based constitution of

[158] See Waldron, 2003a on the public nature of authoritative settlements. See also Raz, 1989, 1153. Contra: Regan, 1989, 1024 ff; Green, 1983, 320–21. See Chapter 13.

[159] Raz, 1998d, 13: 'It is true that there are circumstances and forms of cooperation where the law offers *the most efficient (sometimes the only) way of securing cooperation*.'

[160] See Waldron, 2003a, 53.

[161] See Raz, 1979, 7.

[162] Strictly speaking, the law contributes to *marking the salience* of a coordination option *rather than to actually solving* the coordination problem. The latter depends on further elements, such as the consciousness and intention to coordinate of the parties. See Coleman, 2001; Gaus, 2002; Waldron, 1999a, 104.

[163] See Finnis, 1989, 101 ff; Finnis, 1984, 136.

[164] See Finnis, 1984, 136. See also MacCormick, 1990 on legalism, the rule of law and coordination. See Chapter 4.

[165] See Alexy, 2003c and Postema, 1996, 89 ff.

a legal order. In the second section, I will address the main challenges that have been raised against it.

a. The Argument

As Hampton argues in her analysis of Hobbes and modern social contract theory, a PCCP game may be implicated from the start in the solution of PDs, which modellise the dilemmas facing individuals in the state of nature and before entering the civil state.[166] According to Hampton and others,[167] we face a many-person and iterated version of PDs in the state of nature. There, people who need to cooperate on many issues are constantly confronted with the choice between cooperating or defecting. The problem is that they are too shortsighted to see that iterated PDs rationally require cooperation[168] and they do not favour cooperation as they should. In order to solve this problem, they need to set up a sovereign system to guarantee cooperation and enforce it. People may all desire coordination above all, but if they disagree on the nature of the ruler's authority, and especially on the extent of the issues over which coordination is necessary and the kind and number of offices the government should involve, and if more than one person wishes to be sovereign, as will necessarily happen, then they face a PCCP.

Granted that a series of conflict-ridden coordination games underlies the state's creation, how are these games to be solved and how is the convention, that prevails in identifying who the sovereign is, and thus who has the power to decide all conflicts in a regime,[169] to be concluded? According to Hampton, there are three ways to do so. First of all, there could be explicit self-interested *agreements*, but these are difficult to obtain given the number of agents involved and the complexity of the questions at stake.[170] Another way would be to conclude a *social contract*, but again the parties could not hold such a contract in the state of nature given their difficulties to solve PDs in the absence of a sovereign convention about holding their promises.[171] Thus, finally, the best way to coordinate is to generate an implicit *coordinating convention.*[172] As Hume discussed long before modern game theory, such a convention governing which equilibrium to realise can be generated *without agreement* or *a social contract*, if there is a salient equilibrium recognisable by both parties.[173]

[166] Hampton, 1986, ch 6; Hampton, 1997, 78 ff.
[167] See also Taylor, 1987 and Hardin, 1982.
[168] See Hampton, 1997, 46.
[169] See on the need for such a 'rule of recognition' in Hobbes' account, Hampton, 1994, 24.
[170] See Marmor, 1998, 515.
[171] See also Hume, 1978, 543.
[172] See Hardin, 1982, 155–56 on this form of 'contract by convention' that fits group collective action more plausibly than an explicit social contract. See on the progressive and complex constitution of a coordination convention instead of an implausible social contract, Ullmann-Margalit, 1977, 74 on coordination norms referring to Schelling and Lewis on conventions. See Chapter 13.
[173] See Hume, 1978, III, 2, ii, 490. See Hampton, 1997, 81–82; Lewis, 1969, 35 for the first argument phrased against Quine's objection to the conventional basis of language; according to Lewis, 'conventions' are not 'agreements,' because they are rules that emerge as practical solutions to recurring coordination problems.

Such a coordinative convention may also be referred to, in the legal context, as a *rule of recognition*, to borrow Hart's famous model of the rule that allows us to recognise where the political authority is situated and thus what its authoritative commands are in a state[174] by setting out criteria of legality and imposing a duty on officials to apply the norms that satisfy those criteria.[175] Once we have established, as we have, the need to coordinate and solve coordination problems, but also to establish a political and legal system to remedy this structural problem, we need to coordinate on applying the same set of membership conditions for the category 'law.'[176] Although we might individually prefer different sets of criteria of validity, we would rather all apply the same set of criteria than not coordinate at all.[177] This amounts to committing ourselves to applying a *single convention* that will specify which is the one set of membership conditions.

The rule of recognition *solves* a first-level partial conflict coordination problem whose resolution is necessary if a legal system, as well as second-level and third-level coordination are to be possible. This does not yet imply, however, that the law itself will later on necessarily *solve* or contribute to solve (second-level or third-level) coordination problems.[178] But it is because we need to solve those coordination problems that we need a legal system, and the constitution of that legal system is itself a first-level coordination problem. As we will see, the law may have many legitimate purposes among which coordinative ones are only some. For such a legal system to be able to serve its various ends, however, there must be a rule coordinating our actions regarding its membership conditions and this is precisely why we need a rule of recognition. This is what Arendt means by a *constitution*[179]; the structuring of cooperation requires the constitution of an array of permanent roles so that action-in-concert does not have to be invented anew every time an idea is projected.[180]

Game theoretical interpretations and reconstructions of the rule of recognition have been flourishing in the last few years.[181] They expand on, and sometimes even reconstruct[182] Hart's argument about the normative dimension of the rule of recognition that cannot only be based on the internal point of view, but also on the *coordinative features* of the rule of recognition. Arguably, Hart conceived the rule of recognition as what we refer to in this chapter as a coordi-

[174] See for the same identification of law and state, HAMPTON, 1997, 94, note 25.
[175] See COLEMAN, 2001, 92 ff. A coordination-based reconstruction of the rule of recognition does not necessarily depend on a coordination-based conception of the law that would see the law as the main response to a coordination problem.
[176] See POSTEMA, 1982, 187 ff who refers to this kind of first-level coordination as second-level coordination.
[177] See COLEMAN, 1998, 398 ff.
[178] See COLEMAN, 2001, 93.
[179] ARENDT, 1998, 197.
[180] ARENDT, 1998, 189. See WALDRON, 2000C, 208.
[181] See POSTEMA, 1982; POSTEMA, 1996; COLEMAN, 1998; MARMOR, 1998. See, however, COLEMAN, 2001, 92–95 distancing himself from his previous position.
[182] See POSTEMA, 1982; MARMOR, 1998.

nating convention in the game-theoretic sense[183]; viewed in this way, the rule of recognition can be regarded as a *social practice of coordination* or as an interdependent convergence of behaviour and attitude among relevant officials on the criteria for membership in the category 'law' that is regarded as a *guide for action.*[184] This relevant social[185] practice is comprised of two elements: first, a convergent behaviour and, secondly, a critical reflective attitude toward that (pattern of) behaviour.[186] In this last respect, it is not sufficient and seems to put the cart before the horse to want to support the authoritativeness of the convention by the fact that it is generated and maintained by the officials who are operating according to it. What matters is that its authority derives from something other than officials' prior obedience to it,[187] something that *guides* them to comply with it in the first place.[188] I will discuss those reasons at length at the end of the third part of the book when I address the issue of the law's authority.

b. The Challenges

Recently, this type of coordinative account of governing conventions or rules of recognition of what is to be regarded as 'law' and hence as authoritative has been put into question. These critiques are put forward by anti-conventionalists,[189] as much as by conventionalists who reject the coordination model proposed in this

[183] See COLEMAN, 1998; POSTEMA, 1982. One should note, however, that MARMOR's, 1998 argument that 'coordination conventions' are incapable of explaining the sense that many people in most communities have that their rule of recognition is especially desirable and correct, is misconceived; not only does this argument also apply to Marmor's 'constitutive conventions,' but it confuses the normative justification of the convention with the causal and posterior question of the attachment to it. Besides, coordinative conventions cannot be that arbitrary, since they have to opt for a reasonable option that has often been widely discussed and tested beforehand and that is very rarely indifferent to the participants. Finally, if Marmor's account of constitutive conventions applies well to games such as chess or to opera, the way in which it can create reasons for action in the law remains unclear and unargued for.

[184] See COLEMAN, 1991, 721. See ULLMANN-MARGALIT, 1977, 12 for an analogous definition of social norms.

[185] See on the distinction between a *social* and a *conventional* rule and Hart's move from his practice theory of rules to the latter in his postscript (HART, 1994, 256): MARMOR, 1998, 513. In short, the normativity of a social rule is explained by a reflective critical attitude towards the rule and this explanation has been criticised by Dworkin and Raz. A conventional rule (note that COLEMAN, 2001 does not distinguish between them), by contrast, links its normativity to the fact that others follow it in a normative and coordinative structure.

[186] A formal act of agreement is necessary neither to Hart's account of the rule of recognition nor for it to be a coordinative convention. The critical reflective attitude is an attitude of approval toward some convergent and projectable *pattern of behaviour* and not toward the *rule*, for the rule or norm will come out as the convention created by the practice of coordination; the internal point of view is an existence condition of the rule and it is this shared attitude toward the pattern of behaviour that constitutes the fact that the behaviour is governed by a rule. See ULLMANN-MARGALIT, 1977 on the emergence of norms from coordinating conventions.

[187] HAMPTON, 1994, 27.

[188] See MARMOR, 2001, ch 2 on the normativity of conventions and the distinction between root and auxiliary or derivative reasons. See Chapter 13.

[189] See eg DWORKIN, 2002.

chapter.[190] I will address two of these challenges here: first of all, the identification of a convergent practice to a rule; and, secondly, the compatibility between coordination conventions and pivotal disagreement.

i. From Convergent Behaviour to Rule

A concern which has often been expressed about the conventional construction of rules is that some rules exist without being practised at all. When transposed to the rule of recognition, this argument would clearly undermine the coordination-based conception of the constitution of the legal order defended here. This argument is misleading, however. First of all, the conventional construction of rules only applies to rules which can be regarded as social and does not purport to account for the existence of all rules. Secondly, the rule of recognition of what is to be part of the law is necessarily practised, for the law constitutes a social practice. A further and more important objection to the conventional construction of the rule of recognition is that if the content of the rule is determined fully by practice[191] and convergent behaviour of officials, then the *scope* of the rule can only be *coextensive with the actual convergence of officials* and can never differ from and prescribe anything but their actual behaviour,[192] which is to say that there is no rule or standard at all.[193]

The mistake underlying this concern is to suppose that the semantic *content* of the rule of recognition is determined by the range of convergent behaviour, rather than the rule being *fixed* by the behaviour. The social practice that is relevant is a practice of *following* a rule; there is therefore always a gap between the mere description of rule-guided behaviour and the content of the rule that guides it.[194] This point was most famously Wittgenstein's; a pattern of behaviour can never fully determine the content of a rule, because any pattern of behaviour is consistent with an indefinite number of different rules, each of which covers past behaviour, yet each of which could result in different future behaviour.[195]

[190] See eg Coleman, 2001; Shapiro, 2002; Kutz, 2002a; Marmor, 2001.

[191] See Wittgenstein, 1991, I, 202 on the rule-following question in the application of the rules of *language*.

[192] See Wittgenstein, 1991, I, 201: 'This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.'

[193] It is not possible to distinguish the behaviour from the rule simply by reference to an exception to the rule it would be constitutive of, since not all behaviours can be exceptions and it is difficult to distinguish an exception from a new rule it would be constitutive of in a Wittgensteinian fashion.

[194] See for an analogous idea but within the context of legal interpretation and original meaning, Greenberg/Litman, 1998 who deduce from the rejection of criterial semantics in the law that the meaning of a legal concept does not depend on its past applications; it is at the most constrained by them, but certainly not limited to them. It is the same issue that is raised here; there must be a difference between the content of the rule and past convergent practices. See also Eisgruber, 2005.

[195] See Wittgenstein, 1991, I, 185, 292 on the gap between a rule and its applications, as it is interpreted by Kripke's, 1982, 55 discussion of Wittgenstein's private language argument.

As with any rule, the content of the rule extends beyond any finite pattern of behaviour.[196]

True, for the rule not to be fully indeterminate,[197] unreflective rule-following behaviour must be distinguished from convergent behaviour in the sense that participants must be able to converge on which future behaviour will accord with the rule and which will not. This implies, in other words, that they *grasp the rule* underlying their behaviour.[198] This is not irreconcilable, however, with preserving a gap between the content of the rule and the parties' actual behaviour. Participants in a convergent practice may be in deep disagreement about the formulation of the rule they are following, as long as they share a minimal framework of interaction and bargaining through which these disagreements are successively settled and reopened.[199] This is Hume's strategy when he sets out a rational justification for *following* certain rules, a key component of which is the difficulty of providing a rational justification of the rules *themselves*. Thus, the limits of reasonable agreement constitute the reason for converging on one of the disputed patterns[200]; people can disagree over the content of a rule, but still converge on some minimal pattern of behaviour or conception that will fix that rule.[201] This disagreement need not worry us for in fact we all need to cooperate and converge in interpreting different propositional formulations of the same rule of recognition[202] and our minimal understanding of this rule is broadly shared through a range of disputable and revisable paradigms, as I explained in the first part of the book.[203] Divergent practice in morality and the law is fully understandable and it would be wrong for people to think that controversial moral concepts can be clarified among reasonable people if they took the time and energy, as would be the case in arithmetical reasoning.[204] Instead of saying that

[196] See WITTGENSTEIN, 1991, I 218: 'And infinitely long rails correspond to the unlimited application of a rule.'

[197] I am not endorsing Kripke's radical indeterminacy and sceptical claim he thinks we can draw from Wittgenstein's private language argument and gap between a rule and its applications. See ENDICOTT, 1996 on this point. In a sense, indeed, Wittgenstein's 'rule-following considerations' is strictly a misnomer for Kripke's and others' (eg BAKER, 1981) discussion about correctness and the connection between meaning and content (BOGHOSSIAN, 1989, 516). See in a similar line, WITTGENSTEIN, 1991, I, 201: 'What this shows is that there is a way of grasping a rule which is *not* an *interpretation*.' See also WITTGENSTEIN, 1991, I, 292: 'Don't always think that you read off what you say from the facts; that you portray these in words according to rules. *For even so you would have to apply the rule in the particular case without guidance*.' If the sceptic were right, all rule-following including obeying the law and using language would be undermined and this *cannot be true*.

[198] See COLEMAN, 2001, 81.

[199] On these views, see COLEMAN, 2001, 80-81; MARMOR, 1998, 514.

[200] See MARMOR, 1998.

[201] See HUME, 1978, 502, 532–33, 555; 1975, II, 194.

[202] In this sense, COLEMAN's, 2001, 80-81 conception of Wittgenstein and the rule-following argument is very different from KRIPKE's, 1982 interpretation of it; he assumes that there is a fact of the matter on which convergence is possible through bargaining, whereas Kripke does not think that there is. See for a similar account of Wittgenstein's argument, WRIGHT, 1981, 99 ff.

[203] On paradigms, see Chapter 3. See also COLEMAN, 2001, 96 ff.

[204] See BLACKBURN, 1981, 171.

the content of the rule is determined by convergent behaviour,[205] we should therefore contend that that behaviour *fixes* the rule in helping us identify which rule is being practised.[206]

Finally, the fact that the formulation and content of the rule are established distinctively from the conformity of behaviour to this rule cannot be used as an argument for the *arbitrariness* of conventional rules.[207] First of all, in this model, not all legal rules are conventional rules, but the main rule of recognition only—this means that there will be more institutionalised deliberation about the content of the next rules. Secondly, as we saw before, people will usually only be willing to cooperate over reasonable options in circumstances of reasonable disagreement. In this sense, the chosen option will at least be a reasonable one. Finally, if one replaces the need for a conventional rule in its context, ie a context of fierce moral disagreement, then the salience of any of the disputed albeit reasonable patterns of cooperation is better than none.

ii. Coordination and Pivotal Disagreement

Another critique of the conventional explanation of law, which is connected to the previous one, can be found in Dworkin's view that if the rule of recognition amounts to a unified social practice, participants will not by definition be able to disagree about the content of the rule, thus frustrating legal disagreement of one of its core instances.[208] If this objection succeeds, coordination conventions could be seen as remedies to persistent disagreement over the ways to secure common concerns and thus also over the way to secure coordination on how to ensure second-order and third-order coordination, but it would seem that it does not succeed in offering a complete response to persistent and deep disagreement of the kind I discussed in the first part of the book about the contents of these rules of coordination themselves.

[205] In this sense, there is no regress in the argument that calls for minimal convergence on a framework of bargaining and coordination over the rule of recognition; it does not assume *full agreement* and certainly not the correspondence to a standard of behaviour that would bring back, as in Kripke's flawed sceptical solution to the paradox (KRIPKE, 1982, 91 ff), the difficulty of following a rule when there is a gap between the content of the rule and its applications or disagreement over it (see WITTGENSTEIN, 1991, 224–25 on the close relationship between 'rule' and 'agreement'; BIX, 1993, 42: 'any attempt to justify [the conclusion that two people are going on in the same way] is likely to end up with the assertions that they are following the identical rule').

[206] The content and the scope of a rule such as the conventional rule of recognition cannot be established once and for all through convergent behaviour beyond the minimal need for coordination on some rule, but can be and is generally disputed; the only thing we need for there to be a rule with a determined scope is a minimal understanding that we share at least *as a starting point* through paradigms and other hypotheticals that might then be disputed and revised. This is paradoxically what DWORKIN, 2002, 1659 still fails to see. See even DWORKIN, 1986 whose shared interpretive attitude as the fulcrum of agreement and disagreement implies shared (disputable) paradigms with which we ought to seek fit as long as they are not revised, such as standing up for women as a paradigm of courtesy. See also Chapter 3.

[207] On this argument, see MARMOR, 1997, 1998 against GILBERT, 1989 who associates arbitrariness to indifference to the content of the rule. See also SHAPIRO, 2002, 392 ff. See also KUTZ, 2001B who understands Hart's or Coleman's coordination-based accounts of the rule of recognition as purely unreflective and arbitrary ones.

[208] See DWORKIN, 2002.

This is a serious objection in an account of the morality of conflict that emphasises both the dangers and the benefits of disagreement and should therefore accommodate disagreement at the core of its response to it.[209] These two facets of disagreement are not independent alternatives, but relate dialectically with each other.[210] Arendt was one of the first political theorists to attempt to reconcile these two dimensions of disagreement by making both institutional and procedural proposals to keep disagreement abreast, but without suppressing it and counterproductively separating individuals, and thus leading to 'the shrinkage of the public realm.'[211] There are many ways of channelling disagreement without suppressing it and even by fostering it. Arendt talks of the importance of setting limits that *separate* as well as *relate* individuals to each other; hence the role of constitutional and positive law in establishing artificial channels of deliberation and decision which are more rigid and durable than the actions they accommodate, albeit not too rigid.[212] In other words, Arendt's institutional response to the instability of disagreement amounts to a remedy to a danger that might have to be remedied itself, when what was a danger has become an advantage and the institutional remedy itself has become a danger. It is the object of the third part of the book to discuss adequate political and legal responses to disagreement, which can combine the need for coordination by virtue of the dangers of disagreement, on the one hand, with the need for pluralism given the benefits of disagreement, on the other. For the time being, I would like to show how coordination itself is respectful of and receptive to disagreement and can and should evolve thanks to it.

First of all, it is important to understand that there is no implicit consensus underlying social conventions, but that, on the contrary, social conventions emerge precisely in those cases where an agreement is difficult or impossible to reach.[213] Conventions do not therefore manifest any *pattern of agreement.*[214] They constitute *frameworks of discussion* and bargaining that help settle disagreements over a common coordinative solution, but also to reopen controversies when necessary.[215] Institutional unity and convergence is not achieved through content—a conventional set of criteria—but amounts to institutional unity through agents' orientation towards a collective cooperative goal.

[209] See Chapter 4.
[210] See Waldron, 2000c, 202–3.
[211] Arendt, 1968a, 178.
[212] See Arendt, 1968a, 465–67.
[213] Marmor, 1998, 514.
[214] This seems precisely to be the point which opponents of the coordination-based account of the rule of recognition seem to miss; they believe that coordination conventions are the result of an agreement, whereas they are ways to converge in case of disagreement. See eg Kutz, 2001b: 'While it is possible, as a formal matter, to identify "disagreement over the relevant criteria" as the solution to a coordination problem, such a "solution" would be an evident practical failure. Since the very point of a Lewis convention is to eliminate disagreement over the proper rule, building disagreement into the convention would defeat the point. Hence positivism cannot explain the practice of pervasive disagreement by reference to conventions.'
[215] Bratman, 1993, 99.

Secondly, the existence of a coordination convention does not exclude controversy about its *content*. One ought therefore to distinguish between the *formulation* of the rule which can and will differ from one participant to the other and its *existence*. Even when there are several ways of understanding a rule, there must be something there that people can understand differently and argue about[216] and this minimal framework of bargaining is constituted of the minimal understanding I argued needs to be shared to disagree over the same concept.[217] Thus, conventional rules can admit of the possibility of disagreement, not only about *how to apply* the rules, but also about their *content.*[218] Furthermore, disagreement about the content of the rule is not restricted to peripheral disagreement, but extends to *central* features of the rule. The framework is created and sustained by the behaviour of participants, but the content of the rule is not; the rules are the result of ongoing negotiations.[219] Coleman is therefore right to say that the kind of conventionality at stake here anticipates and invites, rather than precludes, certain forms of moral argument.[220] All that is needed for coordination is a certain overlap over the common goal and the means to secure it and these elements are easily provided.[221]

In conclusion, therefore, broader and revised forms of coordination games of the kind proposed here should not be neglected in favour of other models of 'shared cooperative activity.'[222] Further disagreement about the matters that have been coordinated is accommodated by the proposed model of a coordinative convention *qua* dynamic framework of ongoing coordination.[223] Besides, the idea of 'shared intentions,' ie of a 'state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations

[216] See Chapter 3.

[217] See Coleman, 2001, 96 ff. The argument according to which, since Coleman draws on the persistence of disagreement, he does not have the resources to establish how to draw the line between these cases of disagreement and the minimal agreement required on revisible hypotheticals and paradigms and hence to demonstrate that there is no pervasive disagreement over paradigms and the methodology of bargaining and agreement, is misleading. First of all, this argument would also apply to Dworkin, who is actually willing to welcome Coleman in his camp (Dworkin, 2002, 1665). Secondly, the requirement of temporary agreement on revisible paradigms and other hypotheticals that are constitutive of the minimal understanding is a logical requirement; without this minimal understanding, we would not share the same concept and would not be disagreeing but only talking at cross purposes. See Chapter 3.

[218] See Coleman, 2001, 99. Contra: Dworkin, 2002, 1658 ff.

[219] See Hume, 1978, 490, 503 on the evolutive process of coordination over justice and the law.

[220] Coleman, 2001, 117.

[221] See even Kutz, 2001a.

[222] See eg Bratman, 1992 and 1993 whose theory is now used as a model by Coleman, 2001, 96 ff. See also the latest adaptation of Bratman's concept by Shapiro, 2002 and a critique by Bratman, 2002.

[223] See Bratman, 1993, 99: 'background framework that structures relevant bargaining.' For instance, by reference to Postema, 1982, 200 ff, it is possible to see that coordinative conventions may also be regarded as dynamic bargaining frameworks where disagreement is constantly taken into account and settled. This is also Hampton's, 1997, 111 contention when she reconciles through her governing (coordinative) convention (and other ongoing mechanisms of fairness, such as voting) the need for stability in a political community that commanded the establishment of a coordinating convention in the first place, with the fact of disagreement over some of the elements of the basic organisation of political authority that ought to be dealt with in modern democracies.

between those attitudes,'[224] can help us to 'coordinate our intentional actions'[225] and views of how to achieve the common interest in a coordination model.[226]

3. Second-Level Coordination: the Constitution of Law-making Procedures

The need for second-level coordination occurs when people turn to the law, on which they converge according to first-level coordination, in order to help solve their third-level coordination problems or any other matter on which they need a *single public answer*. Law and the various processes of legislation or adjudication themselves often generate further problems of coordination that have to be dealt with within the law and through politics.[227] Resolution is needed in and by politics just as it is in and by the law[228]; this explains the need for rules of closure on legislative debates and the simple majority rule in elections and legislatures. Thus, before the law can contribute to facilitating third-level coordination, parties must decide which coordinative outcome ought to be favoured, and this is what one may refer to as second-level coordination. It is by doing so and then authoritatively marking which option is the salient one and is to be supported by sanctions and by embodying it that the law may then claim respect in further coordinative issues.

In second-level coordination problems, officials and citizens are asked to accept some *institutional output* as salient and as a reason for putting the determination which it embodies into effect in order to settle the problem of third-level coordination it addresses.[229] The need for second-level coordination implies that the political debate creates rules to choose one view, or at a later stage one interpretation of it, as being embodied in the law. Second-level coordinative rules are often discussed and established through first-level coordination. Among the different procedural rules one may think of in modern democracies, the majority rule is the most common example. I will come back to convergence on the majority rule and to the coordination-based authority of majoritarian decisions in the third part of the book.

4. Third-Level Coordination: the Constitution of Concrete Laws

Even though the *creation of a political authority and of a legal system* can be regarded as a remedy for the first-level coordination problem of whether and how

[224] Bratman, 1993, 107. See Chapter 9.
[225] Bratman, 1993, 99.
[226] Contra: Kutz, 2001b who does not think that his account of minimal shared intentions and cooperative goal can be accommodated in a coordination-based account of the rule of recognition.
[227] See Taylor, 1987, 24, 165 for the same thought on 'political entrepreneurs' and the fact that their existence creates a collective action problem of its own.
[228] See Endicott, 1999, 15.
[229] See Waldron, 2003a on public settlements. See also Schelling, 1963, 112 on the focal point of a coordination convention that does not always serve as an outcome, but merely as a sign of where to look for the outcome as in the case of a 'test vote' in a legislative body.

we need to coordinate and even if *politics* and *democratic procedures* can be understood as a response to the need for second-level coordination on which of the opposing views ought to be embodied in coordinative rules and on whether we ought to coordinate at all on precise issues, we need to establish now how the *law* itself can contribute to facilitating third-level coordination on concrete substantive matters of common concern and justice. The need for third-level coordination is the result of pervasive problems of partial conflict coordination in daily life.[230]

The 'law mediates our conflicts by displacing practical reasoning onto a limited domain of publicly accessible norms, and isolating that reasoning from the conflicting interests, principles and values that stand as obstacles to social cooperation.'[231] It is possible to distinguish three main groups of contributions the law can make to third-level coordination problems, depending on the type of coordination problem at stake. First of all, with respect to *Prisoner's Dilemmas and pure coordination problems*, which are not, as we saw, directly central to political practice, the law may make various contributions to their solution.[232] In PD cases, the law can provide sanctions to offset the tempting difference between coordinating or defecting. In PCP cases, the law can mark the doing of either X or Y as being the salient one by giving assurances to the parties.[233] Secondly, *partial conflict coordination problems* are more difficult to settle than pure coordination games since the conflict must be resolved before coordination can be achieved. The way to solve a PCCP will depend on the circumstances of each case,[234] and in particular on how much each participant considers his own judgement as the only reasonable one, how likely each participant thinks he is to reach the outcome he deems more just by holding out for that option, etc. The law does not actually *solve* PCCPs, but merely marks one of the options as salient and *contributes to facilitating* coordination.[235]

Law can contribute to facilitating coordination through either *legislative* or *judicial* measures.[236] The choice of either methods will depend on whether the contribution to coordination is forward-looking, as it is in legislation, or whether a failure in coordination needs to be redressed retroactively, as it is through adjudication.[237] Thus, according to Postema, 'the law's mediation as a solution to problems of social cooperation is two-fold: (1) it seeks to supply publicly accessible pre-emptive intermediate norms to govern social interaction and (2) it authorizes adjudicative institutions to settle matters left unsettled by this set

[230] On third-level coordination, see POSTEMA, 1982, 183 ff who, however, refers to it as first-level coordination.
[231] POSTEMA, 1996, 91.
[232] See WALDRON, 1999A, 103.
[233] See HAMPTON, 1997, 74–75.
[234] See HAMPTON, 1986, ch 6 on the difficulties that participants may have to coordinate in a PCCP.
[235] See for a critique of this kind of contention, GREEN, 1983 criticising Finnis' pure coordination model of authority.
[236] On the distinctiveness of each method of third-level coordination, see ENDICOTT, 1999, 15.
[237] On this distinction, see POSTEMA, 1982, 184–85.

of norms.'[238] Usually, the law does not merely introduce a rule, whether it is legislative or adjudicational. In addition, it will often create an *executive* machinery to enforce it; laws are not just created to ease coordination, but to provide an authoritative solution such that failure to act in accordance with the law creates a strong presumption that sanctions will be applied.

It must be emphasised that the establishment of *sanctions* in *pure coordination cases* does not contribute to the normative force of the rules (which operate as and replace in a sense informal coordinative conventions), nor need they supply the motivation for compliance with the rules[239]; sanctions merely underwrite the coordinative conventions and facilitate coordination by replacing the replication of patterns of practical reasoning[240] and by making coordination directly accessible to newcomers even before their appropriate desire for coordination is stirred. By contrast, in *partial conflict coordination cases*, the situation is very different; in such cases, there is no single salient option to underwrite before the law intervenes. Participants need sanctions to tilt the balance in one direction and thus to give this option its specific normative force.

III. COORDINATION AS LAW'S MAIN FUNCTION

In the first two sections of this chapter, I argued for the existence of complex coordination problems in daily community life and for the need to solve them. I also argued that this could be done at best by the establishment of a legal system given the need for a collective and formal identification of the salience of one option over the other. After having established how central the law is for political coordination, the present section purports to assess the *importance of the contribution to social coordination in the definition of the law's function*.

Even if one succeeds in demonstrating both the need for coordination and law's particular ability to secure it by contrast to other forms of social rules, this need not yet mean that it is law's main function to do so. There may indeed be other functions the law fulfils which are equally or more important than coordination. It is crucial therefore to determine *how central coordination is to the law's main function*. It is only if we can establish that coordination constitutes a central function of the law that it is likely to play an important part in the justification of the law's claim to authority and alleged right to be obeyed. To refer to the quote

[238] POSTEMA, 1996, 93.

[239] POSTEMA, 1982, 186. See for a critique of the normative role of sanctions FINNIS, 1980, 260 ff: GREEN, 1983, 318 ff. Finnis' conception of the normativity of sanctions in pure coordination problems can be regarded as incoherent for two reasons; on the one hand, it is difficult to see why people who allegedly naturally pursue the common good need further motivation to do so and, on the other, pure coordination games already encompass salient normative options that will only need assurance to be applied. As such, sanctions only work as markers and this does not really seem to account for the importance of the efforts surrounding the role of sanctions in a legal system. See GAUS, 2002.

[240] See on the law's claim to authority on this coordinative basis, WALDRON, 2003A. See also Chapter 13.

by Raz cited at the beginning of this chapter,[241] to be able to argue that coordination is the law's central task, we need to establish more than the good of coordination and the law's particular ability to ensure coordination, as we did earlier in this chapter. We also need to demonstrate that there are *no counterweighing reasons to law's coordination function* and this is the aim of the present section. It is not my aim yet to discuss issues pertaining to the relationship between coordination and the justification of the law's claim to authority, as I will address the issue at length at the end of the book. After some general considerations on the importance of coordination in the law, I will discuss successively two main objections brought forward against the centrality of coordination in our conception of law.

1. The Argument

It results from our discussion so far that problems of coordination are not only 'central to the normal functioning of the law,'[242] but that, as Raz acknowledges, 'much law is a matter of securing social coordination.'[243] To take just a few examples, duties based on the coordinative argument, such as the duty to pay taxes, are among 'the common core of cases regarding which the obligation [to obey the law] exists and applies equally to all.'[244] As Raz acknowledges, it is therefore 'fairly obvious that the law plays an important role in securing some forms of social cooperation in well-ordered societies.'[245]

True, the law can achieve many important goals which cannot otherwise be achieved, by measures that do not secure cooperation.[246] We cannot therefore regard law merely as a solution to coordination problems; law exists, for instance, in order to provide the expertise ordinary people lack, to organize society in a way that enables individuals to be responsible for the lives they lead or to create an efficient scheme of production and distribution.[247] Law can therefore have any number of legitimate purposes and tasks, not all of which can be regarded as coordinative ones. Thus, ordinary politics (eg the making of executive decisions or of decisions as to what legislation to propose) does not always provide participants with one of two outcomes where the force of the demand for one of them to be given is independent of the importance of the

[241] See Raz, 1998d, 10.
[242] Raz, 1995a, 349.
[243] Raz, 1998c, 168. See also Raz, 2003b, 259: 'While *I take coordination to be one of the central functions of government*, I do not believe that people who are in situations where they should coordinate their actions are necessarily aware of this fact' (emphasis added).
[244] See Raz, 1995a, 350.
[245] Raz, 1998d, 10.
[246] Raz, 1998d, 3.
[247] See Coleman, 2001, 94–95.

considerations for and against either outcome, as would be the case in a coordination case; many problems in daily politics can be responded to by deferring decisions, by compromising, by finding a third way, by consultation and so on.[248] Therefore, even if we assume that it is a good thing for a society to secure social cooperation, it is not obviously the law's only task or function to secure it.[249]

It remains, however, that law frequently does perform coordination functions and that the ability to perform these functions well is a prized virtue of law.[250] In fact, to make particular options salient in pure or partial conflict coordination problems may be conceived as *one of the most important functions of law-making.*[251] As Hampton argues, this task is required in order for us to call any system of authority a genuine state.[252] Indeed, providing knowledge and assurance in the circumstances, where it is now clear that people need to coordinate on common matters, consciously agree to do so but disagree on the modalities, comes close to being a central case of the contribution that political and legal authority can make to the pursuit of the common interest in human communities.[253]

Some authors, among which Raz, still argue that coordination models tell us very little about the point and the basis of law. Although, as we saw at the beginning of the chapter, they are most probably right about the shortcomings of the unrevised economic and individualistic game theoretic model,[254] we should distance ourselves from the generalisation according to which collective action problems cannot provide any indications at all for a theory of law. As we saw, many authors do not take seriously enough the resources of the coordination model when applied to *partial conflicts* of *opinions* about matters of *common interest and justice* which are common cases in modern politics. In fact, Raz's earlier views about law's foundation in coordination were much more favourable than they are now; he once argued that '*all* political authority rests on this foundation (although not only on it).'[255] It is worth therefore examining why he changed his mind through assessing some of the most important arguments that he has brought forward more recently against the centrality of coordination for the law.

[248] See Endicott, 1999, 15 who still regards such forms of resolution of political problems as *coordinative* despite the fact that they are not bivalent, ie that they do not oppose two solutions to one another.

[249] See Fuller, 1969a, 1 ff. See Raz, 1998d, 2, 13; Green, 1989b, 805.

[250] Postema, 1982, 185.

[251] See Waldron, 2003a. My aim here is not to give a *functionalist* explanation of the law and of political authority in a sociological sense.

[252] See Hampton, 1997, 74.

[253] Waldron, 2003a.

[254] See for a critique, Baert, 1998, 165 ff.

[255] Raz, 1999b, 64 (emphasis added). See also Raz, 1986a, 56: 'The case for having any political authority rests *to a large extent* on its ability to solve coordination problems and extricate the population from Prisoner's Dilemma type situations' (emphasis added).

2. The Challenges

I will discuss successively two main objections brought forward against the centrality of coordination in our conception of law: the absence of all-encompassing concerted action, and the absence of all-encompassing need for it.

a. The Absence of All-encompassing Concerted Action

Many sceptics argue that some important areas of law do not raise coordination issues. Raz argues, for instance, that 'laws like the prohibition of rape and murder differ from laws which coordinate the efforts of large groups'[256] and that 'there is no reason for an individual faced with the same considerations to conform to the law on such occasions.'[257] Accordingly, 'the reasons which lead one to acknowledge the law's authority in cases of coordination do not apply elsewhere'[258] and many rules cannot be explicated at all by disagreement and coordination problems.[259]

Laws do not fall so clearly into one or the other category, however, and coordination cannot always be excluded that clearly from the law's function in those cases. It is true that coordination is patently at work in the case of contract or tort law where many people who interact desire to coordinate their actions, but disagree on the direction or the priority of their respective actions. By contrast, laws, such as criminal laws, which regulate purely individual behaviour seem, at first sight at least, to have little to do with problems of coordination. But it is precisely here that we should distance ourselves from a purely content-based analysis of the function of the law and of its coordinating task. The latter could indeed very often be merely individualistic, as when people respect circulation signals when driving alone, and legal obedience could still be regarded as part of a coordinative effort in those cases.[260] As we saw before, the coordinative function of the law is a *global* one. It corresponds to a conception of law according to which the reasons to obey the law have not only to do with the desirability of the content of any particular law, but with the desirability of the existence of a legal system and a structure of government by law as a whole, the rules of which people have to play by as responding to a need for coordination of our social and political actions and of our views of what would be right.[261] According to this view, the role of the law in coordinating social action corresponds to the *necessity*

[256] Raz, 1995a, 349.
[257] Raz, 1995a, 349.
[258] Raz, 1995a, 349. See Chapter 13.
[259] According to Raz's account of the justification of law's authority, coordination constitutes only one of three potential justifications of the piecemeal prima facie authority to obey the law. See Chapter 13.
[260] See Raz, 1995a.
[261] See Raz, 1995a, 344 who objects to such a global approach to legal authority.

to avoid people taking existing moral rules into their own hands,[262] by coordinating on one single legal rule that decides once and for all what can be regarded as lawful and what not.[263] Coordination is therefore primarily *adverbial* in the sense that it qualifies the pursuit of any common goals by making them focused and unique, whether these goals are directly or only indirectly coordinative.[264]

There is a further argument against acknowledging a general connection between law's authority and its coordinating task: *legal oversimplification*. According to Raz, indeed:

> laws striving to achieve coordination address masses of people, and are designed to be enforced and regulated through the activities of judicial and administrative institutions. They are drafted not merely to state most accurately the actions required if coordination is to be achieved, but also to be easily comprehended, and to avoid giving rise to . . . undesirable by-products of the legal machine. . . . They may be the inevitable simplifications the law has to embrace to be reasonably understood and efficiently enforced.[265]

Although this concern is understandable, there is no reason to believe it should be that widespread. If it is true that people might go beyond what is required to pursue their coordination goal, the reverse is not necessarily true. Many laws, and even non-coordinating ones, simplify the considerations at stake and this does not make them less authoritative. Moreover, if this reduces their scope, new laws might be enacted if required.

b. The Absence of All-encompassing Need for Cooperation

Another important source of scepticism, which is connected to the previous one, derives from the clarity in many cases of the sanction of *personal morality*. Even if one concedes that coordination is global and adverbial and hence extends to non-collective areas of legal practice, much non-compliance with standards of personal morality is regarded as wrong quite independently of the status of the rules *qua* outcome of a cooperative scheme.[266] If this is right, then coordination may well be central to law's function, but it is not to law's authority. By drawing on Waldron's elaboration of Raz's objection,[267] we could consider, for instance, the law about rape. Raz assumes that 'to refrain from murder or any other moral perversion [such as rape] solely because the law proscribes it, is morally distorted and undesirable.'[268] Rape is already wrong morally and this is valid in any society

[262] Even Raz, 1995a, 347 seems to agree on the need to prevent people from 'taking the law into their own hands.'
[263] See Luhmann, 1989, 140.
[264] See Penner, 2003, 73 for such an interpretation of Raz's service conception of authority.
[265] Raz, 1995a, 349.
[266] Simmons, 2001, 41.
[267] See Waldron, 1999a, 105. See also Waldron, 2003a.
[268] Raz, 1995a, 344.

independently of any further need for coordination through law. This suggests that coordination problems in general cannot provide the basis of an adequate theory of legal authority for there are many legal rules they do not explicate at all.

There is, however, a dimension in which laws on rape are more complex and this relates to some of their elements which are more controversial. One can think, for instance, of the specific age of consent for sexual intercourse or of marital rape. It is difficult indeed to find moral principles and values which are entirely commensurable and compatible; values are generally composite and often conflict with each other.[269] In this sense, the common existence of a spectrum of moral solutions makes coordination desirable in many cases where we think that we already have autonomous moral principles. There are two reasons for this. First of all, these *controversial elements* require a single solution despite the disagreement they give rise to. In other words, there is a need for coordination on this issue, since each of us would prefer a single law on rape, even if it sets criteria over which we disagree in some cases, than having no law on rape at all. Secondly, many laws add to their contribution to the coordination of behaviours a *response* to the failure to abide by the rules in that they associate *sanctions* to them; the content and organisation of such sanctions and coercion need to be coordinated over.[270] Thus, in the case of the regulation of abortion, even if some of the participants disagree on the need to coordinate, because a coordinated solution in one direction regarded by some as being unjust would be worse than none, participants may still acknowledge that they need to coordinate on the application of *force and sanctions* to some cases of abortion that may be regarded by some as amounting to homicide, because force and sanctions are usually applied in response to illegal violence and coercion.

To take another example, although we all have good and compelling reasons for not killing people *per se*, it is important that there be an institutional determination of this kind and that it be respected. There are all sorts of things which flow, publicly, from the fact that someone was killed which would not arise without the public determination that people are not to kill each other. By contrast to what is the case when cursing one's mother, to respect the public prohibition of killing is to take note of it and to be prepared to respond in various ways to actions of this sort when they take place. Thus, although everyone sees that there is but *one way in which the question of common concern can be disposed of*, they need not have begun enforcing it; to respect an authoritative legal settlement in such a case is therefore to register the fact that the given question has been answered officially and that it is now time for those actions to be undertaken in just this way.

Of course, Raz may reply to this counterobjection by arguing that the prohibition of murder is not conventional and coordination-oriented *in its core*, but that it is so *at the margins* only, where exceptions have to be conventionally drawn and

[269] See Raz, 1986a. See Chapter 2.

[270] See Waldron, 2003a who distinguishes between murdering someone and cursing one's mother on these terms.

respected and where it would take too much time to address the issue in each case. It will not do, however, to try to separate packages of settlements rigidly into those which are best understood as genuine legal settlements and those where, for moral reasons, cooperative settlements through the law seem to be redundant.[271] The application of any rule will raise marginal questions where coordination is needed and it is therefore very difficult to distinguish those questions from core questions. It follows from this example that many laws which seem at first sight to reflect plain and uncontested moral beliefs, do establish in their complex details, procedures and presumptions which are not uncontroversial, but over which we would rather coordinate than not.

CONCLUSION

This chapter discussed mainly the negative side of the significance of disagreement by focusing on coordination problems and the need to solve them through the establishment of a political and legal system. It had as an aim to establish the complex and dialectical relationship between the need for *coordination* in the face of persistent reasonable *disagreement* over the right, on the one hand, and the need for *law and politics* to do so in the face of disagreement about how to coordinate, on the other. Disagreement and coordination are two faces of the same reality: the circumstances of politics. It is because we disagree reasonably about issues of common concern that we need to coordinate, but we disagree in the first place because we need to coordinate and therefore disagree about how to coordinate. To explore the complex relationship between disagreement, coordination and the law, the chapter's argument had *three main prongs*. First, it established the existence of coordination problems on matters of common concern and the need to solve them. Secondly, it turned to modes and levels of coordination and in particular to the law's coordinative abilities. Finally, it demonstrated how coordination can actually be regarded as one of the law's main functions, albeit not the only one.

First of all, the *existence of coordination problems on matters of common concern and the need to solve them*: human interdependencies and sociability generate questions of common concern over which there are fierce disagreements and over which we need to coordinate, although we also disagree about how to do so. The central cases of politics can therefore be modelled as partial conflict coordination problems that oppose conflicting opinions about justice and matters of common concern, as opposed to Prisoner's Dilemmas or pure coordination problems to which political conflicts are often compared. The need for coordination can be justified on moral grounds and on the basis of the importance of securing justice, on the one hand, but also on psychological or empirical grounds and on the basis

[271] Waldron, 2003a.

of the importance of stability and predictability, on the other. As to the possibility of coordination in conditions of persistent and pervasive reasonable disagreement, it lies paradoxically in the basic condition of disagreement: human sociability. Hence a minimal convergence on the need to converge (*Grundkonvergenz*) and the key to coordination's success despite disagreement. Note that the moral interest and need to coordinate should be distinguished from the existence of an actual moral reason to do so; the existence of such an obligation to coordinate and obey the law will be discussed in the fourth section of the third part of the book.

Secondly, the *modes and levels of coordination and in particular the law's coordinative abilities*: partial conflict coordination problems over matters of common concern can only be settled, given reasonable disagreement, through collective and formal means of salience-marking. Among those collective and formal means, the establishment of a legal system is the most efficient and flexible one; it provides the public salience and accountability such coordination problems require to be solved. The law does not actually *solve* coordination problems, but it *contributes to facilitating* their resolution through three complex and nested levels of coordination at least: first-level coordination through a governing convention or rule of recognition contributes to the creation of a political and legal system; second-level coordination through procedural rules leads to the adoption of political decisions; and third-level coordination through legal rules and sanctions contributes to the actual settlement of coordination problems.

Finally, *coordination can be regarded as the law's main function or task*: I argued that the task of making particular options salient in partial conflict coordination problems over matters of common interest may be conceived as one of the main functions of law-making. Certainly, securing coordination in these various senses is *not the only task* of the state and of the law. But, providing knowledge and assurance in the circumstances, where it is now clear that people need to coordinate on common matters, consciously agree to do so but disagree on the modalities, comes close to being a central case of the contribution that political and legal authority can make to the pursuit of the common interest in human communities. Arguments to the contrary may easily be discarded. First of all, legal coordination should be understood in an adverbial sense; what matters is not that the legally regulated activity be a coordinative one, but that the law be seen as facilitating the coordination of many different conceptions of what should be our common goal regarding individual and collective activities. Secondly, even in cases where we are bound to abide by a rule on grounds of individual morality only, the law can have an important coordinative role in the detail of the rule's application and of its sanctions.

Part Three: The Response to Disagreement

THE THIRD PART of the book addresses the various *responses* that can be given to persistent reasonable disagreement about matters of justice and to the difficulty of providing a rational justification to moral choices in those matters. The persistence of reasonable disagreement calls for a political answer and therefore for the constitution of a legal order, but it also implies important *accommodations* in the way the law can provide its answers; disagreement not only dictates the choice of law as a coordination method, but disagreement in and about the law also affects the ways in which the law can coordinate our conflicting views. There are both advantages and disadvantages to reasonable disagreement. As such, the means we choose for remedying its disadvantages should be responsive to the advantages of disagreement delineated in earlier chapters.

These different accommodations to the fact of reasonable disagreement affect law-making procedures, law-making institutions, the content of law and issues of legal authority. Each of these elements are addressed in distinct sections. In a first section, I discuss the different alternative *law-making procedures* to agreement in conditions of reasonable disagreement. These different second-order coordination schemes constitute a *crescendo* of potential alternatives to reasonable agreement, all in the same deliberation process, and they range from tolerance through mutual accommodation and compromise to taking a vote. The second section addresses the implications of disagreement for *law-making institutions*. More particularly, it discusses issues pertaining to the democratic justification of the constitutional entrenchment of rights, to the rights-based instrumental justification of the constraints on rights to equal political participation and of judicial review in particular and, finally, to the paradox of democratic representation. The third section looks at the implications of disagreement for the *content of the law*; it discusses issues related to legal indeterminacy, legal coherence and conflicts of constitutional rights. Finally, the last section addresses the issue of *authority and civil disobedience* to the law. Given the suggested account of the emergence of the rule of law in the face of disagreement and the authority of democratically adopted and coordinative decisions in conditions of disagreement, the law cannot avoid making claims that will be at odds with the sense of justice some of us have, thus limiting the grounds on which and the manner in which authority but also civil disobedience may be justified.

Section One: Law-Making Procedures

The two chapters in this first section discuss different alternative *law-making procedures* to reasonable agreement. These different coordination procedures constitute a *crescendo* of potential alternatives to reasonable agreement, all in the same deliberation process, and they range from tolerance through mutual accommodation and compromise to taking a vote.

In the first chapter, I present what amounts to the first and last step in the crescendo of different law-making procedures in the face of reasonable disagreement: *deliberation* and *majority voting*. There, I argue for a particular deliberative voting ethics on the grounds that deliberative democracy on its own does not provide sufficient justification for the voting that takes place once deliberation has failed to produce agreement, as happens in most cases. I start by arguing that *alternative modes of closure* like toleration and mutual accommodation have limited application in conditions of reasonable disagreement. Although both are justified, toleration does not reply to the need for a single answer when deliberation does not bring us to a natural agreement, and mutual accommodation induces a premature pressure for agreement and hence deresponsibilises participants. Given the need for closure after deliberation, voting and majority voting in particular should be justified on deliberative grounds. This justification is founded on both minimal and maximal decisiveness compatible with the most basic and uncontroversial right to equal participation.

The second chapter addresses a specific case of mutual accommodation: *compromise*. There, I argue that compromise does not exhaust mutual accommodation and that some kinds of compromises do in fact go further than mutual accommodation. I discuss these different types of compromise and their justifications and present four arguments against internal compromises of justice, ie compromises that combine different incompatible conceptions of the same concept. These arguments are internal compromises' inefficiency, injustice, incoherence and lack of authority. I conclude by arguing that majority rule amounts to a compromise *qua* process where different conceptions take turn rather than being integrated every time. It should not therefore be identified with nor need it include an external or internal compromise *qua* outcome.

7

Deliberative 'Voting Ethics'

INTRODUCTION

> We should think of deliberation with a view to voting, and voting in a way that looks back to what took place in deliberation, as a unified exercise of political virtue, rather than an unsatisfactory compromise between disparate models of democracy.[1]

THE IDEA THAT democracy revolves around the transformation of preferences through deliberation or discourse[2] and hence consists in an exchange of reasons and reasoned opinions or judgements,[3] rather than a mere aggregation of preferences through voting,[4] has become during the past ten years one of the major positions in democratic theory.[5] Hardly anyone nowadays finds deliberation intuitively repulsive. Nor does anyone not take for granted that, in a democracy, political disagreements over issues of justice and the right are to be resolved by argument and deliberation among all those affected by the future decision. Given the existence of pervasive reasonable disagreement in matters of

An earlier version of this chapter was delivered at the First EuroConference in Legal Philosophy, Tossa del Mar, November 2001. I would like to thank all participants for their comments and criticisms, and in particular Nick Barber, Paolo Comanducci, Marisa Iglesias, Pablo de Lora, Georgio Maniaci, Jose Luis Marti Marmol, Maribel Narvaez, Neus Torbisco, Ernesto Garzon Valdes and Ruth Zimmerling.

1 WALDRON, 1999B, 223.

2 In this chapter, I will not distinguish between 'deliberation' and 'discourse' that are nowadays used interchangeably. It is true that there are important differences between Habermas' theory of discourse and theories of deliberative democracy, but for reasons of simplicity I will assume they both refer to (i) an intersubjective process of communication, by contrast to individual deliberation, that is (ii) expansive, unlike private conversations, and (iii) non-coercive.

3 See ESTLUND, in ESTLUND/WALDRON/GROFMAN/FELD, 1989, 1317; COHEN, 1986A. See also COLEMAN/FEREJOHN, 1986, 16; BRENNAN/PETTIT, 1992.

4 The aggregative model of democracy was initiated by SCHUMPETER, 1947 and further developed by DOWNS, 1957. See also COHEN, 1986A, 28 against RIKER, 1982. See on the distinction between a preference-based and a judgement-based account of voting, SETALA, 1996, 35 ff and WALDRON, 1990A, 51. See also for a critique of the aggregative and strategic model of voting, BOURDIEU, 2000, 81 ff referring to Durkheim's *Leçons de Sociologie*.

5 The main contributors to this new deliberative turn have been HABERMAS, 1998A; BESSETTE, 1994; MANSBRIDGE, 1980; BARBER, 1984; COHEN, 1989; DRYZEK, 1990, 2000; ELSTER, 1986A; MANIN, 1987; FISHKIN, 1991; BOHMAN, 1996; GUTMANN/THOMPSON, 1996; NINO, 1996; BENHABIB, 1996A. Of course, the emphasis on deliberation is not entirely new and it is the revival of an old theme that can already be found in the writings of Aristotle, Burke, Mill and, more recently, Dewey or Arendt.

justice, however, it would also seem quite natural to expect a complete theory of democratic deliberation to include an account of the *institutional forms* that deliberative processes should take. There must indeed be processes of reaching legitimate and binding collective decisions in multimember bodies like legislative assemblies,[6] when an agreement is not possible once deliberation has taken place.

Most theories of deliberative democracy do not provide such an account, however. Some of them reject standard practices of liberal democracy as impossible locations for public reasoning. Others, who acknowledge that non-deliberative procedures constitute an unavoidable component of any democratic institutional arrangement, simply assume the moral superiority of deliberation over voting or other elements of the aggregative model of democracy from which they want to distantiate themselves. In doing so, defences of deliberative democracy neglect issues that are crucial to the task of formulating a persuasive defence of democratic deliberation; to borrow Johnson's terms, they 'do not treat deliberation primarily as a mode of political decision making.'[7] For instance, Dryzek argues that only a shift from voting to communication in the basic conceptualisation of democracy would enable a compelling and critical defence of deliberative democracy.[8] Whereas others like Bohman have identified and celebrated a progressive move back from deliberation to vote as a characteristic feature of the 'coming of age of deliberative democracy.'[9] Dryzek criticises it as a conservative retreat to liberal democratic institutions. In lieu of votes and elections, he offers an account of reasoned agreement as the result of deliberation, as well as an argument for rhetoric means of communication between public spheres of deliberation and the political process of decision-making. According to him, such a theory is the only 'defensible theory of democracy . . . in the wake of the deliberative turn.'[10]

In the present chapter, I aim at reversing this new critical trend in the deliberative democracy movement. I argue that after having criticised and moved away from voting and other democratic institutions, deliberative democracy theorists have started to, and if they have not, should realise that it is best to move back to those institutions and to revise them, thus combining deliberation with collective decision-making institutions; deliberation is more accurately understood as the give and take of public argument with the aim of making an action-guiding and conflict-resolving decision that can be justified to the people bound by it. A complete account of deliberative democracy should place disagreement and the need to vote at the core, and not at the periphery of the democratic exercise. In other

[6] I am concentrating on multimember political bodies, and in particular legislative assemblies, in this chapter, since they are the instances of decision-making institutions where disagreement is most expected and deliberation most required. One should note, however, that the majority rule applies even to so-called 'non-majoritarian' institutions such as courts which have to make a decision one way or another.

[7] Johnson, 1998, 162.

[8] Dryzek, 2000, 47.

[9] Bohman, 1998, 400.

[10] Dryzek, 2000, 2. See more recently, Dryzek, 2001.

words, in circumstances of reasonable disagreement, the deliberative movement should face not only the inescapable culmination of deliberation in a voting process, but also the need for a good theory of deliberative democracy to do more than simply accommodate the act of voting. The time has come for deliberative democratic theories to develop true deliberative 'voting ethics.'[11] Instead of merely tolerating existing voting institutions *realistically* and *pragmatically*, they should attempt to offer a long-awaited *normative theory* or *justification* of the need to vote in the light of deliberation.[12]

It is an important normative task to determine better and worse modes of combining deliberation with existing democratic institutions. In doing so, deliberative democrats face the delicate dilemma of either too much realism or too much idealism; theories of deliberative democracy should not, on the one hand, surrender to existing forms of democratic institutions too prematurely nor, on the other, cultivate too critical an attitude towards the necessary components of any viable democracy.[13] As Bohman puts it, by theorising over such issues, deliberative democracy should not abandon its initial promise, but it must become a *complete theory of democracy* rather than a simple ideal of legitimacy.[14] My aim in the present chapter is not therefore to undermine the legitimacy of the deliberative ideal of democracy.[15] Quite the contrary, since its point is to provide a much needed justification for both deliberation and majority voting in a deliberative voting scheme. All I am aiming at, then, is to undermine the excessive idealism that befalls those who abstract from the empirical consequences of norms in a particular setting. Without arguing against the need for public discussion, it is important to take the question of institutional and constitutional design more seriously.[16]

This chapter spans some of the Anglo-American and German literature which converges on the subject of deliberative democracy. The many different versions of deliberative democracy can roughly be classified under two main schools, the first broadly influenced by Rawls and his follower Cohen, and the second by Habermas and his follower Benhabib. The two traditions, despite their differences, face, I argue, similar practical obstacles to realisation and a propensity to understate the importance of reasonable deliberative disagreement as well as

[11] The term 'voting ethics' is meant to echo Habermas' 'discourse ethics.' I am not using the term 'ethics' in its Kantian meaning, however.

[12] See Koh/Slye, 1999, 15 on the need for additional work on justificatory theories of democratic institutions.

[13] Bohman, 1998, 401.

[14] Bohman, 1998, 401.

[15] My endorsement of deliberative democracy should not be taken as a clear adhesion to republican theory by contrast to liberal political theory. It is possible indeed to defend a conception of deliberative democracy that respects and is grounded in individual rights rather than in the common good, but that can be defended against judicial review and rigid entrenchment of constitutional rights as I will argue in Chapter 9. See Waldron, 1999e for such a liberal account of deliberative democracy or Moreso, 1998a for a republican account of constitutional constraints.

[16] See Elster, 1986a, 117.

the need for a democratic justification of voting procedures. There will be no specific emphasis on any author in particular, but I will discuss in turn different features of some of the main theories of deliberative democracy in both traditions.

The present chapter is structured in such a way as to reveal the gradual acknowledgement and justification that there should be among deliberative democrats of the inescapable fact of voting. Some authors have not made any of the steps I suggest, while others have, but are still half way through. Before discussing the legitimacy of the two democratic decision-making procedures that are deliberation and voting, however, it is important to briefly discuss the issue of the legitimacy of procedural legitimacy itself. In the second section, I assess some of the justifications which are usually given for democratic deliberation *per se*. Then, in the next section, I argue that deliberative disagreement about justice is persistent and hence that reasonable consensus is an unattainable regulative ideal for a democratic theory. In the fourth section, I claim that the need for closure should be acknowledged by deliberative democrats. There, I also assess the different institutional and non-institutional modes of closure that have been proposed *in lieu of* voting in recent deliberative theories. In the fifth section, I argue that deliberative democrats should do more than accommodate voting that comes *after* deliberation, as many do now; they should provide a true deliberative justification of voting. Finally, in the last section, I outline basic deliberative voting ethics: first, an ethics of voting and, secondly, an ethics of majority voting.

I. THE LEGITIMACY OF PROCEDURAL LEGITIMACY

In order to address the issue of the legitimacy of procedural legitimacy, I will, first, present some general considerations about the issue of legitimacy and will then turn to discuss the classic dilemma between procedural and substantive legitimacy. In the third and fourth sections, I will explore different ways out of that quandary and in particular soft substantivism or epistemic populism and soft proceduralism or substantive proceduralism. Finally, in the last section, I will examine some of the implications of the proposed account of minimal substantive legitimation of procedural legitimacy.

1. The Issue of Legitimacy

Before discussing the legitimacy and relationship of the two democratic decision-making procedures which are deliberation and voting, and what makes them legitimate procedures of legitimation,[17] it is important to briefly address the justification

[17] There is, in other words, no procedural legitimacy without a legitimate legitimation procedure. For instance, the legitimacy of democratic decisions depends in turn on the legitimacy of the democratic procedure itself.

of procedural legitimacy itself.[18] I will refer to this second-order legitimacy as the *legitimacy of procedural legitimacy.*[19] The issue of the sources of political legitimacy constitutes one of the oldest and most debated topics in political philosophy. In the legal context, it is with respect to the opposition between democracy and constitutionalism that political legitimacy has most often been discussed.[20] For reasons of clarity, I will focus on the issue independently of that controversy, in the context of the general *opposition* and *dilemma between procedural and substantive legitimacy*.

When we are facing collective problems on which we need a collective decision, it is an observable, widespread and pervasive fact of the matter that we often disagree reasonably about which substantive choice is best. We therefore have to coordinate on a decision-making procedure, thus generating the question of the legitimacy of whatever decision we take through this procedure. In short, political legitimacy encompasses three groups of questions surrounding the justification of political decisions[21]: the legitimacy of procedural legitimacy itself, which is the object of this very section; the legitimacy of democratic decision-making procedures, which I will address in the remainder of this chapter; and, finally, the legitimacy of democratic decisions themselves, which I will address in the last section of this part of the book.[22] What matters in this section is the opposition or dilemma between, on the one hand, the legitimacy endowed on political decisions by the procedure by which they are taken (procedural legitimacy), and, on the other, the legitimacy that derives from the substantive correctness of the content of the political decisions adopted (substantive legitimacy).

2. The Democratic Paradox

At first sight, the dilemma is difficult to perceive; procedural legitimacy and substantive legitimacy seem conceptually independent and to both be applicable separately. The problem is, however, that these questions are not entirely independent. It would seem odd to say that a majority decision is always legitimate independently of its content. Although people are generally ready to abide by the outcome of a procedure, it is not usually for reasons totally disconnected from whether they take these decisions also to be as correct as possible in conditions of reasonable pluralism, or at least from whether the procedure is regarded as fair

[18] See Marti Marmol, 2005 for a detailed presentation of the sources of political legitimacy.

[19] Legitimacy is used here as a *normative* term to be distinguished from the purely formalist or legalistic use of the term to refer to the lawful origin of the decisions at stake, on the one hand, but also from its sociological use to refer to a generally accepted authority, on the other.

[20] See Chapter 9.

[21] I am using 'justification' or 'legitimacy' in a general sense here in order to refer to procedural as much as to substantive justification. Later in this chapter, however, I will oppose (substantive moral) justification or justification *stricto sensu* to (procedural) legitimacy. See Chapter 4.

[22] See Chapter 13.

and substantively justified. Similarly, people do not usually abide by decisions they deem right and just without regard for the procedures through which they have been taken; no one would regard a correct albeit dictatorial decision as legitimate.[23] This has to do, as we will see, with the nature of democracy and the fact that there are important substantive moral reasons for democratic procedures themselves. Because it is impossible to reply to the procedural question without a substantive judgement and to the substantive question without a procedural judgement, and hence without generating potential conflicts between the two approaches in a non-ideal world, things start to look more complicated. Not only do we disagree about the content of the decision that has to be taken and its justification, but we also disagree about how to endow this very decision with legitimacy. Hence the need for a second-order approach to legitimacy that addresses the legitimacy of procedural legitimacy and hence generally the legitimacy of the adoption of the different procedures defended in the rest of the chapter.

It also follows that neither radical proceduralism nor radical substantivism are tenable positions.[24] On the one hand, the identification of legitimation procedures necessarily implies the recognition of their value. Besides, their implementation encompasses the protection of a certain amount of democracy-constitutive rights and principles. On the other hand, the respect for fundamental individual rights implies the recognition of individual self-determination and hence of collective self-government or democracy. It seems therefore that either way a certain tension and dilemma are here to stay; whether procedural or substantive legitimacy takes priority, it will not be without acknowledging the intricate relationship that exists between both forms of legitimacy and the need for both procedural and substantive standards of legitimacy. One may refer to soft proceduralism or soft substantivism, as opposed to radical proceduralism or radical substantivism, depending on whether our account of second-order legitimacy ultimately favours procedural or substantive legitimacy.[25]

Before discussing soft kinds of proceduralism and substantivism, however, it is worth pausing briefly to examine a middle path solution that claims the *co-originality* of procedural and substantive legitimacy.[26] According to that view, democratic procedural legitimacy and moral correctness coincide and the issue of which of them should come first does not arise since they presuppose each other; legitimate procedures are cognitive and by tying legitimacy to reasonable agreement, their outcomes can ideally be taken as morally correct. The most famous

[23] See Gutmann/Thompson, 1996, 4: 'The moral authority of collective judgements about policy depends in part on the moral quality of the process by which citizens collectively reach those judgements.' See also Hershowitz, 2003, 218.

[24] For such a position, see Bayon, 1998, on Garzon Valdes' idea of 'coto vedado,' ie protected domain isolated from any possible procedural and democratic change. See also Marti Marmol, 2005. For a debate on this idea, see Bayon, 1998; Moreso, 1998a; Gargarella, 1998b. See Chapter 9.

[25] See Marti Marmol, 2005 for these expressions.

[26] See Larmore, 1996, 217.

proponent of co-originality is Habermas. According to him, minimal basic rights and institutions are 'co-original'[27] with the democratic process:

> These alternatives [to give priority to human rights or to give it to popular sovereignty] contradict a strong intuition. The idea of human rights that is spelled out in basic rights may neither be imposed on the sovereign lawgiver as a limitation nor be merely instrumentalized as functional requisite for legislative purposes. In a certain way, we consider both principles as equally original. One is not possible without the other, but neither sets limits on the other.[28]

Although the idea of co-originality seems prima facie very convincing, it does not, after reflection, provide the dilemma with an answer different to substantivism. On Habermas' account, indeed, basic rights are constitutive of democracy and should therefore be recognised before we can even talk of democracy. The reverse is not true, however; the democratic procedures of self-government Habermas has in mind when referring to the co-originality of rights and democracy, rely on a heavily substantive conception of equality and on strong liberties. These rights and principles do not, however, depend on a democratic acknowledgement to be recognised. Co-originality thus requires that people rationally accept not only the principle of equal respect and participation, but also strong liberties underlying public discussion among rational subjects; this in itself is not guaranteed in modern conditions of persistent reasonable disagreement about moral principles.[29] In other words, Habermas somehow presumes, in the absence of reasonable agreement, what he is trying to establish through co-originality.[30]

So, if hard or absolute proceduralism, hard or absolute substantivism and co-originality fail to convince entirely, should a mixed account of political legitimacy be founded in priority on the respect of procedures of decision-making (soft proceduralism or substantive proceduralism) or should these procedures be constrained by substantive standards of correctness (soft substantivism or epistemic populism)? This is a hard and almost tragic choice that is often coined as

[27] See Habermas, 1998a, 155, 135: 'Die *Gleichursprünglichkeit* von privater und öffentlicher Autonomie zeigt sich erst, wenn wir die Denkfigur der Selbstgesetzgebung, wonach die Adressaten zugleich die Urheber ihrer Rechte sind, diskurstheoretisch entschlüsseln. Die Substanz der Menschenrechte steckt dann in den *formalen Bedingungen* für die rechtliche Institutionalisierung jener Art diskursiver Meinungs- und Willensbildung, in der die Souveränität des Volkes rechtliche Gestalt annimmt' (emphasis added). See also Habermas, 1998a, 612 ff. See also Chapter 9.

[28] Habermas, 2001a, 767.

[29] See for the same critique, Larmore, 1996, 220–21; Larmore, 1999, 622. See also Elster, 1986a, 117; Przeworski, 1998, 142.

[30] See on this point the recent acknowledgement in Habermas, 2003. There, he goes too far, however, when he contends that the fact that Waldron, 1999 has to rely on some normative justification of voting and the majority rule dispenses him from having to justify all the constitutional principles he claims we have to abide by despite reasonable disagreement; the latter are not indeed the least controversial one may think of and we cannot presume a minimal intersubjective agreement or at least convergence on all of them.

the *paradox of democratic legitimacy*, as Rousseau first expressed it and then tried to circumvent it.[31]

3. Epistemic Populism or Soft Substantivism

According to Rousseau, democracy, ie the sovereignty of the will of the people, is based upon the idea that the exercise of popular sovereignty is legitimate only insofar as such exercise of power really expresses the 'general will,' ie an independent collective good that is said to be equally in the interests of all.[32] One of the central aims of Rousseau's theory is to reconcile knowledge and power or rationality and legitimacy.[33] Hence the reference to this kind of political legitimacy as *epistemic populism*[34] as opposed to strict populism or hard substantivism.[35]

Given the pervasiveness of disagreement due to the difficulty of most fundamental issues to which public opinion must speak, Rousseau does not nourish sufficient optimism about chances of citizens being sufficiently virtuous[36] and able to address questions of the general good[37] as to hold a requirement of *unanimity* for all political decisions. Rousseau contends that unanimity is no guarantee that citizens are genuinely addressing themselves to issues of the general good.[38] The corrupted will of all can also be unanimous.[39] As a result, Rousseau observes that 'the vote of the majority always obligates all the rest.'[40] It is unclear from this last sentence why the majority ought to obligate the minority; it is not because the outcome of the vote and, more precisely, the opinion of the majority are always right *per se*, as they would be in the Benthamite model where the right outcome is the satisfaction of a majority of interests aggregated through a vote.[41] Rousseau actually contends that even if 'the general will is always upright and always tends to the public utility . . . it does not follow from it that the people's deliberations are always equally upright.'[42] He is perfectly aware of the

[31] See Benhabib, 1994a, 28 ff.
[32] See Benhabib, 1994a, 28–29. See also Habermas, 2001a, 767 and 768.
[33] See Estlund, 1997, 181 ff on Rousseau's epistemic approach. See for a critique, Knight/Johnson, 1994.
[34] Cohen, 1986a, 29, 34.
[35] See Cohen, 1986a, 28 criticizing Riker, 1982 and his account of '*populism*' that erroneously identifies majority decisions with morally correct answer. See on the distinction between a purely proceduralist account of legitimacy, a purely epistemic one and an epistemic proceduralist one: Estlund, 1997.
[36] See Fetscher, 1968, 121–22.
[37] See Waldron, in Estlund/Waldron/Grofman/Feld, 1989, 1323. See also Arendt, 1973, 164 on the diversity of opinions and its relationship to the justification of majority rule. See also Locke, 1999, II, VIII, 98.
[38] Waldron, 1990a, 63.
[39] Rousseau, 1997, IV, 2.
[40] Rousseau, 1997, IV, 2.
[41] See Waldron, 1990a, 62. See also Locke, 1999, II, VIII, 98.
[42] Rousseau, 1997, II, 3.

epistemological limits of the 'blind multitude'[43] and tries therefore to reconcile both procedural and substantive trends[44] into what one may regard as a soft substantivist account.[45] According to Rousseau, majority judgements act merely *as fallible* indicators[46] of the general will[47] as long as the right question is asked[48] and when certain specific background conditions are given that are meant to correct the consequences of some factors of epistemic disagreement.[49] These background conditions entail among others: good information, political participation and deliberation,[50] the absence of factions, limited economic inequality and the rule of law.[51]

Even with these qualifications, Rousseau does not endorse the *simple* majority rule in all cases[52]: 'As for the proportional number of votes needed to declare the general will, I have also provided the principles by which it can be ascertained. A difference of a single vote breaks a tie, a single opponent destroys unanimity; but between unanimity and a tie there are *various uneven divisions*, at any one of which this proportion can be fixed, taking the state and the needs of the body politic into account.'[53] In order to improve the soundness of collective judgements, Rousseau carefully assesses the degree of virtue of simple or qualified majorities.[54] Hence 'two general maxims can help to regulate these ratios: one, that the more

[43] Rousseau, 1997, II, 6. See on the contrast between the *Social Contract* and other idealistic writings, Miller, 1984, 44.

[44] See Trachtenberg, 1993, 8 who regards this realistic distinction between the general will and the actual procedure that is used to determine it as the 'cornerstone of Rousseau's theory,' although it is nowhere directly presented or argued for.

[45] Rousseau, 1997, II, 9. Contra: Estlund, 1997, 185 who makes the common mistake of identifying the requirement that the outcome of the decision-making process be obeyed with the attribution to Rousseau of the overoptimistic belief that this outcome *is* the general will, ie the morally correct answer to the question faced by the voters. Rousseau's account is in fact closer to Estlund's own epistemic proceduralism, in the sense that the decision should be obeyed and regarded as legitimate even when not entirely conform to the common good, owing to the epistemic value of the majority rule if its background conditions are satisfied.

[46] See, however, Rousseau, 1997, IV, 2 according to whom the fact that 'the opinion contrary to mine prevails ... proves *only* that I have *made a mistake* and that what I believed to be the general will was not so.' This discrepancy seems to indicate the distinction Rousseau needs to draw between the mere fallibility of the decision-making process and its enhanced quality once certain procedures are respected, hence the presumption attached to them.

[47] Cohen, 1986a, 28.

[48] See Setala, 1996, 36.

[49] There is very little *positive evidence* in Rousseau about what the procedure of opinion-formation could be prior to the vote.

[50] See Rousseau, 1997, II, 3: 'If when an adequately informed people *deliberates*, the Citizens had no communication among themselves, the general will would always result from the large number of small differences, and the deliberation would always be good.' In this sense, I disagree with Estlund, 1995, 92–94 who regards Rousseau's model as expressing the 'strongly epistemic' view that voting *on its own* is 'capable of discovering an independent truth about the common good' by opposition to what he calls the 'weakly epistemic' view that voting has epistemic virtues *derived* from some other practice or institution, such as public deliberation.

[51] Cohen, 1986a, 28.

[52] Rousseau, 1997, IV, 2.

[53] Rousseau, 1997, IV, 2.

[54] Cohen, 1986b, 295.

important and serious the deliberations are, the more nearly unanimous should be the opinion that prevails; the other, that the more rapidly the business at hand has to be resolved, the narrower should be the prescribed difference in weighing opinions; in deliberations which have to be concluded straightaway a majority of one should suffice. . . . Be it as it may, it is by a combination of these two maxims that the best ratios for a deciding majority are determined.'[55]

Rousseau's model may therefore be summarised as a two-tier structure that reconciles an epistemic account of democracy with the procedural aspects of decision-making[56]: the *general will* is characterised in terms of a *perfect procedure of collective choice*, while *democratic decision-making* is construed as an *imperfect procedure* which, when suitably organised, has the property of providing evidence about how best to achieve the object of the general will. If majority judgements provide sound although imperfect evidence about the general will, it is necessary to determine in what sense. Rousseau's only justification is that if there is disagreement and if despite that disagreement citizens are nevertheless addressing the issue of the general good in a well-informed manner and not their own interests,[57] then the fact that 'the vote of the majority always obligates all the rest' 'is a consequence of the contract itself.'[58] This last remark remains obscure and unexplained by the rest of the *Social Contract.*[59]

An argument in favour of Rousseau's epistemic theory and conviction that the right answer will usually arise from majority voting is provided by arguments modelled on Condorcet's *Jury Theorem.*[60] These arguments attribute a judgemental competence[61] to the members of a group, that is a probability of getting the correct answer as specified by an independent standard. They assess decision rules by considering the probability that a group will arrive independently at a correct answer by using those rules. Thus, if the average individual competence is greater than 0.5, then the probability of getting the correct answer from a simple majority increases rapidly as the size of the group increases.[62] The conclusion of this argument is that the opinion supported by the majority is more reliable than the opinion of any single individual if the individuals are more often right than wrong in their judgements and the probability of being right is the same for all

[55] Rousseau, 1997, IV, 3.
[56] Cohen, 1986a, 32. See on the plausibility of the two-tier view, Richardson, 1997, 356. See also Knight/Johnson, 1994.
[57] See on these conditions, Grofman/Feld, in Estlund/Waldron/Grofman/Feld, 1989, 1334.
[58] Rousseau, 1997, IV, 2.
[59] Waldron, 1990a, 63.
[60] Cohen, 1986a, 35. A full discussion of this theorem and its relevance for democratic theory is not possible here.
[61] The competence of a person or group with regard to some pair of answers to a question (one correct, one not) is just the probability that given a choice, the person or the group will choose the correct alternative.
[62] See Barry, 1964, 9–14; Estlund/Waldron/Grofman/Feld, 1989. Contra: Benhabib, 1994a, 29 who obviously overlooks the Condorcetian explanation.

individuals.[63] Even the Condorcet theorem is riddled with well-known controversies.[64] The first objection to the plausibility of the jury theorem is that it is of *limited application*; it can only assume that there are only two alternatives because, if there are more, the problem of majority cycles may emerge.[65] Secondly, the application of the theorem must be tempered by Condorcet's own *pessimism*[66]; he acknowledged other components of the theorem that did not lead to the same result. As group size increases, the average individual competence is likely to decline and to fall well below 0.5, even before one reaches the size of a citizen assembly in a small ideal Rousseau *polis*. Moreover, the theorem implies in itself that if average competence is below 0.5, then the chances of a majority being right decline to zero as group size increases.

Ideally, of course, according to Rousseau, our final standards of legitimacy would be substantive and one element of procedural legitimacy would be substantive legitimacy through the epistemic value of the chosen procedure, ie *instrumental* legitimacy.[67] This is what one may also refer to as *soft substantivism.* The problem is that we disagree not only on the existence and content of substantive standards, but also on a common epistemology and hence on the ways to get to know what those standards are. We can converge neither on moral rightness standards nor on epistemic standards as to how to get to know best what our standards of moral rightness are.[68] Knowing and agreeing on how to best get to the right answer would indeed amount to not disagreeing about the content of the decision to take in the first place.[69] The difficulty is that deciding on decision-making procedures is precisely meant to escape the kind of disagreements we have on the content of the decision itself. Of course, there may be disagreements about the goals pursued by other rights or principles and this seems to be defeating even indirect forms of instrumental justification of rights that are regarded as acceptable.[70] The point is, however, that disagreement about relevant moral goals only really matters in the case of those rights which are implicated in the resolution of this very disagreement. It is only then that it becomes tautological, since these disagreements are the primary subject of the politics that participatory rights are supposed to constitute.[71] This is the idea the concept of the right to democratic participation *qua right of rights* aims to convey.[72]

[63] Setala, 1996, 37.
[64] In this sense, I think that Marti Marmol, 2005 does not pay sufficient attention to the controversial nature of the by default epistemic argument he mentions for majority rule and that he wrongly attributes to Waldron, 1999a.
[65] See Setala, 1996, 21, 40.
[66] Waldron, 1990a, 63; Waldron, in Estlund/Waldron/Grofman/Feld, 1989, 1322.
[67] See eg Raz, 1995a, 117; Kavanagh, 2003a, 460. See also Rawls, 1971, 230–32. See in this sense, Hurley, 1989, 322 ff on the *cognitive value of democracy*.
[68] See McCarthy, 1996 for such a critique of Habermas' rational discourse theory.
[69] Waldron, 1999a, 242.
[70] See Raz, 1995b, 39; Raz, 1992, 127.
[71] Waldron, 1999a, 243.
[72] Waldron, 1999a, 232.

As a result, neither controversial moral standards of substantive legitimacy, nor allegedly privileged epistemic procedures can provide political legitimacy with the uniform sources it requires. In conditions of widespread reasonable disagreement, soft substantivism cannot provide us with a plausible account of the legitimacy of our political decisions.

4. Substantive Proceduralism

The failure of soft substantivism leaves us with procedural legitimacy and soft proceduralism more particularly. If reasonable people tend to disagree about substantive standards of correctness and about the epistemological virtues of procedures that could lead them to achieve those standards, there are more chances of agreement on a procedure of decision-making than on the moral rightness of that decision or the epistemic nature of the procedure.[73] It is important to distinguish two forms of soft proceduralism: hard-soft proceduralism or decisionism and soft-soft proceduralism or substantive proceduralism.

a. Pure Decisionism

Although it recognises the conceptual links between procedural and substantive legitimacy, the hardest form of soft proceduralism, that one may term 'decisionism,' gives priority to procedural legitimacy over substantive legitimacy by making procedural legitimacy one of the conditions of substantive legitimacy. By doing so, however, decisionism denies the conceptual independence of substantive legitimacy and procedural legitimacy by collapsing them.[74] As such it is no longer possible to argue on substantive grounds against a procedurally legitimate decision. It seems clear, however, that in order to argue, as we often do, that a decision may be legitimate in spite of the disagreement of a minority on its substantive correctness, the conceptual distinction between procedural legitimacy and substantive legitimacy cannot be dropped. It must be recognised that, at least for those participants who disagree on the correctness of a given norm, the issue is a *cognitive* one.

Although the notions of substantive and procedural legitimacy are internally related, they express two genuinely different senses in which norms can be considered valid or invalid. This asymmetry between the notions of substantive and procedural legitimacy seems to lead to an impasse. For the whole point of thinking of justice as logically independent of legitimacy is precisely to hold to the

[73] See Lafont, 2002, 2003 and 2004b on Habermas' incapacity to provide political decisions in conditions of reasonable disagreement with political legitimacy. This is due to his conflation of political legitimacy and moral correctness through the requirement of rational acceptability. See Chapter 4.

[74] See Lafont, 2005.

view that the injustice of a norm must affect its legitimacy. This, however, implies that justice is a necessary condition for legitimacy. But how can legitimacy be understood as a purely procedural notion, according to this interpretation, if justice is a necessary condition for legitimacy and is not itself procedural? It follows that we must find an account of procedural legitimacy that respects the conceptual independence of substantive legitimacy, without, however, rejecting the important connection between them. We seem to have gone full circle: too few or too many links between substantive and procedural legitimacy and we can no longer account for our political practice.[75] The key to escape this deadlock lies in articulating a proceduralist interpretation of the relationship between substantive and procedural legitimacy that does not assimilate the one to the other, but that also takes reasonable disagreement seriously.

b. Substantively Legitimate Proceduralism

Substantively legitimate proceduralism provides just that. To understand how this brand of soft proceduralism can escape both pervasive disagreement about substance, while also providing sufficient substantive legitimation, I will, first, present the minimal substantive legitimation of procedural legitimacy. I will then turn to the threat of an infinite regress of procedures and will conclude by presenting a substantive *cum* contingent account of political legitimacy that reconciles proceduralism with the need for a minimal substantive legitimation of the procedure itself.

i. The Minimal Substantive Legitimation of Procedural Legitimacy

The main difficulty with decisionist accounts of political legitimacy is that there cannot be any talk of legitimacy in these conditions; if there is no other standard of correctness than procedural correctness, issues of legitimacy can no longer arise. Any reference to legitimacy requires some kind of minimal substantive and process-independent presumption among participants as to the value of the chosen procedure in practice.[76] If reasonable people disagree so much about justice and if they are ready to deliberate and take decisions about it, it is because they believe in the existence of correct moral answers.[77] In turn, if people disagree so much over which decision-making procedures should be adopted and get into the infinite procedural regress just described, it is mainly because the legitimacy of these procedures entails a minimal substantive question. For instance, when

[75] The point in this section is to provide an account of political legitimacy that can accommodate our political practice of deliberation and participation, rather than a revisionary account of our political attitudes.

[76] See Lafont, 2005.

[77] This does not, however, affect the independence of procedural legitimacy from moral correctness for which I have just argued. All it does is explain people's implication in public discourse and their motivations in criticising and revising legitimate past decisions. See Chapter 4 on the failure of internal scepticism.

people choose majority rule over another procedure, it is because they regard that procedure as valuable.[78]

In these conditions, unless we resign ourselves to abandoning any talk of political legitimacy, we need to capture the belief among participants as to the substantive justification of the procedure on which there is most practical convergence and coordination. This is what one can refer to as the *minimal substantive legitimacy of procedural legitimacy* in conditions of reasonable disagreement. This form of justification takes reasonable disagreement seriously for it amounts to a justification of the decision-making procedure we choose *when we disagree* at a first-order level about the substantive justification of the decision we have to take and at a second-order level about the procedure which will lead us to the substantively most justified decision.[79] What counts therefore is a form of intersubjective presupposition of the existence of such standards of substantive legitimacy of legitimation procedures.[80] This minimal substantive justification is *intrinsic*, and should be clearly distinguished from an *instrumental* justification based on general substantive standards of correctness of the content of the decision obtained or on the procedure's epistemic virtues.[81] As Waldron rightly points out:

> since an affirmation of the right to participate addresses the issue of *who is to make social decisions when the stakes are this high*, it requires a justification that is, so to speak, in the same league of social seriousness as the justifications associated with the substantive options that compete in the political forum.[82]

ii. Substantive Cum *Contingent Proceduralism*

The difficulty is at this stage that there might not only be reasonable disagreements over the content of the decisions to take, but also over the minimal substantive legitimacy of the legitimating decision-making procedures,[83] thus requiring further procedures to take decisions about the decision-making procedure and calling for third-order forms of legitimacy. Such an *infinite regress of procedures*[84] is obviously not a ready answer to the pressing issue of political legitimacy, but it seems inescapable unless one severs all links between procedural and substantive legitimacy, which is

[78] The same can be said of democracy theorists who argue, like I do in this chapter, for the legitimacy of democratic deliberation and majority rule on substantive grounds, rather than only on procedural ones.

[79] In a sense, this is a 'veil of ignorance' type of argument. The argument relies on the idea that once people realise that they disagree on substantive matters and on epistemological issues pertaining to these substantive matters, they will *tend to disagree less* on third-order issues related to how to decide on first-order and second-order disagreements. See also Chapters 6 and 9.

[80] See Chapter 4.

[81] See Christiano, 2004.

[82] Waldron, 1999a, 242 (emphasis added).

[83] In this sense, my account differs from Lafont, 2005 who is confident about the possibility of reasonable agreement not only in the course of the procedure, but also *on the procedure itself*.

[84] See Bayon, 1998 on this regress.

not a desirable approach, as I have just argued. Prima facie, the only answer that could be given to this problem would therefore be a contingent one based on the fact that in practice we seem to predominantly coordinate and converge on using a particular democratic decision-making procedure. The prime difficulty is that the contingency of coordination conventions in the face of substantive disagreement does not provide us with the kind of minimal element of substantive legitimation of procedural legitimacy that we need to avoid pure decisionism.

Because of the threat of an infinite regress of disagreement on the minimal substantive legitimation of the chosen procedure,[85] and in order to escape the contingency of a purely coordination-based choice, it is important to find the morally least controversial procedure. This means trying to gather arguments on the basic values protected by the procedure itself rather than on its epistemic value, as this would imply a common view of standards of correctness and of the ways to attain them.[86] This *soft form of proceduralism* or *substantively legitimate proceduralism* can be regarded as vested with the most second-order legitimacy in conditions of widespread and persistent reasonable disagreement. It acknowledges the relationship between substantive and procedural legitimacy, without, however, collapsing them and takes reasonable disagreement about matters of justice seriously. I refer to its softness to emphasise its partly contingent dimension *qua* coordination convention in the face of the otherwise infinite procedural regress, on the one hand, but also its inbuilt minimal substantive legitimation, on the other.[87] The legitimacy of procedural legitimacy lies therefore in this essential, albeit paradoxical and hence for ever unsatisfying requirement of having to be *both contingent and normative*.

II. THE JUSTIFICATION OF DEMOCRATIC DELIBERATION

What are the implications of all this for our democratic legitimating procedures? In the remainder of this chapter, I will argue for the legitimacy of deliberative voting *qua* democratic decision-making procedure. Before turning to the justification of

[85] See NOZICK, 1974, 98: 'When sincere and good persons differ, we are prone to think they must accept some procedure to decide their differences, some procedure they both agree to be reliable or fair. [But] . . . *this disagreement may extend all the way up the ladder of procedures.*'

[86] Founding the minimal substantive legitimation of procedural legitimacy on the procedure's epistemic qualities is more contestable than founding it on the basic moral justification of the procedure itself given the absence of a common epistemology. See Chapter 1. Contra: MARTI MARMOL, 2005 who does not seem to draw a line between the epistemic justification of deliberation or majority rule and substantive justifications of the procedure itself. People would disagree less, I argue, about a minimal principle of equal respect than about the conditions in which a majority of people's decision can provide a right answer as to other controversial moral issues. The latter would indeed require them to agree on the very issue they disagree about, that is to say the right answer to the question that divides them in the first place.

[87] See Chapters 13 and 14.

deliberative voting, it is important to briefly present a minimal substantive justification, first, of democratic participation *tout court*, and, secondly, of democratic deliberation.

1. The Justification of Democratic Participation

The right to democratic participation is a right to participate in political life on equal terms and to take an equal part in all decisions affecting one's rights.[88] Citizens should have an equal right to have their voice counted in political decision-making procedure. In this sense, the right to participation corresponds to the *principle of political* or *procedural equality*: each person should receive an equal opportunity to influence the outcome of the legislative process.[89] The equal right to participation, and the principle of procedural equality from which it derives, should be distinguished from the *principle of equal consideration*. Contrary to the former which is process-oriented, the latter is result-oriented in the sense that what matters is that a person's interests receive equal weight in the legislative process.[90]

While it may be evident that democrats should be egalitarians and hence endorse procedural equality, an intrinsic justification of the latter has to be established positively by reference to the minimal sense of political equality.[91] As Beitz argues, 'nearly everyone agrees that political democracy . . . most completely embodies an egalitarian ideal. . . . But it is far from clear what is involved in such an ideal, and thus it is uncertain in what sense democratic institutions should answer to it.'[92] Political equality is a broad principle of which procedural equality and participatory rights are only one possible approximation. It is important to note that the point here is not to provide an instrumental equality-based justification of procedural equality.[93] Of course, other facets of political equality may justify instrumental restrictions on the right to political participation, as we will see. However, this is not incompatible with an intrinsic justification of the right to political participation in the first place. It is not because the right to political participation is a facet of political equality that its justification must necessarily be result-oriented and hence instrumental, rather than based on different facets of procedural equality and hence intrinsic in nature.

In a nutshell, the particular importance of the equal right to participation has to do with the *intrinsic value* there is in giving people the opportunity of

[88] See Waldron, 1999a, 213. See Cohen, 1996, 407: 'The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of a society who are governed by that power.'
[89] See Beitz, 1983, 69. See also Manin, 1997, 34–41.
[90] See Beitz, 1983, 71.
[91] See Beitz, 1983, 69–70.
[92] See Beitz, 1983, 70.
[93] Beitz, 1983, 74 ff holds this argument to be an argument for the instrumental value of procedural equality.

contributing to the decisions affecting their lives and their fundamental rights and hence of being the authors of their own laws.[94] There are two main reasons for this. Neither of them provides, however, reasons for an absolute right to political participation, as we will see[95]; procedural equality is only a facet of the more complex principle of political equality.[96]

First of all, the intrinsic value of participatory rights can be related to both the values of *autonomy* and *equal dignity*. According to Beitz, guaranteeing an equal right to participation corresponds to 'a public recognition of equal respect for the autonomy of persons . . . , a communal acknowledgement of individual worth.'[97] We are equal and acknowledging this implies that we must be given the right to participate as equals in the decision-making process that regulates most of our social life. If people were not recognised such a right to participate in crucial decisions about their own lives and hence the basic values which inform our belief in the importance of rights, the recognition of other rights such as dignity or equality would be deprived of any meaning. Hence the idea of *right of rights* and of a *rights-based* (non-instrumental) argument for the right to democratic participation. Not only does democracy allow us to participate as equals, but it reinforces that status. To refer to Gutmann and Thompson, 'when citizens deliberate in democratic politics, they express and respect their status as political equals.'[98] Arendt even goes further and argues that the *equality* of citizens is a condition and a result of the political realm[99]; a well-ordered republic is 'constituted by an exchange of opinions between equals.'[100] Positive laws and political structures must therefore be capable of making people equal in the political realm, even if they are in other respects naturally different and unequal.[101] This arrangement is often labelled *isonomy* by Arendt after the Greek *polis*' structures.[102] In recognition of our engagement in the joint political enterprise, the law creates for each of us an artificial *persona* or role that presents us as equals for political purposes.

A second related reason for the intrinsic importance of political participation may be found in its *agency value*, as Dworkin calls it.[103] It is important for people's self-esteem that they are able to express their political convictions in the public

94 See Pateman, 1995, 28–29. See also Dworkin, 1987, 21; Rawls, 1971, 233–34.

95 See Chapter 9 on the flexible entrenchment of some basic democracy-constitutive rights, like political equality in particular.

96 In this sense, I think that Beitz, 1983, 71 and 80 conflates the intrinsic justification of procedural equality and the right to political participation with the absolute nature of that right. Rights may conflict and can be balanced against other rights and dimensions of interest, without, however, losing their intrinsic justification. See Chapter 12.

97 Beitz, 1983, 74–75.

98 See Gutmann/Thompson, 1996, 18. See also Hershowitz, 2003, 214.

99 Arendt, 1970, 30–31.

100 Arendt, 1970, 93.

101 See Arendt, 1970, 278.

102 See Arendt, 1970, 30–31.

103 See Dworkin, 1987, 21. See also Pateman, 1970, 24 ff; Rawls, 1971, 234.

domain and hence to organise their lives autonomously. Although this second justification for the right to political participation remains quite vague, it should be clear that there is an important value in being able to communicate with others in conditions of reasonable disagreement about justice and hence decide together how to settle our divergences. In a similar vein, Arendt celebrates the 'public happiness' there is in being a 'participator in government'; political, as opposed to 'negative' freedom means indeed the right to be a participant in government and the freedom of self-government based on common action and shared deliberation.[104]

2. The Justification of Deliberation

The idea that democracy revolves around the transformation of preferences through deliberation rather than the mere aggregation of preferences through voting has now become one of the major creeds in democratic theory. Deliberative democracy remains, however, a complex ideal with a variety of forms. What I reconstruct here as the standard case for deliberative democracy is based on the convergence in the writings of a wide range of theorists, not all of whom may subscribe to every aspect of the following definition. Deliberative democracy, broadly defined, is any one of a family of views according to which public deliberation among free and equal citizens is the core of legitimate political decision-making and self-government. One may summarise the core phenomena that count as deliberative democracy as (i) a process of collective decision-making with the participation of all those affected by the decision[105] or at least of their representatives[106] (democracy) and (ii) a means of reasoned argument offered by and to participants who are committed to values of rationality and impartiality[107] (deliberation). Whatever form it takes, a conception of deliberative democracy 'is organized around an ideal of political justification'[108] (public justification) requiring free public reasoning of equal citizens (reasoned argument). Claims on behalf of or against such decisions have to be justified to these people in terms that, on reflection and using their common reasons, they are capable of accepting.[109]

[104] See Arendt, 1968a, 233. Of course, Arendt acknowledges that 'by no means every resident of a country needs to be a member in councils. Not everyone wants to or has to concern himself with public affairs. In this fashion a self-selective process is possible that would draw together a true political elite in a country. Anyone who is not interested in public affairs will simply have to be satisfied with their being decided without him. *But each person must be given the opportunity.*'

[105] See already Aristotle, 1988, III, 1275b13–b21, VI, 1317a40–1318a10 and more recently in the context of deliberative democracy, Dryzek, 2001, 651, 662.

[106] Benhabib, 1996a, 68. On the lack of inclusion of representatives, see Chapter 10.

[107] Elster, 1998a, 8. See also Cohen, 1989, 22.

[108] Cohen, 1996.

[109] See Dryzek, 2000, v.

Although very few people nowadays would contest the need for deliberation in a democracy, very few of them also justify why this should be the case. Advocates of deliberation merely assume that deliberation, because it involves reasoned discussion, is superior to other modes of political decision-making.[110] It is important, however, to take the debate a little further and briefly present elements of a basic justification and legitimation of democratic deliberation.[111] With respect to the *intrinsic* minimal substantive justification of democratic deliberation, deliberation can be justified on grounds of the fundamental liberal principle of equal respect for reason. As I explained at the beginning of the book, the idea of intersubjective reasonable justification is the cornerstone of liberal political legitimacy.[112] If we are to *respect* the moral autonomy of others in conditions where we have no perfect access to moral truth, we must only make moral or political claims on them that interfere with their freedom, when these can be justified *to* them, ie cannot be reasonably rejected by them.[113] Beside intrinsic justifications, deliberation has also been justified on *instrumental* grounds and on *epistemic* grounds in particular.

First of all, as Manin observes, deliberative processes impart and increase necessary *information.*[114] New information is provided this way, because (i) no single individual can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals and (ii) no single individual can possess all the information deemed relevant to a certain decision affecting all. Since one of the main sources of incompetence and of some, albeit not all, disagreements is epistemic, bringing citizens together in an assembly where they are exposed to discussing a broad range of perspectives makes it more likely—although not certain—that truth will prevail over prejudice.[115]

Secondly, the formation of *coherent* judgements cannot precede deliberation; deliberation allows for the expression of arguments in the light of which opinions and beliefs can then be revised.[116] Only once all other standpoints are expressed and exchanged can true consistency in principle become a realisable end. The very procedure of articulating a view in public imposes a certain *reflexivity* on individual opinions; deliberation leads to the formation of conclusions that can be challenged publicly on grounds of shared reasons.[117] Nobody can convince others

[110] See Marti Marmol, 2001, 180 ff criticising Elster's weak justification of deliberation, that consists in the higher probability of impartial and reasonable decisions in deliberation.

[111] These different elements consist in epistemic grounds, as well as intrinsic grounds related to the liberal principle of equal respect for reason or more instrumental grounds related to the enhancement of equality in voting.

[112] Macedo, 1991, 78.

[113] See Gaus, 1996, 129; Rawls, 2000, 192; Macedo, 1991, 51; Waldron, 1993a, 127; Larmore, 1990, 339.

[114] Manin, 1987, 349.

[115] See Manin, 1987, 350.

[116] Manin, 1987, 350.

[117] See Chapter 4.

of her point of view without being able to state why what appears just to her can also be considered in that way from the standpoint of all those involved. Reasoning from the standpoint of others amounts not only to adopting what Arendt calls the 'enlarged mentality' by reference to Kant[118] which remains by and large a purely subjective exercise, but also to adding Arendt's intersubjective condition of communicability.[119] It is only through the discursive presence of others that the impetus for reflexive thinking and the breadth of its scope can be truly ensured.[120]

III. DELIBERATION AND DISAGREEMENT

Given the existence of pervasive reasonable disagreement in matters of justice, one can expect a complete theory of the justification of democratic deliberation to include an account of the institutional forms that deliberative processes should take, when an agreement was not reached through deliberation. Most theories of deliberative democracy do not provide such an account, however. In this section, I would like to argue that actual reasonable agreement cannot constitute the regulative ideal which deliberative democrats want it to be. A realistic theory of democracy should hold on much more to a sense that, even after deliberation, people often continue to disagree in good faith about justice. The pursuit of a potential reasonable agreement amounts therefore at the most to an element of the internal logic of deliberation.

1. Actual Reasonable Agreement *Qua* Regulative Ideal of Deliberation

Deliberative democracy is any one of a family of views according to which public deliberation among free and equal citizens is the core of legitimate political decision-making and self-government. In fact, according to Cohen, 'deliberation aims to arrive at a rationally motivated consensus—to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.'[121] Of course, deliberative democrats are well aware that complete actual consensus is not a realistic aim in complex societies. As Cohen claims, 'even under ideal conditions, there is no promise that consensual reasons will be forthcoming.'[122] The reasonable consensus standard is usually considered therefore a counterfactual and regulative ideal. According to Cohen,

[118] Arendt, 1968a, 220–21.
[119] Arendt, 1982, 84. See also Ricoeur, 1995, 147.
[120] See Arendt, 1970, 227. See also Goodin, 2003b, 171; Gargarella, 1998a, 262; Eckersley, 2000, 128.
[121] Cohen, 1989, 23.
[122] Cohen, 1989, 23.

'outcomes are democratically legitimate if and only if they *could* be the object of a free and reasoned agreement among equals.'[123]

Although the *regulative goal* or *ideal* is not complete consensus here and now, it remains that it amounts to more than the claim that ideally all rational people could agree. For deliberative democrats, *achieving actual* common conviction is the *ideal* that should regulate political institutions and processes.[124] In Gaus' terms, therefore, this regulative ideal can be depicted as the 'Regulative Ideal of Real Political Consensus.'[125] As Postema stresses, 'it is intended as a model for real moral discourse in concrete, historical, social conditions. It is an idealization, to be sure, but it is an ideal to which we can demand real social and political institutions to approximate.'[126] Deliberative politics, we are told:

> seek an answer to which we all can agree, since it is reached from a debate in which each is able, freely and fully, to offer his reasoned judgement under rules that treat no person as privileged. . . . A reasoned interchange in which all seek an answer to which all must agree, results in unanimity. The procedure of deliberative politics is thus informed by the standards that its outcome must satisfy.'[127]

2. Deliberative Disagreement

Diversity of impartial and reasonable opinions about justice is likely to be persistent in pluralistic and globalised societies.[128] Although it may occur, reasonable agreement is not therefore ordinarily to be expected on the subject matter of politics, even after thorough deliberation. In these cases, disagreement persists despite the central requirement for the parties to the debate to act and deliberate *sincerely,*[129] hence Gutmann and Thompson's concept of 'deliberative disagreement.'[130]

Of course, deliberative democrats will reply that they do not deny the existence of reasonable pluralism and disagreement about justice and the right. For instance, Habermas acknowledges that 'experience teaches us that some very well defined issues of justice are often controversial even in homogeneous societies.'[131]

[123] Cohen, 1996, 99–100.
[124] See Cohen, 2001, 385 who claims that 'we do not need to have principles of justice that address' circumstances which will not in fact obtain.
[125] Gaus, 1997, 206.
[126] Postema, 1995b, 360.
[127] Gauthier, 1995a, 320.
[128] See Bohman, 2003, 757.
[129] See Kuran, 1998, passim; Gutmann/Thompson, 1996. See Gaus, 1997, 207 ff. See also Przeworski, 1998, passim on domination and manipulation in the deliberative process. See Boudon, 1994, on the distinction between reasons and causes to hold a belief, on the one hand, and their consequence for the outcome of deliberation, on the other.
[130] See Gutmann/Thompson, 1999, 73 ff. See also Posner, 1998, 1680 who does not seem to realise that Gutmann and Thompson share this view.
[131] See Habermas, 1996a, 1574. See also Mason, 1993, 64.

Despite this acknowledgement of the persistence of reasonable disagreement about legal-political issues, however, Habermas holds a conception of legitimacy[132] that allows no alternative to violence and coercion, but a consensus arrived at in moral or ethical discourses or, at least, in procedurally regulated negotiations.[133] Thus, although they acknowledge the existence of reasonable pluralism and disagreement, deliberative democrats object that this same disagreement is precisely why deliberation is so important in that it will transform disagreement into reasonable agreement.[134]

This approach is flawed, however. Despite all its benefits, deliberation may not lead to a greater consensus on what constitutes the right, but may actually crystallise bases for disagreement. This might occur in at least two ways. First of all, disagreement is not only at the origins of deliberation, but it is a primary *creative resource* of deliberation. Deliberation is indeed a creative process that may multiply the different understandings of what is at stake rather than reduce their number.[135] Secondly, even if deliberation induces a better understanding of the dimensions of conflict, it may simply *make the bases for disagreement clearer.*[136] Even assuming unlimited time for deliberation, unanimous and rational agreement might not necessarily ensue.[137] Finally, seeing the truth thanks to deliberation does not necessarily lead to agreement, for *human reason is fallible* and the *truth multiple.*[138]

Some deliberative democrats, who have started to acknowledge the persistence of reasonable disagreement, have replied by reducing the scope of the *reasonableness* of the opinions the deliberative process can consider and reconcile.[139] As I have explained earlier, such redefinitions of the notion of public reason are incompatible with the ideal of inclusive deliberative democracy these same authors argue for, however. First of all, once the *scope of public reason* has been restricted to some areas of politics, such as 'constitutional essentials' and questions of basic justice in Rawls' account, for instance, and once other controversial moral issues have been taken off the agenda, reasonable views will tend to be more consensual.[140] In such frameworks, reasonable people are of course unlikely to disagree, but this is at the price of not deliberating over what matters most to them.[141] Secondly, by

[132] I am concentrating here on his account of political legitimacy and justification, rather than on his account of moral rightness, although both legitimacy and moral rightness paradoxically depend in his account on the possibility of reasonable agreement. See LAFONT, 2004. See also Chapter 4.

[133] See HABERMAS, 1995A, 558–59.

[134] See BARBER, 1984, 135, 151; SUNSTEIN, 1988, 1555; COHEN, 1989, 23; MANSBRIDGE, 1980, 31–33.

[135] See SUNSTEIN, 1988, 1562, 1575; BARBER, 1984, 119, 128-29, 135; POSTEMA, 1995B, 363. See on manipulation and insincerity in deliberation, PRZEWORSKI, 1998; KURAN, 1998. See also KNIGHT/JOHNSON, 1994, 288 with further references; COHEN, 1989, 24; WALDRON, 1999E, 219.

[136] See KNIGHT/JOHNSON, 1994, 286; RIKER, 1982, 128; ELSTER, 1986A, 115; LARMORE, 1990, 119 ff.

[137] ELSTER, 1986A, 115. See also KNIGHT/JOHNSON, 1994; WALZER, 1989. See for the same critique, LUKES, 1991, 228 ff and KLOSKO, 2000, 240 ff.

[138] See Chapters 2 and 4.

[139] See ESTLUND, 2000B, 116, 124.

[140] See eg GAUTHIER, 1995A, 322; RAWLS, 1993, 223 ff; HABERMAS, 1998A, 339.

[141] See BENHABIB, 1994A, 36–37. See Chapter 4.

restricting the *content of the notion of reasonableness*, deliberative democrats can confine the deliberative ideal to those who share common understandings or principles and who regard politics as a way of ascertaining what those shared understandings are.[142] Such constraints of the 'reasonable' amount to a way of smuggling in some ex ante substantive limitations on the process of public deliberation.[143] Finally, not only do these accounts of unitary public reason and of exclusive reasonableness create the agreement they need, but they *silence justified dissent.*[144] Democratic procedures cannot ignore reasons without threatening cooperation in deliberation itself. If equal standing contributes to the value of a procedure and the willingness to accept its outcome, then deliberators should not be too quick to exclude a reason as a non-public one. This requires, then, an increased willingness on the part of deliberators to take all reasons into account and engage in a discourse of change.[145]

Despite all this and their acknowledgement that reasonable agreement is more often than not impossible in politics,[146] some deliberative democrats refuse to be sceptics about the *aim* of justifiable agreement.[147] As I argued in the second part of the book, we cannot infer from the fact that there has only rarely been complete reasonable agreement on issues of justice in the past that such reasonable consensus is logically or even empirically impossible.[148] Accordingly, then, we cannot reject reasonable agreement as an entirely unattainable aim for deliberative democracy; after all, indeed, it is only meant to be a regulative ideal that one ought to try to reach.[149] Although a good theory may make *idealistic* assumptions about people's motivations, a *realistic* conception of democratic deliberation, however, should hold on much more to a sense that, even after deliberation, people often continue to disagree in good faith about issues of justice upon which we expect the legislature to deliberate and then to settle.[150] We may well need, for the rational debate to seem worthwhile, to have a regulative *ideal* or *hope* of achieving rational consensus, but what we do not need is an unrealistic *expectation* that it will necessarily be achieved. It follows then that deliberative theorists should not too readily assume that disagreement, the absence of consensus and hence the need for a *vote* by the end of deliberation, are signs of failure.

[142] See eg Walzer, 1983; Cohen, 1996, 101; Habermas, 1998a, 282, 304, 388–446, 463–90.
[143] See Knight/Johnson, 1997, 285 for this critique. See also Bohman, 2003, 771. See, for an example of such a constraining approach, Gutmann/Thompson, 1996, 52, 199–229. Contra, paradoxically: Gutmann/Thompson, 1990 who used to argue against this kind of manoeuvre. See Chapters 4 and 9.
[144] Young, 1996, 126; Williams, 2000, 134 ff.
[145] Williams, 2000, 144 ff.
[146] Gutmann, 1999, 230.
[147] See eg Estlund, 2000b, 124.
[148] See Chapter 5.
[149] See Weber, 1949, 90–93.
[150] See Waldron, 1999a, 93.

3. Potential Reasonable Agreement *Qua* Internal Logic of Deliberation

The lack of realism and hence normative pertinence of the regulative ideal of real consensus does not mean that reasonable agreement does not matter in terms of the *internal logic of deliberation.*[151] To argue in good faith is to present reasons that one thinks others should accept and two or more people will only persist in argument if they think that in the end the same considerations could convince them all.[152]

According to Habermas, if participants in the discourse assume that reaching agreement solely on the basis of an exchange of reasons is not guaranteed, their discussion cannot be described as rational.[153] The supposition that rational consensus is possible is not merely a normative or regulative ideal of argumentative discourse,[154] but one of its *constitutive presuppositions*. Such a conclusion is too hasty, however. What can be realised as *observers* of the persistence of political disagreement should be part of our perspective as *reflective participants* in rational discourse,[155] without undermining the participants' view that deliberation is worthwhile. The only supposition[156] one needs for the genuine give and take of rational discourse is that the force of the better argument can contribute to the final shape of *whatever* type of arrangement is reached, even if it does not sanction my view of what it is correct to do in a particular case.[157] For instance, when competing conceptions of justice are at issue, arguments may serve to get others to see the authenticity or the lack of authenticity of a proposed conception and hence give it the appropriate weight.

Thus, the constitutive presuppositions of discussions of justice may resemble those with which participants engage in what Habermas calls critique and criticism in ethical deliberation, *without* necessarily assuming that one will necessarily reach the one correct view nor reasonable agreement.[158] Debate can still be rational without presupposing that the application of reason can answer any or all conflicts; it is possible to reason out the limitations of reason without resort to non-rational means of persuasion.[159] Even if reasonable agreement is out of reach in practice and although we are aware that we might have to resort to a vote, there may be non-ultimate questions that are worth discussing. Moreover, it may even be worth discussing matters of ultimate principle too, for who is to say when the limits of reasoned agreement have been reached?[160] Institutionalised deliberative procedures regulating the use of public reason, such as modes of voting closure,

[151] See Bohman, 1998, 422. See also Waldron, 1999a, 91.
[152] Waldron, 1999a, 91.
[153] Habermas, 1996a, 1574. See also Müller, 2002, 104–5.
[154] See on the same distinction, Waldron, 1999a, 91.
[155] See Waldron, 1994a, 533; Waldron, 1999a, 159 ff on Rawls. See also McCarthy, 1994, 58.
[156] See Chapter 4.
[157] See Cohen/Sabel, 1997, 321, 323; Waldron, 2002a, 153.
[158] See McCarthy, 1995, 478. See also Waldron, 1994a, 534.
[159] Veitch, 1999, 124–25.
[160] Brennan/Pettit, 1992, 318.

do not aim at preventing people from differing in their value orientations or from actively defending them, but they will not lead to a consensual weighing of competing orders of reasons either and should therefore not be presupposed to do so.[161]

There is a difference, therefore, between such an *underlying logic in reasoned argument* and the *regulative ideal or aim at actual reasonable agreement*. Who says reasonable disagreement also means the possibility, even if it remains extremely unlikely in conditions of reasonable pluralism, of reasonable agreement.[162] However, accepting the possibility of a rational agreement as a discipline and a presupposition internal to the logic of deliberation is not the same as stipulating it as the appropriate political outcome or goal of successful deliberation, even at an abstract or ideal constitutional level.[163] It is implausible to regard agreement, as it is by Habermas, as both a *terminus a quo* and a *terminus ad quem* of public practical reason and deliberation; the former is unavailable and the latter is unfeasible.[164]

IV. THE INESCAPABILITY OF VOTING

In this section, I would like to argue for the need for political closure given the persistence of deep moral-political disagreement even after thorough deliberation. The very best theories of deliberative democracy are now characterised by the acknowledgement of pervasive deliberative disagreement and the insertion of the need for closure into their account of deliberation.[165] There remains, however, a temptation for many theorists of deliberative democracy to try to marginalise voting in proposing alternative forms of institutional design. These proposals are crucial, but they cannot avoid the culmination of deliberation in voting by the end of what one may qualify as a crescendo of modes of closure.

1. The Need for Closure

How are people to act toward one another when they are in serious moral disagreement in the political realm and realise that public deliberation and the exchange of public reasons only make their disagreement deeper and more irresolvable?[166] More precisely, is it right to argue that *toleration* is, as some have argued, 'both part of the ideal of public reason and an important virtue for

[161] See Bohman, 1995, 266–67.
[162] See Lafont, 2005.
[163] See eg Gauthier, 1995a, 320.
[164] Postema, 1995b, 352.
[165] See the subtitle of Gutmann/Thompson, 1996: 'Why moral conflict cannot be avoided in politics and what should be done about it.'
[166] See Bohman, 2003, 757.

citizens to exercise and for institutions to secure and respect?'[167] To say that a person tolerates a class of actions is to say that the person believes the actions are morally wrong and *disapproves* of them, but does not seek to use or restrains from using available means of interference or coercion to prevent persons from performing them. In other words, to tolerate something is to exercise restraint in circumstances where one regards that thing as wrong, misguided or deficient.[168] Toleration implies a willingness to put up with those things one rejects or opposes; it amounts to an *agreement to disagree*. It is grounded in respect for persons; autonomy requires a plurality of choices and respect for people's autonomy therefore implies toleration of a plurality of diverging moral opinions, provided they are reasonable.

When applied to political disagreement and social conflict, the argument for mutual respect takes a new dimension. Any society, no matter how homogeneous, will include people who disagree about how to live and about what they want their society to be like. What toleration expresses is a recognition of common membership that is deeper than conflicts,[169] a recognition that other fellow citizens are just as entitled as we are to contribute to the definition of our society.[170] Toleration recognises the *virtue of conflict* and renders reasonable disagreement beneficial for public deliberation and democracy at large.[171] In its positive dimension, toleration requires more than moral indifference, but less than a pragmatic compromise. It implies active and respectful communication and deliberation, even when some forms of expression disturb others.

Toleration can, however, become untenable in conditions of reasonable disagreement where deliberation does not bring us to a natural agreement.[172] It only amounts therefore to a *limited response* to disagreement. Very often disputes over controversial matters of political concern will need *a single and common answer*, and hence coordination on one option among many. Moreover, when toleration applies, citizens go their separate ways, avoiding moral engagement; this may sometimes keep the peace, but it also *locks into place the moral divisions in society* and makes moral progress far more difficult.[173] People should at least be encouraged to look into the *content* of others' views and see their own views as something others might share rather than protect their own views for their own sake. Perhaps in some cases they will thus be encouraged to realise how much they converge or could converge, if they adequately accommodated their mutual views.[174]

For all that people disagree, therefore, they face a deadline and they must reach a decision; political deliberation is not mere conversation, but it is concerned with

[167] See Bohman, 2003, 757–58. See also Walzer, 1997, 12.
[168] See Gowans, 2000, 34; Ackerman, 1980, 305; Waldron, 1993a, 90.
[169] See Bohman, 2003, 765.
[170] Scanlon, 1996, 231.
[171] See Bohman, 2003, 775–76.
[172] Gutmann/Thompson, 1996, 62.
[173] See Gutmann/Thompson, 1996, 62. See also Wingo, 2003, 39–41.
[174] See Green, 2001, 100.

resolving a political conflict. By reference to 'the circumstances of politics'[175] I discussed before, disagreement would not matter if people did not prefer a common decision, but the need for a common decision would not give rise to politics, as we know it, if there was not at least the potential for disagreement about what the common decision should be. Thus, short of unanimity, one needs a collective choice mechanism to aggregate opinions.[176] The deliberative process is usually brought to a *close* by a choice and a decision—the *vote*.[177] Voting does not exhaust democratic practice, but deliberation cannot either; the transformation of opinions can never do more than supplement the aggregation of opinions that remains central to democratic politics in large pluralist societies.[178] According to Saward:

> no matter how much deliberation takes place, heads have to be counted—aggregated—at some point if a democratic decision is to be reached. No adequate model of democracy can fail to be "aggregative." There is no such thing as a purely "deliberative model of democracy."[179]

A plausible and successful account of democratic deliberation must therefore include an account of the *institutional* forms of decision-making that deliberative processes might take. Deliberative democrats must come to terms with the need for existing practices of democracy such as voting. As Benhabib holds, 'a theory of democracy, as opposed to a general moral theory, would have to be concerned with the question of institutional specifications and practical feasibility.'[180] For this reason, 'the deliberative theory of democracy is not a theory in search of practice; rather it is a theory that claims to elucidate some aspects of the logic of existing democratic practices better than others.'[181] More and more deliberative democrats have now realised this.[182] Thus, rather than simply assert their ideal procedure and a few practical approximations of it, some of them have developed a two-step argument, where ideal and practical dimensions of deliberation are given concrete shape and relate dynamically to each other. This is the case, for instance, of Nino's two-stage account of the constitution of deliberative democracy, in which he opposes ideal deliberation to different institutional arrangements of practical deliberation,[183] or of Habermas' two-track approach to the interaction between the public sphere and formal institutions of democratic closure.[184]

[175] Waldron, 1999a, 101. See Chapter 6.
[176] See Elster, 1998a, 9.
[177] Manin, 1987, 359.
[178] Elster, 1986a, 115.
[179] Saward, 1998, 64.
[180] Benhabib, 1996a, 70.
[181] Benhabib, 1996a, 84.
[182] See Manin, 1987, 359 ff.
[183] Nino, 1996, 218.
[184] Habermas, 1998a, ch 8.

2. Various Proposals of Modes of Closure

Even if most deliberative democrats have now acknowledged the need for institutional forms of closure, they still disagree over the different means to do so. Some of them still deeply distrust voting. Most deliberative democracy theories are characterised, however, by the proliferation of institutional designs they promote for ensuring the best conditions of deliberation and collective choice. It is from the interlocking net of these multiple forms of associations, networks and organisations that, according to Benhabib, an anonymous public conversation results.[185] In what follows, I have chosen to discuss a few of those non-institutional and institutional modes of collective choice.

a. Non-institutional Modes of Collective Choice

Echoing the call for institutional concretisations of deliberative democracy, some authors have developed concrete thinking on *non-institutional* 'associative' or 'discursive designs' and their role in deliberative decision-making arrangements. According to Dryzek, discursive design is 'a social institution around which expectations of a number of actors converge.'[186] On this account, 'discursive design can contribute to the solution of complex social problems.'[187] It is a way of making public policy responsive to public opinion through non-electoral means.[188] On this account, public opinion is conceptualised in terms of the outcome of contestation within the public sphere as transmitted to the state through a variety of means, notably rhetoric communication.[189] The public sphere is home to a constellation of discourses which compete with each other. This idea of a competition of discourses implies an ontological shift in the way to think of democracy in terms of intersubjective communication within the public sphere, as opposed to voting within the state.

Although such a deliberative design based on rhetoric means of communication outside traditional institutional forums is very illuminating and should be encouraged, it is incomplete. One need not argue for 'the exclusive reliance on the deliberative institutions of the liberal state'[190] to suggest a more elaborate combination of those institutions with the contestation of discourses in the public sphere.

First of all, this model neglects the ways in which the balance ought to be struck between the different discourses *in the public sphere*. According to Dryzek, 'the balance of competing discourses matters a great deal, but there is never a vote on which discourse should prevail. Votes may sometimes occur as

[185] Benhabib, 1996a, 73.
[186] Dryzek, 1990, 43.
[187] Dryzek, 1990, 57.
[188] Dryzek, 2000, 47 ff; Dryzek, 2001, 665. See also Parkinson, 2003a; Mansbridge, 1999.
[189] Dryzek, 2000, 50 ff.
[190] Dryzek, 2000, 162.

part of the larger contest, but they are largely epiphenomenal, functioning mainly as markers of the prevailing balance.'[191] This sounds a bit optimistic, however, in the face of deep political disagreement. The larger the scale at which an issue arises, the harder it will become to introduce discursive designs to resolve the issue entirely.[192] Moreover, before public opinion can be *transmitted*, it has to be unified and formulated.[193] How else could this be done but through taking a vote? There is rarely a third party in political conflicts that can mediate or decide on controversial issues in which everybody is asked to deliberate. Besides, if there were one, it would itself usually be a disagreeing multimember body, by contrast to what the extensive literature on discursive designs seems to hold.[194] Dryzek himself acknowledges that he 'does not mean that voting as a form of interest aggregation should be banished, because election campaigns do provide one opportunity (among others) for discursive transmission, and elections themselves constitute a reason for state actors to listen to the public sphere.'[195]

Secondly, this model neglects the way in which public opinion can finally be *conceptualised* and *formulated*. Even transmitted through rhetoric means, a vote will have to take place *in the legislature*. Popular preference is formulated through the actual procedure of voting. It is crucial therefore to focus on the fact that the only way we can actually measure will formation is through the casting of votes.[196] Even Dryzek acknowledges this: 'Democratic life is not just the endless interplay of discourses. There have to be moments of decisive collective action, and in contemporary societies it is mainly (but not only) the state that has this capacity.'[197] There is no ontological shift from thinking of democracy in terms of intersubjective *communication* within the public sphere to thinking of it in terms of *voting* within the official or institutional sphere; both processes belong together and should be combined. As Dryzek himself acknowledges, 'the authenticity of democracy requires that reflective preferences influence *collective outcomes*, and so *both* an orientation to the state and discursive mechanisms for the transmission of public opinion to the state are required, *so long as the state is the main (though far from exclusive) locus of collective decision*.'[198]

b. From Institutional Deliberation, through Accommodation, to Vote

Since toleration and peaceful coexistence are not, in most cases, an adequate reaction and response to pervasive reasonable disagreement in politics when we

[191] Dryzek, 2000, 51.
[192] Dryzek, 2000, 50.
[193] Johnson, 1998, 175.
[194] See Dryzek, 2000, 49. See also Bohman, 1995, 270.
[195] Dryzek, 2000, 54.
[196] Van Mill, 1996, 744.
[197] Dryzek, 2000, 79.
[198] Dryzek, 2000, 162 (emphasis added).

need to converge on a single rule of action in order to join forces on some issues[199] and since it is necessary, even in a non-institutional deliberative design, to have recourse to modes of closure in case of persistent deliberative disagreement, it is useful to assess the different modes of closure that have been suggested as *alternatives to voting* in the institutional sphere of deliberation.

Faced with deliberative disagreement, some deliberative democrats, and Dryzek in particular, have recently claimed that not only is consensus of reasons in plural societies implausible, but also that such a consensus is not essential or even necessarily central to the theory of democratic deliberation.[200] For them, therefore, collective choice can be reached, without recourse to aggregative modes, through *alternative forms of 'reasoned agreement.'* On these accounts, collective choices are reached by near-universal assent, but people support those decisions for different reasons; participants can at least all *accept* them if not *agree* or *assent to* them.[201] There are different ways of achieving such convergence of different reasons. It is possible, for instance, to retain a focus on public reason and justification through an allowance that public reason itself can be plural. This is Bohman's account of '*pluralistic agreement*' or 'moral compromise'; such an agreement merely requires continued cooperation in public deliberation despite persistent disagreement.[202]

This idea is very similar to Gutmann and Thompson's model of *mutual accommodation.*[203] Mutual accommodation of our conflicting convictions is one of the possible ways to live on moral terms with reasonable moral disagreement when it persists despite deliberation.[204] It requires that citizens continue to seek fair terms of *mutual restraint* and *cooperation among equals* rather than camp on their dogmatic positions and impose them through a vote.[205] Seeking such an 'economy of moral disagreement' should not, however, be confused with (internally)[206] *compromising one's moral convictions.*[207] It need not lead to accepting others' way of life as equally valid to one's own; it may only lead us to incorporate in some partial way what one sees of value in other ways of life.[208] The final aim is to *seek a balance* between holding firm convictions and being prepared to change them on the basis of objections that one cannot answer.

Maintaining such a balance is no doubt psychologically as well as intellectually delicate, however. Besides, there are further limitations to the principle of mutual

[199] Gutmann/Thompson, 1996, 62.
[200] Dryzek, 2000, 48.
[201] See Wertheimer, 1999, 172.
[202] Bohman, 1995, 267.
[203] The literature lacks a clear distinction between mutual accommodation and moral compromise. See Chapter 8.
[204] Contra: Gutmann/Thompson, 1996. I do not regard mutual accommodation as encompassing deliberation.
[205] See Wertheimer, 1999, 172.
[206] On the opposition between internal and external compromise, see Dworkin, 1986, 179. See also Chapter 8.
[207] Gutmann/Thompson, 1996, 3.
[208] Wong, 1992, 780; Gutmann/Thompson, 1996, 85.

accommodation itself. First of all, despite the value of mutual accommodation and understanding, when we need to get along with our differences, one of the major difficulties with mutual accommodation principles is that people will often *disagree* about them and on what amounts to a reasonable accommodation or compromise of their differences.[209] As Dryzek himself acknowledges, therefore, reasoned agreement may be easier to achieve in local disputes and problems with a relatively small number of identifiable participants.[210] A second difficulty is that, even if one is committed to the moral value of finding a common settlement or accommodation, it cannot always take precedence over *one's other moral values.*[211] In particular, it cannot always take precedence over the values that constitute the source of serious disagreement with others. All that mutual accommodation seeks to achieve is a *second-order agreement* rather than a trade off of our first-order beliefs. As such, it does not ask one to give more weight to the value of mutual respect than to other values one holds.[212] Whereas it is plausible that private interests may converge in some cases with views of the public good,[213] convergence on matters of principle where conceptions conflicts is less likely. As I will argue in the next chapter, parties to a disagreement should not be brought to compromise the conceptions they regard as correct with others they deem incorrect, inconsistent or at least unreasonable.[214]

A third difficulty with mutual accommodation is that, even if the parties to a disagreement can agree to strike a reasonable and principled compromise of their conceptions, mutual accommodation may turn into a *pressure for agreement*. In some cases, it might be better to leave the possibility open to take a vote, than to encourage the artificial and often premature suppression of dissent. It is only if people know that their opinions stand a chance of being voted for or outvoted that they will express their dissents and hence enhance the quality of deliberations. Besides, the possibility of being outvoted increases the degree of political responsibility among citizens, which the pressure for compromise might jeopardise. It is only if a group risks being outvoted, that it understands what it takes to be responsible or not for a political decision. This in turn raises the chances of self-criticism and critical learning.

Finally, unless an external compromise can be reached or unless one of the parties voluntarily changes her mind through her efforts to accommodate the other, they might sometimes want to go *beyond mutual understanding or agreement on applications* and join their forces on acting upon a single principle or set of principles. The same applies when mutual accommodation fails and *no mutually acceptable settlement* can be reached. When this happens, what should citizens or their representatives do? The standard answer is that they should

[209] See Mason, 1993, 144–45; Besson, 2003a.
[210] Dryzek, 2000, 50.
[211] See Wong, 1992, 782.
[212] Gutmann/Thompson, 1996, 93.
[213] This kind of example is the only example Dryzek, 2000, 49 gives of reasoned agreements.
[214] See Besson, 2003a. See also Chapter 8.

vote. The parties might prefer to adopt a decision-making procedure they deem fair enough, such as a mode to choose one reasonable view or the other, to attempting to compromise them into a view no reasonable person holds.[215] It follows therefore that deliberation, mutual accommodation and procedural settlements are not competing decision-making methods.[216] They complement each other as a crescendo of measures that replicates the crescendo there is in practice in the persistence of reasonable disagreement[217]; some disagreements can be solved through deliberation and, when they cannot, mutual accommodation can help to reach a mutually acceptable decision. If not, the parties can still take a vote. While voting cannot substitute for deliberation, it is also true that deliberation cannot substitute for voting. Voting is most of the time the ultimate and inescapable decision-making moment of deliberation.[218]

V. VOTING *AFTER* DELIBERATING

If voting is truly inescapable after deliberation, we need a justification of this voting practice and in particular a truly deliberative justification of it. Before doing so, however, it is important to disparage the misgivings deliberative democrats may still nourish about aggregative decision-making procedures.

1. A *Deliberative* Justification of Voting

After the shift from deliberation back to voting, it is crucial to go beyond the mere accommodation of existing voting practices in a theory of deliberative democracy. Very few deliberative democrats now think of deliberation independently from voting. The question remains, however, of how to make voting more consistent with deliberation rather than see it as a replacement of deliberation. More than practically necessary devices or second-best approximations, decision-making institutions must be the best way of achieving widespread deliberation in a large and diverse citizenry. As Wertheimer puts it:

> the question is how deliberative democrats should *think* about voting. The question is not whether some electoral mechanism is necessary. Obviously it is.[219]

In the recent literature on deliberative democracy, a merely *pragmatic* line of argument for voting has become standard. Voting is necessary, according to

[215] See Chapter 8.
[216] See the three logics of deliberation, bargaining and voting in Elster, 1998a.
[217] See Waldron, 1999b.
[218] See Waldron, 1999b.
[219] Wertheimer, 1999, 180–81.

Elster, 'given the constraints of time and resources.'[220] Habermas also claims that current democratic practices are pragmatically necessary and second-best solutions in complex and pluralistic societies.[221] According to him, procedural settlements amount to '*arrangements*' that reconcile the pressure for decision with rational decision-making.[222] True, one of the most important modes of reaching institutional settlements is the *majority rule*. For Habermas, however, majority decisions only represent a *caesura in an ongoing discussion.*[223] They record the *interim results* of a discursive opinion-forming process that would in the long run lead to a general consensus and that can be reopened at any time by a new majority.[224]

Habermas' pragmatic and temporary view of majority voting cannot resist the pervasive and persistent reality of disagreement. Neither ethical-political nor moral disagreements are susceptible of being solved by determining the one right answer. Their procedurally correct resolution cannot therefore always be acceptable to all for the same substantive reasons and can only be indirectly justified in Habermas' account of political legitimacy. Habermas therefore needs a more deeply proceduralist account of legitimacy than the one he advocates only as an *ultima ratio* and *qua* indirect justification of our political decisions. He can no longer refer to all sources of legitimacy as being based on rational acceptability.[225] In short, therefore, Habermas needs to provide a justification of the need to vote on issues where people disagree reasonably or, in other words, real *deliberative 'voting ethics.'*

Even Nino's arguments about institutional design cannot provide a full normative account of deliberative voting. According to him, 'the ideal constitution of power is based on a justification of democracy that relies on the transformation of people's interests through the process of participatory discussion *and majoritarian decision.*'[226] Nino's argument seems therefore at first sight to give reasons for voting that are not merely *pragmatic* but also *normative*. The prospect that, at the end of the discussion, there will be a vote and that the social decision will be taken by majority rule, is an important element in the transformation of partial expressions of individual preferences into opinions that are somewhat more impartial.[227] It is unclear, however, what role the majoritarian process plays on this account, and hence what its normative justification amounts to. Of course, deliberation may have a transformative effect in providing information and confrontation, but the role of the voting dimension of deliberative democracy in this transformation remains unaccounted for *normatively*.

[220] Elster, 1998a, 14.
[221] Habermas, 1998a, 323 ff.
[222] See Habermas, 1990a, 42; Habermas, 1998a, 220 ff, 254 ff, 369, 613 ff.
[223] See Habermas, 1998a, 220–21.
[224] See Habermas, 1998a, 612 ff.
[225] See McCarthy, 1996, 1121 ff and McCarthy, 1995.
[226] Nino, 1996, 219.
[227] Nino, 1996, 117.

On most of those accounts, then, deliberation and voting are made to seem 'odd bed-fellows,' to borrow Waldron's expression.[228] There is something embarrassing about justifying voting as an admission of failure.[229] Even the deliberative theorists, who acknowledge that voting must somehow be reconciled with deliberation, do it in such a way as to avoid the problems deliberative democrats have been criticising. The simplest model is to have as much deliberation as possible in the public sphere and then have citizens vote, as Benhabib argues.[230] The problem with such *sequential* models of democracy is not only that deliberation does not clearly influence the outcome of voting processes,[231] but that the voting stage itself is not accounted for democratically. It is important therefore to look for a true *combination of deliberation and its decision-making stage*, *ie the voting process*, rather than playing by this fake opposition between deliberation or consensus, on the one hand, and aggregation or voting, on the other. Questions such as Dryzek's question 'should deliberation be oriented to consensus, or is it just a prelude to voting?'[232] are disingenuous. Deliberation should not automatically be oriented to real consensus, but this does not mean that it is just a prelude to voting either.[233]

Even Gutmann and Thompson now seem to have recognised what they call 'the morally powerful *combination* [of deliberation and voting] for justifying laws and policies democratically.'[234] *Combination* aims at achieving more than the mere cohabitation or substitution of deliberation by aggregation feared by many deliberative theorists. Democracy, as a 'unified exercise of political virtue,'[235] amounts as much to deliberation as to voting and it would be wrong to reduce it to one or the other. As Arendt warns us, we should favour measures that do more than 'allow the people a share in public power without providing them at the same time with more public space than the ballot box and with more opportunity to make their voices heard in public than election day.'[236] Dewey expresses the same idea: 'majority rule is as foolish as its critics charge it with being. But it is never *merely* majority rule.' This is because the 'counting of heads compels prior recourse to methods of discussion, consultation and persuasion.'[237] What we need therefore is a *normative* theory that not only reconciles deliberation with disagreement and voting, but also makes voting seem the logical culmination of deliberative democratic decision-making.[238] Every position on which we vote should have had a

[228] Waldron, 1999b, 211.
[229] For instance, the terms 'voting' or 'election' do not appear in the index of Gutmann/Thompson, 1996.
[230] Benhabib, 1996a, 72. See also Goodin, 2003b, 153–54.
[231] Bohman, 1995, 417.
[232] Dryzek, 2000, 170.
[233] Contra: Gutmann/Thompson, 1996, 142.
[234] Gutmann/Thompson, 1999, 267.
[235] Waldron, 1999b, 223. Contra: Goodin, 2003b, 227, note 1.
[236] Arendt, 1973, 253.
[237] Dewey, 1927, 207–8, 144.
[238] See Manin, 1987, 359 on the need for a justification of majority rule *from within* deliberative democracy theory.

chance to be stated in order to ensure an informed, principled and respectful vote. It is indeed part of the voting process in conditions of reasonable disagreement that it should express respect for diverging views and the views of those who might next be in the minority.[239]

2. The Misgivings of the Deliberative Opposition to Aggregative Procedures

Why do advocates of deliberation tend to be so suspicious of political arrangements that rely on the aggregation of preferences or interests like voting procedures? For most of them, such arrangements lack the 'moral resources' necessary to legitimate the outcome of collective decisions.[240] They are 'second best' normatively, because they introduce the possibility of serious distortions of deliberation. As a consequence, deliberative theorists 'wish away the vulgar fact that under democracy deliberation ends in voting.'[241] Some deliberative democrats go as far as to claim that 'with their increasing stress on voting and elections, [conservative] deliberative democrats have played into the hands of their social choice critics'[242]; what these authors suggest, therefore, is a shift away from voting and aggregative procedures which are more akin, in Dworkin's terms, to a 'crude statistical view of democracy.'[243]

Deliberative democrats base their distrust of aggregative procedures on the *endogenous* difficulties[244] that affect them. Those difficulties have been forcefully denounced by social choice theorists and in particular by Arrow.[245] Social choice theory is a branch of rational choice theory that is concerned with ways of aggregating individual preferences and interests into social outcomes, for instance through voting. One of the most famous social theorists' argument, Arrow's argument, demonstrates that there exists no aggregation mechanism that simultaneously conforms to a set of several relatively unobjectionable normative criteria and generates coherent and stable collective decisions (*ambiguity*),[246] provided there is no prior constraint on the content of the preferences to be accommodated (the condition of the 'unrestricted domain'). Under certain conditions, the aggregation method may yield the result that the group prefers option X to option Y, Y to Z, and Z to X, rendering it completely arbitrary where in this cycle we take the majority view to be located.[247] A second argument against

[239] See Galston, 2000.
[240] See Offe/Preuss, 1991; Benhabib, 1996a.
[241] Przeworski, 1998, 141.
[242] Dryzek, 2000, 39.
[243] Dworkin, 1990, 36.
[244] I leave aside more *exogenous* asymmetries and difficulties which, obviously, affect aggregative and deliberative procedures alike. See Knight/Johnson, 1994, 278.
[245] See Arrow, 1951.
[246] Estlund, in Estlund/Waldron/Grofman/Feld, 1989, 1321. See also Waldron, in Estlund/Waldron/Grofman/Feld, 1989, 1323.
[247] See Hardin, 1995 for detailed explanations of the theorem.

aggregative measures relies on Condorcet's theorem I discussed earlier; this theorem demonstrates the possibility of cyclical majorities or intransitive orderings (*instability*).[248]

These results suggest, in Riker's account, (i) that the outcomes of aggregation are *ambiguous* because different methods of counting votes can generate dramatically different outcomes from the same initial profile of preferences and (ii) that, as a result, not only the outcomes of aggregation are especially *vulnerable to manipulation*, but that we typically are unable to differentiate outcomes produced by strategic voting from those that are not.[249] In founding their rejection of aggregative procedures and voting on social choice theory, deliberative democrats *overestimate* the problem for aggregative procedures. Moreover, they also *underestimate* its scope and its transferability to deliberative procedures themselves. In this sense, they operate with something like a double standard.[250]

Primarily, there are the *limits of social choice theory's critique of aggregation*. For a start, the public interest cannot be said to be solely a function of *individual interests rankings.*[251] Although it is true that contractualism presupposes a minimal commonality of basic values that may be thought of as common individual interests,[252] it is possible for individuals to address the abstract question of the nature of the public interest without always thinking of the consequences for themselves.[253] Moreover, public choice scepticism has been met by the growing counterobjection based on the observation that legislatures do *not always* face the arbitrariness and instability predicted by Arrow's theorem.[254] The simple fact that there is such a theorem does not establish that there are such cases.[255] Finally, even if one concedes that voting is about aggregating individual preferences, if one *relaxes the condition of the* '*unrestricted domain,*' the 'impossibility' of the task of designing a collective choice procedure is eliminated. This can be done, for instance, through restrictions of the deliberation's agenda.[256]

Secondly, although they overestimate the difficulty implied by Arrow's theorem for aggregative procedures, deliberative democrats underestimate *its implications for deliberative procedures*. At some point, indeed, matters will have to be put to a vote and if individuals disagree over the dimensions of their disagreement, the outcomes of the vote remain susceptible to instability and manipulation.[257] Moreover,

[248] I borrow the opposition between 'ambiguity' and 'instability' from Coleman/Ferejohn, 1986.
[249] See Riker, 1982; Coleman/Ferejohn, 1986, 11.
[250] Johnson, 1998, 164.
[251] Grofman/Feld, in Estlund/Waldron/Grofman/Feld, 1989, 1330–31.
[252] See Barry, 1964, 12–14. See also Estlund, in Estlund/Waldron/Grofman/Feld, 1989, 1321; Waldron, in Estlund/Waldron/Grofman/Feld, 1989, 1323.
[253] Rousseau, 1997, II, 6; Grofman/Feld, in Estlund/Waldron/Grofman/Feld, 1989, 1330–31. See also interestingly Waldron, 1990a, 51, 61 on abortion.
[254] See Farber/Frickey, 1991, 47–62.
[255] See Johnson, 1998.
[256] Farber/Frickey, 1991, 47 ff.
[257] See Miller, 1993, 81.

analogously to aggregation, there are good reasons to suspect that the outcome of deliberation itself depends heavily upon the sequence in which participants speak and the point at which debate is terminated.[258] Finally, unconstrained communication favoured by deliberative democrats will only make things worse. The requirements specified by deliberative democrats for effective deliberation are precisely those conditions which social choice theorists have demonstrated are likely to produce arbitrary and unstable outcomes in collective choice; these conditions include equal access to debate, an inclusive agenda, etc.[259] Of course, deliberation may help induce a shared understanding regarding the dimensions of conflict and thus minimise the cycling when the choice ranges over only one dimension. Such arrangements could increase the likelihood that members of the constituency have what social choice theorists call 'single-peaked' preferences.[260] This ensures a shared understanding among participants of what is at stake in a conflict, although they disagree over how best to resolve it.[261] This condition is a constraint on the structure of preference orderings and not on the content of preferences.[262] The point is, however, that deliberative democrats cannot simply assume this; they have to argue for the restriction of the domain of preferences through mechanisms endogenous to deliberation and institutionalise it one way or the other.[263]

VI. DELIBERATIVE 'VOTING ETHICS'

In this section, I will argue for the elaboration of truly deliberative voting ethics. To do so, I will present a two-pronged argument[264]: first, an argument for the ethics of voting and, secondly, an argument for the ethics of majority voting.

1. Voting Ethics *from Within*

As Waldron argues, a theory of deliberative democracy is *radically incomplete* unless it dovetails its account of deliberation with an account of what procedures participants use to resolve disputes when deliberation fails.[265]

[258] Johnson, 1998, 176. See eg on the discursive dilemma, Kornhauser/Sager, 1993; Pettit, 1997; Chapman, 1998a; Chapman, 1998b; Pettit, 2000; Pettit, 2001b; Pettit, 2002c; Pettit, 2003b; Kornhauser/Sager, 2004. See also Chapter 11.

[259] See Van Mill, 1996, 735; Riker, 1982; Knight/Johnson, 1994, 289.

[260] See Miller, 1993, 81 ff for such a proposal.

[261] See Johnson, 1998, 177.

[262] See Riker, 1982, 125 ff.

[263] See for such an argument Riker, 1982, 122, 128; Miller, 1993; Dryzek, 2000, 42 ff.

[264] Waldron, 1999a, ch 5 and 1999b does not distinguish between the justification of voting and that of majority voting, but I think that Gutmann's, 1999 reply to his argument requires one to do so.

[265] See Waldron's, 1999b argument. See even Gutmann, 1999, 233.

Of course, there have been arguments in the past for majority decision, that were made from *outside* the deliberative democracy movement. None, however, has been very convincing. According to the strongest argument to date, if people vote their own preferences, there may be some rough equivalence between the formal outcome of a majority process and the substantive recommendations of a utilitarian political morality. The *utilitarian* argument, however, relies on the assumption that voters are not voting on the basis of reasonable and impartial opinions, but are instead voting their own *self-interest.*[266] The logic of this argument does not apply to most democratic instances, be they legislative or judicial, where reasonable people disagree in good faith about conceptions of the right and have to reach a single decision by taking a vote on their convictions about these controversial issues. Moreover, this argument presupposes that the principle of *utility* provides the criterion of substantive correctness in all cases.[267]

We ought therefore to develop a theory that explains why it is reasonable to require people to submit not just their self-interested preferences, but also their most impartial convictions about what justice requires, to voting and to majority decision.[268] Given the close relationship between deliberation and voting I emphasised earlier, deliberative democracy theories offer the best framework for such a justification and the elaboration of true *ethics of deliberative voting and majority rule.*[269] These theories will also in fact benefit from a rethinking of deliberation's own justification, as this cannot be avoided while developing a justification for voting from *within* deliberative democracy.[270]

2. The Deliberative Ethics of *Voting*: Minimal Decisiveness

One may think of two main deliberation-based arguments for voting: first, equal respect for all opinions in circumstances of disagreement and, second, the focus of deliberation on the need to decide.

First of all, each person's opinions about justice should be respected in circumstances of reasonable disagreement where none of them is self-certifying. It is the principle of *equal respect* for people and their opinions that justifies that

[266] See Waldron, 1999b, 214.
[267] See eg Rawls, 1971; Dworkin, 1984a.
[268] Waldron, 1999b, 214–15.
[269] On the notion of 'deliberative majority rule,' see Bohman, 1996, 182 ff.
[270] It is not my aim to assess the legitimacy of the outcomes of majority decisions when it is said to stem from the *preceding deliberative stage* (for such an account, see Benhabib, 1996a, 72 who talks, however, of 'the normative justification of majority rule as a decision procedure following from this model'). This is a distinction some authors omit, such as Wertheimer, 1999, 181. My aim here is to provide a normative justification of the voting stage itself, ie of how it can be regarded as justified and truly democratic, independently of what the deliberative stage will do to make its outcomes legitimate *per se*. Of course, the final legitimacy of political decisions is a result, as we will see, of the *combined* legitimacy of both deliberation and voting.

each member of the deliberating body be given an equal voice in the final vote. As Waldron argues:

> because each member's vote counts equally, deliberation under circumstances of equality [and voting] is respectful of its audience in a way that deliberation under circumstances of inequality might not be.[271]

By contrast to different decision-making alternatives, such as flipping a coin or singling out a leader, voting best respects individual differences of opinion about justice.[272] First, *coin-tossing* does not give positive decisional weight to the fact that a given individual member of the group holds a certain view. Although it gives some weight to that fact when setting out the options, coin-tossing does not accord each individual's view the same decisiveness; in a vote, once a set of options has been established, the fact that an individual favours option A is a reason for the group to pursue option A and this in each individual case. Secondly, the method of singling out a leader *à la* Hobbes gives decisive weight to just one of the competing views, and little or none to the others. Bruce Ackerman identifies this specific dimension of voting as '*minimal decisiveness*' or the recognition to each citizen of 'the right to have his considered judgement determine the social outcome.'[273]

A further argument for the justification of voting is that it focuses the mind on the *need to decide*. Hence deliberation without voting loses a large part of its point and voting gets its justification from its role as a focus in the deliberative process. Gutmann, for instance, now recognises that 'voting is an essential value of democracy.'[274] Deliberation gains in legitimacy by being understood as a broader process of deliberation *cum* voting. There is a sense in which it is only *deliberation in circumstances of final equality of decisional authority* that has the beneficial consequences of deliberation. In this sense, the informative and transformative work one often identifies as the consequence of deliberation, on the model of Nino's theory,[275] may really be traced back to deliberation *in the shadow of voting*.[276]

It is not because there is a general *justification* of voting on the basis of fairness or equal respect that correctives and constraints are not justified, that plain voting is *required* and that plural voting schemes, for instance, cannot be justified[277] or that some issues cannot be taken away from popular voting. A conception of equal respect which is responsive to proven—if that is possible in circumstances of disagreement—acknowledged differences in wisdom may justify some sort of

[271] Waldron, 1999b, 224. Of course, this assumes that the minimal value of equal respect is taken as a consensual standard, as Estlund, 2000b, 120 rightly notes.
[272] Waldron, 1999a, 111–12.
[273] Ackerman, 1980, 283.
[274] Gutmann, 1999, 228.
[275] Nino, 1996, 219.
[276] I borrow this expression from Koh/Slye, 1999, 15.
[277] See Waldron, 1999a, 115.

cumulative voting scheme, rather than the equal weight implicit in plain majority decision.[278] Similarly, other facets of political equality, like the right to full equal participation, may justify proportional representation schemes which constrain the equal right to vote and the equal weight of each vote.[279]

3. The Deliberative Ethics of *Majority Rule*: Maximal Decisiveness

In order to argue for majority rule, I will distinguish the justification of majority rule from the justification of unanimity and minority rule and present the argument of maximal decisiveness compatible with equality and minority rights.

a. From Unanimity, through Minority Rule, to Majority Rule

Many deliberative democrats might agree that *voting* is an essential part of democracy and deliberation. Fewer would, however, want to go one step further and argue that deliberation should dovetail with *majority rule*, because majoritarianism is distinctively democratic.

This is mainly because those authors make the mistake of assimilating a deliberative justification of majority rule with the rejection of all other voting procedures, that may also respect *equal political authority*. For instance, they assume that if one accepts a deliberative justification of majority rule, one cannot accept that, in some cases, a unanimous vote will be as democratic or deliberative.[280] This argument is misleading, however. It is not because there is such a general justification of the majority rule that correctives and constraints are not justified, that majority decision is necessarily required and that qualified or proportional majorities or even unanimity cannot be called for in specific cases.[281] Thus, a conception of voting which is responsive to acknowledged differences in gravity of the issue subjected to vote or to past discrimination in case of proportional voting, may justify unanimity, supermajority rule or qualified majority decision, rather than plain majority decision.[282] In fact, all those alternatives are variables, or correctives of the same principle, that is to say the *simple rule of a larger number of votes when each person has one vote*.[283] Provided those correctives are possible, it remains that, given the persistence of reasonable disagreement and the political need to decide, unanimity is not likely to

[278] For such an argument, see BOHMAN, 1996, 96 ff.

[279] As I argued before, restrictions of procedural equality and the right to political participation are based on other facets of political equality. Contra: BEITZ, 1983, 71 and 82 who understands the intrinsic justification of the right to political participation as implying its absolute nature and the impossibility of balancing it against other rights and interests.

[280] See eg GUTMANN, 1999, 229.

[281] In this sense, LIJPHART's, 1984 opposition between the majoritarian and the consociational models of democracy seems simplistic.

[282] See WALDRON, 1999A, 115.

[283] See BOHMAN, 1996, 96. See also ROUSSEAU, 1997, IV, 2.

provide deliberation with the decision-making procedure it requires. It follows therefore that the rule of the larger number of votes is a much more plausible and practical response to political disagreement.

The next step consists in presenting an argument pertaining to majority rule's normative superiority over *minority rule* or minority veto.[284] If it is clear that unanimity does not constitute a realistic mode of decision-making in conditions of reasonable pluralism, one might object that a minority rule or veto should be put in place instead of majority rule. It should quickly become clear, however, that the minority rule might not only prove inefficient in the long run, but that it is also contrary to the principle of political equality.[285] As Rawls rightly states, 'if minority rule is allowed, there is no obvious criterion to select which one is to decide and equality is violated.'[286] There are different reasons for this. First of all, minority rule endows minorities with more power proportionally to their number than majority rule. Secondly, minority veto protects organised minorities better than insular ones, although the latter need more protection against majorities than the former. Finally, although deliberation encourages the exchange of reasons, minority rule can induce minorities to use their veto to safeguard naked interests rather than reasonable opinions and convictions; by contrast to majorities, which have to be constituted in each case by deliberation, minorities know from the start that they can wave their veto and need not abide by the same deliberating rules as others.

Not only is majority voting compatible with equal liberty and as such it is a proper voting procedure, but it possesses a certain *practical and reflexive prevalence.*[287] The view that there is something inevitable about majority rule was expressed forcefully by Locke.[288] There is no disgrace in realising the *practical or mechanical nature* of majority rule. As Arendt contends, 'majority decision is a technical device, likely to be adopted almost automatically in all types of deliberative councils and assemblies, whether these are the whole electorate or a town-hall meeting or small councils of chosen advisers to the respective rulers.'[289] In fact, as Arendt notes, 'the principle of majority is *inherent* in the very process of decision-making and thus is present in all forms of government, including despotism, with the possible exception only of tyranny.'[290] As such, majority rule tends to arise and persist naturally out of *coordination needs*

[284] See Tatsuo, 2005.
[285] This should not be taken to mean that there is no place for the protection of minority rights. See Chapter 9.
[286] Rawls, 1971, 356.
[287] See for this expression, Solum, 1993. See also Klosko, 2000, 145 on the 'procedural norm of democracy.' He bases his reasoning on the empirical evidence that results from sociological surveys. On the psychological arguments for democratic procedures, see his ch 8. See also Christiano, 2004. See Chapter 7.
[288] Locke, 1999, 375–76.
[289] Arendt, 1973, 164.
[290] Arendt, 1973, 164.

and reasons.[291] I will not therefore attempt to provide a more detailed account of its origins nor of its persistence.[292] However, having established the practical inescapability of majority rule as a successful coordinating technicality is not enough for my purpose in this chapter. I also need to propose a minimal *substantive argument for the democratic justification of majority rule*, that proves it to be a morally respectable voting method.

b. The Argument of Maximal Decisiveness

The main argument for the specific legitimacy of majority rule *qua* voting procedure is that it gives each individual and opinion more than the minimal decisiveness of other voting procedures. Majority decision offers each individual view the *greatest decisive weight compatible with the equal weight* of other views.[293]

In this sense, majority-decision is a *fair* method of decision-making, at least in the most impoverished or formal sense of fairness *qua* equal respect.[294] This last qualification is called for since usual understandings of equal respect and fairness convey substantive concerns. Such substantive conceptions are of little use in the circumstances of disagreement where *reasonable disagreement* over the justice and fairness of a substantive issue also applies to the justice and fairness of a dispute-settlement procedure. Indeed, it is because we disagree about what counts as equal respect or fairness that we need a decision-procedure.[295] Thus, to avoid a vicious regress, all we can work with in those circumstances is what Beitz calls the 'narrow understanding of the more basic principle'[296] of equal respect.[297] This narrow understanding of political equality is in turn best guaranteed by a process of *public* decision-making that openly respects the equal right to participation of all those who disagree.[298]

[291] The coordination that is at stake here is coordination on matters of common concern that naturally takes place through majority voting, rather than coordination on majority voting itself. Of course, one may argue that coordination on majority rule is simultaneous. See also Walker, 2001, 126–27; Przeworski/Alvarez/Cheibub/Limongi, 1996. See Chapter 6.

[292] On the minimal constitutional precommitment over democratic rights and principles, see Chapter 9.

[293] See Vlastos, 1984, 62 ff; Waldron, 1999a, 114. And for more technical evidence, see Brennan/Lomasky, 1993.

[294] On this formal sense of political equality, see Barry, 1991, 26; Barry, 1965, 312. This argument assumes that the minimal senses of political equality and fairness identify the same value.

[295] See for a similar argument, Dworkin, 1986, 180.

[296] Beitz, 1989, 64. Of course, as we saw before, Beitz, 1983, 80 ff denies that either fairness or equal respect can provide sufficient intrinsic justifications for procedural equality and the right to political participation in general, on grounds that these cannot avoid referring to more substantive arguments of equality.

[297] By reducing the level of controversiality of the principle of political equality, this account does not assume that it is possible to avoid any regress at all and that a justification of the majority principle can avoid being normative and hence contestable. Contra: Estlund, 2000b, 118 ff. I do not think that Waldron, 1999a and 1999b is claiming anything different nor that he needs to.

[298] See Christiano, 2004, 276.

The same idea may be found in Singer's contention that the majority rule is a 'paradigm of a *fair* compromise.'[299] By this, Singer means that, in circumstances of reasonable disagreement about the merits of legal decisions and the fairness of decision-making procedures to reach them, the *equal division of power* through the use of majority rule to reach a decision among equal votes can be seen as the least controversial means of decision-making. In this context, fairness is understood in terms of compromise, rather than in absolute terms that would imply full objective knowledge of what is just and fair on the part of all parties[300] or at least a rationally demonstrable proof of what is just and fair. What makes majority rule *the fairest* 'as a compromise,' and provides a stronger reason to respect it than to respect other voting procedures, is that what is asked in return is a minimal sacrifice on the part of each party that is given equal weight and maximal decisiveness in the procedure.[301] This idea of maximal decisiveness compatible with the equal weight of other people's views is very close to Kelsen's *idea of democracy qua synthesis of the ideas of freedom and equality*. According to Kelsen, indeed, 'the greatest possible degree of individual liberty, and that means, the greatest possible approximation to the ideal of self-determination compatible with the existence of a social order, is guaranteed by the principle that a change of the social order requires the consent of the simple majority of those subject thereto.'[302]

Deliberative democrats usually resist these arguments for majority rule on two grounds: first, an epistemic argument and, secondly, an argument based on the tyranny of the majority.

First of all, they give majority decision an *epistemic edge* and move its legitimacy beyond the mere 'numerical version of might makes right.'[303] Thus, they argue, like Gutmann, that 'majority rule typically comes into its own, morally speaking, only when it turns out to be the best way of either expressing the equal political status of citizens or securing at least provisionally justifiable outcomes or both.'[304] The problem with this kind of argument is that it presumes that people initially agree on what is in the interest of democracy or on what is just. I have argued earlier that there is no such reasonable agreement to hope for on those issues and this is precisely the reason why we need a majority decision. In fact, were unanimity to be realised on such issues, it might easily be due to *conformity* or *polarisation* rather than to rational agreement.[305] I share Elster's confidence in the outcome of a democratic decision, when a minority voted against it, rather

[299] Singer, 1972, 32.
[300] Singer, 1972, 33–34.
[301] Singer, 1972, 32, 36. See Chapter 8 on democratic procedures understood as compromise *qua* process.
[302] Kelsen, 1961, 286.
[303] Gutmann, 1999, 232.
[304] Gutmann, 1999, 233. On constitutional constraints, see Chapter 9.
[305] Sunstein, 2002a, 188.

than when it is unanimous.[306] People may be unanimously wrong,[307] as Rousseau famously observes.[308]

Secondly, a further objection deliberative democrats usually make is a variant of the '*tyranny of the majority*' argument. According to this objection, democratic decisions entail the danger of subordinating minorities or individuals to the oppression of a majority. As Beitz puts it, 'why should those who turn out to be in the minority think it a good thing to satisfy preferences that are unreasonable from their point of view?'[309] On the present approach to deliberation, however, the majority's opinion that is acted upon takes my interests, along with everyone else's, properly into account through deliberation and then through voting.[310] The fact that this opinion is not mine is not a threat to my freedom and autonomy.[311] The process institutionalises the admission that there were also reasons not to desire the solution finally adopted; it comes at the close of a deliberative process in which everyone was able to take part, choose among several solutions, and remain free to approve or refuse the conclusions developed from the argument.[312] Although the majority decision does not conform to all points of view, it is the result of their confrontation. Moreover, even if I disagree with the majority, I will not always do so because I think that my interests have not been properly taken into account or that the common good was not understood correctly. But if I do, there is no external reason to take my opinion more seriously than the majority's; the majority is not necessarily right, but it is not necessarily wrong either and there are many reasons to think, as we saw before, that it could not always be wrong about all matters.[313]

In line with the deliberation *cum* voting account of political legitimacy I have been arguing for in this chapter, every position on which we vote should have had a chance to be stated in order to ensure an informed, principled and others-regarding vote. It is indeed part of the voting process in conditions of reasonable disagreement that it should express respect for diverging views and the views of those who might next be in the minority.[314] This conception corresponds in a sense to Dworkin's *partnership conception of democracy*, according to which it is fair to enforce collective decisions on those who oppose those decisions because they have been given equal rights to participate and express their opinions.[315] In other words, majority voting contributes to the justification of deliberation by putting it in focus, but deliberation also contributes

[306] Elster, 1986a, 117.
[307] Przeworski, 1998, 142.
[308] Rousseau, 1997, IV, 2. See Waldron, 1990a, 63.
[309] Beitz, 1983, 81.
[310] See Manin, 1987, 359.
[311] See Gutmann, 1993, 144, 149.
[312] Manin, 1987, 359 who erroneously dissociates his view on this issue from Rousseau's. See Chapter 6 on second-order coordination.
[313] Waldron, 1990a, 65. See also Parry, 1995, 110–11. See also Chapters 1 and 4.
[314] See Galston, 2000.
[315] See Dworkin, 1998. See also Waldron, 2004a for a 'proceduralist' interpretation of Dworkin.

to the justification of majority voting by granting the conditions for the parties' maximal decisiveness in the democratic process. Even Gutmann and Thompson now concede, following Wertheimer, that 'if the majority vote comes on the heels of a deliberative discussion, it may do a lot to *legitimate* a decision—whether or not basic liberties or opportunities are at stake,'[316] and this not only because of the preceding deliberation but because of the combination of voting and deliberation.

As Arendt contends, majority decisions are in order, as long as they are pursuant to a genuine exchange of opinions, on the one hand, and do not degenerate into '*majority rule,*' on the other. What Arendt calls majority rule is the fact that a majority 'liquidates politically, and in extreme cases physically, the opposing minority.'[317] This idea is similar to Kelsen's distinction between the majority principle and the dominion of the majority.[318] What matters towards respecting that distinction and the gap between majority rule and the domination of the majority is, in other words, the protection of the rights of the minority and the respect the majority owes to a disagreeing minority in further deliberations.[319] This is precisely what the minimal substantive legitimation of procedural legitimacy aims at ensuring in making the protection of minimal democratic rights, such as equality and freedom of speech, ie the conditions of fairness of the procedure, the basic condition of democratic legitimacy and hence of the legitimacy of majority decisions.[320]

Thus, there is a distinction to be drawn between the majority's decision being *justified* in its content and being morally right, on the one hand, and its *legitimacy*, on the other.[321] The fact that the majority votes on some policy gives me no reason to think that its decision is justified or the substantively correct one, but it gives me good reason to think that it should be the *community*'s policy.[322] Earlier in this chapter, I used the term 'justification' in a general sense to cover substantive as well as procedural justification. One may actually agree with the proposition that the justification of political and legal decisions need not be given by substantive justification *to each person* given the pervasive circumstances of reasonable disagreement, thus transforming plausible political justification into the kind of political legitimacy defended here. One may also argue, however, that political justification *stricto sensu* is distinct from this impersonal form of political legitimacy and should be regarded as given when *maximal personal justification*

[316] Gutmann/Thompson, 1999, 267 following Wertheimer, 1999.
[317] Arendt, 1973, 164.
[318] Kelsen, 1961, 287.
[319] Waldron, 1990a, 66. See also Todorov, 1985, 34 on the freedom of opinion. The respect for the position of the minority might be an argument in favour of further public discussion and deliberation about the issue. See also Chapter 11 on integrity and the contours and limits of the majority's respect for the minority's opinions.
[320] See Chapter 13.
[321] See Simmons, 1999 on this distinction. See also Wertheimer, 1999, 181.
[322] See Manin, 1987, 359.

is provided, that is when a majority of people regards the decision as justified and the others are satisfied with personal justification to the majority. According to this view, political justification *stricto sensu* is offered to each agent when a decision respects the relative value each places in her own aims, but also demands of each agent that she *respects* the relative value a majority of others place on their aims as well.[323]

CONCLUSION

In this last chapter, I presented what amounts to both the first and the last step in the crescendo of different law-making procedures in the face of reasonable disagreement: *deliberation* and *majority voting*. I argued for the necessity to build a justification of democratic decision-making institutions into the core of any serious deliberative democracy theory. The time has come indeed for deliberative theorists, after having moved away from vote to deliberation, to move back from deliberation to vote and to develop truly deliberative 'voting ethics.' Deliberative democracy only does not provide sufficient justification for the voting that takes place once deliberation has failed to produce agreement and a true justification of the culmination of deliberation in voting is needed. Voting is more than a mere emergency exit or pragmatic resort in conditions of persistent and pervasive reasonable disagreement about justice.

I started by presenting an account of the legitimacy of procedural legitimacy in which I argued that procedural legitimacy takes priority over substantive legitimacy in conditions of widespread and persistent reasonable disagreement. The procedural legitimacy at stake corresponds to a soft form of proceduralism, since the notion of legitimacy cannot be plausibly rendered without reference to the substantive content of the decision to legitimate. Nor can it as a matter of fact be given without reference to the procedure by which this decision was taken. Soft proceduralism is only granted provided the minimal and least controversial substantive legitimation of the procedure is shared by the participants in the procedure itself or at least seems to have been, given the convergence there is on this procedure in practice. One may refer to this as the minimal *substantive legitimation of procedural legitimacy*. Before proceeding with the main argument, I started by briefly restating why democratic procedures are justified, and, secondly, why we should deliberate, and I mentioned reasons pertaining to political equality and dignity for the former and to information, coherence and reflexivity for the latter. As to my main argument, it was a four-pronged one in which each step corresponded to one of the four steps it takes for deliberative democracy

[323] See on the 'political perspective' of political justification and the *multipersonal* account of political justification as opposed to a purely personal account of justification, on the one hand, and a purely impersonal account of legitimacy, on the other: Kutz, 2000a and Kutz, 2000b. See Chapter 4.

theories to move back to vote and to encompass the latter in their account of democratic legitimacy.

First of all, I argued that deep political disagreement, that remains by the end of deliberation, undermines the plausibility and desirability of the *regulative ideal of reasonable consensus* and calls for institutions and procedures of closure. The rejection of the unrealistic expectation of reasonable consensus does not, however, mean that reasonable consensus cannot be retained as the internal logic of deliberation. In fact, without the presupposition that both reasonable agreement and disagreement are possible, participants in the deliberation will not engage actively in the deliberative exercise. There is a difference, however, between accepting the (however unlikely) possibility of a rational consensus as a discipline and a presupposition internal to the logic of deliberation, on the one hand, and stipulating it as the appropriate political outcome or goal of successful deliberation, on the other, thus making the resort to voting look like a failure and at the most a pragmatic solution.

Secondly, I claimed that, in cases where deliberation and mutual accommodation do not succeed in resolving our moral conflicts, voting procedures are the *inescapable culmination of the decision-making process*. The very best theories of deliberative democracy are now characterised by the acknowledgement of pervasive deliberative disagreement and factor the need for closure into their account of deliberation. There remains, however, a temptation for many theorists of deliberative democracy to try and marginalise voting in their accounts of the formation of public opinion and hence to offer alternative modes of closure. I argued that the proliferation of institutional and non-institutional discursive designs at all levels and the development of the public sphere are crucial, but that they cannot avoid the culmination of deliberation in voting by the end of what one may qualify as a crescendo of modes of decision-making.

Thirdly, I criticised the fact that, although most deliberative democrats grant that today, they still look down on voting and regard it as a *necessary evil or caesura* in an ongoing discussion that only awaits to be reopened when people have more time. In response to this sceptical stance, what is needed is the development of a truly deliberative justification of voting. Sequential models of deliberation *and* voting cannot account for the specific deliberative justification of voting nor for the specific vote-oriented type of deliberation we know. I also seized the opportunity to disparage some of the misgivings deliberative democrats may still nourish about aggregative voting procedures and argued that deliberation faces as many cycles and regresses as voting procedures, when people vote on public matters with the public interest in mind and independently.

Finally, I argued for the need to develop a truly deliberative justification of voting, ie voting ethics *from within*. I proposed a deliberative justification of the majority rule that is based not only on its predominance in political practice, but also on a minimalist sense of political equality and fairness. This justification is founded on both *minimal and maximal decisiveness* compatible with the most basic and uncontroversial right to equal participation. I argued that it is only

deliberation in circumstances of final equality of decisional authority, that is to say deliberation in the shadow of voting and in particular majority decision, that can have the beneficial consequences it claims. And, reversely, it is only majority voting *by the end of a deliberative process* that can be vested with the legitimacy it claims. Only in this way can majority voting escape the classic 'tyranny of the majority' argument; according to the deliberation *cum* voting account of political legitimacy, every position on which people vote will have had a chance to be stated in order to ensure an informed, principled and respectful vote. This minimal contingent *cum* substantive justification of majority voting links up nicely with the account of the minimal substantive legitimation of political legitimacy I propounded at the beginning of the chapter. It is only if majority decisions respect the minimal substantive legitimacy requirements that correspond to political equality and minimal democratic rights that they can be vested with political legitimacy.

The general conclusion of this chapter does not affect deliberative democracy's role as an oppositional ideal. Because it is a practical ideal as well as a critical one, demonstrating its institutional feasibility and normative justification ultimately makes deliberative democracy a more, rather than a less, appealing basis for genuine institutional reform.

8

Four Arguments Against Compromising Justice Internally

INTRODUCTION

> If there must be a compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice.[1]

DWORKIN'S RESERVATIONS ABOUT what he calls 'checkerboard'[2] statutes have puzzled many of *Law's Empire*'s readers. Checkerboard statutes compromise principles internally, that is to say in an unprincipled way, by allowing all competing conceptions of the principles at stake to be reflected in the rules produced even if some of them are wrong or inconsistent, hence the checkerboard metaphor. This is the case, for instance, of a statute that compromises the right to life by allowing abortions for women with blue eyes only. In spite of persistent reasonable disagreement about justice, there is often a need to converge on a single rule in some pressing matters. This may sometimes call for mutual accommodations and even lead to compromising some of our views, as I argued in the previous chapter. But should we then really limit ourselves, as Dworkin suggests, to compromising externally about which of two

Earlier drafts of this chapter were delivered at a research seminar in jurisprudence and political theory, University of Oxford, May 2001 and at the IVR World Congress, Amsterdam, June 2001. I would like to thank all participants for their comments and criticism, and in particular Leslie Green, Scott Hershowitz, Wojciech Sadurski and Dale Smith. My special thanks to Nicos Stavropoulos for his detailed critiques, to John Gardner for his helpful suggestions, to Thomas Pogge for an interesting discussion on checkerboard statutes, as well as to Nick Barber for his invaluable linguistic advice.

1 DWORKIN, 1986, 179.

2 See DWORKIN, 1986, 435, note 6: checkerboard statutes are 'statutes that display *incoherence in principle* and that can be justified, if at all, only on grounds of a fair allocation of political power between different moral parties.' They 'treat similar accidents . . . differently on arbitrary grounds' (DWORKIN, 1986, 179). In this chapter, I regard checkerboard statutes as the *product of* internal compromise and will only concentrate on the latter; when an internal compromise is struck between a principle and something else, the result is not principled and the way in which some cases are treated accordingly cannot be principled either. I do not intend, however, to discuss Dworkin's approach to checkerboard statutes *per se* nor, more generally, his postulation of the principles of integrity and coherence in the law as a whole. I will borrow some of his arguments, but am not endorsing nor defending Dworkin's account of integrity in this chapter. See Chapter 11 on integrity and coherence.

or more concepts or conceptions of justice to adopt rather than proceed with a compromise internal to the content of our normative concepts of justice?

Many of us share an instinctively hostile reaction towards legal compromises over matters of principle which attempt to integrate conflicting conceptions of the same concept,[3] or in which the content of one principle is compromised with unreasonable conceptions of another principle.[4] In fact, most of us regard justice, as Rawls claims we should, as the uncompromising virtue of human activity that should have priority over any other consideration.[5] But how do we reconcile these intuitions with the respect we owe to reasonable disagreement over moral issues, and with the connected duties of mutual accommodation which urge us to do more than simply camp on our dogmatic positions until a vote decides one way or the other? Furthermore, how can we explain our hostility towards compromise of principle within the law[6] in the face of the widespread practice of bargaining and compromising over matters of fact, interest and even, sometimes, of principle within the political arena?

In brief, then, attitudes toward moral compromise in politics are ambiguous.[7] This ambiguity is even reflected in the definitions of the concept of compromise. Compromise is commonly seen as a fair technique for dealing with moral and legal pluralism and for settling conflicts by mutual concessions, but it is also sometimes regarded as hypocritical surrender. It seems difficult to draw a line between compromising one's moral convictions and compromising oneself and one's integrity. There is, in other words, an 'air of paradox' around the connection between morality and compromise: commitment to a moral principle means commitment to seeing it fully realised.[8] But, in the context of everyday democratic politics, when faced with reasonable disagreement, commitment to a moral principle may require us to be willing to compromise to some extent or, at least, to express moral goodwill and respect towards accommodating other people's conflicting positions.[9] The difficulty is that this will frequently amount to partially, or even completely, abandoning the principle defended in the first place. I will argue that this paradox can be explained away or tempered by distinguishing cases where moral compromises cannot be tolerated from cases where they can be or

[3] I will assume that the argument one can make about unprincipled exceptions to a *principle* is analogous to the one that can be made about unprincipled exceptions to *concepts*.

[4] See DWORKIN, 1986, 178, 182: 'We would prefer either of the alternative solutions to the checkerboard compromise.' On the lawyers' general reluctance to accept moral compromise, see COONS, 1964.

[5] RAWLS, 1971, 3. See, however, for a critique of Rawls' own compromising of justice and equality through the difference principle, COHEN, 1995, 314, 328–29.

[6] I will restrict the scope of my analysis to *moral* compromise in the *political* process of *law-making*, rather than discuss the issue of political compromise of interests or the broader issue of moral compromise *tout court*. Note, however, that I do not share some authors' view (eg BENJAMIN, 1990, 1) who accept political compromises much more easily than moral ones, independently of any further qualification of the former's content; not all political compromises are compromises of interests and moral compromises in politics raise questions that are as complex as in the purely moral realm.

[7] CARENS, 1979, 123 ff; BENJAMIN, 1990, 4, 8 ff. See also SINGER, 1972, 40 by reference to Thoreau.

[8] KUFLIK, 1979, 38.

[9] See COHEN, 1971, 181–82.

even are desirable.[10] Although compromises may have a positive role to play in democratic politics, the latter should not necessarily be reduced to the 'institutionalised art of compromise.'[11]

My aim in this chapter is to examine the extent to which our shared intuition against some compromises of principle is well-founded. First of all, I will draw a few distinctions inherent to the contestable *concept of compromise*. Secondly, I will discuss the *prima facie justification* of the different forms of moral compromise that may be reached in politics depending on the type of conflict and the principles at stake. Thirdly, I will examine the *limitations* and *dangers* of those various forms of moral compromise. More specifically, I will advance four arguments showing why compromise over justice that strikes a balance between conflicting conceptions of the same moral principle, or between conflicting principles one of the parties[12] does not endorse or recognise as reasonable, is not desirable in the law and does not provide an adequate settlement of reasonable disagreement. In the fourth and last section I will assess the relationship between *democratic procedures* and compromise.

I. THE CONCEPT OF COMPROMISE

1. A Few Distinctions

At the most basic level, there are two rather different ways of understanding what is meant by 'compromise,' depending on whether the focus is on the process or the outcome. In an outcome or 'end-state' analysis, the resolution of a conflict can be characterised as a compromise if it results in some gain and loss for all, regardless of how the compromise was reached. This conception of compromise seems to be the one we use when we speak of 'imposing a compromise solution'; the implication of this phrase is that compromises are outcomes that can be characterised as such without reference to the process by which they are achieved. According to the 'process' analysis, by contrast, a compromise is a certain way of achieving conflict resolution through 'give and take' by each party and mutual accommodation of their differences, whatever the actual terms of the final settlement might be.[13] This is the case when the parties have agreed to submit their dispute to the determination of a certain procedure, such as the democratic procedure.[14] Such a conception of compromise is used when we speak of 'reaching a solution through compromise'; it suggests that compromise

[10] See Halowell, 1944, 173.
[11] Smith, 1942, 2.
[12] I will concentrate, for the purpose of clarity, on *dual* conflicts and compromises, ie pure conflicts and compromises between two distinct principles, although political debates are rarely dualistic in practice.
[13] See Kuflik, 1979, 39–40; Golding, 1979.
[14] See Benjamin, 1990, 6–7.

is not an end result, but rather a special process for generating end results. It is interesting to note that, like compromises *qua* outcome, compromises *qua* process need not be the outcome of a compromise *qua* process themselves. Nor need they be the outcome of a compromise *qua* outcome; there could be an agreement on using the majority rule, for instance.

Although both dimensions may be encountered separately, what is understood as the standard case of compromise usually meets both characteristics.[15] The standard compromise amounts both to a procedure of 'give and take' and to an outcome that results in some gain and loss for all. It is important, however, to keep this distinction in mind in order to avoid dangerous confusion, particularly about the role of compromise *qua* outcome within democratic procedures, as we will see in the last section of this chapter.

In the standard case of compromise *qua* outcome, to which I will be referring unless otherwise specified, a compromise amounts to a settlement that is not constitutive of a real agreement. It is usually reached by negotiation on some 'middle ground' that 'splits the difference' and 'gives something to each side.'[16] Such compromises may be accepted by the parties for different reasons and justifications[17]: parties who cannot agree on A or B will accept compromise C, even though none of its components is acceptable separately to either of the parties. It is therefore important to distinguish the true agreement,[18] ie the full 'endorsement' of the content of C,[19] from the 'acceptance' of C as the outcome of a compromise.[20] The distinction therefore corresponds in a sense to the distinction between agreement and mere convergence on a *modus vivendi*, although not all *modi vivendi* are necessarily compromises.[21] It is useful to distinguish two main types of compromise *qua* outcome when applied to matters of principle, depending on whether or not the trade-off affects the content of one of the principles in a principled way.[22]

First of all, *external* compromises: these are compromises about which principles or conceptions of justice should be adopted.[23] More precisely, external compromises only affect the content of the principles or conceptions of justice at stake in a principled way. The exceptions made are principled, because they are based on another independent principle or conception. Hence, one could say that the outcome amounts to a third and independent principle, conception or scheme of

[15] Kuflik, 1979, 40; Benjamin, 1990, 12.
[16] See Macedo, 1991, 72.
[17] See Habermas, 1998a, 205.
[18] See Chapter 1.
[19] See Boltanski/Thévenot, 1991, 337: 'Dans un compromis, on se met d'accord pour composer, c'est-à-dire *pour suspendre le différend*, sans qu'il ait été réglé par le recours à une épreuve dans un seul monde. La situation de compromis demeure *composite*, mais le différend est évité.'
[20] See Luban, 1985, 417. See Chapter 1.
[21] See Chapter 1.
[22] This distinction should not be confused with Benjamin's, 1990, 20 distinction between external compromise, that takes place between people, and internal compromise, that takes place within oneself.
[23] Dworkin, 1986, 179.

justice, rather than a compromised one. For instance, although equality-based restrictions on public display of pornography are in one sense a compromise of the moral independence of pornography consumers, this compromise is recommended by the principle of moral independence itself, albeit limited in a principled way, and hence constitutes a new scheme of justice derived from moral independence.[24]

External compromises can be either distributive or integrative.[25] *Distributive* compromises split the difference by giving both parties some of their claims, either alternatively or at the same time; such compromises are slightly more satisfactory to both sides than failure to reach agreement at all. For instance, one party might agree on a progressive tax scheme that protects the poor in one case, in exchange for an agreement to renounce a social protection law that would impinge on rich people's property in another. By contrast, *integrative* compromises amount to a new understanding of the issue combining both conceptions or principles into a more complex and principled one.[26] Suppose, for instance, that people disagree over the justice of an inheritance tax in virtue of supporting, on the one hand, the freedom to use one's private property as one wishes and, on the other, the equality of resources in society in general. An integrative compromise could take the form of a scheme of inheritance tax which recognises both principles in a certain relation by setting tax rates that are less than confiscatory. Such ad hoc principled compromises should be distinguished from naturally compromised concepts, that is to say cases where a principled compromise is already conceptualised within an independent and coherent rule. The principle of paying one's creditors pro rata provides an example of this.[27]

Secondly, *internal* compromises: these amount to 'compromised schemes of justice'[28] in the sense that they affect the content of the chosen principle or conception of justice in an unprincipled way. The exceptions made to the principles or conceptions concerned are not based on another independent principle or conception. An example of an internally compromised scheme of justice would be a tax cut scheme that justifies restrictions to the principle of equality by reference to efficiency and economic incentive concerns; these concerns are not usually regarded as independent principles.[29]

In the political and legal context, as opposed to a purely private context of bilateral bargaining,[30] compromises can be struck by officials in very different institutions. Some authors have thus distinguished between *judicial* and *legislative* compromises.[31] In the present chapter, I will not focus on any particular form of institutional compromise, but rather concentrate on their common features

[24] See Dworkin, 1985, 365.
[25] See Carens, 1979, 126–27 on the plurality of possible compromises along a continuum.
[26] See on the origins of this distinction, Follet, 1940.
[27] See Coons, 1964, 788.
[28] Dworkin, 1986, 179.
[29] See Cohen, 1995, 313–14, 328–29 criticising Rawls' difference principle on this very basis.
[30] In this chapter, I will not discuss the different methods of settlement that can lead to a privately negotiated compromise. See eg Kuflik, 1979, 52 ff.
[31] See Coons, 1964, 753 who concentrates purely on judicial compromises.

when applied to conflicts of principle.[32] Perhaps the most interesting common feature of institutional forms of compromise *qua* outcome is the weighing and balancing of the divergent principles or conceptions of the same principle; these may be brought before the institutions by individuals or may actually be part of the process of deliberation. Parties to the compromise are the officials in charge of the deliberation, such as representative members of a legislative assembly or judges. True, officials will often be called on to settle a dispute to which they are not party in the sense that they hold either one of the views disputed, and they will settle on one particular conception or principle at stake in the dispute. In such a case, compromise will not be manifested in the official decision.[33] This rests on the assumption that democratically-chosen officials should have justice in mind, and deliberate and vote on the grounds of what they think is the right or best answer for the community as a whole,[34] and not on the basis of what the parties to the dispute before them or other non-represented interest groups believe.[35]

2. A Caveat: the Disagreeable Nature of Compromise

Before proceeding with the discussion of the justification and limitations of compromises of principle, a caveat is in order. Compromise is one response to controversy over moral matters. As such, it should be no surprise that the very concept of compromise is a contestable one. This contestability occurs at different levels.

First of all, people might not only disagree about what is the proper justification principle in their dispute, but also about whether they should compromise at all.[36] The broader issue raised here is that reasonable disagreement over the justice and fairness[37] of a substantive matter extends to the justice and fairness of the decision-making procedures for resolving the dispute or the type of settlement.[38]

[32] I am not questioning the differences *in content* among the disagreements at stake before the legislature and the judiciary —it is true that there will be more disagreements (and hence compromises) of interests within legislative deliberations than within judicial ones, for instance—but only the differences *in nature* among the compromises reached to settle disagreements of principle.

[33] This may be the case when the parties do not agree on any precise compromise or are not entitled to settle their difficulties privately.

[34] I disagree therefore with some authors' idea that a politician cannot but have dirty hands and take the responsibility of doing things he thinks are morally wrong. See eg WALZER, 1973, 160. Contra: NAGEL, 1979, 74 and, most famously, WEBER, 1991, 77. See Chapter 11.

[35] This applies, of course, within the limits of some basic form of continuity and coherence with past decisions and laws. See Chapters 10 and 11.

[36] This is provided, of course, that none of the criteria usually applied to settle conflicts of legal principles find application or remain uncontroversial. These criteria are, among others, the hierarchical criterion, the chronological criterion or the criterion of speciality. See Chapter 12.

[37] I am not using 'justice' and 'fairness' in the restrictive Dworkinian sense of the terms. See Chapter 1.

[38] See also SMITH, 1942: 'Ideals (justice for example) cannot be invoked to settle issues that involve quarrels as to what the ideals are.' On this issue of regress, see FISHKIN, 1986, 217. See Chapter 7.

Faced with this difficulty,[39] some proponents of compromise have claimed that subjective evaluative judgement is the sole basis for the choice of compromise over other alternative forms of dispute settlement.[40] It is to such arguments that I will turn when assessing the justification and limitations of compromises of principle. Secondly, even when people agree to compromise, when asked to do so with a conception they do not endorse, they may disagree over the reasonableness of that conception[41] and thus over the moral desirability of a particular compromise.

Thirdly, even when they have agreed to a particular compromise, people might still disagree on what constitutes the right compromise between their competing views of justice.[42] As we saw before, there may be many possible compromises along a *continuum* ranging from purely distributive compromises to integrative ones. Integrative compromises, for instance, may be reached either by simply splitting the difference along a continuum of possibilities or by splitting it along the lines that are dictated by an independent mediating principle agreed on by the parties or related to the respective weight of the principles compromised. Some authors have argued that, all else being equal, any division other than 'fifty-fifty' discriminates against one party.[43] There is, however, no reason why both parties should always agree on such a principle of 'equality in indeterminacy' and meeting half-way once they have agreed on compromising.[44] This ranking decision is made even more difficult when what is compromised over is neither divisible nor valuable in monetary terms such as certain matters of principle. Finally, even if the parties can agree on the best 'middle ground,' specific interpretations of that compromise will engender further persistent disagreements.[45] These disagreements might then in turn call for further compromises. All these controversies combine in showing that compromise is neither an easy nor a definitive answer to disagreement, even when it is justified by the criteria I shall turn to now.

II. THE JUSTIFICATION OF COMPROMISE

The justification of moral compromise in politics ought to be argued for on a *specific* basis. Given the diversity of the objects of moral disagreement and its

[39] Like DWORKIN, 1986, 180 ff, I do not think that a *general* and *objective* argument of justice (or fairness, as a matter of fact (contra DWORKIN, 1986, 179)) can be used as an argument for or against internal compromise independently of what the parties hold of the latter's justice. My reasons, however, are related to *reasonable disagreement* about those principles. As we will see, it remains possible to argue against internal compromise from a *particular* perspective of what is just or unjust.

[40] See BENJAMIN, 1990, 107 ff.

[41] See for this instance of second-order disagreement, WERTHEIMER, 1999, 174. See for an example of the avoidance of this problem, MACEDO, 1991, 75 who refers to the reasonable substance of moderation.

[42] GAUS, 1996, 183. See also CARENS, 1979, 126, 137.

[43] COONS, 1964, 759, 803.

[44] Contra: BENJAMIN, 1990, 33; SHER, 1981, 370; KUFLIK, 1979, 50. See for an example of this second-order form of disagreement, GUTMANN/THOMPSON's, 1996, 88–89 critique of Sher's solution of a reasonable compromise on abortion. See Chapter 12 on the weighing and balancing of rights and the role of numbers.

[45] GAUS, 1996, 183–84.

different shapes, the justification of moral compromise is bound to vary. In order to assess it, it is necessary to do so in the light of specific types of political conflicts. I propose to distinguish between compromise of interests and compromise of principles.[46] This second category will then be further divided between multiprinciple and single-principle compromise. The essence of the argument in this chapter is primarily negative; it simply aims to articulate the justifications underpinning the negative intuitions people share against some types of compromise over justice. It does not aspire to provide a general positive justification of the other morally desirable types of compromises.[47] Whilst this section will not attempt to establish the moral desirability of strategic compromises of interests and facts, it will start by explaining why they should be tolerated when they take place. A second step will distinguish those compromises of principle that should be tolerated from those that should not be.

1. Compromise of Interests

In a political community not every conflict is generated by conflicting moral opinions. Difference in taste, preference or interests can also set people at odds.[48] To borrow a famous example, let us imagine that I want to play the trumpet one evening and you want to do some algebra at the same time in the next apartment.[49] As long as competing interests are compatible with basic rights and as long as what is at stake in the conflict is not their legitimacy or ethical importance,[50] there is no moral obstacle to a compromise of interests. Interests and preferences are naturally divisible, as opposed to matters of principle which often form a coherent whole.[51]

In some cases, compromise of interests is not only tolerable but desirable. This is the case, for instance, when we would gain more from a compromised settlement than from failure to reach one.[52] We therefore often accept splitting our differences of interests along any line, as long as doing so makes us all happy. This could be instantiated by the case of zoning, where parking spaces have to be distributed and a line drawn between certain areas. Such compromises are therefore often referred to as *strategic compromises*. To illustrate this argument for the justification of strategic compromise, let us think of a case of factual uncertainty.[53] In

[46] In spite of its widespread use in this context and elsewhere, it is incredible how this distinction is difficult to justify and maintain in most cases where matters of interest and of principle are intertwined; for instance, creating random parking zones will limit people's freedom of movement and the principle of equal treatment, etc. Scope precludes addressing this issue in this chapter, however.

[47] Some positive arguments for external compromise of principle will be presented in Chapters 11 and 12.

[48] See Chapters 1 and 2.

[49] See Dworkin, 1986, 302 ff.

[50] Benjamin, 1990, 15–17.

[51] See Benjamin, 1990, 7; Dworkin, 1986, 179.

[52] Habermas, 1998a, 204–5.

[53] Questions of facts and questions of value are often closely intertwined, thus making this distinction difficult.

this case, the application of a rule or principle can be based on no greater probability of factual accuracy on either side of the dispute and the interest at stake is divisible, as when it is evaluated in money. One could imagine a paternity suit where the probabilities of paternity as well as the monetary support to the child are divisible objects. Such objects are easily compromised over when the factual evidence is uncertain and the parties who agree on the principle make conflicting claims of facts and interests.[54] In such a case, dividing what is at stake between the parties seems like a fair solution.[55]

Given the general desirability of compromises of interests in democratic politics, some proponents of the validity of compromises in the law have tried to identify conflicts of principles with conflicts of interests. This has had regrettable consequences. Most cases of disagreement over principles of justice are not comparable to cases where the parties oppose individual interests,[56] though they may be intertwined.[57] Moreover, this liberal tendency to transform moral conflicts over principles into conflicts of interests has contributed to masking the importance of moral disagreement in politics.[58]

2. Compromise of Principles

Since I lack the space here to go into the details of all arguments for compromises of principle, I will not take a position on their *general* justification, with the exception of a few general considerations about some of the main arguments for them. I will then distinguish, among existing cases of compromise of principle, between those that can be tolerated and those that cannot, in order to argue more precisely against the latter in the next section. It is useful in this respect to distinguish between the justification of two types of compromise in case of principled disagreement: multiprinciple compromise and single-principle compromise.

a. General

Unlike conflicts of private interests that are to be reconciled one way or another, differences between judgements of justice could be regarded as prima facie unsuitable for compromise.[59] By contrast to interests, moral principles are not necessarily

[54] See Elster, 1989, 100.
[55] See Coons, 1964, 757.
[56] See Rawls, 1971, 3: 'The rights secured by justice are not subject to political bargaining or to the calculus of social interests.' See Chapter 12.
[57] See Carens, 1979, 130–31.
[58] See Berlin, 1969b. See my Introduction.
[59] See Habermas, 1998a, 206: 'Weil die Kompromissbildung moralische Diskurse nicht ersetzen kann, lässt sich die politische Willensbildung nicht auf Kompromissbildung reduzieren.'

divisible entities.[60] In some conflicts of principles or conceptions of what those principles amount to in a particular case, however, compromise might be seen as a tolerable or even desirable settlement of reasonable disagreement. In fact, many authors regard moral compromise as the appropriate answer to moral disagreement given the conditions of scarcity, uncertainty and complexity, that is to say the *burdens of judgement* that are typical of modern democratic politics. The circumstances of reasonable disagreement combined with the political need for a settlement[61] have even been described as the 'circumstances of compromise,'[62] by analogy to Hume's 'circumstances of justice.'[63]

According to Sher, a moral compromise is appropriate if the 'grounding' of one's principles is 'problematical,' if the opposing view is supported by 'plausible sounding arguments,' and 'if thoughtful and intelligent people are unable to agree about the issues.' By accepting a 'higher-order moral principle' of this sort, 'we acknowledge both our own fallibility' and show respect for the status of others besides ourselves as moral agents.[64] This duty of respect should lead the parties to tolerate and even to accommodate each other's views as much as possible, thus calling in some cases for compromises that will amount to showing even more respect for one's opponents' views than other forms of mutual accommodation.[65] Sher's contention ignores the possibility that a respectful and peaceful accommodation or settlement may also be achieved by other means that show just as much respect for the other party's view as compromising[66] and yet go further than mere toleration.[67] This can be done, on the one hand, by settlements which promote mutual accommodation in a way that leads to a better understanding of the other position or even to a change of opinion[68] or, on the other, by fair procedures that can be used to choose between the options at stake.

[60] See Dworkin, 1986, 178–79. See also Benjamin, 1990, 7 on external compromise over matters of principle which does not necessarily entail an internal compromise, because principles are 'indivisible goods.'

[61] See for an example of the attractive nature of compromise in politics where we need to act on the basis of a single rule or decision, Carens, 1979, 124 ff. Carens contrasts the case of two eminent scientists who hold competing theories about the causes of cancer with the case of a donor who has to decide to which of them to give two million dollars; in the first case, a compromise is neither necessary nor appropriate for the two scientists will pursue their research until one of their theories is either proven or refuted, whereas, in the second case, the donor is forced to act in the face of uncertainty and has to choose between giving the sum to the scientist he thinks is best given the circumstances, on the one hand, and splitting the amount between the two, on the other.

[62] Benjamin, 1990, 24 ff, 32.

[63] See Chapters 5 and 6.

[64] Sher, 1981, 369.

[65] See among others Kuflik, 1979, 51; Sher, 1981, 369; Benjamin, 1990, 72 ff; Dobel, 1990; Macedo, 1991, 71–72; Gutmann/Thompson, 1996, 88–89.

[66] See eg Smith, 1942, 2 who holds that dictatorship is the only alternative to compromise: 'It is this convergence that makes an ethical enterprise out of politics, which is the institutionalized art of compromise'. See also Kuflik, 1979, 51 and Carens, 1979, 126 ff.

[67] Contra: Sher, 1981, 367–68 for whom there is no middle path between tolerating abortion and compromising over it.

[68] See Wong, 1992, 780–82.

Part of the ambiguity that surrounds the justification of compromise in this respect is nourished by confusion about its exact meaning; some authors have conflated compromise with broader forms of 'mutual accommodation'[69] or 'principled moderation,'[70] of which compromise *qua* outcome is in reality only one type.[71] As I argued in the previous chapter, principles of accommodation are based on mutual respect for diverging positions.[72] They only require, however, that people try, even when they disagree reasonably, 'to accommodate the moral convictions of their opponents to the greatest extent possible, *without necessarily compromising their own moral convictions.*'[73] The parties could, for example, continue to reason together to reach 'mutually acceptable decisions,'[74] by trying to understand the other's position better and by being ready to amend or change their own completely.[75] Besides, the respect-based argument could even be said to strengthen the objection against compromise. Once the parties have accepted the desirability of reaching a settlement given the awareness of their mutual fallibility, the reasonableness of the other party's view will call for more respect than the potentially equally mistaken, or even more mistaken 'halfway' third view; this halfway position might not be reasonably held by anyone as a conception of justice *per se*.[76] As a result, when the political community needs to act on a single view of justice, the parties will generally be more motivated out of respect to accommodate the other party entirely, to strike a distributive compromise or to compromise procedurally in abiding by the outcome of a democratic vote choosing one of the views at stake, for example.

In response, some authors have invoked the right to self-respect of the party, that would otherwise be called to bear the entire burden of the settlement out of respect for the other party's view.[77] They argue that people cannot but choose to preserve the overall pattern of their lives as far as possible, even when compromising it to a certain degree, rather than upset it to the extent necessary to defer to a principled solution that others might prefer. This argument ignores, however, an important dimension of the problem. Self-respect is partly based on the respect one shows to other reasonable moral agents and cannot therefore be opposed to respect for others. It cannot lead to the adoption of a halfway solution that lacks true respect for them. Moreover, if respect for others cannot support

[69] Gutmann/Thompson, 1996, 44, 88. For instance, the definition of compromise given by Bohman, 1995, 263 corresponds to a general conception of mutual accommodation rather than of compromise *stricto sensu*. See also at least in part, Waldron, 1999a, 204.
[70] Macedo, 1991, 72.
[71] See Lendi, 1981, 491.
[72] See Macedo, 1991, 72; Gutmann/Thompson, 1996, 79.
[73] Gutmann/Thompson, 1996, 3 (emphasis added).
[74] Gutmann/Thompson, 1996, 1.
[75] See Gutmann/Thompson, 1996, 85.
[76] See Luban, 1985, 415.
[77] See Kuflik, 1979, 50–51; Benjamin, 1990, 37.

a hybrid position which nobody actually defends before the compromise takes place, respect for oneself, a fortiori, cannot lead one to accept such a position.

Another counterargument may be found in Waldron's account of the circumstances of political integrity or coherence,[78] ie consistency in principle. According to him, compromise is more legitimate when officials are to make a decision among conflicting principles than it is in private situations. Whereas in the latter case it is understandable that individuals try to defend their conceptions of justice as much as possible, in the former case mutual accommodation matters more than individual conscience and compromises are the best way to ensure coherence among the different views represented in the law-making process or across the law as a whole.[79] This argument does not hold, however. There are other ways to ensure coherence than compromise, both within each law or decision and across the law as a whole. Provided one sees coherence as a virtue in a legal system, both forms of coherence may be realised by giving priority to a single principle or conception.[80] Moreover, in the long run, less compromise will ensure more coherence across the law, as it is easier to cohere with past laws and decisions if they are not compromised than if they are.[81] In the rest of the chapter, therefore, the issue of the legitimacy of compromise will mostly be addressed separately from issues of coherence, even if the fourth argument I will use against internal compromise has been developed by some authors within the broader context of arguments in favour of coherence.[82]

In short, the general respect-based argument for convergence and mutual accommodation of reasonable positions seems to cut both ways; it can justify some forms of compromise, but it can also lead away from others. It will be our object in the following sections to determine which ones can and cannot be tolerated. As Gaus rightly contends:

> liberal politics requires that we avoid the Scylla of supposing that what we reasonably believe is conclusively justified—and therefore can demand as a matter of justice that it be embodied in legislation—and the Charybdis of fleeing from ever standing up for our fundamental principles when reasonable people disagree with us, compromising on every issue or always seeking consensus.[83]

[78] The terms 'integrity' and 'coherence' are used interchangeably in this chapter. The former was first introduced by DWORKIN, 1986, but has since then also been used and defended by WALDRON, 1999A. See Chapter 11.

[79] See WALDRON, 1999A, 202.

[80] See Chapter 11.

[81] See RAZ, 1995A, 312–13 on this point. See even WALDRON, 1999A, 194–95 for a similar contention.

[82] Interestingly enough, some authors, like DWORKIN, 1986, 79 ff and WALDRON, 1999A, 202 seem to see external compromises as ways to ensure integrity or coherence, whereas others, like RAZ, 1995A, 312–13 invoke external compromises as counterexamples and arguments against coherence. All tend to agree, however, that the minimal principle of coherence within an individual statute or decision requires rejecting internal compromise: compare RAZ, 1995A, 314 ff and DWORKIN, 1986, 79 ff. See Chapter 11.

[83] GAUS, 1996, 295.

b. Multiprinciple Compromise

Some moral conflicts derive from the opposition of *two (or more) independent and competing principles* that cannot all be satisfied on a particular occasion. There are two ways in which such conflicts of principles may be settled through compromise. Both forms of compromise are *external* ones. First, the parties might come to a *distributive compromise*, that is the acceptance of one of the conflicting principles in one case and of the other principle in another. Secondly, an *integrative compromise*, that weighs and ranks the principles by introducing principled exceptions to them, will often be the most desirable settlement of the conflict.

In terms of justification, if both parties *endorse* both principles, then it is easy to see that they will both be willing to compromise and agree on a ranking of the principles. If they do not endorse both principles, however, they may still *recognise* or *acknowledge* the opposed principle as a reasonable one to hold and see compromise as a desirable settlement.[84] Thus, for example, let us imagine a person who opposes the death penalty whatever the degree of culpability while another thinks it is always right. The former may agree, however, to compromise and accept the death penalty's restricted use according to the degree of culpability, provided the principles on which the latter proposes to establish the degree of culpability are deemed respectable by the former.

Of course, one problem when trying to reconcile independent value-principles[85] is their potential *inconsistency* or *incommensurability.*[86] It is important to keep in mind, however, that the verdict of inconsistency or incommensurability cannot be reached before the end of a substantive argument; it will only be issued when no compromise seems to satisfy any of the parties despite their mutual recognition of the conflicting principles. It might be objected that both parties may be wrong about consistency or commensurability of the principles with which they are willing to compromise their own principles, thus leading both parties to acquiesce

[84] See DWORKIN, 1986, 436, notes 8 and 9. Dworkin only refers to 'recognising' a principle of justice without necessarily 'endorsing' it, but these statements imply a standard of reasonableness that conditions the recognition or acknowledgement of the principle as an independent principle that can justify a principled compromise. This point is similar to the one made by WALDRON, 1999A, 204–8, who acknowledges the limits of integrity and of the willingness to compromise when some of the principles to accommodate strike one party as being particularly unjust and unreasonable. Waldron does not, however, explain what could be those 'thresholds of injustice beyond which integrity ceases to apply' and beyond which principles with which one disagrees become sufficiently unreasonable for compromise to become internal and undesirable.

[85] In this chapter, I am dealing mostly with such value-laden principles. See MACCORMICK, 1984, 237 on the relationship between values and principles.

[86] See RAZ, 1995A, 298, 317; BELLAMY, 1998, ch 4. It is possible to strike a compromise among incommensurable values, but such a compromise cannot be objectively justified and is hence indeterminate morally. See RAZ, 1995A, 316–17 on the justification of local coherence among weighings of incommensurable values *once* a compromise between those values has been struck in a certain way. On incommensurability, more generally, see RAZ, 1986A, ch 13. Contra: DWORKIN, 2001A, 73 whose monistic conception of morality accommodates neither conflicts of values and principles nor their incommensurability. See also Chapters 2, 11 and 12.

in an erroneous theory.[87] This is true, but the point is that we have no means of establishing the correctness and eligibility of a conception of a principle other than our own current views about its reasonableness and hence of telling others that they are wrong when they are about to compromise inconsistent or incommensurable values.[88] We can only do our best in determining what we think is the just result in each case, while leaving open the possibility of improving our conceptions in future.

It follows that my conclusion regarding the potential desirability of compromising over conflicting principles, recognised by both parties, does not hold if the principle with which one of them is asked to compromise is one she does not deem reasonable, independent, consistent or commensurable. One could imagine that it were argued that one should compromise on the justice of imprisonment by granting bail to some detainees according to their eye colour or the day on which they were born.[89] According to a distinction I mentioned earlier, such a compromise would amount to compromising a principle in an unprincipled way, ie *internally, rather than externally.*[90] It is the least attractive kind of compromise over principles, for reasons I shall explain in the third section of this chapter.

c. Single-Principle Compromise

By contrast to the first type of compromise of principles, the second form of compromise is not the product of a trade-off between independent principles, but only involves a *single principle.* This occurs when a conception of this principle is affirmed by one group and rejected by another in favour of a different conception. Such conflicts can arise for two reasons.

Both conceptions may represent two equally eligible aspects or conceptions of the same value-concept in the legal context which, sometimes or always, conflict with one another. I will call this first form of disagreement a case of *metaphysical* disagreement. One could consider the concept of equality as an example of a concept or value of which both equality of resources and equality of welfare might be equally eligible conceptions or interpretations and appear reasonable to both parties, but do conflict with each other all the same.[91] In this case, if we cannot reach a reasonable agreement, compromising might be as desirable as it was in the case of a conflict between two independent moral principles. Again, one may think of two forms of *external* compromise. On the one hand, the parties may agree to accept both conceptions of the principle, but in a *distributive way*. Thus, for instance, equality of resources may be recognised in one case, while equality of welfare is recognised in another. On the other hand, a more *integrative* form

[87] See RAWLS, 1971, 3: 'The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one.'
[88] See WILLIAMS, 2001, 101.
[89] This seems to be the gist of DWORKIN's, 1986, 436, notes 8 and 9 argument.
[90] See DWORKIN, 1986, 183 and note 8.
[91] See RAZ, 2003C, 55.

of compromise, that would rank both conceptions of the principle within the same principled scheme, could be found, provided of course both conceptions are not inconsistent. Thus, for instance, a principled scheme of equality may be established where equality of resources is given priority only as long as equality of welfare is guaranteed.

Most of the time, however, given our doubts about the eligibility of both conceptions, and our awareness that one of us might be wrong or that our conceptions might be inconsistent, we tend to abstain from compromising. Thus, a disagreement that may have legitimate metaphysical origins becomes temporarily *epistemic*.[92] This temporary change of nature affects the prima facie desirability of compromise over a single principle. This is the second type of disagreement to oppose two conflicting conceptions of the same principle. In this case one of the two conceptions is mistaken, but it is uncertain which one. This is the most frequent form of moral disagreement in pluralistic societies given the burdens of judgement and reason that prevail. It is also the form of single-principle disagreement over which it is most counterintuitive to compromise for reasons which I will develop in the third section of this chapter. In a nutshell, such a compromise would be unprincipled and purely *internal* to the principle, to borrow the distinction I drew in the first section, thus integrating a mistaken conception with a correct one.

Before addressing the reasons why internal compromise about justice is not desirable, a brief caveat is in order. When two rival conceptions of the same concept are proposed, they often also refer to other background principles. Thus, for instance, imagine that I assert that killing a foetus is not murder by relying on the principle of the dignity of the mother. Although the principles of the personality of a foetus and of human dignity are independent principles, they are combined in this argument. Imagine a situation in which abortion was permissible up to a certain point in the course of pregnancy. It would be hard to tell in such a case whether what was being compromised were two independent principles or two conflicting conceptions of life. This is because all concepts are intertwined in a complex web of meaning. Most legal cases where the application of a concept is limited by further constraints are not therefore necessarily internal compromises which combine a number of conceptions of the same concept. Rather, they may be cases where independent considerations embodied within a more complex legislative objective limit the application of a concept.[93]

III. THE LIMITATIONS OF COMPROMISE

Internal compromise *stricto sensu* combines either two conflicting but unequally eligible or inconsistent conceptions of the same principle, or the content of a single

[92] See Chapter 2 on metaphysical and epistemic sources of moral-political disagreement.

[93] See COHEN, 1995, 314 for the distinction between a compromise of justice and a simple restriction of it.

principle with another non-independent, unreasonable or inconsistent principle. There are many reasons why we should abstain from making such compromises. Of course, these reasons do not exclude the possibility that people will *prefer* to coordinate on an internally compromised solution rather than on none at all.[94] Four arguments will now be advanced against such internal compromises. Taken separately, each of these arguments has a limited scope, but all four must be understood in such a way as to support and complement each other[95]: inefficiency, potential injustice, concept attribution, lack of political integrity.

1. Inefficiency

An argument sometimes made against internal compromise reflects its *lack of workability* or *inefficiency*. This argument has been advanced by Dworkin.[96] As an example of inefficient internal compromise, one could imagine a case where, in order to strike a compromise between people who think a foetus is a person and those who hold the contrary, the statute enacted says that a foetus is half a person and that accordingly only half of the respect due to human life is owed to it. Such a statute would not only be unintelligible, but completely unworkable: it would be impossible to deduce substantive answers to legal problems from it.

However, most cases of internal compromise we can imagine, such as the permissibility of abortion for women with blue eyes only, for instance, are not actually impractical or unworkable. So, our intuition and the more general case against internal compromise must be founded on another broader argument that would establish why it is wrong for the parties to accept such a compromise in other cases too.

2. Potential Injustice

A second argument against internal compromise is that it seems an inappropriate response to cases where disagreement has *epistemic* origins. This, as we have just seen, is true of most disagreements in pluralistic societies.

[94] See Dworkin, 1986, 180. See also Habermas, 1998a, 204.

[95] This is also Dworkin's way of arguing against internal compromise, through a crescendo of different arguments which are all limited in their scope until the value of integrity is postulated. The difference with Dworkin's account of checkerboard statutes, however, is that my first three arguments hold and that integrity is not simply postulated at the end, but justified on its own before it is used as a fourth argument against internal compromise. In his account of checkerboard statutes, Dworkin, 1986, 79 ff is not arguing primarily against internal compromise but for integrity, whereas I am interested here primarily in internal compromise and only instrumentally in integrity. See Chapter 11.

[96] Dworkin, 1986, 182.

When people disagree about what justice is, they have strong views and opinions about what ought to be done.[97] A compromise that gives something to each of the parties may well look to them as if it is leading them away from the right answer.[98] Compromising on justice may even mean being unfaithful to what they believe to be the true meaning of the concept of justice[99] and this justifies preferring some other solution to the internally compromised one. Deferring to a view one regards as wrong or at least unreasonable, either entirely or in a compromised way, amounts to taking a complete moral stance. Indeed, we should act only for reasons we believe to justify our action, ie only if we think that the action is justified. Since we hold our own views on the question not merely because they are ours, but because we believe them to be true, deferring to the other party's view we regard as wrong or unreasonable cannot be justified in the same way. The only justification for deferring or compromising would then be, according to Joseph Raz, to give other people's views a weight that we do not give our own.[100] This explains why deferring to, or, worse, compromising with others' views, in case of epistemic disagreement, is such a difficult thing to do, even as a public official.[101]

Furthermore, such a compromise might not look like a 'compromise' to the parties, since it does not provide them with any sort of positive repercussion at all. An example may help to clarify the problem.[102] Suppose half the people in a community hold the opinion 'to each according to his need' and the other half 'to each according to his work.' Each finds the other half's conception of the principle of distributive justice reasonably unacceptable; eventually they compromise on 'to each according to his work, unless his work does not suffice to meet his most basic needs: then we keep him afloat with transfer payments.' The compromised principle may very well look wrong to all the parties, since it contradicts and violates their conceptions of distributive justice and hence does not strike them as a positive outcome.

[97] See Waldron, 1999a, ch 9 on the central role of subjective judgements of justice in politics. See also Chapter 1.

[98] Gaus, 1996, 184. It is important not to confuse this argument based on each party's *concrete perspective* about justice with a collective and more *abstract argument* based on the *justice* of such internal compromises in general, that I regard as doomed to fail because of reasonable disagreement about justice. See on the opposition between concrete arguments of justice of outcome against internal compromises and the difficulty of making a more general argument of justice against them, Dworkin, 1986, 180. For the same distinction but in the context of a reinterpretation of discourse ethics, Lafont, 2002 and 2003.

[99] See Dworkin, 1986, 180: 'Both [parties] have a reason of justice for preferring some other solution to the checkerboard one.' See also Dworkin, 1986, 182: 'I would rank the checkerboard solution not intermediate between the other two but third, below both, and so would many people.' See Halowell, 1944, 173: 'Compromise, as a self-sufficient principle divorced from all considerations of truth and justice, is simply, in the last analysis, the ancient Trasymachian doctrine that might makes right.'

[100] See Raz, 1998a, 27–28.

[101] See Chapter 11.

[102] This example is adapted from an example given by Luban, 1985, 415.

One of the main counterarguments put forward against this conscience-based critique of internal compromise in politics is that people should sometimes compromise on a position that both sides think is wrong in order to reduce the magnitude of potential moral error or injustice in one direction or the other. Thus, one may contend that, in everyday politics, internal compromise will prevent instances of injustice that would otherwise occur. According to Dworkin, for instance, 'we cannot say that justice requires not eliminating any injustice unless we can eliminate all.'[103] It seems, indeed, to borrow Rawls' words, that 'an injustice is tolerable when it is necessary to avoid an even greater injustice.'[104]

Although this argument is appealing, it is too limited in scope.[105] The first problem with it is that it is based on divisible cases of justice or injustice. Let us imagine, for instance, the number of death-row prisoners we could save if a compromise was struck where all blue-eyed detainees be liberated. Many claims based on principles of justice are not divisible in this sense, however. For instance, if the same disagreement applies to the liberation of one single prisoner, it is difficult to see how the injustice committed could be divided and hence reduced. Additionally, even if reducing the number of injustices in divisible cases of justice can be a legitimate end for a moral compromise, the means to that effect may still be unjustifiable with respect to the parties' other views on justice.[106] Thus, for instance, pro-life advocates might be willing to accept that pro-choice advocates will not give up legalisation of abortion, but insist that they give up policies that would increase the number of abortions, such as policies of subsidised abortion. Pro-life advocates might agree on such a compromise to save some lives, while pro-choice advocates might agree on such a compromise to save pregnant women's autonomy of choice. However, the refusal to fund abortion, when childbirth is funded, creates an almost irresistible pressure on indigent women to carry a child to term; in this sense, such a compromise might be said to violate the basic rights of poor women to choose between giving birth and having an abortion. Therefore, although it is possible to think of compromises which would reduce the number of abortions while respecting women's autonomy, this second limitation to the argument makes the moral desirability of internal compromises appear even more limited.

Let us go further and imagine that advocates of affirmative action measures accept as a compromise that list-quotas of women in political elections be set at 25 per cent rather than 50 per cent of the candidates. The aim of this compromise is prima facie justifiable in the sense that more women might become eligible than without any quotas at all, while reducing the restrictions of the electoral freedom implied by quotas. One may wonder, however, whether there is not more injustice in potentially limiting the eligibility of men and women by half in a way that is

[103] Dworkin, 1986, 181.
[104] Rawls, 1971, 3.
[105] See Wertheimer, 1999, 175.
[106] See Gutmann/Thompson, 1996, 88 ff. See also Réaume, 1989, 397.

not representative at all of their proportion in the population, than in leaving it to the political process to decide. Such artificial guidelines might in fact have more pernicious consequences for material equality between men and women than seems at first sight.

Finally, suppose that some people who believe very strongly that abortion is murder accept a compromised abortion statute, stating that abortion is allowed on Fridays only, on the basis that it allows for fewer murders than a fully permissive statute. It remains the case, however, that they will rank internal compromises last in other circumstances where the substantive issue is less grave. Imagine, for instance, the case in which it is smoking marijuana that is allowed on Fridays only; conceding to this on Fridays clearly does not have the same weight and moral appeal for those who want to ban all drugs as the equivalent in the abortion case. This suggests that people still share a justice-based intuition against internal compromise.

3. Concept Attribution

Whereas the second argument was based on the parties' perspective on justice, there is a third argument to be made against internal compromise from a more abstract point of view. This argument is intrinsically related to the question of concept attribution.[107] Concept attribution is shorthand for the determination of the concept of which people hold conceptions. When internal compromises try to reconcile true and false conceptions of the same concept,[108] conceptions which are equally eligible, but inconsistent, or non-independent or inconsistent concepts with independent or consistent ones, they produce so-called 'gerrymandered'[109] concepts.[110] Such concepts are not intelligible *per se* and do not stand on their own. Internal qualifications of the same concept or principle can even amount in some cases to contradicting the original principle itself.[111]

There are different reasons why concept-gerrymandering should be avoided. First of all, concepts cannot be created ad hoc depending on the needs of interpretation. A definite number of concepts are at our disposal and what varies are the conceptions and applications of these concepts. The contrary would indeed

[107] See Stavropoulos, 1996, 186 ff who seems, however, to restrict the issue to concept attribution in adjudication. I think that it follows from his reasoning about which concepts can be attributed in adjudication that not all concepts can be compromised in a non-principled way in the legislative process in the first place either; if the contrary were true, this would make adjudication an even more difficult exercise.

[108] See eg Kuflik, 1979, 51 for an argument in favour of a morally acceptable compromise between 'claims based on moral convictions that one can now perceive to have been *mistaken*.'

[109] The term 'gerrymandering' refers, in politics, to the rearrangement of voting districts so as to favour the party in power. The origin of the term is to be found in such an arrangement made by the Massachusetts Jeffersonians when Elbridge Gerry was governor.

[110] See Stavropoulos, 1996, 190.

[111] See Dworkin, 2000b, 49 ff.

seem absurd to each of us given that meaning has logical priority over compromising. Secondly, concepts relate to each other in a complex way; this imposes a requirement that any conception of a concept must fit uses of that concept that are related to other concepts and their respective conceptions.[112] This is precisely something an internally compromised concept could no longer do. Finally, we can make a virtue of this necessity: a logical consequence of the fact that our concepts are already given does indeed correspond to the need for some minimal level of determinacy and predictability in law.

Of course, one may object that there are more complicated concepts that we could name *conciliatory* or *umbrella concepts*, under which conflicting but commensurable conceptions can coexist when cases of single-principle disagreement have metaphysical causes.[113] One could consider the concept of equality as an example of a concept of which both equality of resources and equality of welfare could be equally eligible conceptions and look reasonable to both parties. If the existence of such genuinely complex concepts could be established, there would be no a priori reason for favouring the epistemic interpretation of single-principle disagreement over the metaphysical one, as we saw in the previous section, and, in fact, all conflicting conceptions could be retained. Such conceptions could therefore also be the object of an external and principled compromise within the same idea, where both parties accept them as reasonable and commensurable conceptions, without incurring a contradiction of the original principle.[114] For example, the parties could accept a compromise within the principle of equality between the two conceptions of equality of welfare and equality of resources on the following terms: 'To each according to his work, unless the extent of his needs falls below a certain threshold.'

Such concepts exist, at least on the face of the evidence we have. However, to establish their existence requires a substantive argument. Of course, it is true that both parties may be wrong and that it just so happens that a prima facie internally compromised view has not yet been defended as a coherent conception of the concept of justice, but could well be reasonably held in future as an eligible conception of a complex concept of justice. This is a contingent matter, however. There are some good reasons, on the one hand, why we should not make one particular view, which is not yet reasonably defended and intelligible as such in the community, the community's view and, on the other, why we should not compromise two conceptions one of which may be right and the other wrong. The reverse may also be true. A gerrymandered concept may mistakenly appear intelligible and coherent to reasonable people. In cases of epistemic indeterminacy, however, people have no other solution but to trust their conceptions of a normative concept and disagree about it or even converge on an internally compromised conception of it as long as they regard it as principled

[112] See Stavropoulos, 1996, 197.
[113] See Stavropoulos, 1996, 195 ff.
[114] Contra: Dworkin, 2000b, 49 ff.

and provided the conditions for further deliberation and progress on the matter are guaranteed.

An objection that is frequently raised against this external and abstract view of concept attribution is that, by condemning internal compromise, it constrains legislative authority and its autonomy to draft bad or gerrymandered laws if it so wishes. This objection is misconceived, however. First of all, given our awareness of our fallibility and our difficulty in reaching reasonable agreement on matters of justice, the response we should give to disagreement ought to reflect cautiousness despite autonomy. We should not act to prevent a better answer coming out later in the debate. It follows that we should not prefer pushing forward our views of justice, for instance through internal compromises, rather than reaching other settlements that correspond better to the community's view as a whole[115]; the community's view can never be equated with a compromised view nobody could defend as such in the community or that would amount to a partitioning of justice.[116] Secondly, the objection's fear of a complete identification of law with ethically correct views is misplaced: the content of the law is constrained by past conceptions of its concepts in ways that our ethical views are not.[117] This is one of the reasons why external compromises are so frequent in politics; they provide the means to reconcile past decisions with newer and more appropriate ones and hence to ensure continuity in change in the political community.[118]. This is not, however, a reason to accept internal compromises, as they would jeopardise continuity and coherence not only within each law or decision, but within the law as a whole.[119]

4. Political Integrity

One last argument against internal compromise is based on the violation of one of the political ideals the state ought to respect when enacting laws. According to this argument of political morality, internal compromise fails to capture the core of our sense of the political virtue of consistency in principle, that is also referred to as coherence or integrity.

The principle of *political integrity* refers to the duty for officials to act as consistently as they would in their individual actions.[120] Even when legislation is the product of a compromise, it should express a coherent conception of justice; a person regards a law as coherent, even though she may disagree with it, only if

[115] See Dworkin, 1986, 211 and 213.
[116] See Snyder's response to Coons, 1964, 804.
[117] See Stavropoulos, 1996, 187–88.
[118] There are other ways to ensure coherence than external compromise, both within each law or decision and across the law as a whole. Moreover, in the long run, less external compromise will ensure more coherence across the law, as it is easier to cohere with past laws and decisions if they are not compromised than if they are.
[119] See Chapter 11.
[120] Dworkin, 1986, 183–84.

she can plausibly imagine the view it expresses as being held by herself. If a middle-ground view between either two incompatible conceptions of the same principle or two incompatible principles is not something we would act on individually, then it cannot be a desirable way for the political community to act as a whole and hence for public officials to decide. The principle of integrity has been developed most famously by Dworkin. According to him, integrity calls for as much coherence as possible, on the one hand, within the law as it stands and, on the other, between past and new law.[121] We need not, however, accept Dworkin's conception of moral and legal coherence in the law as a whole en bloc to be sensitive to his argument about coherence in the law-making process.[122] First of all, the conception of integrity used here is limited to local and synchronic coherence rather than general and diachronic coherence and as such it only encompasses consistency in principle within a single law or decision rather than general coherence across the law as a whole.[123] Secondly, Dworkin postulates, rather than argues for integrity; he uses our intuition against internal compromise to justify the need to postulate the principle of integrity.[124] Here, by contrast, I am using a justified principle of integrity to argue against internal compromise.

Of course, one may argue that in some exceptional cases internal compromises of principle might have to be struck within the same legal principle, and that, in those cases, integrity or any other ideal invoked against them may have to be sacrificed to concerns of justice or fairness. Dworkin himself refers to the exceptional possibility of sacrificing integrity, both within each law and within the law as a whole, to justice or fairness generally.[125] Dworkin adds, however, that 'checkerboard statutes are a flagrant and easily avoidable violation of integrity.' This indicates that he views internal compromises within each law as the least desirable sacrifice of integrity to justice or fairness in contrast with other forms of diachronic incoherence. Besides, integrity is a principle that only applies in circumstances of reasonable disagreement over justice (so-called 'circumstances of integrity')[126]; it is therefore both independent and relative to the principle of justice, as it is meant to guide political decisions about justice when the latter is contested and cannot guide them itself. As such, it is difficult to see how integrity could be sacrificed to justice, when the different conceptions of the latter that are at stake before the compromise are themselves contested. Finally, even if this were granted, it is hard to grasp how justice could call for an internal compromise of its own principles

[121] DWORKIN's, 1986, 184 account of integrity is indeed openly limited to diachronic coherence.

[122] DWORKIN, 1986, 188–89 himself contends that his 'argument' is not the only one for integrity. See also WALDRON, 1999A, 191. See Chapter 11 for a detailed argument for an independent principle of coherence in the law.

[123] Of course, the distinction is not always that clear in practice; diachronic coherence has to be ensured synchronically too and synchronic coherence often reconciles diachronic elements. See Chapter 11.

[124] On Dworkin's postulates, see DWORKIN, 1986, 183 and REY, 1998, 101–2.

[125] See DWORKIN, 1986, 217.

[126] See WALDRON, 1999A, 189 ff. See more generally Chapter 11.

and thus constrain the application of the principle of political integrity within the same law, when integrity is precisely meant to avoid such contradictions within the concept of justice itself. It seems therefore that, within the same law, the principles of justice and integrity can only very rarely pull in different directions.[127]

Dworkin's other contentions about the balance that ought to be struck and the compromises that ought to be made between the demands of justice and fairness,[128] or of justice and integrity, can easily be reconciled with his rejection of internal compromise. The compromises he has in mind there are external compromises between either independent principles or judges' second-order beliefs about which principles of justice or integrity to follow, rather than compromises on the content of the first-order principles over which one ought to make a decision. It could mean that either justice or integrity is to prevail, or that a bit of both should, depending on the circumstances. It does not, however, necessarily imply that the outcome of this first-order compromise, if there is one, will be an internally compromised one where a new conception of justice is compromised with wrong or inconsistent conceptions expressed in deliberations or encompassed in precedents. There are smoother ways to ensure a transition when it has won a sufficient majority than compromising principles internally; one may think of a distributive compromise where a new government combines creating new laws it sees as being more just with retaining some of the past government's laws for a while.[129]

As Dworkin argues, politics 'is a theatre of debate about which principles the community should adopt as a system, *which view* it should take of justice, fairness and due process, not the different story . . . in which each person tries to plant the *flag of his convictions* over as large a domain of power or rules as possible.'[130] This is also what Raz means when he discusses the 'partial reform dilemma'; this dilemma is set between, on the one hand, the coherence of purpose of the law as a whole and, on the other, the pursuit of the morally correct line. It results from the impossibility for judges and sometimes for legislators to entirely reform past law in order to produce the new scheme that they would like to enact. In such a case, officials have to decide 'whether compromising and choosing the morally second-best rule which has better consequences is best in the circumstances, or whether it is more important to let the law speak clearly and soundly on a moral issue, and hope that an occasion to extend the correct ruling to other cases will arise and be followed before long.'[131] Raz seems to be saying that the second horn in this dilemma should be chosen, thus undermining the legitimacy of internal compromise.[132]

[127] This does not mean, however, that the principle of integrity is dependent on the principle of justice, contrary to what Réaume, 1989, 392 ff claims. See Chapter 11.
[128] See Dworkin, 1986, 249–50, 256, 340.
[129] See Waldron, 2000b, 42. See also Dworkin, 1986, 218.
[130] Dworkin, 1986, 211.
[131] Raz, 1995a, 316–17.
[132] Raz, 1995a, 317.

IV. DEMOCRACY AS A FAIR COMPROMISE

For many people, as it transpires from the previous example, the response to reasonable disagreement and the solution to the occasional need to converge peacefully lies in a commitment to democracy as a procedural means for resolving conflicts within a given community. This is particularly the case when deliberation and mutual accommodation have proved unsuccessful and when compromises on the outcome have not been reached informally[133] or are not desirable. Interestingly enough, discussions about compromise of principle often regard democracy as the paradigm of political compromise. To assess the extent of the relationship between these two ideas, I will, first, discuss whether democracy can be described as a compromise *qua* process, before considering whether it need imply further compromises *qua* outcome.

1. Democracy as Compromise *Qua* Process

In his *General Theory of Law and State*, Kelsen contends that 'compromise is part of democracy's very nature.'[134] As I argued in the previous chapter, this is echoed in Singer's contention that democracy and majority rule are 'paradigms of a fair compromise.'[135] In circumstances of reasonable disagreement, the equal division of power and the use of majority rule to reach a decision among equal votes could indeed be understood as a fair compromise. It seems therefore that commitment to democracy itself can be understood as a compromise, rather than as a mere 'compromise technique' in the cases where it achieves compromises *qua* outcome. In this sense, democracy may be said to amount to a compromise *qua* process.

As we saw in the first section, a compromise *qua* process is a certain way of achieving conflict resolution by a procedure of 'give and take,' whatever the actual terms of the final settlement might be. This form of compromise is instantiated when the parties submit their dispute to the determination of a certain decision-making procedure. Compromises *qua* process can take the form of democratic deliberation in which each point of view must be given a voice in the process of deliberation and each participant given equal voting rights, but where the parties accept that the final collective decision will be the majority's, except in special cases where unanimity is required. This procedure amounts to a compromise even

[133] In fact, even when external compromises are reached informally on matters of principle, for instance by trading support for some principle in exchange for future support for another one, they take place in an *official arena*, be it the legislature or the judiciary, where settlement procedures are omnipresent, and they are therefore oriented towards a vote; for instance, what is usually traded are votes and even when people have reached the perfect compromise where they have gained sufficient majority or even unanimity on each project respectively, procedure will often end by taking a vote.

[134] Kelsen, 1961, 288.

[135] Singer, 1972, 32. See also Carens, 1979, 134; Kuflik, 1979, 299.

if all agree to it, for each individual can presumably expect to be outvoted some of the time and thus to see a different view of justice from hers adopted. In effect, the procedure is one of *compromise by succession*: individuals take turns in getting their own way on issues instead of compromising distributively on each particular one.[136] It assumes, however, that there will be no permanent minority whose views are consistently overridden by the majority and that basic minority and democratic participation rights are respected.

2. Democracy and Further Compromises *Qua* Outcome

Even when majority decision is understood as a compromise, it does not necessarily require or lead to further compromises *qua* outcome on the particular issues at stake. It is important to keep this distinction in mind as it helps to see why democracy should not be regarded as the necessary paradigm of all compromises.

Of course, the mere fact that a democratic decision-making procedure may produce decisions that one of the parties would oppose, coupled with the possibility of getting her views through on another occasion thanks to vote trading, will often suffice to allow us to understand such decisions as external distributive compromises about justice. In fact, Dworkin's contentions about external compromise *qua* outcome emphasise its relationship with democratic procedures; in such procedures, he says, 'each point of view must be allowed a voice in the process of deliberation but the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority.'[137] Moreover, the process of constitution of a majority on some issue, which will enact its own view of justice, is often subject itself to the need to make integrative compromises; in most cases, there is a broad range of opinions on moral issues and it is rare that any single opinion will command a majority from the start. On the contrary, majorities are very often coalitions of people with different and sometimes conflicting views, who have all made concessions to be in the majority. However, this simple fact is not conclusive.

First of all, the fact that 'logrolling' is a common practice does not lead to the conclusion that a compromise *qua* outcome is morally desirable. It might be regarded as morally worse that people join a majority by consenting to compromises than by being persuaded to endorse the quasi-majority's view of justice. Besides, even if compromises *qua* outcome are struck, they will usually be external and quite minimal compromises, since the majority principle mitigates the pressure for making unprincipled compromises. It makes it more likely, indeed, that those forming a majority are political actors whose

[136] Carens, 1979, 134.
[137] Dworkin, 1986, 179.

conceptions are already similar or consistent in principle. Secondly, people may trade votes and make different concessions, but these do not necessarily have to be related to the actual content of the final, single view of the majority. Votes for a specific law could be traded against other advantages or future votes rather than for concessions in the particular content of the voted law. Imagine, for instance, that someone in the minority on a taxation issue trades her votes on a social benefits question and thus sacrifices her opinion on a less important issue for support over a more crucial one.

Finally, the contention that in a democracy people should make concessions to their opponents, even when the concessions are not needed to create a majority,[138] is misleading. True, there is an increasing need nowadays for more inclusive politics based on mutual acceptance and respect in the face of the reasonable nature of disagreement and the recognition of our mutual fallibility.[139] There is a difference, however, between, on the one hand, the guarantee of respect and equal chances in deliberation or the willingness to listen and maybe to be persuaded and, on the other, the actual constitution of the chosen scheme of justice that risks losing its true nature if it is internally compromised. The acceptance of majority rule, ie the conclusion of a compromise *qua* process, together with a certain amount of coherence,[140] shows sufficient respect for the reasonableness of the positions at stake, including the minority's stance when its turn comes.[141] Besides, such a conception would replace majority rule with artificial convergence, thus simultaneously undermining the political equality that is part of the basic justification of democratic resolutions of disagreement.[142] Finally, making compromise a prerequisite of majority voting would present the danger of reinstating the pressure for agreement which justifies favouring majority rule over other modes of closure.[143]

CONCLUSION

This chapter addressed a specific case of mutual accommodation: *compromise*. I argued that compromise of principles does not exhaust mutual accommodation and that some kinds of compromise do in fact go further than what is required or authorised by mutual accommodation and its respect-based justification. Participants could, for instance, continue to reason together to reach mutually acceptable decisions, by trying to understand the others' position better and by

[138] See COHEN, 1971, 47; CARENS, 1979, 135.
[139] See GALSTON, 2000, 267–68.
[140] See Chapter 11 on the relationship between coherence and compromise.
[141] See WALDRON, 1999A, 165 on majority rule as a respectful procedure. On this point, see also SINGER, 1972, 32 ff.
[142] See Chapter 7.
[143] See Chapter 7.

being ready to amend or change their own completely, but this need not lead them to a compromise. In fact, respect for other reasonable views may in fact undermine the justification of compromise and the adoption of a halfway view no one holds.

The chapter distinguished compromise *qua* outcome, ie the state of affairs in which there is some gain and loss for all, from compromise *qua* process, ie the conflict resolution process through give and take by each party. The standard case of compromise, however, amounts to both a procedure and an outcome. Compromises are cases of acceptance of a solution without fully endorsing its reasons, but they do not amount to true agreements. Compromises are external, when they are principled, and internal when they are unprincipled. External compromises may be distributive when they split the differences alternatively or at the same time, or integrative when they combine the conceptions or principles into a more complex and principled conception.

I argued that internal compromise in case of disagreement over principles of justice constitutes, at the most, a second best alternative. Although it is better than no convergence at all, it fails to capture, among other things, the core of our sense of law's intelligibility and workability, of justice, of correct concept attribution and, finally, of political consistency. First, some internal compromises are unworkable in practice. Secondly, internal compromises that combine non-independent conceptions of the same principle or a principle with something that is not a principle can jeopardise the law's justice. Thirdly, internal compromises do not respect concept attribution as they contradict original principles and make no sense at all in a pre-existing conceptual web of meaning. Finally, internal compromises lack coherence and hence violate the moral justification of political integrity.

This conclusion does not, however, hold for all political compromises in case of conflicts of principle. It does not apply, for instance, to conflicts which oppose two or more independent moral principles provided their conceptions are reasonable, independent and consistent. The same is true of conflicts which oppose two conceptions of the same principle if, by the end of a substantive argument, both parties hold that the two conceptions reflect two conflicting but commensurable values that are equally constitutive of the same concept. All these compromises of principle are external ones; they are merely compromises about which scheme of justice we should adopt, whether they are distributive or integrative, as opposed to compromised schemes of justice.

As an alternative to external compromise *qua* outcome in settling political disagreements, I suggested compromise *qua* process, like democratic procedures and the majority rule. Such compromises select one of the views reasonably held during deliberation where all views have had the chance to be represented and discussed. Accepting majority rule *qua* compromise does not necessarily imply striking further external or internal compromises *qua* outcome within the majority's decision; such concessions may be made in the course of the democratic process, but they are not a prerequisite nor a necessary consequence. The contrary would

transform majority rule into artificial convergence, thus undermining at the same time the political equality that is part of the basic justification of the democratic resolution of disagreements. Majority rule may therefore be regarded as a fair settlement procedure, its fairness being understood in the loose and least controversial sense of the most minimal sacrifice or compromise to be made to reach convergence.

Section Two: Law-Making Institutions

This second section addresses the implications of disagreement for *law-making institutions*. It amounts to an exercise in *institutional design* that takes into account the democratic circumstances of law-making in circumstances of reasonable disagreement about justice. The leitmotiv in this section is the idea of a partnership or dialogue among institutions in controversial issues. The first chapter deals with the relationship and dialogue between constitutional assemblies and legislative assemblies, on the one hand, and with the relationship and dialogue between legislative assemblies and constitutional courts, on the other, while the second chapter addresses the relationship and dialogue between legislative assemblies and the people. The point in all three cases is to reveal the creative force of disagreement both within each institution and in the relations between institutions and its mutual reinforcing effect.

The first chapter addresses the validity of *precommitment or democratic arguments for the entrenchment of constitutional rights*. There, I argue that the precommitment analogy does not apply perfectly to a multimembered and pluralistic body like a parliament or a constitutional assembly. Democratic arguments for constitutional entrenchment do not take disagreement seriously enough and risk constraining too much future democratic deliberation and change. A limited amount of democratic rights may, however, be protected more stringently than others on grounds of the protection of democracy. I discuss different modalities of checks and balances in such a multilayered constitutional model, and in particular constitutional adjudication.

The second chapter addresses the *paradox of democratic representation*. In that chapter, I argue that while the democratic element of democratic representation requires equal participation rights, the representational element of democratic representation paradoxically implies a limitation in inclusion in order to make deliberation possible. This paradox becomes particularly sensitive in conditions of reasonable disagreement when conflicting perspectives and opinions are not represented, thus questioning the basic tenets of deliberative democracy and of legal authority. The chapter provides a mixed model of descriptive representation that allows for the minimal representation of disagreement and conflicting perspectives in particular, that is required by the right to equal participation, but without jeopardising the function of representation. In fact, I argue that this minimal form of descriptive representation is not only an essential element of the democratic legitimacy of representation, but combined with the deliberative and deferral benefits of representation, it provides a competitive alternative to direct participatory democracy.

9

Constitutional Rights Qua *Legislative Precommitment*

INTRODUCTION

> A constitutional 'precommitment' in these circumstances [of disagreement] is therefore not the triumph of pre-emptive rationality that it appears to be in the case of Ulysses. . . . It is rather the artificially sustained ascendancy of one view in the polity over other views whilst the complex moral issues between them remain unresolved. Imposing the template of precommitment on this situation smacks more of Procrustes than Ulysses.[1]

IN HIS RECENT book *Ulysses Unbound*, Elster draws an interesting Freudian analogy; according to him, 'a constitution is similar to the *superego*, in the sense of consisting of rigid and inflexible rules.'[2] In the present chapter, I would like to address the implications that reasonable disagreement about justice may have for the justification of the approach that conceives of constitutionally entrenched rights as precommitments on the part of what others have called the 'higher voice of the people.'[3]

The precommitment conception has been developed most extensively in the constitutional context by authors such as Freeman, Holmes, Sunstein[4] and most recently by Elster.[5] These constitutional conceptions dwell mostly on Schelling's model of strategic collective action and Elster's path-breaking work on imperfect rationality,[6] constraint theory and individual precommitments to a future decision

An earlier version of this chapter was presented at the Philosophy of Rights Seminar, EUI, Florence, in December 2001. Many thanks to Wojciech Sadurski, Georg Sommeregger and Lorenzo Zucca, as well as to the other participants for their helpful critiques and comments. Special thanks are also due to Jose Luis Marti Marmol for his generous comments on an earlier draft.

1 WALDRON, 1999A, 268.

2 ELSTER, 2000, 174 (emphasis added).

3 See HOLMES/SUNSTEIN, 1997, 303.

4 See, among others, HOLMES, 1995, 1988A; FREEMAN, 1990B; ELSTER, 1983, 1984, 1989, 2000; SCHELLING, 1984; SUNSTEIN, 1999; ACKERMAN, 1991. See also OFFE, 1989, 745 and HABERMAS, 1985, 160. See also the interesting discussion between MORESO, 1998A, BAYON, 1998 and GARGARELLA, 1998B.

5 See ELSTER, 2000. I am taking the most recent Elster to be revising, but also expanding on ELSTER, 1984 and 1989. As such, I shall regard his early definitions as confirmed when they are not expressly amended or qualified in the new book.

6 In this chapter, I will play by the rules of rationalistic accounts of individual and collective behaviour and assess their applicability to political action, without questioning their foundations and plausibility *per se*. For an Enlightenment-sceptic account of the Ulysses and the Sirens myth, see ADORNO, 1997, 43 ff. See also Chapter 6.

as a privileged way of resolving the problem of the weakness of will and fragility of reason. This understanding of political self-constraint, however, is far from being new. Bodin and Spinoza already argued for the self-limitation of the sovereign through his own decrees on the foundations of the polity.[7] What is common to all those accounts, however, is that they draw on the famous mythological image of Ulysses and the Sirens[8]: according to Homer, Ulysses decided that he should be bound to the mast in order to resist the charms of the sirens and not to abandon the boat, and he instructed his crew not to release him even if he begged them to.[9]

The democratic precommitment[10] model presents constitutional constraints[11] as 'a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice.'[12] It regards the constitutional entrenchment of rights as an act of self-government or self-paternalism through which the people binds itself and its future decisions—and not only its rulers or government[13]—in advance and in respect of certain rights,[14] to protect itself against its own predictable tendency to make unwise decisions. When a provision is entrenched in a constitutional document, the right that it lays down amounts to a precommitment because it is compounded with an absolute immunity or at least with a relatively rigid immunity against hasty legislative change by simple majority rule. To borrow Garzon Valdes' terms, constitutional constraints create a 'restricted area' where no, or only elaborate, statutory trespass, as it were, is allowed.[15] The precommitment approach to democratically established constitutionalism has been presented by its proponents as a way of reducing the tension there has always been in the liberal tradition between the competing values of democracy and majority rule, on the one hand, and constitutionalism and constitutional rights, on the other.[16] This irreconcilable tension is even regarded by some as 'one of the core

[7] See Spinoza, 1951, VII, 1; Bodin, 1962, I,10.

[8] The 'Ulysses and the Sirens' (Hom. Odys., XII, 156–200) analogy has been most recently developed by Elster, 1984 and 2000. Traces of this metaphor in the precommitment context may be found back in Spinoza, 1951, VII, 1: 'For kings are not gods, but men, who are often held captive by the Sirens' song.'

[9] Elster, 1984, 36.

[10] Some authors have used the terms 'commitment' or 'self-commitment' to identify what I am calling here 'precommitment' or 'self-binding.' In this chapter, those terms will be used interchangeably.

[11] Although the usage is flexible, I will use 'constraints' in the sense of the *result* of the act of precommitting oneself rather than in the sense of the *act* itself. See also Elster, 2000, 4.

[12] Freeman, 1990b, 353.

[13] I will leave the issue of constraints on rulers aside in this chapter and focus on the idea of precommitment *of the people* by the people only. The idea of binding *others* who are subordinated to the democratic will is underlying many of the political precommitments we know, but it is a subquestion to the main question I want to address here. Moreover, only the *self*-binding nature of constitutional constraints has a relevance in the debate over the democratic nature of constitutional rights.

[14] These constraints consist in constitutional rights—the moral rights they are entrenching already apply to the participants in democratic deliberations, although not in a legally and politically binding way.

[15] See Garzon Valdes, 1993, 644–45: '*coto vedado*'.

[16] See Mouffe, 2000, 2 ff on the irresolvable paradox of modern liberal or constitutional democracy.

myths of modern political thought.'[17] Marx actually refers to democracy as the *riddle of all constitutions.*[18] The puzzle of constitutional democracy has been best summarised by Lawrence Tribe:

> in its most basic form, the question . . . is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement . . . deliberately structured so as to be difficult to change.'[19]

According to the precommitment model, if contemporary democratic states have a constitution or a bill of rights, it is because a responsible parliament, a constituent assembly or, in some countries, the responsible people in a referendum have deliberately voted for and thus consented to such constraints on their future deliberations and legislation.[20] In short, then, a form of *democratisation of constitutionalism* takes place through precommitment and counterbalances the democratic deficit created by constitutional constraints. However, not only does the precommitment model see entrenched rights as *democratically established democracy-disabling* devices of some of the imperfections of democracy, but even, for some of those limits at least, as *democracy-enabling* as well as *democracy-constitutive* prerequisites.[21] This then leads to an even stronger argument for the democratisation of constitutionalism through precommitment, that results from the need for a minimal *constitutionalisation of democracy.*[22]

This debate has nowadays grown out of all proportion and I could not do justice to it in only one chapter. Nor do I want to address the related issues of judicial review and of the judicial control of the constitutionality of laws very closely,[23] although I will touch upon them in the last section. All I want to assess therefore are the democratic credentials and moral validity of the precommitment model of constitutional entrenchment of judicially enforceable rights.[24] This critique of the constitutional precommitment model leaves untouched *other* arguments one may make for strong constitutionalism and rigid constitutional entrenchment

[17] Holmes, 1988a, 197.
[18] Marx, 1978, 20.
[19] Tribe, 1978, 9.
[20] I leave aside in this chapter the issue of constitutional constraints on *administrative action* that is often required in modern societies as an elementary aspect of the rule of law.
[21] See Holmes, 1988a; Freeman, 1990b; Ely, 1980. See also Offe, 1989.
[22] See Bayon, 1998, 55 for this expression.
[23] In this chapter I take for granted that the separation of powers, a system of checks and balances and a system of judicial control and interpretation of constitutional rights, or in other words the *justiciability* of constitutional rights, are necessary in a liberal constitutional state. I will therefore refer to Waldron's, 1999a argument against *constitutional precommitment* assuming that it can be detached from his argument against *judicial review* and in particular against Dworkin's, 1986 account of the judicial control of constitutional rights.
[24] I am not addressing the issue of the distinctively *legal validity* of a constitutional precommitment and shall be concentrating on its *moral validity* especially with respect to democracy. On a purely legal interpretation of the validity of constitutional precommitments as the sole plausible way of sustaining the validity of such precommitments, see Marti Marmol, 2001, 179, note 54.

of rights.[25] Since the precommitment argument is democracy-based and hence constitutes one of the strongest arguments to date for rigid constitutional entrenchment, however, this critique should apply *mutatis mutandis* to other arguments. My argument will be that this democratic understanding of the entrenchment of rights fails as a general account of constitutional entrenchment by not taking seriously enough either reasonable disagreement about justice and the right or the dynamic and recursive qualities of democracy.

This approach echoes Waldron's disagreement-based argument against the precommitment model of constitutional constraints. I will attempt, however, to take his argument a little further by pointing at further difficulties endogenous to the constitutional precommitment model itself and will even resist his argument on some issues. I will then sketch what could be the basis for a revised model of constitutional precommitment and a model of weak constitutionalism. Contrary to what Waldron holds, it seems, therefore, that not everybody who thinks that constitutional entrenchments can be 'modelled by the story of Ulysses and the sirens is an idiot'[26]! My argument is structured as follows. I will start by presenting a few definitional pointers. The second section will expose what I take to be the main lines of the precommitment model of constitutional constraints. In the following section, I shall explore the limitations of that model. A fourth section will discuss the counterobjection based on the democracy-enabling role of constitutional constraints. Finally, in a last section, I shall present a revisited model of constitutional precommitment as a form of weak constitutionalism.

I. A FEW DEFINITIONS

Before proceeding further, a few working *definitions* are in order. Although conceptions of constitution and constitutionalism can vary from country to country and depend on the combination of legal requirements and socio-political factors,[27] one should not underestimate the relative autonomy of constitutional development, thus allowing for general normative considerations about Western European constitutionalism to be made.[28]

First of all, the notion of *rights*: I will not take a position in the present chapter on the question of the nature and legitimacy of rights *per se*. Thus, I will not defend

[25] See eg FERRAJOLI, 2001 who attempts to elaborate a purely *theoretical* and *descriptive* concept of fundamental rights and thus to provide a model of *substantive* democracy in which he does not need to develop a democratic or substantive justification for the existence of constitutional constraints on the democratic process. See also FABRE, 2000A for an autonomy-based argument for the constitutional entrenchment of rights against the state and legislators who are not as strictly bound by ordinary legal rights as citizens.

[26] WALDRON, 1999A, 268.

[27] See on the different factors that may cause the rigidity of a constitution, FERRERES-COMELLA, 2000, 46 ff.

[28] See RAZ, 1998C, 156. See also BESSON, 2005C.

a moral, a conventional or a purely legal justification of rights.[29] All I shall assume is that there is a general, albeit not necessary,[30] justification for some sort of legal guarantee of moral rights based on stability reasons and in particular reasons related to the importance of having intermediary levels of agreement on complex moral issues.[31] The crucial question raised in this chapter is whether this should be done by rigid constitutional entrenchment as is the case in most contemporary European legal systems,[32] or by other more flexible constitutional or legislative means.

Secondly, the notion of *constitution*: as I shall understand it,[33] a constitution is a single written document,[34] whose provisions define the constitution and powers of the main organs of the different branches of government and are somehow entrenched, that is to say the amendment of which is subject to special legislative processes, making constitutional amendments impossible or at least more difficult to secure than the passage of ordinary laws.[35] There are two prongs to this definition: a procedural and a substantive one. Procedurally, a constitution is more difficult to change than ordinary legislation (entrenchment) and it takes precedence over the latter in case of conflict (superiority). Substantively, a constitution defines the constitution and organisation of the most fundamental features of political life (constitutiveness) and has an important symbolic function (common ideology). The constitutional protection of human rights differs from the legislative protection of human rights mainly on *formal* grounds of adoption, amendment and repeal procedures. As such, entrenched legislative human rights clauses which are adopted, amended and repealed according to specific procedures may be deemed quasi-constitutional. The constitutional guarantees I will discuss can therefore encompass both types of entrenched clauses. Of course, the question

[29] On these issues, see MacCormick, 1993b, 134–35. See more generally Chapter 12.

[30] See Besson, 2003e on the relationship between moral and legal rights and the absence of a moral right to the legalisation of moral rights.

[31] See Marmor, 1997. See also Raz, 2004c, 13–14.

[32] See eg Fabre, 2000a, 277.

[33] This is a relatively *thick* sense of the concept of constitution, by contrast to a *thinner* sense in which the constitution is simply the law that establishes and regulates the main organs of government, their constitution and powers. See Raz, 1998c, 153.

[34] This definition does not imply that I am favouring the written model of a constitution over the unwritten one. The reason for limiting the scope of the definition in such a way is merely that, in the few countries where the constitution remains unwritten, it is more easily alterable by parliamentary enactment and the issue of the democratic nature of constitutional entrenchment does not arise as sharply (Waldron, 1999a, 221). For practical reasons pertaining to current predominant constitutional practice in Europe, I will not therefore discuss the argument according to which unwritten law and the common law in particular may provide more flexible means of regulation.

[35] I will not dwell here on the distinction between absolute constitutional precommitments and constitutional precommitments that are difficult to amend, because the same distinction applies to individual precommitments and it is not a clear one. The only thing one should keep in mind then is that constitutions are very rarely absolute and impossible to amend. They are, however, most of the time quite rigid, in the sense that their revision is meant to be a longer and more difficult process than the process followed for the amendment of ordinary legislation (see Bryce, 1980, 3 ff).

one may raise is the question of the generality or precision of the human rights clauses depending on whether they are constitutional or legislative.[36]

Finally, the notion of *constitutionalism*. It is a creed that can take extremely various forms, but according to which political power ought only to be exercised under constitutional provisions and subject to constitutional restrictions, where such restrictions include the separation of powers, effective checks and balances among the branches of government and guarantees of minimal fundamental rights. My focus will be on the latter, ie rights *qua* constitutional constraints rather than on judicial modes of constitutional control, and thus mainly on constitutions *qua* bills of rights, rather than on other forms of constitutional constraints that establish the structure of government, like bicameralism or the executive veto.[37]

II. THE PRECOMMITMENT MODEL OF CONSTITUTIONAL CONSTRAINTS

As a response to the democratic objection to constitutionalism, some authors have contended that constitutional structures and entrenched rights that currently apply to us have been democratically chosen. These constraints do not, it follows, involve any disrespect for people's capacities of self-government. In this account, constitutionalism and democracy are mutually supportive.[38] Written constitutional constraints amount to mechanisms of self-restraint that the people deliberately choose to impose on themselves. They are precautions which responsible rightholders can take as moral agents against their own imperfections, for instance in anticipation of cases where majoritarian legislation turns out to be unjust or where popular majorities are panicked by some decisions they have to take. If all issues were subject to simple majority voting, proponents of the model hold that society

[36] Some authors, like Tom Campbell, have argued against both constitutional *and* legislative bills of rights that provide general guarantees of human rights, but in favour of specific entrenched legislation of human rights. The argument is mainly a democratic one based on the lesser degree of limitations specific and fully fledged legislation can set on judicial interpretation of entrenched guarantees of human rights by contrast to general bills of rights. True, there is clearly a need for specific human rights legislation that can flesh out general guarantees and establish specific implementation procedures, depending on the type of human rights and on the constitutional order at stake. However, specific human rights legislation should not be entrenched, because the entrenchment of specific human rights legislation limits the democratic legitimacy of constitutional precommitments even further by making them very detailed and rigid. Moreover, one may argue that it is part of the dynamic nature of human rights that when they are legally guaranteed, they be drafted abstractly and loosely enough to accommodate the new duties they may give rise to given the multitudes of yet indeterminate circumstances in which rights can give rise to new duties. Besides, this kind of legislation would not suffice to protect human rights on its own. For human rights to be implemented and realised more specifically, we need an intermediate level of agreement at the level of general guarantees of human rights that is provided by constitutional guarantees. Finally, another reason to have a bill of rights is the radiation of general human rights in all areas of law and the coherence this ensures. See Chapter 11.

[37] The rigidity of the latter's entrenchment that is based on a widespread and largely common concern for stability is much easier to defend than the rigid entrenchment of essentially contestable *rights*. See Ferreres-Comella, 2000, 45.

[38] Holmes, 1988a, 197.

would lack stability and predictability; all democracies therefore ought to have some stabilising devices to prevent all issues from being 'up for grabs' by simple majority voting all the time. In a nutshell, according to Stephen Holmes' caricature of the precommitment model, which dwells on Hayek's view of a constitution:

> A constitution is Peter sober while the electorate is Peter drunk. Citizens need a constitution, just as Ulysses needed to be bound to his mast. If voters were allowed to get what they wanted, they would inevitably shipwreck themselves. By binding themselves to rigid rules, they can better achieve their solid and long-term collective aims.[39]

This approach to constitutional constraints is based on the familiar idea of precommitment in *personal ethics*: an individual may have reason to impose certain constraints upon himself so far as his future decision-making is concerned. Aware now of a way in which the autonomous will might be determined by various forces in the future, it seeks to limit such determination by responding to certain considerations of principle in advance. Such self-inflicted restrictions on one's own freedom and autonomy have traditionally been regarded as the epitome of freedom or even, for some, as the only possible mode of being free. Full freedom entails the freedom to bind oneself and to reduce one's range of choices.[40] In order to present the precommitment model of *constitutional constraints*, I shall expose, first, the basis of the model, ie Elster's model of individual precommitment, and, secondly, the main elements of its analogical application to constitutional constraints.

1. Elster's Model of Individual Precommitment

The political precommitment model has been developed on the basis of studies in personal ethics and, in particular, Elster's groundbreaking work.[41] As he is the main author to have studied closely both individual precommitment and its applicability to the constitutional context, and as he has most recently restated his theory of individual and political constraints, it is useful to expand a little on the main tenets of his theory.

In his original study, Elster develops a model of individual precommitment in anticipation of cases of irrationality or imperfect rationality that can arise by weakness of will, excess of will or distortions in the formation of beliefs or preferences.[42] Precommitment amounts, in Elster's account, to the intentional and deliberate shaping of the feasible set of actions for the purpose of excluding certain possible choices.[43] It is a constraint that an agent imposes on herself for the sake of some expected benefit to herself.[44] According to Elster, then, 'to bind

[39] Holmes, 1995, 135.
[40] See eg Hegel, 1966, 139; Kant, 1991, 44.
[41] See Elster, 1983; Elster, 1984; Elster, 1989; Elster, 2000.
[42] Elster, 1989, 194.
[43] Elster, 1983, 114.
[44] Elster, 2000, 4.

oneself is to carry out a certain decision at time t1 in order to increase the probability that one will carry out another decision at time t2.'[45] There are four further conditions. The second condition reads: 'if the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.'[46] The third condition is that 'the effect of carrying out the decision at t1 must be to set up some causal process in the external world.'[47] The fourth condition is that 'the resistance against carrying out the decision at t1 must be smaller than the resistance that would have been opposed to the carrying out of the decision at t2 had the decision t1 not intervened.'[48] The final condition reads 'the act at t1 is an act of commission, not omission.'

Elster distinguishes between the reasons or motives for precommitment and the devices of precommitment. First of all, Elster has recently refined the set of *reasons* that may call for precommitment: he mentions passion, self-interest, preference change, time-inconsistency and inefficiency.[49] Two remarks are in order about those reasons. With respect to *passion*, Elster uses it in an extended sense that covers not only the emotions proper such as anger, fear, love, shame and the like, but also states such as drunkenness, sexual desire and other visceral feelings.[50] There are four ways in which passions may cause a discrepancy between plan and behaviour: distortion of cognition, clouding of cognition, weakness of will or induction of myopia. As to *time-inconsistency*, it occurs when the best policy currently planned for some future period is no longer the best when that period arrives. The preference reversal involved here is not caused by exogenous and unforeseen changes in the environment, nor by a subjective change in the agent over and above the reversal itself. It is caused by the mere passage of time.[51] Secondly, Elster mentions different precommitment *devices* meant to set constraints on the different *reasons* we have for precommitting ourselves. These are mainly the elimination of options, the imposition of costs, the setting up of rewards, the creation of delays, the changing of preferences, the investment in bargaining power and the induction of ignorance or even of passion.[52]

2. The Constitutional Analogy

After introducing general issues about the constitutional analogy to the individual precommitment model, the different elements of the constitutional analogy

[45] Elster, 1984, 39.
[46] Elster, 1984, 42.
[47] Elster, 1984, 42.
[48] Elster, 1984, 44.
[49] Elster, 2000, 1 ff.
[50] Elster, 2000, 7.
[51] Elster, 2000, 24.
[52] Elster, 2000, 6.

that correspond to the core elements of the individual model will be isolated and discussed.

a. The Principle of Analogy

According to the precommitment model of constitutional entrenchment, it may be said, by analogy to the individual context, that a democratic people may resolve collectively to bind itself in advance to resist the sirens of rights-violation and to remain, as it were, 'in the same boat' as our forebearers.[53] But is it really plausible to build a constitutional account of self-constraint on the model of individual precommitment?

To start with, proponents of the precommitment model should acknowledge that precommitment is not very common *even in the individual case.*[54] In ordinary cases, indeed, future-directed intentions of rational individuals lead without great difficulty from deliberation to conduct without the need for external resources of constraint. In this sense, therefore, ordinary people do not always have a tendency to make unwise decisions which they might live to regret nor do they always mistrust themselves individually.[55] A fortiori therefore they will not always distrust themselves when acting collectively in a polity.

Secondly, Elster concedes that, even in cases where the conditions for individual precommitment are fulfilled, *the analogy between the individual and the political cases is not perfect*[56]: 'social decision-making bears at best a rough similarity to individual choice.'[57] In the latest restatement of his constraint theory, Elster contends that some of the reasons and devices that are available for individual self-binding are not available in the collective case, and vice versa.[58] Holmes, himself, says that one should be careful in extending to a collective group a conceptual framework that applies to one person. Elster maintains, however, in his latest book, that 'in spite of disanalogies between the individual and the collective cases, the idea of constitutional precommitment is not meaningless.'[59] According to him, precommitment can be seen as a solution to political weakness or failure of will, ie *akrasia*, just as it is a solution to individual weakness of will.[60] What is assumed is not that the political community is unitary, but on the contrary that it is as *divided* as the individual is.[61] Many authors writing on individual rationality have indeed been assimilating the individual to a fragmented polity or multitiered

[53] This is an expression used by Habermas, 2001a, 775.
[54] Bratman, 1999a, 12.
[55] Contra: Holmes, 1995, 272.
[56] Elster, 1989, 194.
[57] Elster, 1991a, 115.
[58] Elster, 2000, 90.
[59] Elster, 2000, 96.
[60] Elster, 1984, 195. See Pettit, 2003c on the analogy between collective and individual akrasia, which amounts to 'a sort of constitutional disorder: a failure to achieve a unity projected in the avowal of agency'.
[61] Elster, 2000, 168.

self.[62] This understanding of the individual parallels a conception of democracy where a majority of individuals decide for all the others. Although this understanding of the divided individual certainly eases the analogy between the individual and the political,[63] it does not make the political case any easier. Moreover, in a democracy, all the selves are acting together and hence voting simultaneously, thus making the idea of a united precommitment less plausible than in the individual case where the many selves rarely decide together.

Finally, another commonly mentioned difficulty resides in the possibility of attributing intentions to a group of people and, in our case, to the legislature as a whole. Some theorists have thought it nonsensical to assign the intention to bind itself to a constituent assembly; intentions are allegedly mental states that *groups* cannot have.[64] However, legislatures do deliberate and act[65] and it therefore seems reasonable to ascribe an intention to them when it is shared by at least a good portion of the *members* of the group.[66] One can, therefore, undoubtedly speak of the intent of a group when all, or almost all, members of the group have the same specific intention, the intention is relevant to their participation together and the members know, or at least assume, that the intention is shared.[67] Of course, it remains to be shown how these shared intentions can be regarded as constitutive of an 'intentional consensus,' if one is to assert a complete analogy between individual and constitutional precommitment.[68]

b. The Analogy Applied

In order to grasp the details of the constitutional analogy, it is important to examine the translation of each of the core elements of the individual precommitment model into the constitutional context.

First of all, if one refers to Elster's distinction between reasons and devices for precommitment, what could be the *reasons or motives* for the adoption of constitutional constraints? Generally speaking, the political community is portrayed as having committed itself in advance to respect certain rights, and as having asked the judges to prevent it from violating them through *ignorance* or *passion*. In that account, as Elster sums up, constitutionalism amounts to, on the one hand, 'rules

[62] See SCHELLING, 1984, 84 on the case of a multitiered individual where one of the selves wants to prevent the bad consequences that follow when the other self is in command, by making a self-binding decision.

[63] See MORESO, 1998A, 77.

[64] See EASTERBROOK, 1983, 547.

[65] See RAZ, 1996A, 263.

[66] MARMOR, 1992, 162. Shared intentions do not, however, correspond to a distinct mental state or an attitude in any mind, but consist of a web of attitudes: BRATMAN, 1993, 98, 107.

[67] See BRATMAN, 1992, 335 and 1993 on 'shared cooperative activities' and 'shared intentions'. On these restrictive conditions: GREENAWALT, 2000, 1626 and 1999, 99–100. See also on the last condition: RAZ, 1996A, 264. See also SEARLE, 1990, 401. See Chapter 6.

[68] On the minimal convergence on coordination as opposed to an agreement to coordinate, see Chapter 6.

versus discretion'[69] and, on the other, 'reason versus passion' or '*politique politisante* versus *politique politisée*'[70]. More precisely, Elster now identifies four reasons for constitutional precommitment: passion, partisan interest, time-inconsistency and inefficiency. The first three main motives can be understood in a way that is similar to the individual case. The efficiency motive, however, reflects the idea of using constitutional provisions to eliminate or reduce certain forms of waste and inefficiency that would prevail if all legislation took the form of simple statutes that could be changed by a simple majority[71]; the main case of inefficiency Elster is thinking of is political instability.

Secondly, provided there are similar reasons for adopting constitutional constraints, what could be their *devices*? When mentioning the several *devices* self-binding can use in modern representative democracies, Elster talks of substantive issues one takes off the political agenda, on the model of Holmes' so-called 'gag rules.'[72] He also adds that there are all sorts of other means that could be used in a democracy to protect future decisions from the instability there is in leaving the possibility open for all issues to be reversed by a simple majority voting. The political process, for instance, guards itself against impetuous decisions by requiring two readings of a bill, time intervals between announcement of intent and realisation of some activity, public notice and other dilatory procedures.[73]

In short, and despite the risk of oversimplification, one may say that there are *two main dimensions* to constitutional constraints. Constitutions regulate political life, as well as themselves. The first task, that is a *substantive* task, is carried out by a bill of rights, as well as provisions regulating the machinery of government. The second task, that is the *self-regulating* or *procedural* task, is carried out by rules governing the amendment of the constitution itself, as well as rules regulating the temporary suspension of the constitution. First of all, then, substantive constraints encompass, among other things, guarantees of fundamental civil or socio-economic rights, on the one hand, as well as fundamental political and democratic rights, on the other. Secondly, procedural constraints can, on the one hand, regulate the adoption and amendment procedure of primary statutory rules (secondary rules) and most importantly, on the other hand, either block or slow down the process of amendment of these secondary rules or other substantive constitutional constraints by foreseeing different procedural constraint devices (tertiary rules).[74] These are, among others, absolute entrenchment, delays, ratification by referendum, double majorities of the population and the regions in federal states or, finally, supermajorities. These different procedural constraints have

[69] Elster, 1988, 6.
[70] Elster, 1988, 6.
[71] Elster, 2000, 154.
[72] See Holmes, 1988b.
[73] See Schelling, 1984, 97.
[74] On those three levels of conventional or constitutional rules, see Hampton, 1997, 108–10.

two effects: on the one hand, they amount to ordinary precommitments meant to avoid the consequences of passion or time-inconsistency for procedural issues and, on the other, they stabilise substantive precommitments that are meant to avoid the same problems at a substantive level.[75]

The substantive and procedural dimensions of constitutional constraints are therefore *complementary*: when they are entrenched, not only are individual rights guaranteed and as such they become devices of constitutional control over the democratic process, but their entrenchment implies higher-level procedural constraints that form an obstacle to certain political changes by making those changes impossible or at least more difficult. Without procedural constraints, substantive constraints would not remain constraints for long; what is the use of a ban on racist parties if a majority can amend that ban? The same is true of marriage or other individual precommitments; what makes a marriage a precommitment is not only the substantive promise of living together, but also the procedure that will apply in case one wants to step back from that promise. In this chapter, I will be concentrating on the *substantive dimension of rights as precommitment devices*, even though they usually are complemented by procedural constraints.

III. THE LIMITATIONS OF THE PRECOMMITMENT CONCEPTION OF CONSTITUTIONAL CONSTRAINTS

1. General

In this section, I would like to discuss the limitations of the precommitment model of constitutional rights and hence question the moral *desirability* of constitutional precommitment in a democracy. Of course, one may argue that a constitutional precommitment is already *impossible* and thus regard the question of its moral desirability as superfluous. A *revolution* is indeed possible at any time and the launching of a *new constitutive process* and the constitution of a new constituent assembly cannot be excluded.[76] Given that revolution and the creation of a new constitution imply a fundamental change of political organisation and identity, as well as costly consequences, at least in the case of a revolution, however, I will not regard the impossibility argument as a sufficient drawback, not to address the question of the moral desirability of constitutional precommitment.

There is no doubt that the people in a democracy can be beneficially constrained by its constitution *in practice*. The question of the latter's *legitimacy* remains open, however. At least two problems arise if one understands those constraints as precommitments.[77] First of all, one cannot infer from the fact that some structure has an effect, that it was *designed* in order to produce that effect. There are cases where constraints benefit the constrained agent, but were not chosen by

[75] See Elster, 2000, 118.
[76] See Marti Marmol, 2001, 177.
[77] See Hubin, 1986, 90 ff.

the agent in virtue of those benefits. For the sake of the argument, however, I will assume in this chapter that constitutional constraints are designed to limit the actions of the majority in a democracy and as such are *essential* constraints and not merely *incidental* constraints.[78] Even if it is true that consequences of constitutional constraints that were not in the minds of the framers may be acknowledged later,[79] the reasons they give for maintaining the constraints do not justify the actual *imposition* of those constraints retrospectively. As such, incidentally beneficial constraints do not play much of a role in the democratic justification of constitutional rights *qua* precommitment. Secondly, the idea that a people can bind itself in advance on *controversial* substantive matters is fraught with difficulties. In fact, it is the analogy between individual and political self-binding that is severely limited.[80] If constitutional entrenchment is to be understood as a form of precommitment, then both the precommitting agent and the constrained agent must resemble exactly the earlier and later Ulysses. Precommitment requires, indeed, that there be a single agent who performs an action at one time with the clear intention of causally constraining herself through an external mechanism at a later time. It is not at all evident that constitutional constraints fit this model.

In this section, I would like to discuss a few of those difficulties. They relate to the different conditions for precommitment,[81] ie the subject, the object, the target, the implementation and the operation of a constitutional precommitment. Finally, in a last subsection, I shall present the main implications of those difficulties for the precommitment model of constitutional rights.

2. The Precommitting Subject: Ulysses versus a Majority of the Voting Population

There are two issues worth discussing regarding the comparability between the individual model of the precommitting subject and the sovereign people: first, the *collective and divisive* nature of the people and, secondly, its *intergenerational* dimension.

a. Ulysses versus a Complex Collective Entity, the People

In general, if precommitment is to be used against instability, this presumes that the decision to precommit oneself must be clear and uncontested. The precommitting subject is meant to be quite certain and lucid about the detail of the actions she wants to avoid and the basis of their undesirability.[82] It follows that, in the case

[78] See Elster, 2000, 4 on this distinction.
[79] Elster, 2000, 5.
[80] See Elster, 1989, 196.
[81] These conditions are *cumulative* conditions; hence, if any one of them is not satisfactorily fulfilled, it is the validity of the precommitment model as a whole that is jeopardised.
[82] Waldron, 1994b, 37.

of a political entity, the precommitment decision would have to be *unanimous* and thus depend on a rather strong consensus about the goals of political life.[83] Political examples traditionally used to support the idea of constitutional precommitment also rely on a unanimous self-binding decision. This is relatively easy, since most of them refer exclusively to a single sovereign or king. It is the case, for instance, of Bodin's defence of the enabling self-limitation of the king's power[84] or of Spinoza's discussion of the king's precommitment to its own decrees.[85]

The difficulty with a collective entity like the democratic people, however, is that it is composed of different individuals who disagree reasonably and in good faith about justice and political institutions. Thus, as a whole, they lack the kind of univocity and unanimity one needs when binding oneself.[86] In this sense, the people is like Elster's example of a person with multiple simultaneous selves whose grasp of a complex issue is not absolutely clear.[87] How, in those circumstances, could 'constitutionalism stand for the rare moments in a nation's history when deep, principled discussion [in a constituent assembly] transcends the logrolling and horse-trading of everyday majority politics, the object of those debates being the principles which are to constrain future majority decisions'?[88] How could constitutional politics or '*politique politisante*' differ after all from ordinary politics or '*politique politisée*'?[89]

Interestingly, Elster himself has now moved away from this idealised dichotomy between framers and politicians. He says very clearly that 'the idea that framers are *demigods legislating for beasts* is a fiction,'[90] just as Holmes and Sunstein speak of the 'myth of the framers.'[91] This kind of fiction is of little help, however. If the absence of conditions of unanimity can be presumed in Eastern European countries, what makes it the case that our perennial constitutions would have been written in a context so very much different from the constitution-making context in those countries? The answer to this question is deeply *contingent.*[92] In fact, with the exception of the recent South African Constitution for which a supermajority was required, most of our contemporary constitutions were adopted by simple majority. A confirmation of this may be found in the constitutional process actually taking place in Northern Ireland, where there is very little consensus over which rights should be entrenched and how.[93] Of course, in

[83] Bohman, 1996, 48; Freeman, 1990b, 353–54.
[84] See Bodin, 1962, I,10 quoted by Holmes, 1988a, 214.
[85] Spinoza, 1951, VII, 1.
[86] Bohman, 1996, 48; Waldron, 1994b, 37. See for a similar argument, Bayon, 1998, 54 and Gargarella, 1998b, 67.
[87] Elster, 1984, 109–10.
[88] Elster, 1988, 6. On the superiority of constituent assemblies' decisions over ordinary political decisions, see Ackerman, 1991, 6–7. See for a similar view Moreso, 1998b, 37–38.
[89] See Raz, 1998c, 155 similarly doubtful: 'constitutional politics may not be the same as parliamentary politics, but they are not altogether separate either.'
[90] Elster, 2000, 172.
[91] Holmes/Sunstein, 1997, 282.
[92] Bayon, 1998, 54.
[93] On this question, see Harvey, 2001, 163 ff.

case of disagreement over the constitution, the people could be happy to resort to a vote. But this just passes the buck, as it were; can a majority of the voting population generate the kind of univocity and clarity that is needed to bind the entire population? It seems not. As Elster still holds, 'if the precommitment decision is unanimous, it has better claims to be an act of self-binding than if it is a case of a majority imposing its constitutional views on a minority.'[94] According to him:

> the general problem which haunts constitutionalism—why should any generation be bound by the decisions of its predecessors?—would be exacerbated if 51% of one generation could bind the next generation to principles which could be undone only by a two-third majority or even by unanimity.[95]

Not only might a minority of the voting population reject those rights, even members of the majority might have different opinions as to what those rights amount to effectively. It is not the case, then, that in our calm moments we agree about what should be done and precommit ourselves in the face of temptation only; even in those calm moments, people disagree reasonably about rights.[96] It seems to follow therefore that, provided the other conditions for a valid precommitment are given, unanimous agreement on constitutional precommitment is contingent at the most; it will depend in each case on the complexity of the object and the depth of the theoretical issue to be settled. In sum, then, the constitutional precommitment model cannot be generalised to all rights and people. But, even if it did, could it apply across time to the precommitting generation as well as to *future generations* of the people?

b. Ulysses versus the Intergenerational People

The present binding power of any decision taken in the past constitutes a problem. It is clear that majoritarian decisions suffer from a democratic deficit with the passage of time. As the interests of people change and the people themselves change, there is a progressive weakening of the presumption that the prior decision reflects a solution in which the interests of all those concerned were considered.[97] This problem is even more acute when the actual membership in the political community has entirely changed *over time*, as can be the case in a world of migration.[98] Why, indeed, would a subsequent generation be bound by constitutional commitments entered into by their ancestors?

[94] Elster, 2000, 168.
[95] Elster, 1988, 6.
[96] Waldron, 1999a, 267–68; Bohman, 1996, 48–49.
[97] Nino, 1996, 183. See Chapter 7.
[98] On the further complexity of the *space-related* change within citizenship that occurred through the development of EU human rights protection and hence the heightened controversiality of the precommitment of one polity by dispersed sites of authority, see Walker, 2001, 134.

True, the people of a political community may be regarded as an entity distinct from the mere aggregation of its individual members. This distinct entity allows for a certain amount of coherence in collective action both in the same generation and across generations.[99] At first sight, therefore, a decision taken by one generation could bind the next one by binding *itself*.[100] However, the ex ante idea of intergenerational coherence of a political entity does not mean that all precommitments to the future will bind the next generations ex post.[101] This is what Elster calls the *paradox of democracy*: 'each generation wants to be free to bind its successors, while not being bound by its predecessors.'[102] As Elster now acknowledges, the 'moral justification of self-binding in the literal sense does not carry over to this metaphorical sense: the founders cannot claim the right to bind their successors. In some cases, they can be reasonably sure that their successors will want to be bound to certain procedural rules, but the creation of substantive and controversial rights cannot be justified in this way.'[103]

It follows that a certain amount of caution is in order when precommitting oneself to the future on controversial issues; those who do so should look upon what they are entrenching with the eyes of the generations to come.[104] Thus, although the intergenerational dimension is not necessarily conclusive against the precommitment characterisation of constitutional constraints, it is likely to be conclusive inasmuch as the future has a tendency to vindicate the wisdom of past minorities. Precommitments should therefore be kept, if they are legitimate at all, to a minimum.

3. The Object of the Precommitment: the Charm of the Sirens versus Rights Misconceptions

In the case of Ulysses, the object of the precommitment was clear; it was to keep Ulysses tied to the mast rather than letting him dive into the sea and swim to the sirens, both activities being clearly something to be avoided. Precommitting oneself against future misconceptions of constitutional rights, by contrast, is something more complex; how can one be sure than any new conception of a right will be a misconception and a violation of justice?

[99] Contra: Otsuka, 2003 who regards any intergenerational sovereignty as impossible and hence contends that constitutions should be repealed and may be re-enacted every single generation. He grounds his argument on an idea defended by Jefferson, 1984, 959–64.

[100] This point is important, because, even if Elster, 2000 is right in correcting his earlier views by saying that what people want, when they precommit themselves in politics, is mostly to bind *others*, they do it as representatives either of the people as a whole or as representatives of an intergenerational community, thus consciously binding *themselves too* and not only a minority or the next generation.

[101] Waldron, 1999a, 274.

[102] Elster, 1984, 93.

[103] Elster, 2000, 278.

[104] See Arendt, 1973, 198.

Of course, not all constitutional provisions are that complex. There is an important difference between binding oneself to do something straightforward, like respecting electoral quorums, and binding one's conception of essentially contestable concepts such as equality or freedom of speech. In the latter case, the idea of precommitment on a clear object seems far less attainable than in the former case. Moreover, given that disagreement over rights is present from the beginning and therefore predates precommitment, the argument that attempts to minimise disagreement by explaining it by reference to the creation of constitutional boundaries fails. Elster, for instance, argues that 'some of the temptations against which the agent is supposed to be protected by the precommitment device may owe their existence to the device itself.'[105] This may be true in some cases, but it does not apply to the reasonable motivations of disagreement in most cases of constitutional controversy. As Waldron rightly concludes, then:

> if the best explanation of these persisting disagreements is that the issues the society is addressing are themselves *very difficult issues*, then we have no justification whatever for regarding the temporary ascendancy of one or the other party to the disagreement as an instance of full and rational precommitment on the part of the entire society.[106]

Given the difficulty there is in establishing the people's unanimous decision to precommit itself on controversial issues like substantive rights, one may wonder whether a subcategorisation of those rights and differences in the precommitment's precision may not be in order. It would allow for some amount of precommitment, that seems to be needed on some more straightforward issues, while also leaving sufficient scope for the further debates we seem to need on other more controversial issues, as we will see.

4. The Target of Precommitment: Individual Weakness of Will versus Reasonable Disagreement

Can we really talk of weakness, excess or inconsistency[107] of the will, that is of rational *akrasia*, as being the target of constitutional entrenchment in the case of the sovereign people? In the case of Ulysses, it is clear that only individual *akrasia* can lead someone to succumb to the sirens' charms. This is because the consequences can only be negative: death is the only possible consequence. In the case of a polity's conception of rights, by contrast, it is more difficult, by reason of the complexity and controversiality of rights, to distinguish cases where political contestation and a new majority's opinion lead to a true misconception or violation of a right and thus can be regarded as instances of collective *akrasia*, on the one hand, from cases where they do not, on the other. To address this issue I will, first

[105] Elster, 2000, 282.
[106] Waldron, 1999a, 270.
[107] See Spinoza, 1951, VII, 1.

of all, present the precommitment model's proponents' idea of the constitutional entrenchment's target. I will then discuss some of the model's limitations with respect to what I take to be its main target, ie disagreement about rights.

a. Political Akrasia as Precommitment Main Target

In Elster's own terms, there is no canonical model of rational beliefs in the political realm. There can be no clear notion of what irrational beliefs mean either. All there is, is a conception of reasonableness which is agent-relative. Political precommitment does not therefore seem to be an option as a precaution against the *lack of reasonableness* of our future rights-conceptions and disagreements about rights. By contrast, *weakness, inconsistency and excess of will* do arise in political action, when for instance the polity yields to undemocratic impulses and fears. Collective *weakness or inconsistency* of will may arise when the polity is unable to stick to past decisions. Collective *excess* of will may occur when the polity is tempted to deploy means the knowledge of which renders them inefficacious.[108]

Political akrasia encompasses cases of decisional pathology provoked by *passions* like anger, panic or greed, but also, more broadly, cases of *general political instability*. Collective or political *akrasia* can arise for two reasons, therefore.[109] It is possible to distinguish between political weakness of will or *akrasia stricto sensu*, on the one hand, and the political instability or *akrasia* that results from disagreement and conflict, on the other. First of all, there may well be cases of collective or political *akrasia* that result from *individual weaknesses, inconsistencies* or *excesses* adding to each other. In those cases, constitutional constraints may be seen as prophylactics against anger, panic or greed in the political realm too.[110] The same point was famously made by Hamilton: 'Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint.'[111] Secondly, there are cases, however, where what is at stake is not the result of the addition of individual *akrasia*, but the instability that results from plain *disagreement*. Most of the time, indeed, if a majority of the people decides not to respect a right the way it was entrenched, it is not out of whim, passion or of the weakness of individual wills, but out of perfectly reasonable contestation. Such contestation can be qualified in two ways. First, it can be the result of clashing *self-interests*. Secondly, it can also be principled and *reasonable*. The difficulty is that in both cases disagreement can lead to past decisions being overturned and thus to a form of collective instability in the long run, and hence to the *collective akrasia* or the *akrasia of the political community as a whole.*[112]

[108] Elster, 1989, 194. Beyond the two main groups of reasons or motives for constitutional precommitment discussed in this section, Elster also mentions *time-inconsistency* and *efficiency*.

[109] See for a similar distinction between precommitment against weakness of will and precommitment against conflict, Moreso, 1998a, 78 ff.

[110] See Waldron, 1999a, 266.

[111] See Holmes's, 1995, 1 opening quote by Hamilton.

[112] See Pettit, 2003c on this form of collective *akrasia* caused by other means than a sum of individual *akrasias*.

In other words, in case of reasonable disagreement, it is not only our future irrationality we wish to protect ourselves from, but our future rationality as well.[113] Ulysses could well have been led by the song of the sirens to believe falsely but reasonably that steering into the rock would not wreck his ship, but even in that case, he should have been prevented from doing so. This has led Holmes to claim that 'even a perfectly rational, clear-eyed and virtuous future generation could benefit from pre-established procedures for resolving conflicts'[114] and thus from being constrained by such a procedure. This second form of collective *akrasia* is illustrated by what Elster calls 'zig-zag policies and constant reevaluation of past plans.'[115] For him, if all issues were subject to simple majority voting—whatever the reasons for doing so—society would lack stability and predictability.[116] This is a problem for politics and law, because stability is an important political value. It follows therefore that constitutional precommitment may be seen as both a precaution against the typical first form of political *akrasia* and a 'method of avoidance' of this second form of collective conflict.

b. A Few Limitations: Reasonable Disagreement versus Collective Akrasia

After a presentation of the different limitations reasonable disagreement raises for the notion of political *akrasia*, I will assess the risks raised by constitutional precommitment and will conclude by a discussion of the paradox of constitutional precommitment.

i. The Limitations

There are two main difficulties with the second notion of political *akrasia* and target of precommitment. Those difficulties undermine, I shall claim, the relevance of precommitment in other cases too, by virtue of the ex ante uncertainty we are in as to the ex post facto benefits of a constitutional constraint.

First of all, disagreement might not lead to the instability that is feared. In such cases, the fear of collective *akrasia* is exaggerated and ordinary legislative means would have been sufficient to ensure the cooperation and stability that is needed in a polity.[117] There are reasons to think that this will often be the case. Moreover, disagreement at a later stage will often reflect the very disagreement people had when committing themselves in the first place.[118] As Waldron argues, 'it is the same disagreement all the way through, though the weight of opinion has shifted back and forth.'[119] It is therefore difficult to imagine the risks to which a present majority is subject that explain why its decisions should be constrained by a decision taken

[113] Hubin, 1986, 84 ff.
[114] Holmes, 1988a, 237.
[115] Elster, 1984, 88.
[116] Elster, 1991a, 129–30.
[117] See Adorno, 1947, 75; 1997, 59. See also Offe, 1989, 749.
[118] Waldron, 1999a, 267.
[119] Waldron, 1999a, 267.

by another majority at an earlier time, if the latter already faced the same risks.[120] The present majority could commit itself afresh to some rules just like the earlier majority did and this without risking *akrasia* and violating rights any more than the latter. This is a point recently made by Elster: if the constitution-makers are themselves subject to standing passion, why should they precommit themselves against the tendency to act on this motive?[121] A related point one could make, finally, is that constitutional rights do only rarely provide stability, as constitutional history demonstrates.[122] Constitutional rights are most of the time essentially contestable concepts which create deep and pervasive disagreement. I will come back to this feature of constitutional rights in the last section, as this is something which alleviates the paradox of constitutional precommitment.

Secondly, another difficulty with the second type of target of constitutional precommitment is that disagreement and instability might well occur, but be beneficial and lead us to improve our conceptions of rights by overturning our initial understanding. Desirable reasonable contestation can arise for two reasons: first, the *world* itself may *change* and because of one's precommitments, 'one may be prevented from making the right choice in unforeseen circumstances'[123] and, secondly, the people themselves may *change their mind* on the justice of the view they had bound themselves to and this for what they would have then seen as valid reasons.[124] Whereas the first point is self-evident, the second one is a difficulty Elster mentions and fails to solve.[125] These potential benefits of reasonable disagreement imply that Elster's fourth condition for a valid precommitment cannot be fulfilled. This condition reads as follows: 'the resistance against carrying out the decision at t1 must be smaller than the resistance that would have been opposed to the carrying out of the decision at t2 had the decision t1 not intervened.'[126] In the political case, indeed, it might in fact be easier to find an agreement or even an agreement on a better conception of a right at a later stage than it was at the time of the precommitment.

ii. Assessing the Risks

There are three crucial questions one may ask at this stage: first, how can we judge that such shifts in opinion are not authentic? Secondly, how can we be sure that they do not take the minority's view sufficiently or even better into account? And, thirdly, how can we establish that they are not based on good reasons? I shall argue that none of these questions can be affirmed or negated *generally* with certainty, thus undermining the general legitimacy of the precommitment model.

[120] Nino, 1996, 184.
[121] Elster, 2000, 173.
[122] Gargarella, 1998b, 69 arguing against Moreso's, 1998a stability-based defence of constitutional precommitments.
[123] Elster, 1991a, 81.
[124] See Schelling, 1984, 104.
[125] Elster, 1984, 110.
[126] Elster, 1984, 44.

The first question is naturally the question of the *authenticity* of the majority's change of mind and disagreement[127]; its reasons must be real ones and not reflect mere self-interest. As Waldron argues, 'upholding another's precommitment may be regarded as a way of respecting her autonomy *only if* a clear line can be drawn between the aberrant mental phenomena the precommitment was supposed to override, on the one hand, and genuine uncertainty, changes of mind, conversions, etc, on the other hand.'[128] In conditions of reasonable disagreement over matters of right, however, it is impossible to draw such a clear line with certainty.[129] Moreover, one may observe that the emergence of new reasons is very likely in a complex collective entity like a democracy.[130] This suggests that a change of opinion and disagreement in the future is more likely to be brought about by reasonable persuasion than it is to be the product of weakness of will or self-interest. This seems to undermine Elster's idea that everyday majority politics are made of logrolling and horse-trading.[131]

The second question examines whether the change of mind does not amount to disrespecting the *minority's rights*. Precommitment and agenda-narrowing will always favour some parties and disfavour others; they are seldom neutral.[132] If precommitment is a source of institutional development, then it will tend to be a strategy available to the more powerful members of a group to protect the status quo.[133] As Elster rightly contends, the majority's exercise of its power to bind the people as a whole amounts primarily to wanting to bind *others* and the minority in particular.[134] As such, it is impossible to state with certainty whether respecting a constitutional constraint protects a minority any more than a revision of the constraint.[135] The third and final question aims at assessing the *substantive validity* of the new reasons. True, the majority in the precommitment may be right and the new majority wrong.[136] However, who is to say that the constitution 'agreed upon' was just and that changing one's mind and thus breaching the constitutional constraint might not be beneficial?[137] This question cannot be answered with certainty[138] and should not therefore be regarded as a decisive criteria in legitimating constitutional precommitments. After all, in many countries majorities have been

[127] See SCHELLING, 1984, chs 3 and 4.
[128] WALDRON, 1994B, 38.
[129] This is also ELSTER's, 1989, 194 point when he says that precommitment cannot be used as a model for the political exclusion of rational beliefs for lack of canonical rules on what is a rational belief and hence, I assume, change of belief.
[130] See WALDRON, 1999C on the 'wisdom of the multitude' in Aristotle's political writings. See Chapters 4 and 7.
[131] ELSTER, 1988, 6.
[132] See SCHELLING, 1984, 104 . See even HOLMES, 1988B, 51, 56.
[133] KNIGHT, 1992, 131, note 5.
[134] See ELSTER, 2000, ix, 277.
[135] BOHMAN, 1996, 50. See for a similar argument GARGARELLA, 1998B, 67.
[136] See FREEMAN, 1990B, 353–54.
[137] See also OFFE, 1989, 745 who talks about 'volle Selbstbehinderung an "*falschen*" Bewegungen' (emphasis added).
[138] See ELSTER, 1984, 108 ff.

the ones supporting liberal constitutions; as such, their opposition to the rights of minorities cannot therefore be simply assumed.[139]

It follows from the indeterminacy of those three questions that precommitment can only be justified ex post facto[140]; we cannot justify an ex ante constitutional limitation of democratic procedures merely on the ground that democracy is *sometimes* protected against itself or even strengthened when we remove issues from its sphere of decision.[141] *To the ambiguity of disagreement, then, corresponds the ambiguity of strategic self-censorship and self-binding.* It seems unwise, therefore, to make precommitments immune from revision or at least difficult to revise,[142] and as such to resort to such precommitments *tout court*. To borrow Waldron's words:

> we are not entitled to secure stability at the cost of silencing dissent or disenfranchising those who express it. And we should not use the ideas of constitutional caution or constitutional commitment as a way of precluding effective deliberation on a matter on which the citizens are still developing and debating their various views.[143]

Although it might be beneficial for *democratic stability* to prevent disagreement and correlative instability from taking place, democracy is also about deliberation and it is thus enhanced by disagreement. As Holmes warns elsewhere, 'democracy is not only made possible but also made imperfect by a systematic thinning out of the issues under majority control.'[144] It flows from all this that the precommitment model relies too much on the *immutability and identity of political and moral beliefs*. It does not pay sufficient heed to the dynamic and recursive qualities of democracy through which people may acquire more commitments, but through which they also reasonably contest and want to revise other dominating ones, often for good reasons.[145] As Bohman rightly states, 'the belief in the finality of constitutional essentials simply ignores their constant dialogical respecification and renegotiation in all currently existing forms of democracy.'[146] Mill already opposed perpetual contracts and in particular perpetual marriage for the same reasons; such vows do not only infringe human capacity to change, but also *human ability to learn.*[147]

Thus, albeit the main point of precommitment is not to undermine and deny any relevance to deliberation and spontaneity, the latter are threatened by it in practice. Elster concedes that 'a strategy for reducing the undesirable consequences of spontaneity may also reduce the overall amount of spontaneity.'[148] The devices

[139] See Waldron, 1999a, 271.
[140] Bohman, 1995, 255.
[141] Nino, 1996, 39–40.
[142] Bohman, 1996, 50.
[143] Waldron, 1999a, 306.
[144] Holmes, 1988b, 56.
[145] See Unger, 1996, 168–69.
[146] Bohman, 1996, 49.
[147] Mill, 1962, V, xi, 11. See also Locke, 1999, 73; Kant, 1991, 57.
[148] Elster, 1984, 41.

for coping with impulsiveness may end up as *prisons.*[149] Elster even acknowledges that 'if one deliberately restricts the feasible set, one also runs the risk that the preferences that initially were the reason for the restriction ultimately come to be shaped by it, in the sense that they would have been different had they not been so restricted.'[150] There is a slippery slope between committing to *suicide prevention* and committing to a *suicide pact*[151]: 'to prevent the constitution from becoming a suicide pact, it should contain clauses allowing for emergency powers.'[152] This is a point Adorno makes, though in a more radical way; for him, precommitment to avoid self-destruction leads itself in the end to human self-denial and self-destruction.[153] It follows therefore that there is place for a certain amount of *paternalism against the people's self-paternalism.*[154] A similar point can be deduced from Schelling's contentions on the legal impossibility to bind oneself unless in relation to others[155]; even if I can promise myself never to smoke a cigarette, I can legally release myself from that promise whenever I choose to smoke. It seems to follow, then, that if no individual can precommit herself at law, it would a fortiori imply that the law itself could not be the object of the people's precommitment. If the law aims at protecting people against themselves, how could the law-maker escape its own rule?

iii. The Paradox of Constitutional Precommitment

In conclusion, precommitments are *neither democratic nor undemocratic*; in practice, they may as often as not *limit* rather than *enable* or *protect* democratic discussion and progress.[156] This is what seems to be the irreducible *paradox* of constitutional precommitment[157] and one of the major drawbacks in accepting too readily the precommitment model. Precommitting oneself to liberal or democratic rights, indeed, appears somehow self-defeating; it amounts to entrenching, with one hand, the guarantee of free moral judgement and free public opposition, that is entailed by both liberal and democratic rights, while taking away the same right, with the other hand, by protecting this guarantee against future moral judgement and future public dissent![158]

Elster now recognises the *dilemma between rigidity and stability*. He still argues, however, that the stabilising effect of constitutional constraints is arguably their

[149] Ainslie, 1984.
[150] Elster, 1983, 115.
[151] Elster, 2000, 174.
[152] Elster, 2000, 279.
[153] Adorno, 1966, 292; 1997, 55–56, 68. See also MacCormick, 1993b, 143.
[154] Offe, 1989, 750.
[155] Schelling, 1984, 103. Even if one understands precommitment as a specially strong form of mutual cooperation or promise, the issue of paternalism remains; the law of contract has developed different means to free people from impetuous or unreflected engagements.
[156] Bohman, 1995, 255.
[157] It should not be confused with Elster's own 'paradox of democracy' that was discussed before: Elster, 1984, 93.
[158] This point echoes Waldron's, 1999a, 222–23 argument against the constitutional entrenchment of rights that implies distrusting the very same abilities one is actually entrenching.

most important aspect and that it provides a justification for the seemingly arbitrary procedure of allowing a small majority in the constituent assembly to adopt a document that can be changed only by a substantially larger majority. He also acknowledges, however, that this procedure is not justified in all cases[159] and that 'safety-valve clauses' and 'escape hatches' ought to be established against second-order abuses of precommitment. No satisfactory solution to this paradox is to be found, however, in carving exceptions into a precommitment. The point, indeed, is that it would be very difficult and would even undermine the whole ratio of precommitment if one wanted to distinguish between disagreements which lead to undesirable instability and erroneous changes, on the one hand, and reasonable disagreements that are called for and would lead to positive changes in our conceptions of rights and justice, on the other; it would require us to get into the very kind of pervasive and persistent contestation over what is the right conception of our rights that the constitutional precommitment was meant to avoid.

Elster has recently realised this point. He acknowledges that safety-valve clauses interfere with the impact of the constitution on the first-order problems precommitment was meant to solve. According to him, 'if the framers try to prevent the constitution from becoming a suicide pact, it may lose its efficacy as a suicide prevention device.'[160] He therefore concludes that 'one might well decide against adopting'[161] those correctives to the rigidity of the precommitment model. However, by firmly holding to his original claim that constitutional constraints should be understood as precommitments, Elster undermines, I believe, his whole project of saving his model by nuancing it to make it more acceptable.[162] A much more sensible solution, for which I shall argue in the last section, would be to reject the *general* application of the precommitment model to constitutional constraints, while maybe allowing some amount of constitutional entrenchment *in some cases*, rather than to maintain the general model while undermining it by qualifying it in too many ways, on the one hand, and by then disassociating from those nuances, on the other.[163]

5. The Implementation of the Precommitment: Ulysses' Crew Qua External Enforcer versus the People

A fourth issue is raised by the condition according to which the enforcement of the precommitted decision should be the fact of an *external* authority. In Elster's

[159] Elster, 2000, 155.
[160] Elster, 2000, 174.
[161] Elster, 2000, 167.
[162] For a similar critique of Elster's account of constitutional precommitment, see Marti Marmol, 2001, 179.
[163] Other softer and complementary means of remedying *akrasia* than constitutional precommitment may be envisaged and in particular the constraints of the moral principle of legal coherence or integrity; the advantage of such means is that they do not entirely evict the possibility of a new collective decision on the matter, but add a normative element to the balance. See Chapter 11.

account, indeed, a further criterion for precommitment is that 'the effect of carrying out the decision at t1 must be to set up some *causal process in the external world*.'[164] This excludes purely internal strategies such as decisions to decide or other private side bets.[165] In case of democratic precommitments, however, it is difficult to see, with the exception of some international organisations or instruments,[166] which authority external to society could be delegated some of the powers of society and the sovereign people.[167] As Elster himself concedes, 'the analogy between individual and political self-binding is severely limited. An individual can bind himself to certain actions, or at least make deviations from them more costly and hence less likely, by having recourse to a legal framework that is external to and independent of himself.'[168] If the sovereign people precommits itself, however, it can always undo its ties if it wants to.[169] Besides, as Bohman puts it, 'given that non-tyranny requires that citizens be the enforcers of their own commitments, the original problem simply repeats itself in cases of conflict with those who find the original agreement unacceptable.'[170]

The difficulty, therefore, is to understand how so many constitutions come to acquire the mysterious binding force they have. There are, it seems, two cumulative senses in which constitutional provisions can be said to be binding through an external source. First of all, one answer to the paradox may lie in constraints that are external to some of the institutions set up by the people to act in their name, even though they are not external to the people as a whole. Political precommitments usually call for adjudication and judicial interpretation and thus are, for obvious reasons, placed *outside* the political system proper—even though the final control is sometimes retained by legislative authorities.[171] As Waldron rightly states, 'even though the constraints are not external to that framework, they are in the relevant sense external to the particular agencies in which "the will of the people" is embodied for purposes of ordinary political decision.'[172]

Secondly, another reason for the binding nature of constitutional entrenchments based on some external authority could flow from the latter's *original foundation* itself. This argument has been put forward most famously by Holmes. In this account, constitutional constraints that set enduring institutions and mechanisms of collective action are *constitutive of a political community*; they make the political

[164] Elster, 1984, 42.
[165] Elster, 1984, 43.
[166] One may think, for instance, of the European Convention on Human Rights as a democratic precommitment of the people of the different member states (see MacCormick, 1993b, 143), although no longer in the United Kingdom where 'rights were brought home' by the Human Rights Act in 1998 (see Ewing, 1999, 80).
[167] Past majorities and new ones are part of the same sovereign entity, as it is understood in this chapter, and cannot therefore be understood as constitutive of a form of 'hetero-paternalism,' contra Nino, 1996, 184.
[168] Elster, 1984, 42. See also Knight, 1992, 131.
[169] Elster, 1984, 42. See Waldron, 1999a, 260; Rawls, 1993, 234–35.
[170] Bohman, 1996, 49.
[171] Elster, 1988, 4.
[172] Waldron, 1999a, 261.

practice possible for the first time[173] and as such they are external to the system at least at first. According to Elster, the solution lies in the special status of the *constituent assembly* that lays down the ground rules to be followed by all later generations, that sets the conditions in which they might be amended, or even that entrusts certain powers of decision to the judiciary branch. It is distinct from the ordinary political electorate, since it only gathers once, at the very beginning and then loses its specific authority in favour of the constitutional text. As Elster puts it:

> the constituent assembly has a unique and privileged character, not by right but by historical accident. In exceptional and unpredictable historical situations, representativity of persons and legitimacy of voting methods are decided on the spot; the drastic breach with the past leaves the assembly free to bind the future.[174]

Of course, the possibility of constitutional amendment then raises the issue of the legitimacy of the amending authority. If the '*politique politisante*' and the '*pouvoir constituant*' are to be distinguished from the '*politique politisée*' and the '*pouvoir constitué,*' then it is difficult to understand where the amending power fits and where it get its legitimacy from.[175] Some call it the 'pouvoir constituant derivé' and consider that its amending power cannot logically derive wholly from the constitution since it can change the constitution, but that it stems from the people's sovereignty itself. The democratic legitimacy of a liberal constitution lies, in other words, in its own liability to revision.

Elster has a further very interesting argument about the binding force of the constitution. Whereas his first argument was a *positive* one, this argument is *negative*: the original constitution retains its binding force as long as there are no legitimate alternatives. According to Elster, 'the implication of this analysis is that later generations have no obligation to feel bound by their predecessors, but neither do they have any legitimate right to bind their successors. The constitution remains legitimate only because *all alternatives lack legitimacy*; it is a focal point in Schelling's sense[176] or a "bright line" in the sense of Ainslie.'[177] He then adds:

> if, say, in the constituent assembly 70 per cent voted for a required majority of two-thirds to change the constitution, whereas today 60 per cent are for a required simple majority only, this is not a legitimate basis for change.[178]

The problem with such an account of constitutive constitutional rights that is based on the lack of legitimate alternatives, however, is that it aims at founding

[173] Holmes, 1995, 163–64.
[174] Elster, 1984, 94.
[175] See Elster, 1984, 94 on the infinite regress between '*pouvoir constituant*' and '*pouvoir constitué*'.
[176] See Schelling, 1963, 112.
[177] Elster, 1984, 95.
[178] Elster, 1984, 95.

itself on a constitutive coordination convention[179] in cases of *partial conflict coordination problems*; such coordination problems are cases of substantive disagreement over what is the right solution, but where there is some convergence on the need to coordinate our efforts on one of the debated solutions. The need for coordination in such cases, however, does not necessarily support the further step of entrenching those conventions against all future amendments. All it does is make one rule salient and hence constitutive of a coordination convention. Thus, unless the parties also coordinate on making this rule entrenched, nothing prevents another rule from becoming sufficiently salient in the future for another coordination convention to take place or at least a new majority from changing the rule. Salience is neither necessarily intergenerational nor irrefutable; what matters for salience, indeed, is not the salience *to* the earlier majority, but the salience to the new one whatever composition it has—unless, of course, salience itself is constitutionally defined and entrenched. I shall come back to this distinction between constitutive coordination conventions and constitutional precommitments in the next section.

6. The Operation of the Precommitment: Keeping Someone Tied versus Judging Rights-Violations

Finally, one may wonder whether the traditional *devices* for individual precommitment apply that easily to the constitutional model.[180] The main issue to be raised is the looseness of the *causal link* between the precommitment decision and the precommitted one, when the latter is a matter of judgement rather than a decision the content of which has already been decided upon, such as keeping Ulysses tied to the mast instead of letting him dive into the sea and swim to the sirens. In Elster's account, one of the criteria of precommitment is indeed that 'the effect of carrying out the decision at t1 must be to set up some *causal process* in the external world.'[181] If precommitment amounts to setting up a causal process in the external world, this excludes, for example, *decisions to (let others) decide*. Although such decisions can be external in the sense that they rely on other people's judgements, they are not causally related to the precommitting agent's will, because they are not entirely under her control.

In the case of abstract constitutional rights, the application of precommitments will always be a matter of *judgement*, be it the legislature's or the judiciary's; abstract rights do not apply on their own and any decision of application will have to interpret them. Rights are mostly abstract normative and contestable concepts the role of which is precisely to create disagreement and prevent any conception from being

[179] I am not using the term 'convention' as in Elster, 2000, 273, but in a Humean sense as in Chapter 6. See Hampton, 1997 for a recent Humean interpretation of constitutional conventions.
[180] Elster, 2000, ix.
[181] Elster, 1984, 42.

settled once and for all.[182] Moreover, when a *group* of people must decide on issues of rights, they will usually reasonably disagree about those issues in a very similar way to the people disagreeing at the time of the precommitment. In Waldron's own terms, 'in most constitutional cases, opinions differ among the citizens as to whether the legislation in question is the sort of thing they wanted (or would or should have wanted) in a founding moment to pre-empt.'[183] Thus, not only will the judges and legislators disagree about the content of the entrenched rights, but they will also know that the founders disagreed before them.[184] If this is sometimes recognised as an advantage and democratic corrective of otherwise rigid entrenchments, it also shows that entrenched rights cannot really be seen as clear and causal precommitments once and for ever. According to Waldron, 'the arrangement amounts to a deliberate decision by various agents, not to constrain themselves by mechanical means as in Ulysses' case, but to have themselves constrained by others' judgement.'[185] Because for there to be a precommitment, some options must be *excluded*,[186] the second condition set by Elster for precommitments is not fulfilled. This condition reads: 'if the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.'[187]

Albeit allowing for flexibility, therefore, this kind of non-causal self-binding creates the risk of enabling the agent who exercises the precommitted functions to exercise her judgement in a way that does not represent the intentions of the precommitting agent. In those circumstances, then, and to borrow Waldron's words, 'the *act* of precommitment may be autonomous; but its *operation* may be something less than a consummation of the agent's autonomy inasmuch as it is subject to the judgement of another.'[188] It follows, therefore, that precommitment is nothing more than a 'form of submission'[189] to the judgement of another agent. Thus, if the idea of precommitment is to preserve its aura of autonomy and democracy, the person bound, ie the people in our case, must retain the authority of the point and extent of her or their being bound.[190] Of course, if one asks the people when disagreement already rages, then there is nothing one can do but make one's own decision about the violation of a right. Debates about original intent in constitutional interpretation are a sufficient proof that it is usually impossible to establish what the founders or a collective legislature intended to say, even minimally, except by reference to the words they chose to use to express

[182] See Chapters 3 and 12.
[183] Waldron, 1999a, 268.
[184] Waldron, 1999a, 268.
[185] Waldron, 1999a, 263. See also Bohman, 1996, 49.
[186] Elster, 1984, 42.
[187] Elster, 1984, 42.
[188] Waldron, 1999a, 262. See for a similar argument, Bayon, 1998, 54.
[189] Waldron, 1999a, 265.
[190] Waldron, 1999a, 265.

it, that is to say their minimal semantic intention.[191] At that stage, then, one should stop justifying this decision by calling it a consummation of the people's precommitment and autonomy, thus undermining the basic function and need of precommitment.

Once what the people have committed themselves to becomes controversial, then there is no longer any basis in the idea of precommitment for defending a particular interpretation against democratic objections.[192] Even if this interpretation is the people's itself, there is not much in the precommitment that will not be questionable and hence revised; one way or the other, indeed, interpretations of fundamental rights will be overridden, be it by the people or the judiciary. It follows therefore that interpretations and judgements in matters of constitutional rights can hardly be causally related to the autonomous decision of a majority of the people in the first place, thus undermining the precommitment modellisation of that decision and the democratic credentials of constitutional entrenchment.

7. Implications for the Precommitment Model of Constitutional Rights

I hope to have established by now how limited the precommitment conception of constitutional constraints happens to be. As Waldron rightly summarises:

> the idea of a people binding itself against certain legislative acts in the future is problematic in cases where members *disagree* with one another about the need for such bonds, or if they agree on the need but disagree about their content. It is even more problematic where, on *highly contestable issues like rights*, these disagreements can be expected to *persist* and change in unpredictable ways.[193]

One could add to this list of grievances, moreover, that these disagreements may not only be the outcome of a weakness of individual wills, but may be very *reasonable*, thus maybe improving our global understanding of the issue provided revising constitutional rights is possible. The difficulty is made even more acute

[191] I am assuming here that a precommitment's meaning is to be deduced from the terms used, rather than from further intentions. If there is an intention to be traced back, it is the minimal semantic intention, that is to say the intention to express what the terms used usually express according to the language conventions of the time. There is, in conditions of reasonable disagreement, no theoretical justification, when interpreting statutes, for referring to the legislature's intentions apart from the minimal common intention to enact legislation and hence to express the majority's views in the enacted legal text. This is precisely what legislation in conditions of reasonable disagreement amounts to: legislation must be something that multitudes of individuals must be able to access and understand without re-opening those very disagreements that gave rise to the need for legislation in the first place. See, albeit for different reasons, Raz, 1996a; Kavanagh, 2002. See also on the minimal justification of Dworkin's 'moral reading' of the constitution, Eisgruber, 2005; Greenberg/Litman, 1998.

[192] Waldron, 1999a, 266.

[193] Waldron, 1999a, 269–70 (emphasis added).

when one thinks of a people tying its own hands *without any external control,* thus allowing itself to untie its own hands at a later stage. And it is even worse when the form of precommitment chosen is to assign the *future decision*, procedurally to another *multimember* body, whose members *disagree* just as much as the people who committed themselves in the first place. In those circumstances, we cannot fully accept the *general* logic of precommitment in matters of rights and should leave it as much as possible to the members of the society to work out their differences over rights in each case, improve their understandings and change their minds in the collective decision-making process.

This does not mean, however, that democrats should not be concerned with the fate of individual rights under majority rule. As Waldron rightly claims, most rights are associated with democracy in the sense that they require the same respect for individuals as democracy does.[194] It is from this commonality of value of constitutional rights and democracy that Waldron derives his *rights-based argument* against the constitutional entrenchment of rights *qua* lack of respect for the autonomy and self-determination of the rights-bearers. However, the reverse is also true, according to Waldron; some rights are directly implicated in the democratic ideal. In this sense, not only does the recognition of rights imply the respect for the rights-bearers' self-determination and hence for democracy over constitutional entrenchment,[195] but democracy itself implies the recognition of the rights which guarantee the principles and values that underpin democracy's fundamental working rules.[196] So, while the first dimension of the relationship undermines a purely substantive approach to legitimacy, and support for absolute constitutional constraints on democracy along the lines of the absolute precommitment model rejected here, the second dimension of the relationship between rights and democracy prima facie requires proponents of a purely proceduralist approach to legitimacy to nuance the *democracy-based argument* against the constitutional entrenchment of rights and the absolute rejection of rights-based constraints and precommitments on the democratic process.[197]

IV. A COUNTEROBJECTION: THE CONSTITUTIONALISATION OF DEMOCRACY

The rights-dependent nature of democracy explains why some authors have used it as a powerful counterobjection to the democratic critique of the precommitment model of constitutional constraints that has just been presented. I shall now turn to this counterobjection and in particular to the idea that not only does precommitment ensure a *democratisation of constitutionalism*, but

[194] Waldron, 1999a, 282–83.
[195] See Waldron, 1999a, 223.
[196] See even Waldron, 1999a, 282–83.
[197] See Chapter 7 on the legitimacy of procedural legitimacy in general.

that a *minimal constitutionalisation of democracy* itself is needed. According to this objection, precommitment is not only a democratic democracy-disabling means and as such a mode of democratisation of constitutionalism, but it is sometimes also *democracy-enabling* or even *democracy-constitutive.*[198] To assess this counterobjection, I will, first, outline its content, then discuss its limitations and, finally, draw different implications for the general validity of the constitutional precommitment model.

1. Democracy-enabling and Democracy-constitutive Precommitment

Whereas the main argument under review in this chapter holds that the idea of a majority binding itself to entrenched constitutional rights is best understood as a form of precommitment and constraint on democratic decision-making, another related argument goes further and argues that this kind of precommitment cannot only be seen as a constraint of democracy: it is in fact at the core of any valid conception of democracy. In this account, part of what constitutional framers do is to construct an enduring set of institutions and principles which can embody future democratic decision procedures and mechanisms of collective action. As such, some constitutional constraints, and in particular basic procedural rules and democratic rights, have an important *constitutive and empowering function*: without them there could be no further democratic decisions. This argument echoes Elster's 'constraint theory' and the proposition that sometimes *less is more.*[199] It has also been developed most famously in the constitutional context by Holmes:

> Constitutions may be usefully compared to the rules of a game and even to the rules of grammar. While *regulative* rules govern pre-existent activities, *constitutive* rules make a practice possible for the first time . . . Constitutions do not merely limit power; they can create and organize power as well as give it direction . . . When a constituent assembly establishes a decision procedure, rather than restricting a pre-existent will, it actually creates a framework in which the nation can for the first time, have a will.[200]

Holmes further contends that constitutive constraints, such as minimal democratic rights, are necessary for political decision-making to be truly *democratic.*[201] The same

[198] The *additional* rather than merely *alternative* nature of the democracy-enabling dimension of precommitment is something Holmes, 1988a and 1995 seems to have overlooked; even if constitutional precommitments are democracy-enabling, they can only fulfil their function by being democracy-disabling in the first place, ie by preventing the democratic process from revising and thus undermining its own prerequisites.

[199] Elster, 2000, 1. See also Elster, 1988, 9; Holmes, 1988a. See Schumpeter, 1946, 146: 'Autos mit Bremsen schneller fahren als sie es sonst täten, *weil* sie mit Bremsen versehen sind.' See also most recently Eisgruber, 2001; Eisgruber, 2005.

[200] Holmes, 1995, 163–64.

[201] Holmes, 1995, 171.

argument has been made by MacCormick. According to him, constitutionalism is a *prerequisite for democracy.*[202] Holmes argues, therefore, that constraints on majority rule adopted in the past can actually also expand the powers of present majorities in certain ways. They are 'instruments of government' which help organize the process of deliberation and decision-making.[203] This is not so much because of that majority's decision's superior quality, as in the prior section, but because *not all decisions can be taken at once*. According to Holmes, indeed:

> it is meaningless to speak about popular government apart from some sort of legal framework which enables the electorate to have a coherent will. For this reason, democratic citizens require cooperation from regime-founding forefathers. Formulated somewhat facetiously: without tying their own hands, the people will have no hands. *Decisions are made on the basis of pre-decisions.*[204]

Others go further and regard constitutional rights and democracy as *co-original* and interdependent. They need not therefore commit on which of rights or democracy come first and choose rights as preconditions of democracy like other theorists. According to them, rights and democracy rely on each other to emerge. This idea may be found in Offe's interpretation of Habermas' discourse ethics which he names '*ethics of self-binding,*'[205] because it regulates a procedure of self-commitment.[206] This precommitted procedure does not aim at constraining decisions, but merely guarantees minimal basic rights and institutions which are constitutive of, but also 'co-original'[207] with the democratic process.[208] It follows, according to Habermas, that if basic rights are *constitutive* of the democratic process, they cannot at the same time *constrain* it in a non-legitimate way[209]; there cannot be any public autonomy without sufficient private autonomy and vice versa[210]:

> These alternatives [to give priority to human rights or to give it to popular sovereignty] contradict a strong intuition. The idea of human rights that is spelled out in basic rights may neither be imposed on the sovereign lawgiver as a limitation nor be merely instrumentalized as functional requisite for legislative purposes. In a certain way, we consider both principles as equally original. One is not possible without the other, but neither sets limits on the other.[211]

[202] MacCormick, 1993b, 145.
[203] Holmes, 1995, 272. See also Holmes, 1995, xii.
[204] Holmes, 1988a, 231 (emphasis added).
[205] Offe, 1989, 755.
[206] See Habermas, 1985, 160. See Offe, 1989, 745.
[207] See Habermas, 1998a, 155, 135. See Chapter 7 for a more detailed discussion of co-originality.
[208] Offe, 1989, 745. Co-originality goes both ways and means that just as democracy cannot be constituted without constitutional rights, the latter cannot be constituted undemocratically and then constrain the democratic process. It is in this sense that it differs, prima facie at least, from Dworkin's, 1995b, 17 and 1998 partnership conception of democracy whose substantive underpinnings imply constitutional rights' constraints.
[209] Habermas, 1998a, 162; Habermas, 2001a, 770.
[210] See Habermas, 2001a, 767.
[211] Habermas, 2001a, 767.

Although the idea of co-originality seems prima facie very convincing, it does not, after reflection, provide the dilemma with a different answer to other authors' contentions about the constitutive nature of democratic rights.[212] On Habermas' account, basic rights are constitutive of democracy and should therefore be entrenched before we can even talk of a democracy. The reverse is not true, however; the democratic procedures of self-government Habermas has in mind when referring to the co-originality of rights and democracy, rely on a heavily substantive conception of equality and on strong liberties. These rights and principles do not, however, depend on a democratic acknowledgement to be legitimate. Habermas somehow presumes, therefore, what he is trying to establish through co-originality.[213]

The more general argument for enabling constitutional precommitments on the grounds that some rights are constitutive of democracy is at first sight very appealing. It is true that not all constitutional constraints are properly thought of as mere limits to majority-based changes of basic rights. Some of them, and in particular political procedures, are better thought of also as forms without which majority rule or even democracy could not exist[214]; one may think of the right to vote or the right to political equality, for instance, or, in the case of deliberative democracy,[215] the right to free political speech and the right to assemble.[216] Those principles and rights are the product of decisions made in order to constrain, but also to constitute and enable future democratic decision-making. Not only would democracy not exist in the first place without those constitutive constraints, but their constraining nature prevents democracy from being undermined through a simple majority decision later on.

2. A Few Limitations: Constitutive Predecision versus Constitutional Precommitment

Despite the prima facie intuitive power of this argument, I shall argue that its basis remains obscure. First of all, contrary to what Holmes seems to hold, not all constitutional constraints are constitutive ones without which democracy would lack its basic preconditions. Secondly, there are, it seems to me, two additional difficulties with this argument: first, situations where an amendment of constitutive rights would improve our understanding of democracy, and thus be *truly enabling*, cannot always be distinguished from others, and, secondly, not all constitutive rights are necessarily to be *entrenched*.

[212] See Chapter 7.
[213] See on this point Habermas, 2003 for a recent acknowledgement.
[214] Elster, 1988, 3.
[215] See Sunstein, 1999, 147 ff; Sunstein, 1993b, ch 5; Habermas, 1998a, ch 3; Cohen, 1989, 1996; Benhabib, 1996a.
[216] See Elster, 1998b, 97 on deliberation and constitution-making. Not only may deliberation be part of the process of adopting a constitution, but it might be a *constitutive rule* of that democratic process, since deliberative democracy may be one of the goals of the framers.

First of all, it is unclear why a past majority would be in a better position to establish the right decision procedure and other constitutive rights in a truly enabling way. If this is so, why cannot the present and more legitimate majority decide everything? Why should it take the risk to be badly empowered, when it could empower itself in a much better way? The risk of persistent reasonable disagreement about democratic prerequisites is often overlooked by their proponents[217]; democrats disagree fiercely about what rights are prerequisites for democratic deliberation, but also about what their actual content should be.[218] These issues remain the subject of *healthy and benign disagreement* in our relatively stable societies that does not usually threaten the rights of the minority or any preconditions of the democratic order. Thus, the constitutive nature of some constitutional rights does not rebut any of the arguments presented earlier in this chapter against the precommitment model of their entrenchment[219]; constitutional restrictions may prevent people from deciding future conflicts in the fairest and most egalitarian way, that is, by majoritarian decision. Such precommitments can therefore often be illegitimate attempts by a majority circumstantial in the past to dominate future majorities.[220] Even if a revision of constitutive rights were to lead to wrong results, it is true prima facie that it would be better if it was the deed of a majority of the contemporary voting population rather than of an earlier majority or even of a group of judges. In those cases, constitutional constraints cease to be enabling and become stifling, to borrow Elster's expression.[221]

But is there not something question-begging or circular in stressing that the people ought to be allowed to decide on its own political arrangements by using the coordination procedure it happens to have been working with so far? No, since democracy is in part about democracy, just as politics is also in part about the boundaries of the political, as Arendt famously reminds us. To borrow Holmes' and Sunstein's expression, 'the rules of the game cannot be clearly distinguished from the content of the game.'[222] Of course, it is true that majority rule cannot exist without first *establishing* a procedure that makes certain decisions authoritative. There is, however, no need to *entrench* that procedure without first questioning the authority of the majority of the time to decide what is best.[223] As Nino puts it:

> if one believed that the procedure established in the constitution was right, one would celebrate the fact that no simple majority could reform it. Similarly, if one believed it to be wrong, one would regret the inability of the majority to reform it.[224]

[217] For instance, GUTMANN/THOMPSON, 1996 whose constitution of deliberative democracy, ie three basic principles, cannot be freely deliberated over since their elimination is not an option of the deliberation. See also SUNSTEIN, 1999, 147–48 who emphasises disagreement over liberty and opportunity, but downplays the kind of disagreement there could be about what he regards as constitutional rights constitutive of deliberative democracy.

[218] See even MACCORMICK, 1993B, 143.

[219] WALDRON, 1999A, 285; WALDRON, 1994B, 39.

[220] NINO, 1996, 40.

[221] ELSTER, 2000, 280.

[222] HOLMES/SUNSTEIN, 1997, 288.

[223] NINO, 1996, 184.

[224] NINO, 1996, 184.

Secondly, even if one concedes the importance of constitutive predecisions on procedural rules and rights for our collective political practice, it is important not to confuse constitutive procedural 'predecisions' with constitutional 'precommitments.' The fact that predecisions or original decisions on decision procedures are necessary for democracy to function, does not necessarily already imply precommitment on those predecisions. If one recalls Elster's definition, precommitments refer to cases where an agent carries out a certain decision at time t1 in order to decrease the probability that he will carry out *another decision* of the same kind at time t2. Thus, they imply the future existence of another decision on the very same issue. By contrast, predecisions decide on something in advance or on a way to do something rather than on a way to decide on the same issue again. For instance, constitutive procedural rules are predecisions about the way decisions will have to be taken; there are rules which determine when elections are to be held, how electoral districts are to be drawn, etc. The people who take these decisions do not fear that future decisions on the same issue will not reflect the content of that decision, as in an ordinary precommitment. Thus, they do not aim at increasing the probability of any future decision on the issue of the decision-making procedure. All they want is to frame a type of decision-making procedure in order to facilitate and enable future decisions on other issues. This argument has been made most forcefully by Waldron.[225]

The idea of constitutive predecision is analogous to the idea of *coordination convention* that allows for cooperation on a single rule despite disagreement on which rule ought to be followed in partial conflict coordination problems. At some point, in a political community, coordination is needed on the institutions and procedures which are constitutive of democratic decision-making.[226] It follows, then, that the salience of a single procedural rule in case of partial conflict over the procedural issue is often constitutive of a coordinative practice and convention. This may not be the best or the fairest solution, but it is more convenient for everyone to respect this convention, than to risk its disappearance, in light of the difficulty in re-establishing communication that would result if each person pursued her own idea of the appropriate response. However, there is nothing in the coordination model which requires constitutional entrenchment and precommitment rather than the mere assurance of future convergence on legal rules and rights. In a sense, it is true, coordination conventions constitute the earlier stage that is needed for any further shared precommitment at the collective level, but precommitment is not implied in a coordination convention *per se*. As Bohman rightly contends:

> if constitutions are meant to be precommitment devices, they are rather badly designed for that purpose. It is better to see them as providing ordinary commitments of planning and its constraints on future action than as establishing irrevocable

[225] Waldron, 1999a, 276–77. See also Chapter 6 on the n-levels of coordination and their complex imbrication.

[226] Mouffe, 2000, 113.

> decisions. Just as the plans of individual agents help them coordinate their many desires and goals as new situations and contingencies arise, constitutions embody future-oriented intentions, plans and norms that help to coordinate the open-ended joint activity of deliberation.[227]

Of course, in case of *intense instability*, the need may arise to establish constitutional precommitments over procedural rules and democratic rights, as a precaution against their hasty and destructive alteration in the political process. The mere existence of a legal rule as a salient point of coordination might not constitute sufficient *assurance* in some cases that the parties will cooperate on that rule and only amend it for a better rule. An ill-motivated majority might use majority rule to disable majority rule in the future. This argument comes very close to Bayon's argument for a notion of majority rule and democracy that is 'closed to change' and not self-embracing; according to him, indeed, the contrary would lead to a *contradictio in adjecto* since it would amount to allowing the self-annulation of the ideal of democracy in cases where the majority so wishes. In that account, therefore, in order, on the one hand, to avoid an infinite regress of legitimating procedures, as well as, on the other, to avoid jeopardising minimal conditions of democracy through a totally open notion of democracy, we should adopt *basic democratic decision procedures* and thus accept minimal constitutional constraints on basic democratic procedures.[228] Bayon refers to this as a *weak form of constitutionalism*, according to which the only legitimate constitutional limits to majority rule are constitutive elements of democracy and majority rule itself.[229]

3. Implications for the Precommitment Model of Constitutional Rights

It follows, therefore, that the democracy-enabling counterobjection cannot be regarded as a conclusive justification for the entrenchment of all constitutional rights, nor even all constitutive constitutional rights. There are some limited cases in which the entrenchment of constitutive democratic rights and rules is required, however. The ambiguity that seems to be emerging again here corresponds to the very *paradox of precommitment* that I mentioned before. As Nino argues, if preconditions of democracy, without which there could be no democracy at all, have to be entrenched and taken off the democratic agenda where they could risk being dispensed with, this creates the danger of removing most questions from the process in which our conceptions can be improved and given their democratic legitimacy and credentials.[230]

[227] Bohman, 1996, 50 (emphasis added). See also Bratman, 1999b, 12.
[228] Bayon, 1998, 57 ff.
[229] Bayon, 1998, 55.
[230] Nino, 1996, 222.

Of course, one may reply that constitution-makers could deliberate about what different constitutional rights mean, thus making up for some of the deliberation one could wish for.[231] The drawback, however, is again very serious, since constitution-makers could not contemplate dispensing with those rights altogether. If democratic constitutive rights have to be guaranteed and entrenched in order for that decision to be regarded as democratic, then any participant in the deliberative constitution-making process could only argue against them by engaging in a performative contradiction.[232] As Michelman rightly argues, it is hard for the proceduralist theorist to account for the democratic quality of a process of will-formation in a context that still has to produce, as its outcome, the very legal standard, namely the constitution, by which anything, including processes of will-formation, can be called democratic.[233] The choice lies, therefore, between giving priority to certain constitutive rights over democracy (soft substantivism), on the one hand, and giving priority to democracy over any kind of rights and even the constitutive rights whose existence and preconditionality is acknowledged (soft proceduralism), on the other.[234] This very dilemma precludes, it seems, any sharp advice as to the desirability of entrenchment. What I shall suggest, therefore, is a model in which different *levels of entrenchment* could be foreseen for different *rights and rules* depending on whether they are constitutive or not and whether the rigidity risk is worth taking depending on the stability of the political system.

V. THE PRECOMMITMENT MODEL *REVISITED*

It flows from the previous considerations that there is, in the case of some constitutive democratic rules and rights at least, a paradox of precommitment and that all one can do is proceed with *caution*. I would like to suggest, therefore, that one should avoid, on the one hand, making the procedure for the reform of constitutional rights the same as for ordinary legislation (the so-called 'Westminster model') and, on the other, adopting for all or even some of them a very rigid procedure of amendment on the model of the American Constitution or some unamendable dispositions of the German Constitution[235] (the so-called 'dualist constitutional model')[236]. It does not make sense to offer a blueprint here, but what I propose is a model of *weak constitutionalism* between those two extremes, where *different levels of constitutional entrenchment* are foreseen for *different rules, principles and rights*.

[231] See MacCormick, 1993b, 143.
[232] Dryzek, 2000, 16.
[233] See Michelman, 1999. See also Ferrara, 2001, 783–84 for a critique of Habermas', 2001a reply to Michelman's critique.
[234] See Chapter 7 for a detailed discussion of the dilemma.
[235] See Bayon, 1998 for the same distinction. My revised model of constitutional precommitment and entrenchment parts, however, from Bayon, 1998, 58 ff who holds that a core of minimal democratic rights should still be made *absolutely unamendable*, while the rest remains open to change through *simple majority decision*.
[236] See Ackerman, 1991.

In this section, I will, first of all, briefly present the different tiers or degrees of entrenchment corresponding to the rights and principles to be entrenched. Secondly, I will assess a few of the correctives of the potential negative consequences of constitutional rigidity.

1. The Different Levels of Entrenchment Model

In this section, I suggest that we adopt a multitiered system of amendability in which different rights get the different levels of entrenchment they deserve.[237] I shall propose that these different *levels of entrenchment* for different *rights and rules* should depend on whether they are constitutive of democracy or not and, in the latter case, whether the rigidity risk is worth taking in some circumstances of intense instability. Under 'a variable levels of entrenchment' approach, most of the constitution would be easily amendable and, in those cases, the precommitment paradox would not occur. Some provisions, however, could only be changed under stricter conditions such as a qualified majority. I shall now present the different rights to be entrenched, and then the different levels of entrenchment I believe should correspond to these rights.

a. The Different Rights Entrenched

Despite the risk of oversimplification,[238] I suggest that three sets of constitutional constraints be distinguished: *constitutive institutional and procedural rules*, such as electoral rules, the majority rule and other secondary or tertiary decision-making rules; *political and democratic rights* that are part of the preconditions of a democratic order, such as political equality, free speech and freedom of association, the right to deliberate and participate, the right to vote or the right to free democratic elections; and, finally, other *substantive socio-economic and civil rights* that are not as strictly related to the functioning of democracy, such as the right to religious freedom. These distinctions are crucial, since all constitutional constraints do not have the facilitating and enabling character of constitutive rules of procedure, which have to be entrenched in some cases, nor the function of democratic rights and preconditions which also have to be entrenched for democracy to function. This differentiated system also has the merit of accounting for Holmes' and Bayon's judicious argument about enabling and constitutive procedural and democratic rules whose function may be threatened in circumstances of intense instability. It also allows, however, for the improvement of our conceptions of more substantive rights and hence for the possibility of progress through reasonable disagreement about fundamental rights.

[237] On a three-tiered system of amendability for Eastern European constitutions, see HOLMES/SUNSTEIN, 1997, 296.

[238] Procedural and substantive rights, as well as political and civil rights, often overlap, of course.

The distinction between *precommitment on results* and *precommitment on procedure* corresponds to a more general shift toward procedural justice that has taken place in the past ten years, where the substantive constitutional constraints on majority rule are progressively replaced by procedural control. In this context, one may understand the purpose of entrenched constitutions as protecting democratic procedures from bias and distortion through the guarantee of *political rights*, while the laying-down of substantive principles and *socio-economic* and *civil rights* remains the task of the legislature and of legislative rights.[239] Of course, this distinction is somewhat artificial. In a broad sense, indeed, *all rights are associated with democracy*. As Waldron rightly argues, all rights require the same sort of respect for individuals as democracy requires.[240] As such, it is difficult to draw a clear line between constitutive or democracy-associated rights and other more substantive rights. In a sense, therefore, the concern a democrat ought to have for rights also extends to the substantive rights that are not directly related to the democratic process, thus potentially leading to the indiscriminate entrenchment of all types of rights.

Although one may concede all this, there remains a sense in which democratic rights and constitutive procedural rules are *more directly relevant to the operation of the democratic process*. As such, this process will be more directly threatened if these constitutive rights are violated than if more substantive ones are. When procedures are at issue, outcomes need not be simply because rights related to both procedures and outcomes have the same underlying value.[241] What is at stake here is not the equal concern and respect which underlies all fundamental rights, but, in line with a more functionalist approach, those rights which are directly involved in the operation of democratic procedures. As Habermas rightly states:

> because the classical liberties are not primarily intended to foster the qualification for political citizenship, liberal rights, unlike political rights, cannot be justified by the argument that they make democracy possible.[242]

b. The Different Tiers of Entrenchment

Provided these are the different rights we should work with, what should be the *corresponding levels of entrenchment*? It is important to distinguish between two main tiers of entrenchment: first, fundamental civil and non-political rights and secondly, constitutive procedural rules and democratic rights.

i. Fundamental Civil and Non-political Rights

Strict constitutional precommitment and entrenchment of fundamental civil and non-political rights is counterdemocratic and will block any progress in

[239] See for the same view applied to judicial review, ELY, 1980.
[240] WALDRON, 1999A, 284–85. See DWORKIN, 1995B, 17 and 1998, 453 ff.
[241] See FABRE, 2000B, 97 note 39.
[242] HABERMAS, 2001A, 771.

our future understanding of rights. These rights should therefore remain easily amendable through flexible supra-legislative processes. The same applies to socio-economic rights. Of course, amendments might be counterproductive and even wrong, but the total uncertainty in those matters should prevent any ex ante legitimation on substantive terms of constitutional precommitments on issues of rights; the risk may well be taken,[243] but it seems too high in circumstances of pervasive reasonable disagreement about justice and the right that characterises the political life of pluralistic societies.

It is interesting to note that my suggestion goes against the usual intuition that stricter conditions of entrenchment are owed to substantive liberal rights than to democratic and political rights and especially than procedural rules.[244] All it implies, however, is that, in conditions of reasonable disagreement about the content of rights, interpretations of the latter should not be cut off from democratic deliberation and change. Of course, if fundamental rights are to play their role as trump of utilitarian considerations and more generally as a yardstick of legislative interpretation, they should be entrenched, even if this is in a very flexible way and hence have recognised priority over ordinary legislation. Nor does the difference in the stringency of entrenchment mean that democratic decisions take priority over fundamental civil rights as these remain constitutionally protected.[245] It does not imply, for instance, that in case of conflict between procedural rights and a substantive right like the right to life, for instance, the former should get automatic priority: the level of formal entrenchment does not constitute a criterion of absolute priority, but only one element in the balance of constitutional rights.[246]

ii. Constitutive Procedural Rules and Democratic Rights

Constitutive procedural rules and democratic rights are a different matter. In both cases, the rules and rights at stake are so intimately connected to the democratic order that leaving them to ordinary legislative revision procedures, which do not necessarily guarantee those standards, could amount in cases of instability to undermining the entire democratic system. I would, however, suggest more stringent amendment conditions in the case of procedural rules than in the latter, because they are not rights and tend therefore to be less controversial.[247]

A flexible entrenchment of constitutive rights with an abstract wording would seem to combine ideally both the paradoxical requirements of flexibility and of stability of the democratic order. The only way we have of making sure that the revisions we achieve are representative and legitimate is by ensuring that they respect the democratic process, thus rendering this requirement a condition of any further process of revision. True, we can never be certain that minorities have good reasons to fear that a legislative rethinking of constitutive procedural rights would be a way

[243] See for a partisan of such risk-taking, Moreso, 1998b, 35, 38–39.
[244] See Christiano, 2000, 535–36; Holmes/Sunstein, 1997, 297. See also Hampton, 1997, 109–10.
[245] Contra: Fabre, 2000b, 97.
[246] See Chapter 12.
[247] See on the same distinction, Ferreres-Comella, 2000, 45.

of silencing them rather than of improving their position. But such destructive decisions can often not be put right when they have been taken,[248] thus asking us to weigh the respective dangers of rigidity with those of flexibility; we cannot wait for the risk of intense instability becoming so important that it is too late to protect democracy against itself. In other words, we cannot let the majority decide in each case who is in the minority and what the latter's rights are. There may well be cases where the authenticity and the legitimacy of the popular desire for revision of basic constitutive elements are undubitable. Experience teaches us, however, that such moments are not paradigmatic of democratic government in the long run[249]; it is important, therefore, that when the need for change is felt, we make sure *in advance* that all are heard. The same point has been made by Benhabib:

> The deliberative theory of democracy transcends the traditional opposition of majoritarian politics vs. liberal guarantees of basic rights and liberties to the extent that the normative conditions of discourses, like basic rights and liberties, are to be viewed as *rules of the game that can be contested within the game but only insofar as one first accepts to abide by them and play the game at all.* . . . One cannot challenge the specific interpretation of basic rights and liberties in a democracy without taking these absolutely seriously.[250]

In fact, sufficient convergence and coordination may be ensured on constitutive rules that are necessary for the operation of democracy, thus allowing for quasi-unanimity to be gained on the necessity to precommit on those rights and rules. In order to make sense, the precommitting agreement on democratic rights and principles must be unanimous, otherwise it would be circular and would succumb to the democratic objection. As I argued before, minimal constitutive rules and democratic rights, whose most evident justification is equality-based,[251] are often less controversial than more substantive civil rights. People, who might one day be in the minority, are likely to converge on minimal minority rights that are meant to ensure the fairness of the decision-making procedure in all cases. This makes a precommitment sound more plausible both at the beginning and at the moment of constitutional interpretation and implementation. All it requires after all is an agreement on a way of agreeing or what I have referred to as convergence on the need to converge; if one refers to the social contract tradition, such unanimous *reflexive agreements* tend, indeed, to be more plausible than substantive agreements.[252] Precommitment would therefore belong to some form of *economy of constitutional*

[248] See Elster, 1988, 9.

[249] By contrast to this experience-based approach, Waldron's, 1999a approach goes from *stark realism* and often open *pessimism*, on the one hand, to *unrestricted idealism*, on the other. This can be seen, for instance, if one contrasts his approach to the prospects of constitutional agreement or to the reasons to coordinate to avoid anarchy, on the one hand, with his trust in majoritarian democracy or in representative democracy, on the other. While it is true that the benefits of the latter were for long neglected, it is dangerous to forget some of their inbuilt dangers. See Chapter 10.

[250] Benhabib, 1996a, 80 (emphasis added).

[251] See Waldron, 1999a and Singer, 1972. See Chapter 7.

[252] See Wintgens, 2001, 275. See Chapter 6.

disagreement[253] in which we try to settle in advance what we know we will disagree about time and again, and most of the time with dangerous consequences whose foreseeability is too high to be risked.[254]

In short, then, the benefits of the democracy-enabling function of precommitment outweigh, in the limited cases of constitutive democratic rights, the shortcomings of its democracy-disabling function; if what is at stake is the destruction of the democratic process, then constraining it is a tolerable option. In this sense, this weak form of constitutionalism can be regarded as both democratically chosen and democratically required; the need for a minimal constitutionalisation of democracy leads therefore to the strongest form of the argument based on the democratisation of constitutionalism.

2. A Few Built-in Correctives

a. General

Faced with this multitiered entrenchment model, one may wonder how the entrenched constitutive procedural and democratic rights, but also other minimally entrenched rights, may still be flexible enough for democratic change and substantive improvement. To pre-empt such democratic objections, one may suggest different *correctives* that make the revisited and tempered constitutionalism model even more democratic. Regarding some minimal constitutional rights as precommitments and then providing for correctives may seem at first sight normatively counterintuitive. Constitutional precommitment is indeed meant to avoid precisely this kind of weighing and exception-carving. The situation is different here, however. It follows, indeed, from my main argument against the constitutional precommitment model in general that those correctives have become the rule, as it were.

Elster mentions the possibility of suspending the constitution.[255] Such a *suspension*, however, is limited to cases of emergency when an amendment would be too time-consuming. Moreover, emergencies that suspend constitutional rights may be used to abolish the constitution and the very idea of precommitment it was meant to be an exception to. As such, it is a corrective used only exceptionally and it hence has little relevance for my purpose. Other correctives are less exceptional and already built into the entrenchment system proposed here: first, *flexible amendability* of all constitutional constraints; secondly, the use of *essentially contestable concepts* in constitutional norms; and, thirdly, the *people's final competence* in the interpretation and application of those norms and, in particular, different

[253] See GUTMANN/THOMPSON, 1996.
[254] On this idea of constitutional entrenchment as a compromise between the risks of rigidity and those of self-referentiality, see MACCORMICK, 1993B, 143.
[255] ELSTER, 2000, 174.

modes of *checks and balances* over the main precommitment agents, ie the courts. These different correctives are connected in their decreasing degree of generality: first, we should try to ensure general amendability of all entrenched clauses and at all levels of entrenchment; secondly, these flexibly entrenched clauses should when possible be general and entail essentially contestable concepts to ensure constant deliberation and renewed interpretations; and, finally, these new eminently judicial interpretations should be submitted to a democratic control, thus closing the precommitment circle.

b. Flexible Amendability

A way of ensuring sufficient flexibility to revision and improvement despite constitutional entrenchment resides in the possibility of relaxing conditions for *constitutional amendment at all the different levels of entrenchment* that were distinguished earlier. Usually, conditions for such amendments are stringent and make any effort to change the constitutional conception difficult and slow.[256] In fact, this very procedural difficulty is precisely constitutive of the nature of constitutional constraints. What I would like to suggest here is that, without totally conflating constitutional and legislative amendment procedures, in cases where the entrenchment conditions have to be stricter than in the ordinary legislative case, we should experiment with flexible approaches of constitutional constraints and foresee neither unamendable constitutional constraints as in the German Constitution nor rigid forms of entrenchment which render constitutional revisions almost impossible in practice.[257] Revisions should be made easier, although not as much as legislative amendments, and this whether they are total revisions or merely piecemeal ones.

By analogy to an argument which has been made about the necessity to loosen the conditions for constitutional amendments in Eastern European countries where constitutional debates have only just started, one may say that, as long as matters of right remain reasonably contestable and that this form of disagreement does not threaten the existence of the state and democracy, leaving the development of constitutional conceptions to lighter procedures of amendability may be the best solution. This would enable necessary but legally channelled readjustments to swiftly changing circumstances and reasonable disagreement. This progressive politicisation of constitution-making should not be feared, however; it is the result of a need for *public legitimacy.*[258] Certainty and stability cannot be produced by constitutional rigidity, since in most cases, the more difficult it is to amend a constitution, the less confidence and trust in officials' accountability there will be. As Holmes and Sunstein rightly emphasise, 'attempts to depoliticize

[256] I intentionally leave aside the issue of whether the procedure is dominated by the ordinary parliamentary assembly, or whether a popular referendum is also called for.

[257] For instance, the Swiss Constitution does not entail unamendable clauses, but is quite rigid, since it requires a double majority of people and cantons in a referendum to be revised. The last total revision took no less than 30 years!

[258] See Holmes/Sunstein, 1997, 288.

or juridify constitution making are unreasonable in societies where the future is so open and the choices so basic and so large.'[259] This quasi-politicisation of constitution-making and amending is particularly important in contemporary pluralistic societies where, on the one hand, the constituency is constantly changing due to immigration and globalisation more generally and, on the other, where political issues gain in complexity every day. The costs of binding precommitment generally increase as the future becomes more uncertain, because the flexibility lost through precommitment becomes more valuable.[260]

The flexibility of constitutional essentials and their eased amendability enable the people to remain in touch with its own governance, thus revising constitutive principles when necessary. Moreover, this openness and flexibility of the constitutional amendment process also encourages an active *dialogue between constitutional and legislative assemblies*. While a minimal constitutionalisation of democracy is necessary, that constitutionalisation should be as democratic as possible and hence be based on dialogue and debate. Such a dialogue is made possible by a division of labour within the legislative power itself, but also by the lack of exhaustivity of the constitutional delegation to constitutional assemblies. The flexibility of constitutional entrenchment thus allows both for the enhancement of disagreement through the possibility of democratic revision further down the line and for the channelling of disagreement through preventing it from getting out of control. This relationship of constitutional cooperation enhances democratic deliberation both within each institution and among institutions, instead of preventing the next institution from figuring out constitutional rights in a newer context or, worse, of leaving it entirely to that institution to do so. Legislative and constitutional assemblies are thus inescapably connected by the text of the constitution, albeit in way of deliberative continuity or integrity rather than of absolute authority.[261]

c. Essentially Contestable Concepts

Even in an easily amendable multitiered scheme of entrenchment, where different rights are given different levels of entrenchment, some apprehension may remain as to some of the negative aspects of entrenchment, and in particular *verbal rigidity*. In Waldron's terms, indeed, 'a legal right that finds protection in a bill of rights finds it under the auspices of some canonical form of words in which the provisions of the charter are enunciated.'[262] Of course, all legal terms are canonical, and this is part of the legal contribution to social and political coordination,[263] but the difficulty is enhanced with constitutional concepts since they cannot be as easily amended as other legal concepts.

[259] Holmes/Sunstein, 1997, 306. Contra: Pogge, 2002, 153 ff who defends constitutional entrenchment in the context of fledgling democracies in transition.
[260] Cowen, 1991, 363.
[261] See Chapter 11.
[262] Waldron, 1999a, 220.
[263] See Chapter 6.

The most common mode of entrenchment of fundamental rights, however, is through abstract terms which do not give away more than abstract normative concepts, the conceptions of which are still to be worked out. In fact, concepts, such as freedom, equality or democracy, are properly called *essentially contestable concepts* in the sense that their conceptions are contestable across the board and are therefore in search of contestation and fresh moral judgement in each case.[264] Those concepts can be shared and minimally agreed over without full agreement in judgement on a complete conception. Mouffe speaks of a 'conflictual consensus'[265]; we can agree on the importance of entrenching the guarantee of 'liberty and equality for all,' while disagreeing sharply about their meaning and the way those rights should then be implemented.[266]

This approach to entrenched constitutional rights is similar to Sunstein's idea of *incompletely theorised agreement*. These agreements leave it to further debates to flesh out the entrenched rights, but gather sufficient minimal agreement at a non-completely theorised level for the entrenchment to take place.[267] The idea is to precommit oneself minimally for there still to be unanimity at the stage of precommitment and for the rest to rely on future reasonable disagreements and deliberations. Benhabib rightly claims that 'in a constitutional democracy the question as to which aspects of the higher law are entrenched against revision by the people as opposed to which aspects may be repealed is itself always open and contestable.'[268] Indeed, 'democratic debate is like a ball game where there is no umpire to interpret the rules of the game and their application definitively. Rather, in the game of democracy the rules of the game no less than their interpretation and even the position of the umpire are essentially contestable.'[269] In fact, much constitution-making in human history has been possible only because of this phenomenon, at least when it comes to the description of basic rights. This is a point Benhabib makes when she says that:

> basic human civil and political rights, as guaranteed by the Bill of Rights to the US Constitution and as embodied in the constitution of most democratic governments, are never really 'off the agenda' of public discussion and debate. They are simply *constitutive* and *regulative institutional norms of debate* that cannot be transformed or abrogated by simple majority decisions. The language of keeping these rights 'off the agenda' mischaracterizes the nature of democratic debate in our kinds of societies: although we cannot change these *rights* without extremely elaborate political and juridical procedures, we are always disputing *their meaning, their extent and their jurisdiction.*[270]

In fact, once the idea of democracy-enabling constitutional precommitment is accepted, it follows that abstract constitutional concepts should be used in constitu-

[264] See Chapter 3.
[265] Mouffe, 2000, 103.
[266] Mouffe, 2000, 113–14.
[267] See Sunstein, 1999, 128 ff. See Chapter 5.
[268] Benhabib, 1996a, 80.
[269] Benhabib, 1996a, 79–80.
[270] Benhabib, 1996a, 79 (emphasis added).

tional norms. To allow for the benefits of disagreement and debate, and the emergence of better conceptions of fundamental concepts, the use of such abstract concepts is indeed recommendable when entrenching rights. It leaves it to each generation's disagreements to flesh out its rights according to its own moral judgement, thus allowing the constitution to preserve its majoritarian, albeit precommitted, character through time.[271] Each generation reappropriates and re-authorises, as it were, its constitutional rights and principles through re-iterating and transforming them in their contestations,[272] be it in the judiciary or the legislature. This is also what one may refer to as a *constitutional narrative*[273] or a *constitutional iteration*. According to Habermas, this dynamic and historic conception of the constitution can be understood in the long run as a *self-correcting learning process.*[274]

As Arendt argues, respect for a constitution does not mean treating it as being beyond change, but treating it as an *object of change.*[275] This matches Dworkin's argument for the 'moral reading' of the constitution, according to which constitutional texts invoke abstract moral concepts and principles whose meaning calls for fresh moral judgements by all its interpreters.[276] The democratic justification of constitutional precommitment actually provides the moral reading with a democratic justification.[277] This approach to constitutional flexibility is ever recognised in certain constitutional regimes. In Switzerland, for instance, so-called '*Verfassungswandel*', ie changes in the constitution, may be officially acknowledged by judges when the meaning of a constitutional provision has altered with time. Similar mechanisms also known as those of 'living constitutions' may be found in Canada and elsewhere.[278]

Of course, if contestable concepts are used in this way, everything seems to be 'up for grabs' after all. In fact, one may wonder why constitutional rights should be entrenched in the first place and why one should speak of constitutional precommitment at all, even in the proposed multitiered model of entrenchment. First of all, although the meaning and conceptions of rights will be subject to discussion at each point in time, entrenchment guarantees the difficulty to revise the fundamental *concepts* themselves and to start all over again every time there is a disagreement.[279] It emphasises the difference, therefore, between disagreement

[271] See FERRERES-COMELLA, 2000, 50, 68.

[272] See DERRIDA, 1988 on linguistic iterations. See also HONIG, 1991 and HONIG, 1997 on the democratic iterations of our legal and political principles. See also BENHABIB, 2004.

[273] See MÜLLER, 2002.

[274] HABERMAS, 2001A, 774.

[275] See also PREUSS, 1999, 421 on the idea of '*Wandelverfassung*' or constitution of change in Europe.

[276] DWORKIN, 1995B, 2.

[277] DWORKIN, 1995B, 2. See EISGRUBER, 2005 on the lack of democratic justification of constitutional entrenchment in Dworkin's account of the moral reading and constitutionalism more generally.

[278] See eg KAVANAGH, 2003B; SAGER, 1990.

[279] FERRERES-COMELLA, 2000, 52. Despite its advantages, therefore, the essential contestability of constitutional concepts is not the key to the complete reconciliation of constitutionalism with democracy and to the paradox of precommitment through recursive deliberative validation. As such, I think that Benhabib, Habermas and other deliberative democrats are too optimistic about the extent of reconceptualisation there could be through the contestation of contestable concepts and provisional substantive principles within a constitutional framework. See eg HABERMAS, 1984, I, 8–42; HABERMAS, 2001A, 775; BENHABIB, 1990; BENHABIB, 1996A, 80; GUTMANN/THOMPSON, 1996, 4 and 11–51; GUTMANN/THOMPSON, 2000B; BOHMAN, 1996.

over the content of rights and disagreement about their legitimacy and recognition in the first place. Entrenched rights provide an *intermediate level of agreement* at the stage of general guarantees of human rights[280]; once this is achieved, it is easier to get to the further and deeper levels of disagreement implied by the specific realisation of these rights. Secondly, entrenchment of the mere idea of rights suffices to instil into legislative politics the consciousness that there are *limits* on what we may do to each other for the sake of the common good.[281] Finally, entrenchment also guarantees the fact that those basic concepts and rights will have to be at least interpreted and argued over, thus constituting a form of *agreement to disagree*.[282] As Habermas puts it, 'the unifying bond consists of the *shared practice* to which we have recourse when we endeavour to arrive at a rational understanding of the text of the constitution. . . . The performative meaning of this practice is simply spelled out in the words of the constitution.'[283] As Waldron contends, albeit in the context of a critique of entrenchment:

> we do not agree on many things in our society, but perhaps we can agree on this: that we are a better society for continuing to argue about certain issues than we would be if such arguments were artificially or stipulatively concluded.[284]

d. The People's Last Word in Constitutional Interpretation

Even if one chooses contestable concepts for our constitutional constraints and allows for flexible amendments of those constraints at all levels of entrenchment, there is an additional corrective one needs in order to avoid the final competence of constitutional interpretation of our constitutional concepts entirely escaping the control of the people in favour of another final authority, such as courts. In this chapter, I assumed that the separation of powers, a system of checks and balances and a system of judicial control and interpretation of constitutional rights, or in other words the *justiciability* of constitutional rights, are necessary in a liberal constitutional state and can be reconciled with democratic authority. It is important, however, to ensure a *balanced dialogue between the judiciary and the legislature* in the context of constitutional interpretation, on the model of the dialogue I hinted at earlier between the constituent assembly and the legislature.

Institutional, and constitutional cooperation in particular, are the key to legitimate law-making in circumstances of disagreement, where competent authorities should always be reminded of competing opinions and perspectives. This is what Montesquieu has in mind when he argues for the separation of

[280] See Raz, 1997b. See also Raz, 2004c, 13–14.
[281] See Waldron, 1999a, 307.
[282] Thus, for instance, art. 124 of the French Constitution of 1793 provided that the Constitution would be engraved on tables at the Assembly and in the public squares of the nation. The idea was thus to promote public deliberation.
[283] Habermas, 2001a, 775.
[284] Waldron, 1994a, 539–40.

powers[285] as a mode of expression of our disagreements and hence of dialogue among conflicting points of view.[286] It is through this *friction among powers* and *institutional conflict*[287] indeed that disagreement can both be brought to fruition while also being kept in check.[288] Contrary to what Hobbes holds of the destructive nature of the separation of powers,[289] the latter not only stimulates conflict, but can also place it under the institutions' mutual control. In other words, the minimal constitutional entrenchment of democratic rights and the limited judicial interpretation and control of these constitutional rights contribute to protecting the democratic conditions and framework in which disagreement can flourish from democratic self-destruction. Conflict therefore contributes to the productive tension that characterises a legitimate exercise of the separation of powers *qua* combination of division of labour and checks and balances.

Even if a limited amount of constitutional entrenchment is regarded as necessary for further democratic deliberation to take place and hence as democratically legitimate, the necessity of democratic dialogue and tension speaks against *constitutional* or *judicial review* and the ultimate judicial competence of interpretation.[290] Paradoxically, then, the democratic justification of constitutional entrenchment and hence of the moral reading of the constitution play against the very constitutional institution that is usually taken to go hand in hand with them.[291] In reply to the democratic objection, it is sometimes said that what justifies constitutional constraints is that it would be inappropriate for the representatives of the people to be 'judge in their own case' (*nemo judex in sua causa*) when determining whether or

[285] See MONTESQUIEU, 1989, Bk 19, ch 27.

[286] See MÜLLER, 2002 and MÜLLER, 2005 for this interpretation of Montesquieu.

[287] The separation of powers is taken in a broad sense to mean the soft and flexible separation *of functions* rather than the pure separation of powers or institutions themselves. This is also what Montesquieu has in mind rather than the illusionary independence of the three powers and the myth of the absolute separation of powers. See BARENDT, 1995; ALTHUSSER, 2003, 98 ff, 102–3 who refers to the *liaison* or *mutual moderation of powers*.

[288] See on the benefits of the friction among powers or functions, BARENDT, 1995; BARBER, 2001, 60. See also on the American separation of powers, *Myers United States,* 272 US 52, 293 (1926): the purpose of separation of powers 'was not to avoid frictions, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.' See CALABRESI/RHODES, 1992, 1156 on the separation of powers as 'institutionalising conflict.'

[289] See HOBBES, 1999, ch 19, 130, 228, 225.

[290] See eg BAYON, 1998 and GARGARELLA, 1998B.

[291] Dworkin's constitutional jurisprudence is a 'house of many rooms' which can accommodate diverse accounts of constitutionalism: see EISGRUBER, 2005 who rightly argues that Dworkin owes us a democracy-enabling theory of constitutional entrenchment that can belie the democratic democracy-disabling arguments of originalists, but who does not see, however, that the consequences of the democratic justification of constitutional entrenchment in Dworkin's account of the moral reading undermines the latter's justification of judicial review. It is crucial to disentangle the institutional knot surrounding constitutions and distinguish between constitutional entrenchment, constitutional moral reading and constitutional review; all three need not be given in all accounts of constitutional jurisprudence.

not a piece of legislation violates the rights of a minority.[292] If the people precommits itself in regard of some constitutive democratic rights, then it would seem to beg the question to assign to the majority of the people decisions about the nature and limits of majority decision-making. All this is true. What is not, however, is what many constitutional lawyers believe accordingly, which is that judicial review is the best way to allow the judges to cast themselves in the role of external 'guardian of the constitution.'[293]

The point indeed is that if we understand democratic constraints as precommitments, even flexible ones, the person who precommits herself retains her *authority* on what she has precommitted herself to. Although they have precommitted themselves not to be judges in their own case again in the future, citizens, in their full autonomy, are the ones to be asked in case their instructions are unclear and have to be interpreted. Since matters of right will usually be the object of persistent reasonable disagreement through the entire population, either judges decide *in their own case* and *without instructions* on the basis of their own authority and this goes beyond precommitment, or they do ask the people about its instructions and this amounts to the people interpreting the meaning of its own precommitment. One way or the other, actual or anticipated interpretations of fundamental rights will be overridden and it is more legitimate if this is the making of the people.[294]

What one could suggest, therefore, is a *limited model of judicial interpretation* where the judiciary plays its interpretive role of checks and balances, but where the final interpretive competence in case of deep theoretical issues shifts back to the legislature, thus keeping disagreement alive and the tension among institutions productive. This is a solution Elster himself has been proposing of late.[295] Various versions of this control exist in European liberal societies.[296] In some countries, the judges do not have the power of judicial review, but merely the power to ask the people or the parliament in its authority to reconsider the compatibility between a legislative act and its constitutional precommitments and perhaps to launch a partial revision of the constitution, as in Switzerland. This is also the solution the UK Human Rights Act 1998(HRA) has chosen in authorising judges to scrutinise and

[292] Scope precludes considering other arguments for or against judicial review, such as Waldron's, 1999a rights-based argument against judicial review and Kavanagh's, 2003a rights-instrumentalist argument for judicial review, and I will concentrate on the democratic argument in this chapter. Let me say, however, that, despite their legitimacy, minimal rights-instrumentalism and even rights-based rights-instrumentalism cannot apply to the justification of political and democratic rights, whose primary function lies in the settlement of disagreement over the very rights one aims at using to justify political rights. See Chapter 7 for a similar argument against instrumental and epistemic justifications of procedural legitimacy and democratic rights in particular.

[293] See Ferreres-Comella, 2000.

[294] See Waldron, 1999a, 293–94.

[295] Elster, 2000, 165.

[296] One may think, for instance, of the possibility given by the Hungarian Constitution to a supermajority in the parliament to *reinstate* a law deemed unconstitutional by judicial review. Another way to circumvent the democratic objection to the entrenchment of constitutional rights is the inclusion of an *override clause* as in s. 33 of the Canadian Charter of Rights.

declare legislation to be incompatible with protected conventional rights, but not to invalidate it[297]; the judges have no choice but to apply the offending legislation to the case in front of them.[298] Of course, the people might trust judges more than the legislature and it might be the case that ignoring a *judicial declaration of incompatibility* is impossible, thus undermining the margin of appreciation of the legislature.[299] It is, however, up to the democratic process to determine what its response should be in all cases.[300] It has actually been suggested that constitutional entrenchment of rights and the adoption of the UK Human Rights Act in 1998 has clarified and strengthened the role of parliament in human rights matters and constrained possibilities of future judicial activism.[301] Some have even foreseen the possibility of encouragement of a constitutional partnership between courts and parliament.[302]

CONCLUSION

In this chapter, I tried to argue that the approach that conceives of constitutionally entrenched rights as democratic precommitments fails by not taking reasonable disagreement about rights and the recursive qualities of democracy seriously enough. Of course, other arguments may be brought forward in favour of rigid constitutional entrenchment, but I concentrated in this chapter on the democratic argument for the latter, because it is the strongest in the now classic opposition between constitutional entrenchment and democracy.

The constitutional precommitment analogy derives from personal ethics. It does not, however, apply perfectly to multimembered and pluralistic bodies like parliaments or constituent assemblies. I started by claiming that the idea of a people binding itself against certain legislative acts in the future is problematic in cases where people *disagree* with one another about the need for such bonds, or if they agree on the need for them but disagree about their content. It is even more problematic where, on *highly contestable issues like rights*, these disagreements can be expected to *persist* and change in unpredictable ways. Moreover, these disagreements may not only be the outcome of a weakness of individual wills, but may be entirely *reasonable*, thus perhaps improving our global understanding of the issue, if left unconstrained. The difficulty is made even more acute when one

297 *Human Rights Act 1998* (UK) c. 42.

298 Of course, s. 6 of the HRA, and the duty to interpret legislation in conformity with the HRA it establishes, have already given rise to doubts as to the extent of the competence given to courts in the matter and as to the difference between constitutionally conform interpretation and judicial law-making. See eg CAMPBELL, 1999, 23 ff and KAVANAGH, 2004. Hence the importance of ultimate democratic control over judicial constitutional interpretation.

299 See EWING, 1999, 99.

300 Contra: WALDRON, 2001c, 7 does not seem to find this distinction among final constitutional authorities sufficient for the judicial control and interpretation of constitutionally entrenched rights not to amount to judicial review.

301 See FREDMAN, 2000 on this point.

302 See CAMPBELL, 1999, 24 ff.

thinks of a people tying its own hands *without any external control,* thus allowing itself to untie its own hands at a later stage. And it is even worse when the form of precommitment chosen is to assign the *future decision* procedurally to another *multimember* body, such as for instance a judicial body, whose members *disagree* just as much as the people who committed themselves in the first place. Finally, I claimed that this democratic argument for constitutional entrenchment risks constraining too much future democratic deliberation and change.

I then argued that the counterobjection based on the *democracy-enabling* and *democracy-constitutive* function of constitutional precommitment, as opposed to the main argument for a democratically established *democracy-disabling* device, has important limitations. It does not, in particular, justify more than a coordinative 'predecision' on constitutive rules and by all means not necessarily an entrenched one. However, I conceded that this counterobjection justifies the limited entrenchment of some constitutive democratic and procedural rights in circumstances of intense instability where ordinary legislative amendments could too easily annihilate those rights. This type of precommitment is part of what I named an *economy of constitutional disagreement* where actual reasonable disagreement can be settled in a way that takes precedence over future reasonable disagreement, when the latter is likely to have dangerous consequences for democracy and the respect of minorities' rights. This concession leads, however, I claimed, to what one may call the *paradox of precommitment*; if preconditions for democracy, without which there could be no democracy at all, have to be entrenched and taken off the democratic agenda where they risk being dispensed with, this creates the danger of removing central questions from the process in which our conceptions can be improved and given their democratic legitimacy and credentials.

Faced with this dilemma, I sketched a model of *weak constitutionalism* that allows for *differentiated degrees of entrenchment for different rights*, depending on whether they are more or less constitutive of the democratic system; on this model, civil and socio-economic rights would be easily amendable albeit not as easily as ordinary legislation, whereas democratic rights and constitutive procedural rules would be more firmly entrenched, although not as firmly as in most contemporary European constitutions. This model enables us to limit cases of precommitment to those where we think it will definitely have stabilising consequences, rather than allow for broad-scope precommitments and then have to justify exceptions to them that undermine the whole purpose of precommitting ourselves in the first place. Moreover, this *revisited model of constitutional precommitment* presents the advantage of reconciling the best it can the two tiers of the constitutionalism paradox; when the *minimal need for the constitutionalisation of democracy* is acknowledged, the argument based on the *democratisation of constitutionalism* that is at the origins of the constitutional precommitment model is made stronger.

Correctives for the rigidity implied in this system, despite its differentiated tiers of entrenchment, can be found within the system itself. First of all, I argued

for flexible conditions of amendability of all constitutional constraints in each respective tier of the differentiated system of entrenchment. They guarantee a continuous dialogue between constitutional and legislative assemblies instead of pre-empting it by entrenching rigid norms. I also argued, secondly, for the flexibility implied in using *essentially contestable concepts* as constitutional constraints. The entrenchment of such concepts allows for a minimal conceptual stability and continuity, while also encouraging a constant questioning and new interpretations of our constitutional rights. Thirdly, I offered a *limited model of judicial interpretation* as opposed to *judicial review*, according to which the people retains the final control over constitutional rights' interpretation. I also argued for a limited system of *checks and balances* on the precommitment checking agents themselves. This in turn implies a complex relationship of dialogue and cooperative partnership among constitutive assemblies, legislative assemblies and courts in the protection of constitutional rights, thus enhancing in the long run the amount and quality of political participation in the realm of rights.

In conclusion, we cannot fully admit the *general* logic of democratic precommitment as a model for the rigid entrenchment of our constitutional rights, except for the minimal and flexible entrenchment of core constitutive democratic rights and rules. We should let the members of a society work out their differences in each case, improve their understanding and change their minds in a collective decision-making process. As Elster says about individual precommitment, 'what is lost, perhaps, is the sense of adventure.' In democratic politics, we cannot afford this loss in spontaneity and potential progress through reasonable disagreement and deliberation. And this so much more so in contemporary pluralistic societies where the constituency is constantly changing and where political issues gain in complexity every day. Although it must be guaranteed a minimal existence through a minimal constitutive entrenchment, democracy must also be given the means of ensuring its own transformation.

10

Participation and the Paradox of Democratic Representation

INTRODUCTION

> The paradox is that representative democracy may help, by its insidious educative power, to sustain and promote a culture that is, in sectors and particulars, more directly democratic, more constitutionally delicate, and more beautifully illustrative of moral indeterminacy than the political system itself; while in the encouragement given to independence of spirit in the twofold sense, it may attain its highest justification.[1]

IF IT IS right that democratic deliberation can be seen as a response to pervasive and persistent reasonable disagreement about justice and hence as a way of legitimating political and legal decisions in conditions of reasonable pluralism,[2] a difficulty remains: who should be deliberating?[3] Theories of deliberative democracy are typically concerned with representatives and not with citizens.[4] The question that arises then is how to make sure our representatives' deliberation can represent our deliberation and how to make sure their disagreement can represent our disagreement? Similarly, when political equality is invoked to justify majority decisions and explain their authority in the face of disagreement,[5] the appeal is to the equality of citizens; it is they who will be bound by decisions they disagree with and who should therefore be able to regard themselves as these decisions' authors. The difficulty is that most of the time majority decisions are not made by those who are subjects to the law, but by their representatives.

An earlier draft of this chapter was delivered in a working group of the IVR World Congress, Lund, August 2003. I would like to thank all participants for their comments and criticism, and in particular Tom Campbell and Vlad Perju. Many thanks to Thomas Pogge for an enlightening discussion on the issue and to Roberto Gargarella for raising my interest in this question in the first place. Last but not least, I want to express all my gratitude to Jose Luis Marti Marmol for his generous comments.

1 KATEB, 1981, 368.

2 See eg DRYZEK, 2000; ELSTER, 1998A; HABERMAS, 1998A; BENHABIB, 1996A; GUTMANN/THOMPSON, 1996; COHEN, 1989; MANIN, 1987. See Chapter 7.

3 See GARGARELLA, 1998A, 274.

4 Of course, ideally, all those subject to a decision should have a say in the decision-making process and hence in deliberation (DRYZEK, 2001, 651; HABERMAS, 1998A), but, in practice, most deliberative democracy theories target forums where all citizens are only rarely present and where representatives are the ones taking decisions (GOODIN, 2000, 82). See PARKINSON, 2003A.

5 See eg WALDRON, 1999A, 114, 165; SINGER, 1972, 32 ff; BESSON, 2003F, 237–40.

There is, in other words, a prima facie problem of *political equality*[6] and *lack of inclusion* contrary to one of the basic tenets of democracy and democratic participation[7]: when representatives are the ones to deliberate and make decisions, not all those affected by these decisions, and who might be in disagreement with them, can take part in the deliberation and in the vote that leads to the final decisions, although these decisions are meant to settle their disagreements.[8] True, as some deliberative democracy theorists have argued, more deliberation in more institutional and non-institutional forums will help constitute a stronger public sphere and hence ensure more implication of the citizenry in their representatives' decisions and hopefully more responsiveness on the part of those representatives as well.[9] It will not, however, elude the present difficulty[10]: what matters here is who takes part in the final deliberation and the final vote,[11] and hence who gets a hearing rather than just a voice.[12] Since all matters are only rarely exhaustively discussed in the public sphere before being transferred for deliberation to representatives[13] or at least highjacked by political parties,[14] it is the legitimacy of representation that should be sought and not only the legitimacy of deliberation itself.[15] Any consideration of

[6] It is *procedural equality* and the equality to participate rather than the equality to vote and elect one's representatives, and hence to consent to power, which is at stake here. See MANIN, 1997, 34–41. See also BEITZ, 1983, 69.

[7] See eg ARISTOTLE, 1988, III, 1275b13–b21, VI, 1317a40–1318a10 and more recently in the context of deliberative democracy, HABERMAS, 1998A and DRYZEK, 2001, 651, 662. I distance myself therefore from the deliberative view according to which the outcome of a *procedure to which all agree* may be regarded as a sufficient *ersatz* to the participation of all to that procedure (see eg MÜLLER, 1992, 155, 158). Even if all agreed to the procedure of representation, as they probably would nowadays, this does not exempt the procedure from respecting basic democratic legitimacy requirements, and in particular from protecting political equality.

[8] I am concentrating in this chapter on legislative or parliamentary representatives, although my argument also applies *mutatis mutandis* to all political representatives, with the exception of judges, of course, who cannot be said to *represent*.

[9] See eg DRYZEK, 2001; MANSBRIDGE, 1999; HABERMAS, 1998A; MÜLLER, 1992, 155 ff; MÜLLER, 1999. See also Chapter 7.

[10] See PARKINSON, 2003A, 190–91.

[11] See GOODIN, 2003B, 1–2. I take GOODIN's, 2003B proposal of 'democratic deliberation within' or 'reflexive democracy' to apply to representatives (see also DRYZEK, 2001).

[12] See GOODIN, 2003B, 178 criticising DRYZEK, 2001; HABERMAS, 1998A; BOHMAN, 1996.

[13] See PHILLIPS, 1995, 43.

[14] See MANIN, 1997, ch 6 on the further level of complexity added to representation by the emergence of political parties. For reasons of clarity, I will not dwell on this issue in detail in this chapter. In short, political parties represent one form of disagreement stimulated by commonly held opinions and perspectives dictated by party membership.

[15] See GARGARELLA, 1998A, 274 on the complementary relationship between deliberation and representation and the absurdity there is to wanting to fix issues of democratic legitimacy through deliberation alone. See also PARKINSON, 2003A, 186. As we will see, deliberation and representation are complementary; although it is important to address the issue of the democratic legitimacy of deliberative representation separately from the legitimacy of deliberation itself, I will argue that the legitimacy of representation requires and in fact nurtures deliberation. See MILL, 1991A, 241–42, 247–48 and more recently URBINATI, 2000 and MANSBRIDGE, 1999 on the necessity to conceive representation as surrounded by deliberation. Of course, some of the underlying assumptions of deliberative democracy *per se* need to be reassessed in the light of the specificities of disagreement and group representation; the very notions of reasonableness and impartiality may indeed already exclude some group perspectives (WILLIAMS, 2000; YOUNG, 1996).

deliberative democracy and of democracy in general is incomplete without consideration of how inclusive deliberation and hence representative structures are.[16]

This is no doubt an old chestnut. The tension between direct participatory and indirect representative democracy has been a recurrent theme in the history of political theory. As Arendt elegantly puts it, 'the question of representation, one of the crucial and most troublesome issues of modern politics ever since the revolutions, actually implies no less than a decision on the very dignity of the political realm itself.'[17] Still, the conditions of widespread and persistent reasonable disagreement about justice which prevail in contemporary politics exacerbate its difficulty.[18] Some authors even contend that disagreement can be adduced against representative institutions and justify the adoption of a purely participatory model of democracy.[19] And while Rousseau's views have for long been disparaged as idealistic and bizarre, a number of thinkers have recently begun to resurrect these views and to challenge the substitutability of representation for direct participatory democracy.[20] This approach is now under revision, however. Representation is not only an inescapable and necessary dimension of contemporary politics and this for pragmatic and prudential reasons related to the size of the polity or to the division of labour. In these conditions, there is in fact no other choice but to let a few representatives deliberate in place of all citizens and let their majoritarian decisions bind everyone. What recent proponents of direct participatory democracy ignore, however, is that representation is also a desirable and justifiable mode of government.[21] It is more than a second-best approximation or substitute for direct democracy or even for democracy *tout court*, as people long said it was.[22] In fact, more and more voices are heard every day in favour of the democratic legitimacy of representation, and not only, as until recently, on the part of neo-Schumpeterian theorists of electoral democracy.[23]

[16] See Saward, 2000a, 10.

[17] Arendt, 1970, 239.

[18] See eg Gargarella, 1998a, 270; Kymlicka, 1995, 129–30.

[19] See eg Rousseau, 1997, III,15. See, however, Wintgens, 2001, 274–76 for a representative reinterpretation of Rousseau.

[20] See eg Barber, 1984, 145–46. See also Hirst, 1990; Pitkin, 1989, 150–51. See Urbinati, 2000; Plotke, 1997, 25–27 on this growing interest in direct participatory democracy as opposed to indirect representative democracy. I refer to 'direct participatory' and 'indirect representative' democracy to quote the use of these terms in this context. As we will see later, however, the indirectness of representative democracy does not lie in the absence of participation, but in the spatio-temporal gap between deliberation and decision.

[21] See eg Young, 1997a; Urbinati, 2000 and 2002; Kateb, 1981; Plotke, 1997.

[22] Representation was not democratic from its origins (Manin, 1997, 1 ff; Manin/Przeworski/Stokes, 1999a, 4; see eg Hobbes, 1999) and is not democratic *per se* (Pennock, 1968). It is important therefore to see whether these 'principles of representative government' which apply unchanged in contemporary democracies (Manin, 1997, 236) can really be regarded as democratic. In what follows, however, I will use 'representation' and 'modes of representation' to refer to democratic representation, unless otherwise stated.

[23] See eg the recent efforts to rehabilitate the democratic legitimacy of representation, in Kateb, 1981; Plotke, 1997, 18; Young, 1997a, 352; Urbinati, 2000 and 2002.

The problem is, however, that a systematic and comprehensive defence of the democratic legitimacy of representation has not yet been provided.[24] Representation cannot simply be associated with the exact 'reflection of the underlying ideal of debate, deliberation and voting among the members'[25] of the polity. This all the more so given all the misgivings democratic representation provokes in our political systems, based on the commonplace view of representation *qua* perverted, purely interested, elitist and over-politicised mode of decision-making.[26] Representatives' failures to take all interests into account and the current breakdown of trust between citizens and their delegates cannot simply be blamed on the incapacity and corruption of the actual representatives in place rather than on representation itself and the ways in which it is currently organised and institutionalised. Besides, demands for more presence of members of minority or disadvantaged groups among representatives become more insistent every day.[27] It is more difficult today in the face of pervasive moral and political conflicts to argue that a few representatives who defend certain fixed interests can determine what is good and right for everyone than it was in the seventeenth century when a relatively more homogeneous public agreed on the distinct existence of a common good[28]; the acknowledgement of increasing social and moral pluralism and the gradual crumbling of collective identities into more idiosyncratic specificities challenges our old representative models.[29] As Mansbridge rightly argues, the more conflicts and disagreements there are, the more the demand for political equality grows within representation mechanisms.[30] Representing the whole society does not yet mean full political equality and inclusion in the modes of representation.[31]

As a result, an argument for the democratic legitimacy of representation and hence of representatives' decisions in the face of reasonable disagreement has

[24] See PITKIN, 1972, 86. See, however, URBINATI, 2000 and 2002; YOUNG, 1997A; PLOTKE, 1997; KATEB, 1981 and 1992, 36–56. I am not concerned in this chapter with other forms of legitimacy of representation than intrinsic democratic legitimacy (see also URBINATI, 2000 and 2002). As such, I will not discuss instrumental and epistemological modes of legitimation of representation in general and of descriptive representation in particular, such as those founded on impartiality, for instance (eg GARGARELLA, 1998A, 261–62; ARENDT, 1968A, 241–42). The inclusion of diversity matters *per se* even if, as Phillips argues, 'it proves to have no discernible consequences for the policies that may be adopted' (PHILLIPS, 1995, 20).

[25] WALDRON, 2002B, 7, note 3; WALDRON, 1993A, 49. See also WALDRON, 1999A and 2002B where the representative issue is only very rarely directly addressed, although it is omnipresent in the background. The only exception is WALDRON's, 2000D article on the disagreement-related importance of the size of legislative assemblies.

[26] I am concentrating in this chapter mainly on the representative system at work in modern Western democracies and in particular in European democracies. See on the contemporary crisis of democracy, MANIN, 1997, ch 6; SETALA, 1996, 40; MÜLLER, 1992, 156 ff.

[27] See eg YOUNG, 1990, 1997; PHILLIPS, 1995; WILLIAMS, 1998; GARGARELLA, 1998A.

[28] See eg BURKE, 1925; HAMILTON, 1961, note 35, 220–21. Contra: GARGARELLA, 1998A, 263–64.

[29] See GARGARELLA, 1998A, 270–71.

[30] See MANSBRIDGE, 1981, 466, 469–70 who argues against KATEB's, 1981 apology of representation.

[31] This is where I think GARGARELLA, 1998A, 262 ff errs, when he argues that Burke and the American Founders shared the idea of 'full representation' with promoters of descriptive representation. The most they shared was the democratic ideal that all those affected should be represented independently of the ways to represent them.

become a missing link in recent 'legisprudential' accounts. Without an argument for the democratic legitimacy of representation, however, these theories of legislation are bound to attract, and have already attracted, critiques of their idealisation of democratic participation.[32] It is crucial therefore, on the one hand, to present arguments for the democratic legitimacy of representation in the context of conflict-ridden conditions of decision-making and, on the other, to suggest institutional reforms of current modes of representation that take reasonable pluralism more seriously.[33] This is what one may refer to as the *challenge of disagreement*. To take up this challenge, the present chapter is structured as follows. First of all, I will present some elements of a plausible conception of democratic representation which constitute the premise for my revised account of representation. The next section will examine the challenge disagreement raises for representation, by first posing the challenge itself and then by presenting one of its most common answers: descriptive group representation. In the third section, I will discuss two counterchallenges one may raise against the challenge of disagreement: the paradox of democratic representation and the counterchallenge of diversity. The fourth section will develop a revised conception of representation that takes both the challenge of disagreement and the two counterchallenges seriously. Finally, in a last section, I will discuss the consequences of this revised account of representation both for the protection of deliberation and political equality in conditions of widespread reasonable disagreement and for the democratic justification of representation itself.

I. THE CONTOURS OF DEMOCRATIC REPRESENTATION

In this section, I would like to present briefly the notion of representation I use as a premise in this chapter as well as its scope, before introducing its five main constitutive elements.

1. Notion and Scope

The idea that democratic decision-making revolves around the deliberation and decision of a few representing the many has now become one of the major creeds in democratic theory. Representation is not only an inescapable and necessary

[32] See eg Eisgruber's, 2002a, 41 ff critique of Waldron's argument against judicial review. See also Kavanagh, 2003a, 470 on the problematic issue of the requirement of participation in Waldron's account.

[33] I lack the space in this chapter to get into the detail of these institutional reforms. See on such attempts, the contributions in Manin/Przeworski/Stokes, 1999a. I assume that it is possible to separate the conceptual and normative meanings of representation from descriptive or empirical ones (Frankena, 1968). See Chapter 3. It is important to remember, however, that other elements of the political system contended might affect the representative practice which is not isolated and hence the implementation of the proposed model of representation. See eg Pitkin, 1972, 239–40 on the importance of the practical test of theoretical models of representation. See also Müller, 1992, 158–59; Pitkin, 1972, 239–40; Scanlon, 1977, 98; Beitz, 1983, 69–70.

dimension of contemporary politics, but also a desirable mode of decision-making. Representation is regarded as *necessary* for pragmatic and efficiency reasons[34] related to the size of the polity[35] or to the division of labour.[36] No one can be present at all the decisions or in all the decision-making bodies whose actions affect her life, because there are so many of them and they are so dispersed. Besides, these bodies could not hold all those affected with all the conflicting opinions, interests and perspectives they might have. Representation is also a *desirable* and justifiable mode of government in contemporary pluralistic conditions.[37] This has to do mainly with the channelling and resolution of conflicts[38] and hence with the facilitation of deliberation.[39] Representation facilitates deliberation by reducing the number of discussants and hence the number of conflicting opinions, interests and perspectives in conflict,[40] but also by establishing a gap between representatives' deliberation and citizens' decision or vote and hence by granting more time for reflection and deliberation among citizens, among representatives and among citizens and representatives.[41] More arguments will be presented for the justification and 'moral distinctiveness'[42] of representation in the course of this chapter.

Beyond this general adhesion to the principle of representation, democratic representation remains a complex ideal with a variety of forms. Although it is a significant and widely used concept, its precise meaning remains contested.[43] What I reconstruct here as the standard case of representation is based on the convergence in the recent writings of a wide range of theorists, not all of whom

[34] Some add the refinement of ideas to this list on the model of the Federalist Papers' argument for representation: MADISON, 1961, 82. See eg ARENDT, 1970, 226–27 who contends that representation in politics will pass opinions 'through the sieve of an intelligence which will separate the arbitrary and the merely idiosyncratic, and thus purify them into public views.' The idea is not an elitist assumption about the lack of deliberative capacities of ordinary people (see SCHUMPETER, 1947), but rather that ordinary citizens are not given the chance to develop those deliberative capacities and this is a point that goes back to Mill (see PATEMAN, 1970). Others add to the list of reasons to adopt the representative model of democratic decision-making the Burkean and elitist argument that some people are simply epistemologically more able to recognise and protect objective public interests: BURKE, 1925 and HAMILTON, 1961, note 35, 220–21 (see MANIN, 1997, 94 ff).

[35] See ARENDT, 1970, 236: 'obviously direct democracy will not do, if only because the rooms will not hold all.' See also HAMILTON/JAY/MADISON, 1961, note 35, 218. See also YOUNG, 1997A, 352–53; PITKIN, 1972, 87; DAHL, 1989, ch 13 on the inescapability of the scale problem in a democracy, even in a very small polity. See on the same point, URBINATI, 2000 on the de facto representation known even in the Athenian allegedly direct democracy for reasons of time and space in the democratic interaction. See also GOODIN, 2003A and 2003B, 4–5 who contends that new technologies cannot put right the difficulty created by the number of people who are to deliberate and vote.

[36] See eg SIEYÈS, 1963; MANIN, 1997, 3.

[37] See eg YOUNG, 1997A; URBINATI, 2000 and 2002; KATEB, 1981; PLOTKE, 1997.

[38] See eg HOBBES, 1999; SIEYÈS, 1963; DUNN, 1999B; ANKERSMIT, 1996 and 2002; LOUGHLIN, 2003A.

[39] See eg ARENDT, 1970, 226 ff; PITKIN, 1972, 212–13; YOUNG, 1997A, 353.

[40] See MÜLLER, 1992, 155, 157–58; MÜLLER, 2002, 109; HABERMAS, 1998A, 210 ff, 222 ff; YOUNG, 1990, 263; YOUNG, 1997A, 353.

[41] See URBINATI, 2000; KATEB, 1981; YOUNG, 1997A.

[42] This is the title of KATEB, 1981.

[43] See PITKIN, 1972, Introduction; PITKIN, 1989, 132–33; MANIN, 1997, Introduction. See also ROGOWSKI, 1981, 395 ff.

may subscribe to every aspect of the definition. Representation, broadly defined, is a *process according to which some people, the 'representatives,' usually only a few, stand for and act so as to bind the 'represented,' usually more or even all those affected people who cannot be physically present*.[44] More precisely, one may summarise the core phenomena that count as representation as the process (i) according to which the constituency, first, authorises the representative to stand and act for it, mainly through elections, (ii) according to which, then, the representative stands and acts for the constituency so as to bind it and (iii) according to which, finally, the representative is held accountable[45] by the constituency, mainly through re-election pressure,[46] but also through other modes of periodical or even constant control such as a strong and extensive public sphere.[47]

The relationship of representation is therefore best described as a *process*.[48] Representatives and their constituency should be in constant dialogue about the deferred political decision from the moment of authorisation to the moment of accountability. They should all act as agents in order for true and democratic representation to take place; representatives should represent and be held accountable, while those represented should authorise their representatives and then hold them accountable. Without an active constituency which holds representatives accountable, there is no representation *stricto sensu* but mere domination.[49] This explains the importance of the impulse to political participation and the development of an extensive public sphere which, in sufficient deliberative conditions, should be provoked by the spatial and temporal gap opened by representation between deliberation and decision.[50] Representation is 'deferred democracy,'[51] according to Young, that is to say a democracy in which the moment and location of deliberation (by representatives) are distinct from the moment and location of the decision or electing vote (by constituents).[52] It is in this democratic deferral and spatio-temporal gap therefore that the 'indirectness'

[44] See Pitkin, 1972, 8–9; Urbinati, 2000; Müller, 2002, 107.

[45] In this chapter I will use the terms 'accountability' and 'responsiveness' interchangeably. Strictly speaking, however, accountability is a property of institutional structures, whereas responsiveness is a consequence of interaction within such structures. See Ferejohn, 1999, 131.

[46] See Manin, 1997, 175 ff; Eisgruber, 2002b, 166.

[47] See on accountability through the public sphere, Müller, 1992, 156–57. See also Urbinati, 2000; Mansbridge, 1999; Parkinson, 2003a, 190–91. See Kuper, 2004 for alternative modes of ensuring responsiveness among representatives both at the national and post-national levels. See, finally, the contributions in Manin/Przeworski/Stokes, 1999a for a more detailed discussion of different means of ensuring accountability including, albeit not only, through elections.

[48] See Young, 1997a, 358 ff. See also, although in other terms, Kuper, 2004; Urbinati, 2000 and 2002. See also Harlow, 1985, 81 on the idea of representation *qua* 'buckle between power and people.'

[49] See Kuper, 2004; Plotke, 1997, 27 ff; Pitkin, 1972, 231–32.

[50] See Urbinati, 2000 by reference to Mill's, 1991a, 413 *agora* which encompasses representation, but also a strong public sphere and forms of direct participation and public duties. See also Mansbridge, 1999, 227–28 and Parkinson, 2003a, 190–91 on a broad 'deliberative system' which includes representation forums, but also deliberation between those active in the forums and in the public sphere.

[51] Young, 1997a, 355–57.

[52] In this sense, deferred democracy can be summarised by three differentiated elements: deliberation and decision take place in *different place*s, at *different times* and are handled by *different people*.

of the relationship of representation resides rather than at the level of active participation of citizens which is an essential element of representation as well.[53]

The relation of mutual agency and dialogue thus created leads to the differentiation and mutual constitution of represented and representatives.[54] By becoming an agent of the representation relationship it establishes, the constituency constitutes itself as a political entity and participant.[55] This initial self-constitution then becomes mutual constitution and hence progressive differentiation in the course of the representation relationship and of the dialogue thus initiated. As such, it is important to distinguish this conception of representation from Pitkin's influential albeit minimalist definition of representation. The latter conceives of representation as a mere replacement for what cannot be present, without further interaction between the absent and passive constituent, on the one hand, and the present and active representative, on the other.[56]

2. Five Constitutive Elements

If representation is a matter of persons choosing other persons to represent them, the identification of the relationship of representation can be broken down into five main questions which should be kept distinct[57]: who is represented?; who are the representatives?; how are they chosen?; what do they represent?; and how do they represent?.

a. Who is Represented

The first question one should raise in the context of representation has to do with whom should be represented. Usually, representatives represent *citizens*, ie the individual members of the political entity at stake.[58] They can represent them as a whole people or else represent them as subgroups of the whole people in different political entities. Two interesting issues are worth discussing in this context.

First of all, the relationship between *individual and group representation*: although representatives usually represent individuals who elect them, ie the members

[53] See Urbinati, 2000.

[54] See on the idea of representation *qua* creative source of unity and constitution of the represented, eg Young, 1997a, 354–58; Young, 2000; Plotke, 1997, 30; Ankersmit, 2002; Saward, 2003a; Loughlin, 2003a.

[55] See Ankersmit, 1996, 56.

[56] Pitkin, 1972, 9; Pitkin, 1989, 142.

[57] Contrary to Pitkin, 1972, 90–91, I do not hold that it is only possible to discuss what representatives should do, if one chooses a substantive as opposed to a descriptive account of representation. I argue, on the contrary, that it is possible to have either models combined with a delegation or with a trusteeship model of representation. See also Saward, 2003a on the importance of understanding representation as both an active and passive phenomenon.

[58] An interesting question to raise and which I will have to leave aside in this chapter is the extent to which resident aliens should be represented, even though they cannot vote and are not eligible. See Benhabib, 2004.

of their constituency, it is not rare to encounter the representation of groups *qua* constituency. It is the case for party representatives, but also of the representation of groups of interest or of other social groups. Besides, most of the time, representatives represent many different layers of individuals or groups within their constituency; a socialist woman will represent socialist voters and women socialist voters.[59]

Secondly, the relationship between *one's constituency's interests and the people's as whole*[60]: another difficulty relates to the difficulty there is for a representative who is elected by a constituency to decide, in case of a conflict of interests, between her constituency's interests and the people's as whole. According to Burke, representatives represent the people as a whole rather than those who elected them.[61] In practice, however, things are never that clear. In the European Parliament, for instance, some MPs say they represent Europeans as a whole, whereas others claim to represent their own constituency, ie voters in their own European country.[62]

b. Who the Representatives Are

This is certainly one of the most contested questions in the theory of representation. One usually opposes the descriptive model of representation, according to which representatives should represent by resembling those represented as much as possible, to the substantive model of representation, according to which, on the contrary, representatives should represent their constituency symbolically only.[63] In the descriptive model, representatives should mirror their constituency ('*Darstellung*') and *not only* stand and act for it as in the substantive model ('*Stellvertretung*' or '*Repräsentation*').

Of course, it is impossible for a small group of representatives to mirror the entire diversity of the wider population in every detail of their individuality.[64] Some proposals have been made, especially in the eighteenth century, for *microcosmic representation* of this kind.[65] The problem lies, however, partly in the size

[59] Of course, one may wonder whether she has the choice to represent women or not; the issue is usually approached from the voters' end rather than from the representatives'. One may contend that with a woman's perspective, a woman representative cannot avoid representing women.

[60] See eg PITKIN, 1972, 215 ff. It is important not to confuse this distinction with another contrast between representation *qua* delegation and representation *qua* trusteeship; in both cases, the constituency's interests might have to be represented, but in one case according to a mandate and in the other without any.

[61] See BURKE, 1925.

[62] See SCHMITT/THOMASSEN, 1999 on this disparity of approaches.

[63] See PITKIN, 1972, chs 4 and 5 for this denomination. See also since then, MANSBRIDGE, 2000. By contrast, PHILLIPS, 1995 who speaks of a 'politics of presence' by opposition to a 'politics of ideas'; WILLIAMS, 1998 who speaks of 'self-representation'; YOUNG, 1990, 1997 who speaks of 'group representation'; GARGARELLA, 1998A on 'full representation'; ANKERSMIT, 1996, 347 who opposes 'aesthetic' or symbolic representation to 'mimetic' or descriptive representation.

[64] See MÜLLER, 1992, 156.

[65] See eg ADAMS, 1951, 205; MIRABEAU, 1834, I, 7. See MANSBRIDGE, 2000, 105–7 for a description of these proposals. See also PITKIN, 1972, ch 2.

of the representative assembly[66] and partly in the costs.[67] The most that can realistically be intentionally described in practice are broadly distributed common characteristics,[68] such as a person's life experience, identity or activity where she has affinity with others.[69] What is usually meant by descriptive representation is therefore *group representation*, such as representation of women or ethnic, religious or cultural groups.[70]

It is interesting to note that according to Pitkin and others, descriptive representation is purely passive and aims at gathering information rather than at deliberating and decision-making.[71] Usually, however, descriptive representatives actively promote the interests of those they represent, in both a creative manner when new circumstances arise and in a manner responsive to them.[72] Representation is a constitutive relationship through which identities and opinions are mutually forged rather than merely mirrored and then defended.[73] Descriptive representation does not therefore exclude substantive representation, but merely adds onto it.[74] To quote Phillips, both the message and the messenger matter.[75]

c. How the Representatives are Chosen

This third question is intrinsically related to the previous one—or at least was in ancient times.[76] One usually distinguishes three modes of selection of representatives: election, lot and random sampling. While it should be clear how an election and its different variants work, selection by lot or sampling is less evident.

Whereas in an election, people choose their representatives, the selection of representatives by lot or random sampling share the characteristic of submitting

[66] See GOODIN, 2003A.
[67] See MANSBRIDGE, 2000, 107.
[68] Of course, minor and more personal characteristics can also be descriptively represented, but not intentionally and on a large scale. I will come back to this issue in the context of the descriptive representation of disagreement.
[69] See YOUNG, 1997A, 362.
[70] Contrary to what its denomination seems to indicate, the descriptive character of the representative can therefore be more or less *visible* depending on how much the common element to the membership to one group depends on visible characteristics. See MANSBRIDGE, 2000, 100–1 on this point.
[71] See PITKIN, 1972, 61, 81, 90; PARKINSON, 2003A, 189.
[72] See MANSBRIDGE, 2000, 107. Part of the problem with Pitkin's evaluation of descriptive representation may be explained by the fact that she concentrates on a microcosmic form of representation which aims at representing all individual specificities and group differences present in society, and this mostly through sampling rather than through election. The same applies to ANKERSMIT's, 1996, 28 critique of what he refers to as 'mimetic' representation.
[73] See SAWARD, 2003A; ANKERSMIT, 2002.
[74] See MANSBRIDGE, 2000, 101; PARKINSON, 2003B. As a consequence, while descriptive representation implies substantive representation, the reverse need not be true. In this sense, the opposition between substantive and descriptive representation is not therefore entirely logical and transitive: while descriptiveness really refers to a *personal quality* of the representatives, substantiveness refers to their *activity* rather than to their personal qualities, thus creating a certain amount of confusion with the fifth question.
[75] See PHILLIPS, 1995, 5 on the subordination of the 'who represents' to the 'what is represented' in mainstream accounts of representation.
[76] See MANIN, 1997, 8 ff.

the determination of representatives to others than those represented. While the selection of representatives by lot leaves it to chance to determine who should be representative among all or some of the represented, selection by sampling is the task of a few citizens who choose randomly from samples of the population.[77] All three modes can therefore be ordered in a decreasing order of democratic legitimacy: the more choice the citizen has in the determination of her representatives, the more influence she can be said to have in the final deliberation and vote.[78] Although selection by lot is somehow more legitimate than arbitrary sampling, it only makes sense in a homogeneous society in which all citizens have very similar interests and perspectives and in which the political equality that matters is equal chance of holding office rather than equality in consenting to power.[79]

A related albeit distinct issue is the question of the qualification of a representative. Whether she is elected or selected by lot or sample, it is important to realise that the ideal of a representative *qua* '*par inter omnes*' is not necessarily feasible anymore. Political matters become more and more complex and the mere fact of being represented by a few willing and able citizens might not be a fit response to this increasing complexity.[80] In these conditions, the legitimacy of a selection of representatives by lot or sampling seems even weaker. If our representatives know better than us, then we should at least be able to select them rather than leave it to chance to select incompetent representatives.[81]

d. What the Representatives Represent

At first sight, representatives represent the people affected by their decisions. The difficulty is that given the extreme diversity of all individuals constituting the citizenry, it is impossible to represent them in all their individual features. All it is possible to represent, therefore, are common aspects of citizens' individualities.[82] One usually finds mention of the representation of people's interests, opinions or perspectives, but there may be many other elements or dimensions to represent.[83] Two caveats are in order at this stage. First of all, it is important to distinguish between the object of descriptive representation and the object of substantive representation. Although their difference may affect the dimensions of the object

[77] See eg FISHKIN, 1991, 1995, 1996. See also MANSBRIDGE, 2000, 105–7 on microcosmic representation by randomly sampling representatives from the population.

[78] See MANIN, 1997, 83. See also, however, MANIN, 1997, ch 4 on the deficiencies and in particular the aristocratic nature of elections in the selection of representatives.

[79] See MANIN, 1997, 34–41.

[80] This is one of the reasons given by ARENDT, 1970, 226–27 for representation in the first place: not all people are interested in public matters and provided they are all given a chance to participate, representation is legitimate.

[81] See MANIN, 1997, 78. Of course, the question arises of how a less enlightened people is able to elect an assembly consisting of people more enlightened than they are themselves: see SETALA, 1996, 39.

[82] See MÜLLER, 1992, 156; YOUNG, 1997A, 362.

[83] I am excluding, for instance, preferences, desires and subjective interests.

they represent, it is not necessarily the case.[84] A second caveat has to do with the opposition of representation *qua* delegation to representation *qua* trusteeship; if the object of representation amounts to the constituency's opinions, there is not much the representative can do but follow a mandate, but things are different when the object of representation consists in the constituency's best interests or in its general perspectives.[85]

It is worth examining briefly each of the potential objects of representation. Although people's interests, opinions and perspectives are related to one another in some ways[86] and are often inseparable at the particular level,[87] they are conceptually distinct.

First of all, people's *interests*: this is the most common object of representation which is often described as 'acting in the interest of the represented.'[88] The concept of interest stems from the objective theory of values. It amounts to what is in the objective interest of a person, ie what is important to her life prospects, rather than to her subjective interests, choices, desires or preferences. As such, a person's objective interest is more difficult to determine than her subjective interests and preferences. It is best judged neither by what people themselves choose nor by what they would choose under ideal conditions. Even in ideal circumstances, people might not be competent assessors of their own interests. However, given the burdens of reason and in particular social and moral pluralism, even the best representatives are unable to provide the one right answer to what is in other people's interests.[89]

In the representation context, what is at stake are the interests of many people, ie the nation's or the constituency's public interests. Individual interests cannot indeed possibly be represented in their extreme diversity. As such, it is important to distinguish these interests from three other things. First of all, the interests of the public ought to be distinguished from the *common good*, that is to say the amalgam of standards that has priority over individual interests because it is allegedly fundamental to the way of life of the group.[90] Secondly, what is in the public interest

[84] It is possible to imagine a descriptive representative who represents the interests of her constituency and not necessarily its members' opinions, although it is difficult to imagine a descriptive representative not judge from her own perspectives thus not represent her constituency's perspectives (see YOUNG, 1997A, 369–73). The reverse is more difficult to imagine, however: how indeed could a substantive representative be trusted to represent her constituency's perspectives or standpoints as well as a descriptive representative?

[85] It is worth distinguishing these two groups of issues, however, as there is a difference between what you stand for, on the one hand, and how you stand for it, ie what you do when you stand for it, on the other.

[86] It is difficult indeed to distinguish someone's ideas or opinions from her interests, since, although they differ in nature, the ideas or opinions represented will usually be about her interests, ie about which should be her personal ends and how best to achieve them. Similarly, a person's perspectives will influence her opinions and her conceptions of her interests.

[87] It is difficult to defend someone's interests without thereby acting according to her perspectives. This is actually even an intentional outcome in the case of descriptive representation where representatives should be able to act in their constituency's interests through sharing their perspectives.

[88] See eg PITKIN, 1972, 209; KUPER, 2004.

[89] See even PITKIN, 1972, 212.

[90] See MANSBRIDGE, 1981, 467–68 on the evolution to an adversary conception of the representation of a balance of conflicting interests rather than of a common interest.

differs from what is *good for all*, ie a good whose benefits can be shared by all constituents. Thirdly, public interests are different from the *aggregate of subjective individual goods* as in the utilitarian calculus of what produces the most preference-satisfaction overall, regardless of the distribution of satisfaction. Although it remains contested, the benefit to a numerical majority of people is to date the least contestable indicator of the interests of the public,[91] provided all perspectives are somehow given a voice in official and non-official deliberations.[92]

Secondly, people's *opinions* or *ideas*: they amount to any judgement or belief about how things are or ought to be, and the political judgements that follow from these judgements or beliefs.[93] They are based on principles, values and priorities, since these bear on a person's judgement of what ends should be pursued. We also speak of convictions or worldviews and although it is possible to discriminate between these forms of opinions, I will not dwell on this point in this chapter. Opinions may be about what one takes to be one's objective interests and the means to achieve them, but they should not be confused with them; there may be opinions over other principles or values than objective interests and objective interests need not depend on the opinions of those whose interests they are, although they will have to depend on the opinions of those who defend these interests.

Contrary to interests, which can become public through the game of the majority, and to perspectives which usually stem from social and hence shared structures, opinions and ideas remain individual. Of course, they can naturally be affected by social perspectives and hence become more common, but it is rare. This fact makes them relatively indeterminate and their individual representation more complex.[94] Besides, according to Arendt, it is often difficult to represent opinions because most of the time they are the result of a political confrontation and expression which does not always take place before the representatives' deliberations.[95] Opinions which can be represented therefore are those rare ones which have been expressed in the public sphere before representatives' deliberations and those which are usually held in common by many people. Hence, the advantage of focusing representation on perspectives which can be represented even before opinions have actually been forged on their basis.

Finally, people's *perspectives* or *standpoints*: perspectives involve the ways people interpret issues and events and produce judgements and beliefs, because of their structural social locations and experiences.[96] These structural locations result from group differentiations and collective cultural attributions, such as

[91] See also KUPER, 2004; MANSBRIDGE, 1981, 468.
[92] See MÜLLER, 1992, 156–57.
[93] YOUNG, 1997A, 364.
[94] See ARENDT, 1970, 227: 'Opinions never belong to groups but exclusively to individuals, who exert their reason coolly and freely, and no multitude, be it the multitude of a part or of the whole society, will ever be capable of forming an opinion.'
[95] See ARENDT, 1970, 268: 'the most the citizen can hope for is to be represented, whereby it is obvious that the only thing which can be represented and delegated is interest, or the welfare of the constituents, but neither their actions nor their *opinions*' (emphasis added).
[96] YOUNG, 1997A, 365.

age, gender, race, religion, etc. Perspectives affect one's opinions and interests, but should not be confused with them. It is possible to share a common perspective without having the same opinions or even the same interests. For instance, gender affects one's perspectives, without, however, implying the identity of all women's opinions and interests, or even the strict identity of all women's perspectives. Perspectives are worth representing, because they are not necessarily shared by all representatives and often need to be present for fair and balanced decisions to be taken. They are easier to represent as they are usually part of a social being and attitude, that is to say something that need not be expressed to be recognised contrary to individual opinions and is usually collective.

e. How the Representatives Represent

The question of the mode of representation is one of the most contested points in theories of representation.[97] It should be carefully distinguished from the second question; once we know who the representatives are with respect to their relationship to the represented, it is important to establish how they should represent them. Of course, both issues are often related, but their relationship is not a necessary one.[98]

One usually opposes representation *qua* delegation (representation as mandate) to representation *qua* trusteeship (representation as independence).[99] When representatives are regarded as delegates, they are bound by the instructions of those represented as in a mandate relationship. When, on the contrary, representatives are associated with trustees, they are given free rein to make decisions according to their best judgement, within the limits of course of the object represented (interests, opinions or perspectives) and their accountability to those represented. One of the main difficulties with these two models is that they describe the representation relationship in a manichean way. It is rare indeed that either representatives or those represented bear the whole responsibility for a decision. Usually, all are responsible to a certain degree, as they must be able to influence and convince each other in open conditions of deliberation.[100] Part of the problem is that representation is no traditional relationship of agency. There is indeed

[97] See PITKIN, 1989, 142 ff.

[98] Hence it is wrong to assume that descriptive accounts of representation will necessarily be delegation accounts as well. Descriptive representation amounts to substantive representation with a descriptive dimension added to it. As such, it is entirely possible to imagine a descriptive representative deciding according to her best judgement of what is in her constituency's interest. See PHILLIPS, 1995, 56 on the necessary alliance between politics of ideas and politics of presence. See also MANSBRIDGE, 2000, 101 on the relationship between substantive and descriptive representation.

[99] Some authors, like PITKIN, 1972, ch 7 identify this distinction with the distinction between representation *qua* authorisation and representation *qua* accountability. These denominations might become confusing, however, since even representatives *qua* delegates are authorised and even representatives *qua* trustees are accountable. This is particularly important in the context of descriptive representation where Pitkin and other authors simply assume that what is at stake is a mandate and that when there is a mandate, there need not be accountability. See PHILLIPS, 1995 and WILLIAMS, 1998 on the importance of providing descriptive representation with means of accountability.

[100] See already PITKIN, 1972, 154–55.

no principal and agent, but two groups of political agents so to speak[101]; both sides of the relationship of representation are needed to ensure that all interests and perspectives are taken into account, on the one hand, and thoroughly discussed and hence understood, on the other.[102] I will come back to this dimension of representation later, as it is central to my account of open representation in conditions of reasonable disagreement.[103]

II. THE CHALLENGE OF DISAGREEMENT

After presenting the challenge which persistent and widespread reasonable disagreement raises for democratic representation, I will turn to the main answer it has been given so far: descriptive group representation.

1. The Challenge

Democratic deliberation and majority rule are usually seen as the solutions to widespread and persistent reasonable disagreement about justice and matters of principle. The problem, and the challenge this sets to our current conceptions of democratic representation, is that those who deliberate and vote to settle our conflicts are representatives and not those who disagree in the first place. True, some degree of exclusion is inherent to representation, but the challenge retains its sting: if representation is a necessary and desirable way to deliberate and vote, then the disagreements we would have deliberated and voted on, had we not been interrupted or had we been able to start deliberating at all, should be represented. This is what I have called the *challenge of disagreement*. The point of this section is to unpack and rationalise this practice and understand whether and to what extent disagreement ought to be represented.

a. Why Disagreement should be Represented

There are different reasons for requiring sufficient representation of our disagreements and more generally of our diversity in representatives' deliberations and votes.

First of all, *representatives' horizontal disagreements*[104]: our disagreements are very rarely exhausted before the buck is passed on to our representatives. Since

[101] See Kuper, 2004; Plotke, 1997, 31; Young, 1997a, 358 ff.
[102] See Young, 1997a, 358 ff; Urbinati, 2000 and 2002 on representation *qua* advocacy.
[103] See Manin, 1997, 222 on the change of nature of disagreement through the relationship of representation.
[104] On this opposition between horizontal disagreement among citizens, vertical disagreement among citizens and representatives and vertical disagreement among representatives, see already Postema, 1982.

most of our disagreements are not settled before representation takes place[105] or even only occur alongside representatives' disagreements, as some topics only arise in parties' packages or once representatives have started to deliberate,[106] there is no one crystallised opinion, principle or interest to be represented but a multitude of conflicting perspectives about what this opinion, principle or interest should be.[107] According to some authors, our disagreements are suppressed by electoral choices and translated into horizontal disagreements among representatives; the latter's settlement should therefore be taken to settle our disagreements.[108] True, representatives tend to disagree reasonably as much as citizens.[109] Their disagreements can, however, be very different from ours.[110] One may question their legitimacy in deciding for all citizens on that basis.[111] It is important, therefore, that all points of view in conflict be represented both in further deliberations among representatives, on the one hand, and in the voting process, on the other.[112] All points of view should indeed be represented in the deliberative process, in order to ensure full information and insights on the issues discussed. Moreover, they should also be represented in the aggregative process so that the resolution of conflicts can take all interests and perspectives into account.

Secondly, *representatives' and citizens' vertical disagreements*: citizens often disagree reasonably with their representatives and this disagreement constitutes an intrinsic part of their relationship of representation. It is through this constant dialogue that the dialectic between authorisation and accountability can take place and that both representatives and represented can be agents of representation.[113] Since the quality of representatives' deliberation and decisions depends on this vertical exchange and dialogue between representatives and citizens,[114] the more informed and complete the latter is, the better it is. It follows therefore that the more citizens' horizontal disagreements are represented within their representatives' horizontal disagreements, the more constructive their vertical disagreements will be. Vertical disagreements that feed into representatives' horizontal disagreements will in turn stimulate citizens' horizontal disagreements, thus creating a virtuous and reinforcing circle of disagreement and deliberation. It is important to emphasise that these

[105] See PHILLIPS, 1995, 43.

[106] See MANIN, 1997, ch 6 on 'audience' democracy and the setting of the agenda of disagreement by parties and representatives only. Disagreement among citizens amounts, in this context, to a consequence of representation rather than the reverse.

[107] See MANSBRIDGE, 2000, 100.

[108] See DUNN, 1999B according to whom, in order to avoid conflicts, we transpose the 'horizontal danger' of killing each other into the 'vertical danger' of being coerced by governments.

[109] See eg PITKIN, 1972, 212 ff.

[110] See MANIN, 1997, 204; PITKIN, 1972, 212–13.

[111] This argument is analogous to WALDRON's, 1999A argument against the legitimacy of judges in disagreement to decide for citizens in disagreement, since there is no coincidence of their disagreements and no dialogue among them. See Chapter 9.

[112] On the importance of representing disagreement in both the deliberative and aggregative moments of the decision-making process, see MANSBRIDGE, 2000, 103.

[113] See even PITKIN, 1972, 212. See also ANKERSMIT, 2002 who argues that disagreement among citizens and their representatives keeps them attuned to each other's opinions and decisions.

[114] See PITKIN, 1972, 212; KATEB, 1981, 361.

vertical disagreements apply whether representation is descriptive or purely substantive.[115] Interests remain controversial whether one shares the same group perspectives or not, as disagreement may be due to moral or even other non-group related forms of social pluralism.

b. How Disagreement should be Represented

'Representing disagreement' sounds more like a slogan than like a practical form of representation. A distinction should be drawn in this respect between the particulars, the sources and the fact of disagreement, on the one hand, and between individual and group disagreement, on the other.

First of all, then, the *particulars*, *sources* and *fact* of disagreement: to claim that disagreement should be represented means that those people who disagree should be represented. As I explained earlier, however, we know that we cannot represent people in all their particulars. Similarly, one can represent disagreement in general, but cannot actually stand for all its particulars. The three objects of disagreement representation, ie the particulars, sources and fact of disagreement, correspond to a decreasing degree of specificity of the object represented.

Particulars of disagreement include interests and opinions in conflict, according to the distinction I drew earlier between the main objects of representation. As it is difficult, however, to represent all interests and all opinions in conflict, some authors have argued, albeit in other words, for a representation of the *sources* of disagreement, ie the different perspectives or standpoints on the basis of which people forge their opinions and conceive of their interests.[116] Perspectives can be regarded as sources of disagreement in the sense that perspectives influence the development of opinions and interests which conflict. Thus, although perspectives may also conflict, it is the conflict between the opinions or judgements made on the basis of these perspectives that are mostly observable. True, there may be other sources of disagreement than social pluralism and the plurality of perspectives, such as moral pluralism in particular.[117] However, social perspectives remain the most describable and representative source of disagreement. As perspectives tend to be socially forged, there are less perspectives to represent than conflicting opinions, in order to represent the same disagreements. Another benefit of representing sources of disagreement rather than detailed particulars of disagreement is that disagreements need not have been completely spelled out to be represented; this is important as often people do not have the time to disagree completely before representation takes place. Although standpoints or perspectives are fewer than opinions in conflict, they remain very numerous. Some authors have therefore argued that what should

[115] Contra: PITKIN, 1972, 213.
[116] See YOUNG, 1997A, 365 ff.
[117] See Chapter 2.

be represented is the sheer *fact* of disagreement rather than the exact parameters of that disagreement.[118] This can be done by representing some but not all interests, opinions or perspectives in conflict so that the fact of disagreement is made present.

Secondly, *individual* or *group disagreement*: when representing either of the three elements distinguished before, it is important to know whether it is individual or group disagreement one wishes to represent.[119] Disagreements may indeed result from conflicts of individual interests, opinions and perspectives, but also, and the two are often related as they appear as individual disagreements, from conflicts of group interests, opinions and perspectives.[120] In fact, individual disagreements are rarely, and maybe sadly so, isolated from group disagreements in practice. Of course, to concentrate on group disagreement tends to dangerously simplify the grounds of disagreement and even to acknowledge the existence of preconstituted constraints on individual opinions and perspectives.[121] It remains, however, that in the context of democratic representation, group disagreements are the most relevant disagreements. First of all, group disagreements are easier to represent than individual disagreements given the extreme individual diversity one would have to represent in the latter case.[122] Secondly, when disagreement representation is reduced to the representation of conflicting perspectives rather than opinions, the relationship to group representation becomes clearer, since individual perspectives are usually determined by individuals' belonging to social groups.[123]

2. A Common Response: Descriptive Group Representation

After an argument for the descriptive representation of disagreement, I will discuss three different dimensions of the implementation of the descriptive representation of disagreement in practice.

a. From Disagreement Representation to Descriptive Representation

While it should be clear that disagreement representation can only realistically occur in practice through the representation of group disagreement, it remains to be established why the representation of disagreement is better ensured by descriptive

[118] See GOODIN, 2003A who, however, only distinguishes between the particulars and the fact of disagreement and does not envisage the third option I have discussed here.

[119] See GOULD, 1996, 185.

[120] I am assuming that groups pre-exist disagreements among group perspectives. Of course, the existence of groups may be reinforced or undermined by disagreements among their members or disagreements with other groups.

[121] See URBINATI, 2000 according to whom Mill did not associate proportional representation with group representation.

[122] I explained this earlier in relation to the opposition between 'microcosmic' and mainstream descriptive group representation. See MANSBRIDGE, 2000, 105–7 on this point.

[123] See YOUNG, 1997A, 365. See also PHILLIPS, 1995, 6.

representation, albeit not exclusively so.[124] In other words, what is it which requires, for instance, that the representation of the difference of perspectives between men and women is ensured by having both male and female representatives deliberate and vote over these matters? Some of the reasons overlap with reasons for descriptive group representation *tout court*, but a second group of reasons are specific to the issue of disagreement representation.[125]

First of all, *descriptive representation tout court*: different arguments have been made for descriptive group representation. Primarily, it is a concern for presence, memory or voice which has been put forward.[126] The recognition of historically disadvantaged, marginalised or minority groups' interests and standpoints is facilitated by the presence of members of these groups among the representatives.[127] This is also sometimes referred to as the *consciousness-raising function* of descriptive representation.[128] A second argument often presented is more motivational. It relates the visibility of diversity to the stimulation of deliberation and hence to an increase in the legitimacy of decisions.[129] It is also sometimes referred to as the *perspective-expanding function* of descriptive representation.[130]

Secondly, *descriptive disagreement representation*: the two arguments for descriptive group representation *qua* disagreement representation are related to the two prongs of the justification of the disagreement challenge discussed before. First of all, *horizontal disagreement among representatives*: when representatives are members of the different groups whose different standpoints and differences of opinion lie at the origins of horizontal disagreement among citizens, they can represent these different standpoints and opinions, and hence disagreements, better than members of other groups.[131] Some groups cannot indeed even realise what other standpoints could be and how to get to share them.[132] This applies to the deliberative as much as to the aggregative functions of representation. On the one hand, the presence of members of all groups whose perspectives are in conflict helps increase the degree of information and the amount of insights available in deliberation. It also reminds representatives of the diversity of views on the matters they are about to discuss

[124] This section should not therefore be taken to exclude other modes of representation of disagreement, as we will see in the fourth section where I discuss a revised and complex account of disagreement representation.

[125] The present argument should not, however, be taken to provide descriptive representation with an exhaustive and complete argument, which is proof to all critiques and objections to the general idea of descriptive representation. See on the costs of descriptive representation, PHILLIPS, 1995, 21 ff; MANSBRIDGE, 2000, 122–23; YOUNG, 1997A, 349–51; WILLIAMS, 1998, 5–8; SQUIRES, 2000. See more generally BESSON, 1999, 2001 and 2002 on the importance of the flexibility of seat and list quotas and other affirmative action measures. See also ALVAREZ, 2003.

[126] See eg YOUNG, 1997A; PHILLIPS, 1995; WILLIAMS, 1998; MANSBRIDGE, 2000.

[127] See MANSBRIDGE, 2000, 119–22.

[128] See PHILLIPS, 1995, 176.

[129] See eg GOODIN, 2003A and 2003B; GARGARELLA, 1998A; URBINATI, 2000 and 2002.

[130] See PHILLIPS, 1995, 53.

[131] See MANSBRIDGE, 2000, 100.

[132] See YOUNG, 1997A, 366 ff, 369 ff.

and hence instils a degree of cautiousness among them. On the other hand, descriptive disagreement representation also contributes to the inclusiveness of the aggregation of all interests and perspectives in conflict in the final vote.[133] Secondly, *vertical disagreement among representatives and citizens*: the presence of descriptive group representatives eases the representation of the points of view at stake in horizontal disagreements among citizens and hence the vertical communication between representatives and citizens, as well as the settlement of their vertical disagreements.[134] As I argued before, the communication between representatives and citizens is crucial to the relationship of representation, hence the importance of descriptive group representation in this respect.

b. The Implementation of Descriptive Disagreement Representation

Three issues arise in the context of the implementation of descriptive disagreement representation: first, the issue of selecting the groups which are to be descriptively represented; secondly, the issue of the actual object to be represented[135]; and finally, the issue of the number of descriptive representatives to be elected.

First of all, *the groups to be represented*: not all groups of affinities can be represented given the issue of size that underlies representation.[136] Besides, not all groups have reasons to be represented either. Authors usually mention historical disadvantage, political marginalisation or some kind of political relevance of the groups at stake.[137] The issue arises then of how to identify these disadvantaged or minority groups. Their particular salience could be the object of democratic deliberation. This raises, however, the well-known issue of the tyranny of the majority. True, one may establish measures to protect minority rights, but these require deliberation and the whole issue becomes circular. It seems, therefore, that all we have are the disadvantaged groups' claims,[138] combined with a certain degree of collective recognition in practice. In the context of the representation of disagreement, things are slightly easier. The groups selected for representation should be those whose members' perspectives provoke differences of opinions and disagreements relevant to the issues the representative system must solve.[139] For instance, if we know the main issues to be addressed politically are pensions and tax, it suffices to determine how these issues polarise public opinion in order to determine which groups of people tend to disagree on these issues. The identification of those groups therefore relies on the visibility of disagreement and hence on the factual

[133] See MANSBRIDGE, 2000, 103–5.
[134] See MANSBRIDGE, 2000, 99.
[135] Other forms of non-descriptive disagreement representation may represent other dimensions of disagreement than descriptive group representation. Purely substantive and reflexive representation may indeed concentrate more on individual opinions and perspectives when representing disagreement.
[136] See PHILLIPS, 1995, 46, 171; YOUNG, 1990; YOUNG, 1997A, 362.
[137] See eg YOUNG, 1997A, 349; KYMLICKA, 1990, 65, 69–70; TULLY, 1995, 4–6.
[138] See PHILLIPS, 1995, 169.
[139] See MANSBRIDGE, 2000, 103; MANSBRIDGE, 1981, 474; WILLIAMS, 1998, 50–51.

observation of differences of opinions and/or perspectives among groups, thus reducing the level of indeterminacy.[140]

Secondly, *the dimensions of disagreement to be represented*: once we know which groups should be represented, it is important to determine which dimensions of disagreement should be represented.[141] Within the context of descriptive group representation, it is possible to represent neither all the individual nor all the collective particulars of disagreement. Whether there is one or more group representatives, they will be unable to represent the multitude of interests and opinions at stake. What they can represent by virtue of their difference, however, is of course the sheer fact of disagreement, but also more interestingly, the sources of disagreement, or at least those sources which are related to social structures of difference and hence to conflicting group perspectives.[142]

In this respect, it is important to emphasise that group representation cannot and should not be associated with essentialism. Women should be represented by women in the context of disagreement representation, not so much because there are allegedly purely and essentially feminine interests and opinions which any *one* woman and only a *woman* can represent. Ideas are not necessarily gendered and when they are, they are too diverse to all be represented and this through descriptive representation in particular. The reason for having women representing women is, as Young argues, that women represent other women's standpoints or perspectives and a shared experience of marginalisation.[143] As Phillips explains, it is indeed possible to share an experience without having the same experience,[144] and more importantly without having the same opinions and interests. For instance, women share a perspective, but might not have the same particular perspectives on the issue of abortion. Besides, even in the context of representing female perspectives, descriptive representation does not assume men cannot represent these perspectives as well as women.[145] All it assumes is first, that women's proportional presence among representatives matters democratically, and secondly, that their perspectives are more likely to be expressed by those who share them than by male representatives who have never even come across such viewpoints themselves.[146]

Finally, *the number of descriptive group representatives*: one often speaks of statistical or proportional representation to identify descriptive representation, thus indicating that, in order to mirror the wider population, group representatives should be elected in proportion to the importance of the group in the entire population.[147]

[140] See MANSBRIDGE, 1981, 474. Of course, there is a *time factor* to take into account when disagreement has been observed and before identifying the groups at the origins of those disagreements. It is only through the recurrence of some divisions that we can identify their origins.

[141] Perspectives need not therefore be identified independently from the groups to be represented.

[142] See eg YOUNG, 1997A, 365 ff.

[143] See YOUNG, 1990, 184; YOUNG, 1997A, 369 ff. See also WILLIAMS, 1998, 5–6.

[144] PHILLIPS, 1995, 52, 176.

[145] See PENNOCK's, 1979, 314 famous phrase: 'no one would argue that morons should be represented by morons.'

[146] See YOUNG, 1997A, 369 ff.

[147] See eg URBINATI, 2000 who speaks of 'proportional representation' to refer to descriptive representation.

However, some advocates of descriptive group representation do not require proportional representation, but only a threshold presence in the deliberation.[148] Such a presence is, indeed, sufficient to comply with many of the reasons for descriptive representation and in particular the consciousness-raising and perspective-expanding functions of descriptive representation. What it underestimates, however, is the importance of having as many representatives as possible of the same group to achieve the best representation of as many facets as possible of group membership and hence of perspectives. It also neglects the importance of having a critical mass of representatives of one group of perspectives for deliberative synergy to take place.[149] Finally, it is at odds with the necessity to have a proportional number of representatives for the conditions of legitimacy of the final vote and the aggregation of perspectives among representatives to be fulfilled.[150] One group representative is enough, in other words, to represent the mere fact of disagreement, but not to represent its sources and in particular the variety and importance of the perspectives which are at its origins.

III. THE COUNTERCHALLENGE

There are two main limitations which appear fatal to the disagreement challenge and to the idea of descriptive group representation of disagreement: the paradox of democratic representation and the counterchallenge of diversity.

1. The Paradox of Democratic Representation

Faced with the challenge of disagreement, some may claim that the association of representation with disagreement is misleading. One of the justifications often given to representation is indeed diversity and the need to overcome political conflicts[151] or at least to channel them in order to facilitate or even enable democratic deliberation.[152] Some have even called this element of facilitation of deliberation the great *opportunity of representation*.[153] In these conditions, it does make no sense, at first sight at least, to try to make deliberation totally inclusive and to aim at full equality by mirroring diversity and thus freezing disagreement.[154]

[148] See eg PHILLIPS, 1995, 47, 67 ff; KYMLICKA , 1993, 77–78; KYMLICKA , 1995, 147.
[149] See WALDRON, 2000D.
[150] See on these points, MANSBRIDGE, 2000, 104–5.
[151] See eg SIEYÈS, 1963; LOUGHLIN, 2003A; DUNN, 1999B.
[152] See eg ARENDT, 1970, 226 ff; PITKIN, 1972, 212–13; YOUNG, 1997A, 363; HABERMAS, 1998A, 210 ff, 222 ff; MÜLLER, 1992, 157–58.
[153] MÜLLER, 1992, 157–58; MÜLLER, 2002, 109; HABERMAS, 1998A, 210 ff, 222 ff.
[154] See eg GOODIN, 2000, 82 and GOODIN, 2003A by reference to the Federalist Papers and in particular HAMILTON, 1961, 218. See already MILL, 1991A as discussed by URBINATI, 2000 and 2002, on the dangers and advantages of reintroducing diversity in representation through proportional representation.

This position is instantiated at one extreme end of the spectrum by reference to Hobbes' first examination of representation in political theory; according to him, the sovereign should be the only representative of a divided people, which can only thereby be considered a political unit.[155] This conception of representation was then adopted and expanded by Sieyès who saw representation as a fundamental fact of modern society and political representation as a permanent necessity in any large and populous country in which it was virtually impossible to unite the voice of the people directly.[156] More recently, many authors have revived this position and developed it further; representation is regarded as a cultural phenomenon[157] which constitutes the represented *qua* political entity as much as the representative.[158] Some also speak of representation as differentiating those represented into a true and unified 'people' or a 'constituency' as opposed to merely mirroring them.[159] This approach implies the rejection of descriptive accounts of representation which aim at rigidly reintroducing a frozen diversity into the differentiated result of representation.[160]

This is what I will refer to in this chapter as the *paradox of democratic representation*[161]: the *democratic* element requires that all subjects be given full and direct participation in the deliberation and decision-making process,[162] while the *representative* element amounts to the institutional response to the impossibility of entirely respecting the latter when organising democratic deliberations.[163] The more representation aims at imitating direct participation and full inclusion, the more disturbing the paradox becomes.[164]

2. The Counterchallenge of Diversity

Even if the concept of representation were to tolerate the expression of any diversity and full inclusion in principle, it would be impossible,[165] or at least too costly,[166]

[155] Hobbes, 1999, ch 19, 129–30 and ch 30, 114, 121.
[156] See Sieyès, 1963. And more recently, Loughlin, 2003a.
[157] See Saward, 2003a.
[158] See Plotke, 1997, 30.
[159] See Young, 1997a, 359; Ankersmit, 2002.
[160] See Young, 1997a, 369 ff; Ankersmit, 2002; Loughlin, 2003a. See also Ankersmit, 1996, 44: 'The mimetic theory of representation is in fact not a theory of representation at all, but a theory *against* representation.'
[161] See Young, 1997a, 353 on this very paradox.
[162] See Aristotle, 1988, III, 1275b13I–b21, VI, 1317a40–1318a10. See also Dryzek, 2001, 651.
[163] See Müller, 1992, 155.
[164] See Young, 1997a, 353; Ankersmit, 1996, 347; Loughlin, 2003a. This paradox echoes Pettit's, 2003a, 23, 36 paradox allegedly created by some of the depoliticising trends recognisable in our political practice, which are, however, not contrary, but necessary to deliberative democracy itself. This is because, according to Pettit, the deliberative and the democratic elements in deliberative democracy tend to pull apart. One could draw an interesting parallel here and deduce a *second-order paradox* for democratic representation that would not so much apply to the choice of representation over participation, but to the choices of representative modalities: not only does democratic deliberation require a limitation of full participation by the instauration of representation, but within representation, it calls for a limitation of full descriptive representation.
[165] See Goodin, 2003a; Young, 1997a, 353.
[166] See Mansbridge, 2000, 105–7.

in the present conditions of widespread and extremely complex diversity to represent all the dimensions of the disagreements at stake. This objection was Hamilton's already, but it has been put forward again recently.[167] It would be paradoxical indeed if the problem of size, which is often used to justify representation,[168] was not to become a problem for descriptive group representation itself. Hence what I will refer to as the *counter-challenge of diversity*.[169]

There are different facets to this counterchallenge. First of all, *the number of different groups to be represented*: The amount of groups whose perspectives conflict has become so large in our pluralistic societies that a proportional representation of all of them is impossible.[170] Secondly, *the amount of internal heterogeneity to be represented*: The emphasis on groups' internal heterogeneity is a consequence of the distinction I mentioned before between descriptive group representation and essentialism.[171] Given the size limits of representation, the internal heterogeneity of represented groups cannot therefore possibly be fully represented.[172] Finally, *the number of cross-cutting differences to be represented*: a point related to groups' internal heterogeneity is the multitude of cross-cutting dimensions of difference which overlap different groups.[173] If all these cross-cutting groups were to be represented, the size issue would become too problematic.

Not all of these three facets of the counterchallenge cut some ice, however. Whereas the first issue may be conceded in the context of representing all politically pertinent conflicting perspectives in a society,[174] the next two difficulties are not as important as they seem at first sight. They can be accommodated in the model of descriptive group representation of disagreement discussed before. When descriptive representation is conceived in terms of group perspectives, both the amount of internal heterogeneity and of cross-cutting dimensions of difference are much more reduced than claimed.[175] For instance, Latino and lesbian women share a common experience of marginalisation *qua* women which affects their perspectives in very much the same way, although their opinions and interests might be diametrically opposed in a specific case.

IV. THE REPRESENTATION OF DISAGREEMENT RECONCEPTUALISED

Despite the gravity of some of these counterchallenges, it is important not to fall into the opposite trap and to see representation as a purely substantive and independent

[167] See HAMILTON/JAY/MADISON, 1961, note 35, 218.
[168] See eg PITKIN, 1972, 87. See already MILL, 1991A as discussed by URBINATI, 2000 and 2002.
[169] See GOODIN, 2003A; GARGARELLA, 1998A, 270–71.
[170] See GOODIN, 2003B, 188; SUNSTEIN, 2002A, 175.
[171] See GOODIN, 2003B, 187. See also PHILLIPS, 1995, 145, 55–56.
[172] See GOODIN, 2003B, 186–88.
[173] See PHILLIPS, 1995, 9.
[174] This need not mean, however, that the descriptive representation of one group in particular, eg women, are affected by this counterchallenge.
[175] In fact, most advocates of descriptive representation are aware of the difficulty there is to representing the particulars of disagreement and would tend to fall into the group of perspectives' representation: see eg PHILLIPS, 1995, 52, 176; WILLIAMS, 1998, 5–6; YOUNG, 1990, 184; KYMLICKA, 1995, 138.

function entirely cut off from the represented. Even authors like Sieyès or Burke, who have emphasised the unity-producing role of representatives, assumed that representatives needed to demonstrate a certain heterogeneity.[176] Disagreement can and should therefore be represented, but in making the most of the two paradoxes which affect the relationship between disagreement and representation.[177] In this effort to reconceptualise the representation of disagreement, I will start by discussing the paradoxical relationship between disagreement and representation, before presenting a multidimensional and mixed model of representation.

1. The Paradoxical Relationship Between Disagreement and Representation

Reconceptualising the representation of disagreement is not only a matter of finding a way out of the paradox of democratic representation and hence of striking a compromise between two conflicting demands of democracy, ie deliberation and inclusion. It is also, paradoxically, about enabling the basic functions of representation and hence of deliberation. Disagreement can indeed be understood as a crucial input and output of representation without threatening the latter's *raison d'être*.

Without the descriptive representation of disagreement, the very deliberation and questioning within and outside main institutions, which representation is claimed to enable or at least improve by channelling conflicts and deferring democracy, cannot take place. The deferring and differentiated relationship of representation through the dialectic of authorisation and accountability cannot be set in movement without the stimulation of a certain interest and participation on the part of those represented. This active participation of citizens depends on the quality and perceived legitimacy of horizontal disagreements among representatives and hence of vertical disagreements among representatives and citizens. The latter is necessarily related to the descriptive representation of disagreement for two reasons. First of all, citizens will only be interested in taking part in representation's exercise in mutual learning and civilising if their conflicting opinions, interests and perspectives are taken into account before being debated further by their representatives, and hence only if they feel part of their representatives' disagreement.[178] Secondly, it is only if their disagreements are part of their representatives' disagreements that they will engage actively in their vertical disagreements and deliberations with them.[179] Vertical disagreements that feed into representatives' horizontal disagreements will in turn stimulate citizens' horizontal disagreements,

[176] See eg Burke, 1925, 115. See also Manin, 1997, 186.

[177] See also Arendt, 1970, 236; Young, 1997a; Urbinati, 2000 and 2002; Mill, 1991a; Phillips, 1995; Williams, 1998.

[178] See already Mill, 1991a, 370 as discussed by Urbinati, 2000 and 2002, 81: 'A symbolic presence would make up for physical attendance, *while expanding political debate beyond the parliament and allowing citizens to feel more identified with their representatives, and finally with the political institutions*' (emphasis added).

[179] See Kateb, 1981, 361 on the importance of representing diversity as the source of regulated contest and competition.

thus creating a virtuous and reinforcing circle of disagreement and deliberation.[180] The crux of the matter is that all this depends on the descriptive representation of horizontal disagreement among citizens. Disagreement which is to be channelled by representation and deferred in order to further deliberation turns out to be required by representation and deliberation themselves.[181]

It was contended earlier that it is the very paradox of democratic representation that it cannot comply with both the democratic requirements of inclusion and deliberation. I have now argued that this paradox may be circumvented by another one: the paradoxical relationship between disagreement and representation. So, one paradox replies to another.[182] Williams, one of descriptive representation's most recent advocates, mentions two opposed approaches of representation depending on whether they mediate conflict by being expressive or suppressive of disagreement.[183] Given the resolutely discursive and expressive orientation of the account of representation defended here, disagreement can be turned into a resource for representation itself.[184] In these circumstances, the descriptive representation of disagreement is not only compatible with the differentiating nature of representation, but becomes one of its requirements and virtues.

2. The Revised Model of Disagreement Representation

There are ways of institutionalising and organising the descriptive representation of disagreement so as to reduce the amount of identification between representatives and those represented and hence to circumvent the paradox, without, however, giving up disagreement's descriptive presence.[185] The role of descriptive representation of disagreement need not be to reproduce complete social identities and mirror them, but simply to give a presence to those conflicting perspectives which would otherwise remain unheard. In what follows, I will explore some of the (non-exclusive) ways of reconciling the descriptive representation of disagreement with the differentiating nature of representation.[186] There are two main ways of reconciling the paradoxical demands of representation and

[180] See KATEB, 1981, 360–61 on a similar virtuous circle between the electoral system and diversity. See also KUPER, 2004; ANKERSMIT, 1996, 56.

[181] See ARENDT, 1970 on the same paradox of the necessity of representation when most citizens are not interested in political matters, but of the simultaneous danger of infantilising and depoliticising citizens even more through deferring democracy to a bunch of elected representatives.

[182] See KATEB, 1981, 368 on this last paradox. See MILL, 1991A on both the advantages and disadvantages of reintroducing diversity into representation. See URBINATI, 2000 and 2002 for a discussion of Mill's views.

[183] See WILLIAMS, 1998, 9, 50–54, 243.

[184] See WILLIAMS, 1998, 243.

[185] On such mixtures and alternative models of representation, see GOODIN, 2003A and 2003B; ECKERSLEY, 2000, 128–29; YOUNG, 1997A; URBINATI, 2000 and 2002.

[186] The presentation will not be exhaustive, however; other institutional reforms may contribute to the representation of disagreement in a way that is compatible with the differentiating function of representation, such as in particular modes of ensuring more responsiveness on the part of both

disagreement: first, a balance of descriptive and substantive representation and, secondly, a delicate balance of the representation models of trusteeship and delegation.

a. A Balance of Descriptive and Substantive Representation

A mixed model of descriptive and substantive representation, or more precisely a minimally descriptive model of representation,[187] can provide representation with the necessary degree of diversity to represent disagreement, without, however, aiming at mirroring existing social segmentations and without falling prey to the size problem. There are two alternative ways to balance elements of the descriptive and substantive representation of disagreement.

First of all, *representing the sources rather than the particulars of disagreement*: I have already argued against the representation of the particulars of disagreement, ie conflicting opinions and interests, for reasons related to the size of the representative assembly, but also more generally of indeterminacy. Instead, the representation of disagreement should focus on the *sources* of disagreement, and more particularly on *group* or *collective sources* of disagreement such as conflicting perspectives or standpoints which influence individual and collective opinions and hence induce disagreements.[188] Since conflicting perspectives lie at the origins of disagreements rather than constitute their outcomes, representing them does not equate to mirroring people's opinions and identities.[189] On the contrary, it leaves sufficient leeway to the differentiating and constitutive effect of representation[190] and for genuine and unconstrained deliberation among representatives, among representatives and citizens and in turn among citizens themselves to take new shapes both among citizens and representatives.[191] It also enables the representation of new disagreements generated by conflicting perspectives in the course of representation.[192]

citizens and representatives (KUPER, 2004) and a stronger and livelier public sphere (MÜLLER, 1992, 156–57; HABERMAS, 1998A; DRYZEK, 2001; PARKINSON, 2003A; MANSBRIDGE, 1999). These alternative modes of reinforcing representatives' accountability and responsiveness do not, however, target the central issue of actually representing disagreement within the representation phase itself. Moreover, other institutional correctives than democratic representation should also be targeted to ensure full equality of participation, such as minorities' veto rights or the decentralisation of power from national parliaments to regional ones. In fact, one may contend that democratic representation alone, even with the correctives and reforms suggested here, might not suffice in ensuring complete equality in conditions of reasonable pluralism.

187 I argued earlier that descriptive representation implies substantive representation, although the contrary is not necessarily true. Hence the idea of a mixed model can only be taken in a figurative sense.

188 See YOUNG, 1997A, 369 ff.

189 See YOUNG, 1997A, 366.

190 See YOUNG, 1997A, 369.

191 See MANIN, 1997, 222 on the new shapes disagreement may take once represented.

192 See MANIN, 1997 on 'audience' democracy and the setting of the agenda by parties and representatives. This implies in turn that new disagreements among representatives, but also among citizens, arise out of representation. These new disagreements should also be descriptively represented.

Secondly, *representing the fact rather than the sources of disagreement*: instead of representing the sources of disagreement thanks to the descriptive representation of group perspectives, the representation of disagreement could be reduced even further to the representation of the *fact* of disagreement.[193] This could be done, for instance, by reducing the requirement of proportional representation to a mere presence threshold of one representative *per* group.[194] It could also be achieved by only descriptively representing some groups and some perspectives.[195] This is already the case in many countries in which some groups, and not all, are attributed list- or seat-quotas in elections.[196] Finally, representing the sheer fact of disagreement could be done by representing some dimensions, opinions or perspectives of individual disagreements rather than group disagreements.[197]

This minimalist account of the descriptive representation of the sources or the fact of disagreement could not only complement ordinary substantive representation, but it could also usefully be associated with what one may refer to as *reflexive* representation.[198] This mode of internal representation corresponds to Kant's idea of 'enlarged mentality'[199] and to Arendt's idea of 'representative thinking'[200]; it requires from each representative that she projects herself into the place of others in her own internal deliberation,[201] rather than leave the confrontation with diversity to external and interactive deliberation.[202] This implies in particular taking into account and cohering with the diverging opinions and perspectives of those represented when deliberating and taking decisions.[203] Without some kind of minimal descriptive representation, however, reflexive representation cannot be as diversified as required by the representation of disagreement.[204] It is necessary to give representatives the incentive to make other perspectives imaginatively present.[205] Ideally, then, it is a mixture of both the modified descriptive and reflexive

[193] See Goodin, 2003a.
[194] See Phillips, 1995; Kymlicka, 1995. Contra: Mansbridge, 2000, 104.
[195] The distinction between representing the fact or the particulars of disagreement should not be confused with the distinction between substantive and descriptive representation; it is possible to represent descriptively and substantively both the fact and some particulars of disagreement.
[196] It is the case in Switzerland and Belgium with respect to representatives of different linguistic areas and it is the case in some European countries like Germany with respect to female and male representatives.
[197] This is particularly important given the caveat I mentioned earlier with respect to the independence of many individual disagreements from group disagreements. See Urbinati, 2000 about Mill's distinction between proportional and group representation.
[198] I borrow this expression from Goodin's, 2003b concept of 'reflexive democracy.'
[199] See Kant, 2001, 216.
[200] See Arendt, 1970; Arendt, 2001 on political judgement more generally. See also Beiner, 1983 on political judgement.
[201] See Arendt, 2001, 19–20.
[202] Hence Goodin's, 2003b, 169 ff idea of 'democratic deliberation within.'
[203] This form of enlarged mentality is broader than the one I will refer to in Chapter 11. There, what matters is coherence among officials' opinions and decisions rather than among officials' decisions and outcomes, on the one hand, and citizens' opinions and reasons, on the other.
[204] See Goodin, 2003a and 2003B, 186–88; Eckersley, 2000, 128; Gargarella, 1998a, 261–62.
[205] Goodin, 2003b, 171; Gargarella, 1998a, 262; Eckersley, 2000, 128.

forms of representation which should be used to represent disagreement. This is what Eckersley calls *diverse representation*.[206]

This account of descriptive *cum* substantive representation in the context of the representation of disagreement offers another advantage. As Sunstein has recently argued, too much diversity in a deliberative body may induce polarisation and hence less deliberation.[207] However, as I argued earlier and as the author also acknowledges, some descriptive representation of diversity may help enhance mutual questioning and curiosity and thus improve deliberation.[208] The balance suggested here could in this sense constitute the right balance of polarisation for successful democratic deliberation. Furthermore, as Goodin argues, it might be better for the quality of deliberations not to have a full descriptive representation of disagreement as people tend to cut deals in such circumstances.[209] If, on the contrary, they realise the existence of disagreement through its descriptive representation, but also realise at the same time that not all perspectives in conflict are represented, they might be more inclined to be cautious and respectful of others' interests.[210] Finally, the fluidity ensured by this mixed model of representation tends to prevent the danger of balkanisation most critiques of descriptive representation have emphasised. Given that not all groups are represented and given that, when they are, it is not constantly so, all their perspectives do not become entrenched and can still evolve.

b. A Balance of Trusteeship and Delegation

A revised account of the mode of representation can provide an alternative way of ensuring representation with what is needed of diversity description without, however, undermining representation's differentiating and civilising effect and without encountering the size difficulty.

When representatives are regarded as delegates, they are bound by the instructions of those represented as in a mandate relationship. When, on the contrary, representatives are identified with trustees, they are given free rein to make decisions according to their best judgement. This distinction replies to the question of *how* representatives represent, by contrast to the question of *who* the representatives are which has been discussed at length in this chapter.[211] One of the main difficulties with these two models is that they describe the representation

[206] Eckersley, 2000, 128–29.

[207] See Sunstein, 2002a. See also Goodin, 2003a.

[208] See Sunstein, 2002a, 186, 192.

[209] See Goodin, 2003a; Sunstein, 1988, 1587. See also Phillips, 1995, 24–25 on this very same concern about the narrow politics of interest-based groups that might be encouraged by descriptive representation.

[210] See Goodin, 2003a.

[211] It is important not to confuse these two issues, as it is possible to conceive of a descriptive representative who acts as a trustee and vice versa. It is true, however, that it helps being a delegate to also be a descriptive representative. It is not, however, because the representation of disagreement is in part descriptive, that it is limited to the collection of information or to the mere application of a mandate; descriptive representatives also act in the best interest of their constituents and this with or without a precise mandate.

relationship in a manichean way. It is actually very rare to see either the representatives or those represented as solely responsible for a decision. Usually, all are to a certain extent, as they must be able to influence and convince each other in open conditions of deliberation.[212] This is what Urbinati refers to as *advocacy* in the representation relationship,[213] in order to distinguish this model from pure delegation without authorisation and pure trusteeship without accountability.

It is crucial that representatives have a certain autonomy and can act as they judge best in new circumstances, while also taking citizens' relevant perspectives and interests sufficiently into account. It is through this link that representatives can stimulate the participation of citizens and the dialectic of representation without, however, mirroring too exactly their constituents' opinions and hence hindering the mutual differentiation and civilisation which the enhanced participation and deliberation are to achieve. Disagreements among citizens should be able to influence the deliberations of representatives, but the latter's disagreements or the disagreements they cause among citizens or among representatives should also be able to influence citizens' disagreements in return.[214] In fact, representatives' decisions should amount neither to mere compromises of their constituents' conflicting perspectives and interests,[215] nor to the recognition of a common good and objective public interest beyond conflicting perspectives.[216]

V. SOME IMPLICATIONS: THE DEMOCRATIC LEGITIMACY OF REPRESENTATION

Adequate modes of representation which take disagreement on board not only succeed in reconciling representation and disagreement. Paradoxically enough, they also provide an even *better protection of deliberation and political equality* in some cases than direct democracy alone and hence an argument for the *democratic legitimacy of representation*.

First of all, *the enhanced amount and quality of participation and deliberation*: the quality of deliberation increases through the distance that representation establishes between the deliberation and the decision. By interrupting disagreement and deliberation and deferring decisions until later, representation increases the quantity and quality of deliberations.[217] This is, of course, only as long as deliberations include most points of view in conflict among citizens.[218] As I argued earlier, it is only

[212] See already PITKIN, 1972, 154–55. See also KUPER, 2004; PLOTKE, 1997, 31; YOUNG, 1997A, 358.
[213] See URBINATI, 2000 and 2002.
[214] See MANIN, 1997, 222 on the change of nature of disagreement through the relationship of representation.
[215] See URBINATI, 2000 and 2002, 83. In this respect, it is important to distinguish representatives' judgements that take citizens' perspectives into account, from their judgements *qua* officials which should cohere with other officials' judgements and lead in some cases to compromises of principle. See Chapters 8 and 11.
[216] See MANSBRIDGE, 1981, 475–76 criticizing KATEB, 1981 for straddling these two approaches.
[217] See URBINATI, 2000 and 2002; YOUNG, 1997A, 358 ff.
[218] See WILLIAMS, 1998, 8–9.

when disagreement is represented that citizens will develop sufficient interest to disagree further on these issues among themselves and then to disagree with their representatives, thus triggering the participation and deliberation in the public sphere that representation requires. Then, in turn, vertical disagreements that feed into representatives' horizontal disagreements will stimulate citizens' horizontal disagreements and deliberation, thus creating a virtuous circle and intensifying the effect of disagreement and deliberation. This revised conception of representation enables more disagreement within and outside the institutional forums to arise from the representation of disagreement[219] and hence contributes to the development of an extensive public sphere. This could help in turn solving the issue of citizens' chronic apathy[220] and circumventing representation's depoliticising effect.[221] Once disagreements are adequately represented, representation becomes *disagreement-generative*, an outcome which Kateb celebrates,[222] and thus induces more and better deliberation.[223] One may say, therefore, that thanks to the adequate representation of disagreement and hence to the triggering of citizens' involvement *qua* agents of representation, the deferred effect of representation can be stimulated and the degree and quality of democratic deliberation increased.[224] This way, representation gains in legitimacy by comparison to direct democracy *alone*.[225]

Secondly, *enhanced political equality*: the protection of equality is also increased through the different degrees of political deliberation and control introduced by representation,[226] provided of course disagreement is adequately represented. Simple majorities cannot exclude minorities as easily as in a direct democracy; it takes a majority to elect and authorise representatives, another for these to act and still another to make them accountable. The deferred nature of the decision and the increased scope of deliberation also leave more time and space to diverging opinions and perspectives to make themselves heard and perhaps to convince and change majorities until the decision-making stage. Although the descriptive representation of disagreement cannot be as inclusive as the direct participation of all, this incomplete inclusion is compensated by the correctives representation provides to the excesses of majoritarianism. One

[219] See MANIN, 1997, 186 ff on disagreement in representation *qua* school of citizenship.
[220] See KUPER, 2004.
[221] See also ARENDT, 1970.
[222] See KATEB, 1981, 361 on the importance of diversity in representation as the source of further democratisation and regulated contest and competition. See also MANIN, 1997, 222.
[223] The entrenchment of disagreement at the end of representative deliberation is not excluded therefore, but this is a positive element rather than a negative one, contrary to what GARGARELLA, 1998A, 274 seems to fear. My account of deliberative democracy is indeed an agonistic one which is not founded on the rationalistic presumption of agreement and impartiality as Gargarella's, but concentrates on conflict and discussion as these are a constitutive part of the legitimacy of democratic deliberation, ie voicing all opinions in conflict and discussing them before taking a vote and hence respecting the basic principle of political equality. See also KATEB, 1981, 361; URBINATI, 2000. See Chapter 7.
[224] See URBINATI, 2000; KATEB, 1981.
[225] See PLOTKE, 1997, 25–27 on the false opposition between representation and participation.
[226] See URBINATI, 2000 and 2002.

may say, therefore, that representation may be more consistent with political equality in some cases than direct democracy *alone*.[227]

While disagreement seemed fatal to representation at first sight, it now seems that it can not only be accommodated by representation, but that when it is, it can also provide a democratic argument for representation conceived as both requiring and stimulating an active and diverse citizenry through the deferral of political decisions and the dialectic of authorisation and accountability.[228] This is particularly important as there has not been a complete normative justification of representation and of its intrinsic democratic value to date. Reassessed and revised as suggested, representation becomes more than a necessary and inescapable mode of government; it constitutes a desirable and justifiable model of democratic decision-making in conditions of reasonable pluralism. In these conditions, representation's democratic legitimacy may be said to have been redeemed by the very phenomenon it aimed at dealing with: disagreement.

In conclusion, as Plotke rightly contends, 'representation is democracy'[229] and 'the opposite of representation is not participation,'[230] but exclusion; true representation requires inclusion and participation to increase the quality of democratic deliberation. It is wrong therefore to oppose representation to participation and to privilege the latter over the former as many still do nowadays. As Arendt rightly observes, they are two necessary dimensions of modern democracy and should be understood as intrinsically related in the complex constellation of democracy.[231]

CONCLUSION

In this chapter, I addressed a third type of institutional relationship and dialogue beside the dialogue between constitutional assemblies and legislative assemblies and between legislative assemblies and constitutional courts: the dialogue between representatives and those represented, and more particularly between legislative assemblies and the people in the so-called public sphere.

For a long time, democratic representation has been regarded as a default and pragmatic solution to the difficulties of practical democratic governance. In fact, it has become such an inescapable part of the political landscape that people simply take it for granted. Issues of inclusion and political equality have naturally been raised in the past, but most of the time they have been solved outside of the realm of representation or set aside as unproductive given the inescapable fact of representation. Deliberative democrats have developed stronger accounts of the public

[227] Urbinati, 2000 and 2002.
[228] See also Urbinati, 2000, 2002; Manin, 1997; Mill, 1991a, 165 on representation as a device that can help actualise the normative content of democracy.
[229] Plotke, 1997, 19.
[230] Plotke, 1997, 19.
[231] See eg Arendt, 1970, 236, 278.

sphere and hence foreseen an enhancement of the dialogue and responsiveness between represented and representatives in institutional and non-institutional forums. Although these accounts are essential, they do not face the inclusion problem in representation openly. The constant reference to a non-inclusive model of decision-making to settle our reasonable disagreements ought somehow to have been *accounted for and justified*, on the one hand, and *institutionalised* in such a way as to ensure sufficient representation of our conflicting perspectives, on the other. This is what I referred to in this chapter as the *challenge of disagreement*.

In response to the challenge of disagreement, I argued that while the democratic element of democratic representation requires equal participation rights, the representational element of democratic representation paradoxically requires a limitation in inclusion in order to make deliberation possible. This difficulty becomes particularly sensitive in conditions of reasonable disagreement when conflicting perspectives and opinions do not get represented, thus questioning the basic tenets of deliberative democracy and of legal authority. To meet the challenge of disagreement, I argued that disagreement, or more precisely the conflicting perspectives that induce disagreement, should not only be represented, but should also be descriptively represented through group representation. It is not only a matter of presence and visibility of the diversity of perspectives in conflict, but also of effective communication and deliberation among representatives and among representatives and citizens. True, the challenge of disagreement is not as strong and straightforward as expected and its discussion raises many paradoxes and puzzles. To start with, given the conception of representation *qua* deferred relationship of authorisation, participation and accountability used in this chapter, representation cannot afford to mirror constituents' identities and full diversity; it is meant to contribute to the constitution and the differentiation of the constituency thanks to constant dialogue and cannot do so if representatives merely mirror a pre-defined constituency and are prevented from deliberating in conditions of diversity. This is what I called the *paradox of democratic representation*. The second counterchallenge, ie the *counterchallenge of diversity*, has to do with the practical impossibility of representing all particulars of disagreement descriptively.

My response to these two counterchallenges and paradoxes was to present *another paradox*: representation requires sufficient descriptive representation of disagreement to stimulate the dialogue and participation through which the relationship of representation can be launched. Only then can the public sphere play its role in ensuring the mutual responsiveness that is crucial to representation. Paradoxically, then, adequate descriptive representation of disagreement amounts not only to a requirement of political equality, but also of representation itself. What is necessary for the democratic legitimacy of our disagreements' settlements amounts to more than a compromise of conflicting principles. It actually constitutes a basic requirement of democratic representation. Of course, any descriptive representation of disagreement will not be able to comply with the differentiating requirement of representation, on the one hand, and the counterchallenge of diversity, on the other. In response, the proposed account

conciliates both descriptive and reflexive elements and adopts a half-independent mode of representation. What is represented is the sheer fact of disagreement and at the most some of the main group perspectives at the origins of the relevant disagreements. The chapter therefore provided a mixed model of descriptive representation that allows for the minimal representation of disagreement, and conflicting perspectives in particular, that is required by the right to equal participation, but without jeopardising the function of representation.

The challenge of reasonable disagreement therefore provides us with the occasion to *relegitimate representation democratically*. Thanks to the stimulation of participation and deliberation ensured by the descriptive representation of some dimensions of disagreement, the proposed account of representation guarantees a better protection of political equality and deliberation in some cases than direct and purely participatory democracy. Deliberation amounts to an intrinsic element of the relationship of representation and, once stimulated by the descriptive representation of disagreement, it is enhanced by the different levels of deliberation among citizens and representatives, on the one hand, and within institutional forums and outside them, on the other. The spatio-temporal gap representation created between deliberation and decision increases the quantity and the quality of deliberation in the public sphere and hence ensures in some cases a better protection of political equality than purely participatory democracy, provided it is filled with sufficient disagreement and deliberation. In a nutshell, one may contend that the representation of disagreement becomes a constitutive element of a strong public sphere and hence of the democratic legitimacy of representation.

Of course, this should not be understood as a disavowal of *direct democracy* which retains a prima facie advantage in terms of the guarantee of political equality and inclusion. There is an ideal form of democracy, but all we achieve are approximating practices which all present advantages and disadvantages. In fact, I would suggest, both forms of governance should be *combined in a semi-direct system*, so that the benefits of representation and deferred democracy can be complemented by those of direct democracy and full inclusion. The indirectness of representation does not reside in the lack of participation of citizens, but in the spatio-temporal deferral it creates between deliberation and decision. Full participation and representation are no longer enemies and it is time to go beyond this sterile distinction. As Plotke rightly argues, 'rather than opposing participation to representation, we should try to improve representative practices and forms to make them more open, effective, and fair.'[232]

[232] Plotke, 1997, 19.

Section Three: The Content of Law

This third section looks at the implications of disagreement for the *content and implementation of the law*. It examines some of the facets of our traditional approaches to the law's content and legal reasoning that need to be revised in the new light of disagreement. The section discusses issues related to legal coherence and conflicts of constitutional rights.

The first chapter argues that, in the realm of legal interpretation and legal decision-making, the reasonableness of our disagreements calls for respect for other diverging views and hence, within the limits of moral pluralism, for synchronic and diachronic consistency in principle or *coherence*. This principle is justified as an independent political virtue and principle on grounds of public morality and respect for others in conditions of reasonable disagreement, on grounds of collective action and, finally, on grounds of legal authority.

In the second chapter, a particular case of legal indeterminacy arises when *constitutional rights conflict* and cannot therefore be made legally coherent; in these cases, alternative means of resolution should be found. I start by assessing the nature and origins of these conflicts by opposing conflicts of constitutional rights to conflicts of purely moral rights. Then, I discuss a precise typology of conflicts of moral rights in general and of constitutional rights in particular, before addressing issues pertaining to their resolution both *qua* conflicts of purely moral rights and *qua* conflicts of constitutional rights.

11

Integrity: Should the Law Speak with One Voice?

INTRODUCTION

Leges sunt inventae quae cum omnibus semper *una atque eadem voce* loquerentur.[1]

SHOULD THE LAW 'speak with just one voice?'[2] This is what Cicero seems to say in *De Officiis* and it is also what many of us would intuitively say should be the case. In fact, our legal practice seems, at first sight at least, to confirm this intuition; it suffices to think of the principle of precedent or of analogical reasoning to see that the law already works so as to speak with one voice.[3] But does this intuition survive strict moral scrutiny? More particularly, does it resist to the point where speaking with one voice commands a result which justice condemns?[4] Or, in a more practical fashion, does it withstand the observation that 'nothing in the way . . . law [is] produced guarantees [one's] success in finding a coherent conception of it'[5] and that it amounts at the most to a 'checkerboard'[6] or 'patchwork'[7] of disparate conceptions of justice left by different majorities at different times?[8]

Many legal philosophers argue nowadays that the law should speak with one voice. Of course, they do not always use these exact terms.[9] Metaphors abound: some say that the law should 'hang together,'[10] while others speak of the law as

An earlier version of this chapter was presented at Wojciech Sadurski's seminar on theories of justice, EUI, Florence in November 2002. I would like to thank Silvina Alvarez, Wojciech Sadurski, Georg Sommeregger, Lorenzo Zucca and the other participants for their comments. Many thanks to Thomas Pogge for helpful comments and critiques.

1 CICERO, *De Officiis*, Liber Secundus, 42.

2 WALDRON, 1999A, 190.

3 See KRESS, 1996, 536.

4 Some actually argue that, most of the time, it is actually the point of integrity, or of precedent, to morally require decision-makers to follow morally incorrect principles: see POSTEMA, 1997, 821; SCHAUER, 1994, 48 on this paradox. See for a critique, ALEXANDER/KRESS, 1997, 288.

5 DWORKIN, 1986, 273 himself voices this critique to show that he is aware of it.

6 On this expression, see DWORKIN, 1986, 179. Dworkin uses the image of checkerboard law to refer to an *individual* law or decision that is incoherent *per se*, but one may also use it to refer to the law *as a whole* (WALDRON, 2000A, 42). See Chapter 8.

7 On this expression, see ALTMAN, 1986, 222 and WALDRON, 1999A, 189.

8 This point has been expressed most famously by UNGER, 1996, 66: 'Defeated or rejected solutions will remain, incongruously, in corners of the law as vestiges of past approaches and prophecies of possible alternatives.'

9 See DICKSON, 2001B who mentions these different conceptions of coherence.

10 MACCORMICK, 1978; MACCORMICK, 1984: coherence *qua* 'making sense as a whole.'

a 'tightly knit unit.'[11] Despite the terminological differences, these accounts are usually read as promoting the same political virtue and principle[12]: *coherence* or, more famously, *integrity*, as it is sometimes referred to. It seems, then, as Joseph Raz puts it, that 'coherence is *en vogue*' among legal philosophers.[13] One of the first and most elaborate and provocative arguments for integrity was made by Ronald Dworkin in *Law's Empire*.[14] According to Dworkin, even though citizens as political participants speak in different voices on matters of justice and are aware of their divisions,[15] when these individuals act as *officials* and hence in the name of the community,[16] they should, for that reason, always regard it as a *moral demand* to *speak in just one voice*; this applies even if that single voice in which officials speak does not always lead to what they individually regard as just results.[17] Integrity requires, in other words, that the laws and decisions they adopt as officials, and hence which the state acts on, should be made to cohere as much as possible with past laws and decisions in force, as if they conveyed a single view of justice.[18] Disagreement about principles of justice and the principles governing fair decisions does not indeed

[11] Peczenik, 1983.

[12] One finds reference by Dworkin, but also by his commentators to integrity as a virtue, a value, an ideal or a principle. These different characterisations matter, but, for our purposes, those terms merely refer to the different functions or features integrity may have in a political and legal system. In short, principles are criteria for judging conduct to be right or wrong and virtues are stable and intentional dispositions to act well. According to some authors, virtues and principles are competitors, whereas for others, like Kant in particular, virtues cannot exist without principles. Ideals, by contrast, are (often fictional) fully specific persons or societies in which some principle(s) or virtue(s) is or are fully realised. When applied to integrity, this explains how integrity can be a principle of legal interpretation and legislation, while also possibly being the latter's value, the legal system's virtue as a whole or even the main feature of the ideal political community.

[13] See Raz, 1995a, 277.

[14] In this chapter, I will concentrate on *Law's Empire*, assuming that Dworkin's argument for a principle of coherence in case of official disagreement corresponds, although in a more elaborate way, to the discussion of adjudication principles of *Taking Rights Seriously* (see Hurley, 1990, 238). As Dworkin confirms on viii and ix of his Introduction to *Law's Empire*, he still defends, first, the idea that there is a right and coherent answer to be discovered in the law to all hard cases, although he now makes sure to disconnect this affirmation from any metaphysical implications. Secondly, he now distinguishes his explanation of what the law is from his theory of adjudication; his basis of argument is therefore no longer phenomenological, but merely interpretive. See also more recently, Dworkin, 2003c; Dworkin, 2004b. I therefore only partly agree in this respect with Raz, 1995a, 323; Raz, 2004d.

[15] Dworkin, 1986, 174.

[16] See Dworkin, 1986, 184 who addresses the ambivalence between officials expressing themselves as 'individual officials one by one' or as a whole. This is particularly important since, as we will see in this chapter, different arguments for the independent value of integrity target different dimensions of officialdom, either *qua* group or *qua* ensemble of individuals.

[17] Dworkin, 1986, 165: 'It requires government to *speak with one voice*, to act in principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice and fairness it uses for some.'

[18] My account of integrity is kept very broad on purpose; it applies to *all* authorities in charge of the production of law and to *all* past constitutive elements of the law. This is meant to avoid some of the difficulties of determining among past laws and decisions exactly what is the 'base' of coherence at law, ie the sources of law with which a new law or decision is to be made coherent. That base must be, practically speaking, the same for all participants, so that coherence imposed on it will yield *one legal system* per state, however much people may disagree about its content. On this last point, see Kress, 1996, 537; Raz, 1995a, 288. See also on the issue of the fixed starting points of the coherence equilibrium, Baum Levenbook, 1984, 366 ff. See also Dickson, 2001b.

guarantee that this will always be the case naturally[19] and this calls for a third political principle in circumstances of disagreement about principles of justice and fairness: integrity.[20]

Integrity has become something of a slogan in legal and political philosophy ever since Dworkin qualified it in *Law's Empire* as an independent principle.[21] Albeit sharing terms with the relatively consensual concept of personal ethical integrity[22] and with influential coherence theories in other areas of philosophy, political integrity claims in fact to be both much more than that and something very different from it. It is to be an *independent virtue and value of political morality*, on a par with but distinct from the two other main political ideals of justice and fairness. But is there really such a distinct moral virtue of political integrity? If coherence is *en vogue*, so is scepticism about it. It is the objective of the present chapter to assess the different claims that have been made for and against the independence and the value of integrity over the past 15 years. The idea of integrity has not yet been given all the attention and the arguments it deserves.[23] Dworkin postulated, rather than argued for integrity[24] and those who have argued for coherence and integrity after Dworkin have only very rarely done so in great detail.[25] An 'internalist' argument is needed that accounts for the actual *reasons to abide by past principles and decisions* and hence integrity's moral value, instead of 'externalist' arguments that only account for the *beneficial causal effects* of abiding by these principles and decisions.[26]

The topic is vast and complex as it overlaps law and morality. Not only is coherence a complex issue in moral theory, because it is related to controversial accounts of coherence in morality and in particular to truth and epistemological coherentism, but it is controversial within legal philosophy itself. It raises difficult questions as to the law's validity, justification, legitimacy and, even, authority and is associated to very different decision-making processes, including adjudication and legislation. It should not come as a surprise, therefore, that the literature on the issue has grown out of all proportion, and this, even if one restricts oneself to accounts of legal coherence. Rather than setting out to review all the literature

[19] Dworkin, 1986, 166, 273.

[20] See Dworkin, 1986, 178.

[21] Dworkin, 1986, 176–77, 217. Rawls had introduced the idea of *reflective equilibrium* into political theory in his *Theory of Justice* and hence a conception of coherence well before Dworkin produced his account of legal integrity in *Law's Empire*.

[22] See Calhoun, 1995.

[23] Theorists of legal coherence are eg MacCormick, 1978, 1984; Alexy/Peczenik, 1990; Hurley, 1990, 1989.

[24] On Dworkin's postulates, see Dworkin, 1986, 183 and Rey, 1998, 101–2.

[25] For instance, Raz's, 1995a, 314 ff account of local coherence provides examples of cases in which coherence is valuable without saying why it is valuable, except for a quick reference to the rule of law and coordination. This also applies to Waldron, 1999a, but he denies that giving such an argument was his aim in the first place. See, however, Postema, 1997 for a detailed account of the justification of the moral principle of integrity in law. See also Smith, 2005 for a detailed discussion of Dworkin's argument of integrity.

[26] See Postema, 1997, 822–23 on this distinction and for an internalist account of integrity. See eg Alexander, 1989; Schauer, 1987 for an externalist account of precedents.

and produce a complete taxonomy of all conceptions of coherence in the moral and legal realms,[27] my more modest goal will be to defend Dworkin's intuition about the independent value of integrity—but not necessarily his reasons for postulating it. Powerful arguments have indeed been developed against coherence and Dworkin's integrity by Joseph Raz,[28] but also by others more recently and they need to be taken on board. In my defence of integrity, I have found support in Waldron's argument for the *circumstances of integrity*, ie the circumstances of reasonable disagreement about justice, and my ambition is to expand his idea that the principle of integrity is called for in case of reasonable disagreement about the principles of justice and fairness.[29]

The present chapter is structured as follows. It is important to start by presenting a *few conceptual clarifications*, in order to delineate the concept of legal integrity from other connected concepts. I will then discuss the different *constitutive elements* of legal integrity and what it requires precisely. The chapter will also delineate the *circumstances* or real world conditions of integrity that make it a necessary, plausible and practicable value and principle in law. Finally, I will present three arguments or *justifications* for integrity's independent value.

I. THE CONCEPT OF INTEGRITY

As Waldron rightly puts it, 'coherence is a concept of which there are many conceptions.'[30] It is a highly contestable and complex concept. What is offered here, therefore, is a first and very basic approximation of a taxonomy of conceptions of coherence. This definitional exercise will be articulated around four elements: the term, the meaning, the scope and the relevance of integrity.

First of all, the *term* of integrity: I will use the terms '*integrity*' and '*coherence*' interchangeably in the present chapter. Dworkin's integrity is what I have in mind here. As a brand of coherentism in the law, it can be dubbed as coherence.[31]

[27] See eg Kress, 1996; Dickson, 2001b.

[28] See Raz, 1995a.

[29] See Waldron, 1999a, 189 who refers, by reference to Hume's and Rawls' 'circumstances of justice,' to these circumstances as to the 'circumstances of integrity' as opposed to what he calls the '*circumstances of politics*,' ie the fact of pervasive disagreement about justice among *citizens*. See also Waldron, 1999a, 159–60; Waldron, 1999c, 154. See also Waldron, 2004a. See also Chapters 5 and 6.

[30] Waldron, 1999a, 193. See also Raz, 1995a, 290: 'It is not possible to determine in advance precisely what coherence means, and how precisely different accounts of the law compare in the degree of coherence they show the law to have. These questions are among those which are at issue between competing accounts of the law, and can only be determined concretely in the face of the competing accounts.'

[31] For the same opinion, see, among others, Waldron, 1999a, 190; Kress, 1996, 546; Baum Levenbook, 1984, 355; Hurley, 1989, 262; Hurley, 1990, 221; Bengoetxea/MacCormick/Moral Soriano, 2001, 47. Contra: Raz, 1995a, 315–21, esp. 317 who criticises Dworkin's argument for integrity and loyalty to the community among arguments for coherence (307 ff), but who still emphasises later that it is not clear how integrity amounts to coherence in the Dworkinian sense. See most recently, Raz, 2004d. Raz argues that Dworkin cannot be a coherentist, because in *Law's Empire* other moral elements, like justice or fairness, do a lot of the justificatory work. What this critique misses, however, is that, although there are other criteria of justification, integrity is the only applicable one when there is disagreement about the others. See the recent reply by Dworkin, 2004b.

This does not mean, however, that all coherence accounts can be reduced to Dworkinian integrity. Moreover, integrity *qua* coherence can be studied and used in a way that can be detached from the rest of Dworkin's legal theory; it signals a political virtue, and not its background nor the argument that is made for it there. In fact, Dworkin himself hoped this would be the case and that the virtue of integrity could be defended through other arguments and in other contexts than the ones he sets up in his postulation of integrity.[32]

Secondly, the *meaning* of integrity: coherence will be used in a technical philosophical sense in this chapter, rather than in the commonly accepted sense of the property of what is intelligible.[33] In fact, this chapter argues for *normative* coherence, ie coherence of normative standards and principles, rather than coherence among facts or empirical descriptions.[34] Normative coherence, because of the elements it aims at making cohere, has an important justificatory role. It is possible to distinguish seven properties of ideas or theories that make them coherent: consistency, comprehensiveness, completeness, monism, unity, articulateness and justifiedness.[35] All these elements concur to the rationality of ideas or theories, that is something we usually regard as desirable.[36] Each of these elements may be argued to be necessary or sufficient for coherence. The one this chapter is most interested in, however, is consistency.

Consistency may be logical or principled.[37] In moral and legal theory, *logical* consistency is a very weak constraint and most authors agree that coherence amounts to more than that.[38] All it requires is the legal positivists' external systematicity, that refers merely to the systematicity and consistency of the sources of the law by contrast to doctrinal systematicity that refers to the consistency of principles in the law.[39] Another form of logical constraint lawyers often consider is the absence of contradiction among legal rules. The constraint advocates of coherence have in mind, by contrast, is *principled* or *doctrinal consistency,*[40] ie consistency in principle.[41] Principled consistency requires that underlying principles are made to cohere in the same law or decision if they conflict, on the one hand, or across the law with conflicting principles underlying past laws and decisions, on the other.

[32] Dworkin, 1986, 188.

[33] See Kress, 1996, 536; Raz, 1995a, 280.

[34] See MacCormick, 1984 on the opposition between 'normative coherence' and 'narrative coherence' among evidentiary facts.

[35] See Kress, 1996, 533 ff.

[36] See Brennan, 2001; Pettit, 2001a, 2001b and 2002; List/Pettit, 2002 and 2004 for rationality-based arguments for coherence. See also MacCormick, 1984, 243. See, however, Raz, 1995a, 305 for a rebuttal of a direct relationship between rationality and legal coherence.

[37] See Postema, 1997, 827 on this distinction.

[38] See Alexy/Peczenik, 1990; MacCormick, 1984. See Dickson, 2001b for a presentation of the different arguments.

[39] See, for instance, Raz, 1980, 1–4; Hart, 1994, 274. On this opposition between doctrinal and external systematicity, see Waldron, 2000a, 32, 35.

[40] Kress, 1996, 534. Raz, 1995a, 314 refers to his account of local coherence as an account of 'doctrinal' coherence. See also Waldron, 2000a for the reference to 'doctrinal' systematicity.

[41] See Kress, 1996, 540. See MacCormick, 1984, 235; Alexy/Peczenik, 1990, 130; Dworkin, 1986, 163, 184, 219 ff.

Thirdly, the *scope* of integrity: the kind of coherence that is at stake here is *legal coherence*. Legal coherence is a form of political coherence that applies to the legal results of the political process.[42] It should be distinguished carefully from strictly *moral* coherence, except in the cases where both are related through the legal incorporation of moral principles and values.[43] This is an important nuance as, although there is an overlap in some cases, not all cases of legal coherence will correspond to cases of moral coherence.[44] To understand how these two forms of coherence relate, it is important to briefly state what moral coherence amounts to. Depending on one's attitude to moral pluralism, morality will be more or less coherent.[45] Monistic accounts of morality will claim absolute coherence,[46] whereas pluralistic accounts will argue for a more moderate form of coherence. True, value pluralism *per se* does not identify with moral incoherence as sound moral principles may be coherent despite being in conflict. In fact, only those pluralistic accounts of morality which accept that values not only conflict, but can be incommensurable, face a difficulty in claiming absolute coherence.[47] Other pluralistic accounts can indeed claim 'coherence in pluralism', ie ways to make conflicting values cohere under higher values and principles.[48]

When transposed in the legal context, these different approaches of moral coherence will generate different approaches to legal coherence. Even if both realms are distinct, the numerous zones of overlap make moral coherence or lack of coherence relevant for the attempt to reconstruct the law in a coherent way. In those areas, the monistic accounts of morality will look at legal coherence as something entirely feasible overall. The advocates of coherence in pluralism will claim that legal coherence does not aim at revealing a systematic priority between reasons as they might conflict, but only at weighing and balancing them according to a theory of coherence *qua* 'supportive structures among reasons.'[49] Finally, those who are sceptical of general moral coherence given the possibility of conflict of incommensurable values will be even more sceptical of accounts of general coherence in the law,[50] but need not exclude it in all cases of moral pluralism.[51] On their accounts, legal coherence may also

[42] The law-related nature of integrity does not make it a legal principle; it remains a *moral principle* although it applies to the political process and the law in particular. See below.

[43] See Chapter 2.

[44] See MacCormick, 1978, 100 ff on these two levels of coherence and justification. Contra: Stavropoulos, 2004.

[45] See Chapter 2.

[46] See Dworkin, 1986, 176. See Dworkin, 2001a. For a recent analysis of the relevance of Dworkin's monism for adjudication and legitimacy, see Lucy, 2002, 239–40.

[47] It is the case of Raz's moral theory and this obviously influences his critique of legal coherence. See Raz, 1995a, 317.

[48] See Chang, 2004. See also MacCormick, 1978 and Bengoetxea/MacCormick/Moral Soriano, 2001, 79. See Lucy, 2002, 236 ff on MacCormick's pluralist conception of adjudication and coherence.

[49] Bengoetxea/MacCormick/Moral Soriano, 2001, 79.

[50] See Raz, 1995a, 298.

[51] See Nagel, 2001, 109–10.

require transcending moral incoherence in some cases by making the law 'coherent in its moral incoherences.'[52]

Finally, the *relevance* of integrity: legal integrity is an outgrowth of, but something distinct from accounts of coherence of truth and justified belief.[53] Coherence theories of justified belief are meant to escape foundationalism in theories of knowledge, whereas coherence theories of truth contrast with correspondence theories of truth. Despite being derived from these theories of coherence, the account of coherence in politics and the law this chapter is interested in may be held and justified separately from them. Rather than being an epistemic account of what legally justified beliefs are[54] or a constitutive account of the law's true nature,[55] it concentrates on the role of coherence for law's legitimacy or authority.[56] In a nutshell, it claims that a legal system exemplifying integrity is more legitimate.[57] In this sense, *justificatory coherence*[58] may be held by legal positivists and Dworkinians alike.[59] By justificatory coherence, I mean to say that integrity is a *necessary* requirement of legal justification, but not necessarily a *sufficient* one[60]; integrity might be sufficient for justification in some cases, but in other cases other forms of justification might be required. I do not mean, therefore, to exclude other non-coherence-based forms of justification.[61]

[52] See RAZ, 1995A, 316 ff on the value of local coherence in case of social and moral pluralism. On law's own conflicts that often transform and channel prior moral conflicts into legally resolvable ones, see VEITCH, 1999, 182 ff.

[53] See KRESS, 1996, 534–35.

[54] See RAZ, 1995A, 279–86 for a critique of epistemic accounts of coherence in the legal context and in general.

[55] Contra: RAZ, 1995A, 279, 286 ff who sets the kind of coherence he criticises as being constitutive of and hence relative to the law's truth. This might be what DWORKIN, 1986, 218, 225 has in mind too: 'Nor is the adjudicative principle of integrity absolutely sovereign over *what judges must do* at the end of the day. That principle is decisive over *what a judge recognizes as law.*' However, this constitutive conception of coherence is not the only kind of coherence one may derive from his account and certainly not the only one to make a case for. Moreover, Dworkin's theory entails other necessary elements of legal validity such as moral justification. Hence, probably, RAZ's, 1995A, 325 incredulous remarks about Dworkinian integrity amounting to coherence. See also RAZ, 2004D.

[56] See BAUM LEVENBOOK, 1984, 355 ff for a *justificatory* account of coherence in legal reasoning. See also MACCORMICK, 1978 and 1984. See, finally, FUMERTON, 1994 on the plausibility of a coherence account of law that is not a constitutive one.

[57] See Chapter 13. See POSTEMA, 1997, 855: 'Authority freed from integrity's discipline is free to ignore politics, and the very circumstances which demand that we pursue justice indirectly, in the name of justice itself.'

[58] I owe this expression to KRESS, 1996, 540.

[59] The difference between my premises and RAZ's, 1995A will bar the total transitivity of our accounts.

[60] See, more generally, DICKSON, 2001B on 'coherence in legal reasoning: necessary, sufficient or desirable?'.

[61] Integrity need not be an absolutely determining feature of legal justification, but it is a necessary one and one needs to show why. Of course, this form of underdetermination is a problem, but it is a problem for all theories which have many rather than just one criteria of legal justification. See FINNIS, 1987A and 1990 on this difficulty. For justificatory accounts of coherence in legal reasoning that allow for other forms of justification, see MACCORMICK, 1978 and 1984 and BAUM LEVENBOOK, 1984, 371 ff.

II. THE CONSTITUTIVE ELEMENTS OF INTEGRITY

Before establishing the conditions in which integrity is required, plausible and practicable, and before addressing the central question of its value, it is important to see what integrity itself requires in legal practice, that is what forms it may take.[62] Roughly speaking, there are six constitutive elements of integrity, that are worth distinguishing here[63]: the actors, object, degree, scope, levels and methods of integrity.

First of all, the *actors* of integrity: integrity applies to the law-making process of *all authorities*, and in particular to the legislative and adjudicative processes.[64] Of course, some nuances should be made before extending integrity to all authorities alike.[65] In particular, adjudication is not always regarded as a truly law-making process. A way to limit the scope of adjudicative integrity, therefore, is to limit it to hard cases, ie cases where the law is unclear on an issue and new law has to be enacted through judicial discretion.[66] Actors of integrity do not only encompass officials like legislators, executive officers or judges, but also citizens *qua* voters in direct democracies. This nuance is important, as in direct democracies, many of the laws and decisions are enacted through voting in referendums and initiatives. Of course, legislators are the ones putting legislative proposals to the vote and enacting them and as such they have a heightened responsibility in the process.

Secondly, the *object* of integrity: integrity is a virtue of the law *as a whole*; as such it binds all authorities in respect of *all sources* of past law, be they legislative or judicial sources. Limiting integrity to some sources of law and to an authority's own legal decisions would limit the law's capacity to speak with one voice.[67] The applicability of integrity to the law as a whole does not mean that a new law or decision should be made to cohere with all past laws independently of the subject matter.[68] Some areas of law are bound to have distinctive sets of coherent principles that may not always cohere with other areas of law's sets of principles.[69] As an *optimisation* principle,[70] integrity requires more coherence

[62] On the intrinsic relationship between the nature of a concept and its justification, see, however, Chapter 4.

[63] On further forms and methods of coherence, see KRESS, 1996, 541.

[64] See DWORKIN, 1986, 176. Even though Dworkin's account of integrity extends to legislatures, the only examples he gives show that he is exclusively preoccupied with judges. Moreover, if one refers to DWORKIN, 2003B, 662 and DWORKIN, 2003C, 11, he seems to have now reduced the scope of integrity to judges only.

[65] There is a sense in which legislative integrity is a collective exercise that has more legitimacy than individual judicial integrity according to which the law is made coherent on the basis of a single individual judgement with no collective deliberation about the best way to do so. It follows, therefore, that often issues of integrity and settlement will be entangled with issues of *institutional competence*. See also WALDRON, 2003A. See eg POSTEMA, 1987 and KORNHAUSER/SAGER, 2004 for a critique of 'protestant' judicial integrity in Dworkin's account.

[66] See RAZ, 1995A, 304.

[67] Some exceptions may have to be drawn to respect the principle of parliamentary sovereignty in some countries. See WALDRON, 2003A on integrity among different institutions and authorities. See Chapter 13.

[68] On this difficulty, see DICKSON, 2001B, but also DWORKIN, 1986, ch 7.

[69] See BAUM LEVENBOOK, 1984.

[70] See ALEXY, 2000, 294 ff.

from more closely connected laws and principles than from more indirectly related ones.

Thirdly, the *degree* of integrity: coherence implies consistency in principle among different sources of law. It is important to ask, therefore, whether this consistency should operate at the degree of the *reasons*, premises or intentions underlying those decisions or at that of their *outcomes*, conclusions or canonical texts. It is indeed a controversial question in the context of group choices whether outcomes can match reasons for those choices and hence whether, more particularly, coherent outcomes can match coherent reasons.[71] Given the doctrinal paradox, and the regular difficulty of getting the majority on the reasons to match the majority on the outcomes, it is unlikely that integrity can apply to reasons underlying collective decisions; democratic rules and voting protocols reduce this extensive match to mere wishful thinking.[72] In the circumstances of democratic politics, the only responsibility political actors can take, therefore, is that of the coherence of outcomes; reasonable disagreement both requires and limits that responsibility.[73]

Once we know coherence applies to decisions and outcomes rather than to underlying reasons, there remains to be established what it is in those decisions that should be cohered with. Coherence is about consistency *in principle* and as such it should aim at the integration or fit of the principles *expressed* in the decisions.[74] In the case of diachronic coherence, this implies taking a retrospective look at the decisions and identifying the protected principles. In the case of judicial precedents, these principles may be found in the *ratio decidendi*, but also elsewhere in the decisions.[75] Judicial precedents do not exhaust the base of integrity, however. Integrity requires a form of consistency in principle that goes beyond strict consistency with the content of precedents and extends to all the principles underlying a decision.[76] Moreover, integrity applies outside the judicial sphere and cannot therefore be identified entirely with respecting precedents. Finally, integrity in adjudication requires coherence with past legislation and not only with past judicial decisions.

Fourthly, the *scope* of integrity: integrity applies equally to all decisions and laws and is therefore *general* or *global* by contrast to *local* or *particular* coherence.[77]

[71] See Kornhauser/Sager, 1993; Pettit, 1997; Chapman, 1998a; Chapman, 1998b; Pettit, 2000; Pettit, 2001b; Pettit, 2002c; Pettit, 2003b; Kornhauser/Sager, 2004 on this 'doctrinal paradox' or 'discursive dilemma.'

[72] See Kornauser/Sager, 2004, 271.

[73] In this sense, Dworkin's, 1986 focus on the integrity of outcomes is a more plausible account than that of Pettit, 2001a who concentrates on the coherence of reasons or premises. See Kornhauser/Sager, 2004.

[74] There is an important issue of interpretation here, as the different principles used and their weighings are rarely clearly signposted in the law. For purposes of clarity, however, I assume that what is interpreted is the text of different laws and decisions.

[75] This is a controversial question pertaining to the legal theory of precedent. Space precludes discussing it further in this study. See, however, Perry, 1987; Schauer, 1987; Hurley, 1990; MacCormick, 1992; Alexander, 1996; Hershowitz, 2005.

[76] See Hurley, 1990, 245 ff. See Raz, 1995a, 318 and Dickson, 2001b on the relationship between precedent, analogical reasoning and coherence. See also Postema, 1997, 821.

[77] Raz, 1995a, 314 opposes local to global coherence.

Notable exceptions, however, are made in the cases in which legal coherence is made not only difficult, but truly impossible by a pre-existing lack of moral coherence; these cases result from the increasing importance of social and value pluralism and their consequences for the law. Despite these contingent exceptions, however, there is some value in referring to integrity as a *general virtue of law* rather than a *local* one; coherence is indeed a virtue of the law itself, rather than of some laws only.[78] By contrast, Raz claims to be supporting 'local' coherence of doctrine in specific fields.[79] In practice, however, Raz's alleged 'local' coherence is much more general than he says it is and this for two reasons. First, the 'dilemma of partial reform' he describes as the dilemma between coherence of purpose and the pursuit of the morally correct line is much more widespread than it appears[80]; this can be deduced from the importance Raz gives to social pluralism and disagreement as causes of the untidiness of law in the section where he criticises general coherence accounts.[81] As Raz links the partial reform dilemma to local coherence, the pervasive cases where a risk of diachronic or synchronic incoherence due to legal reform is given by reason of social pluralism could be cases where local coherence applies. Secondly, although moral pluralism and the incoherent conflicts of incommensurable values are constitutive of one of Raz's critiques of general coherence, he produces an argument for local coherence in these cases.[82] It is hard to see, therefore, what the difference is between, on the one hand, the incoherence that might result from a succession of different coherent compromises of incommensurable values and, on the other, the incoherence that arises from a succession of different coherent compromises of independent competing principles. If local coherence applies to the former, it should also apply to the latter. As the latter constitute most of our compromises at law, coherence is therefore much more general than Raz is ready to concede.[83]

Fifthly, the *levels* of integrity: integrity may be synchronic when it is a virtue of the same law or decisions and diachronic when it is the virtue of a series of laws or decisions across time.[84] Dworkin draws a similar distinction between laws that are coherent in themselves and laws that are coherent with past laws, although he restricts the scope of integrity itself to diachronic coherence.[85] Both forms of integrity are required for general integrity in the law and are conceptually linked given integrity's *path-dependent* nature. True, at first sight,

[78] Bengoetxea/MacCormick/Moral Soriano, 2001, 47. Dickson, 2001b conflates general coherence with unrestricted coherence; she assimilates Raz's, 1995a argument for local coherence to Baum Levenbook's, 1984 compartimentalisation of objects of coherence.

[79] Raz, 1995a, 314. See also Baum Levenbook, 1984.

[80] Raz, 1995a, 316.

[81] Raz, 1995a, 300–1, 312 ff.

[82] Raz, 1995a, 317.

[83] Raz, 1995a, 319 seems to be aware of this problem, as he contends that 'coherence is everywhere.'

[84] On the opposition between 'synchronic' or 'normative' and 'diachronic' or 'narrative' coherence, see MacCormick, 1995c, 119, 124; Postema, 1997, 826; Postema, 2003, 235 ff. It is a distinction also used in Pettit, 2003b that I have adapted to integrity.

[85] Dworkin, 1986, 184.

legal coherence seems to be primarily synchronic with diachronic coherence being derived from and dependent on it; it is only indeed through synchronic coherence at each moment of the law's development that diachronic coherence will be made possible in the long run.[86] Besides, diachronic coherence in each case will have to be ensured synchronically too. Diachronic coherence remains, however, essential to the issue of synchronic coherence which can only arise in a legal system characterised by cross-temporal normativity.[87] Without diachronic coherence, synchronic coherence would be made extremely difficult; the principles of past laws and decisions are necessarily part of current deliberations and decisions and hence affect the different principles at stake in ensuring synchronic coherence. Both are in fact necessary and mutually reinforcing elements of the law's integrity.[88]

Finally, the *methods* of integrity: coherence is usually regarded as a method for resolving conflicts. Generally speaking, integrity requires authorities to produce new laws that first, cohere in themselves, and secondly cohere with past law. The latter amounts to making new law cohere with past law rather than to make past law coherent *per se*. In effect, however, as coherence is path-dependent, to render new law coherent, one has to make past law coherent when it is not already, thus reaching a form of reflective equilibrium. There are different methods for resolving conflicts and ensuring coherence. Among them, one should mention reflective equilibrium, weighing and balancing,[89] lexical ordering and pre-emption. These are major methods of coherent conflict resolution, but the list is not exhaustive.

There is one method of coherent conflict resolution that is often assimilated to coherence and hence the source of a lot of confusion. This method is coherence through *compromise.*[90] As I have discussed compromise at length before, I will be short. The first source of confusion is that coherence or incoherence may be entirely independent from the existence of compromise in the law, whether external or internal. It is important, therefore, not to confuse arguments for coherence with arguments for compromise or arguments for compromise with arguments for coherence,[91] although some may argue for both on the same grounds.[92] The second source of confusion that surrounds compromise in the coherence context is that compromise may render conflicting principles more coherent, but it may also combine them in an incoherent way thus calling for coherence or even making coherence difficult or impossible, and this whether compromise is external or internal and integrative or distributive.

[86] See MacCormick, 1995c, 124 and Postema, 2003, 235–36.
[87] See Jackson, 1988 on the priority of narrative or diachronic coherence.
[88] See Postema, 2003, 236 ff on the ambivalent nature of integrity.
[89] Most famously, this is the main coherence method defended by MacCormick, 1978, 1984; Alexy/Peczenik, 1990, 132 ff; Bengoetxea/MacCormick/Moral Soriano, 2001.
[90] See Chapter 8.
[91] See eg Raz, 1995a, 312 ff.
[92] See eg Waldron, 1999a, 204–5.

As such, compromise may be at once, and depending on the context, a source of coherence[93] or incoherence.[94]

III. THE CIRCUMSTANCES OF INTEGRITY

Identifying the circumstances of integrity is crucial to assess whether integrity is a necessary, plausible and practicable ideal and virtue in ordinary politics. It does not yet provide a justification of the independent principle and virtue of integrity, but it is a necessary step to establish the necessity and practicability of integrity before one can set out to justify it.

On the model of Hume's and Rawls' 'circumstances of justice,' Waldron describes conditions of reasonable disagreement about justice as the 'circumstances of integrity.'[95] Circumstances of integrity are real world circumstances where reasonable disagreement about justice is inescapable. The 'social pluralism' this conduces to, coupled with moral pluralism, is likely to lead to enacting legal rules and principles that reflect the different conceptions of the people who made them.[96] As such, the circumstances of integrity differ from ideal conditions where coherence would prevail on those matters and where integrity would therefore become superfluous, on the one hand, and from 'worse than real' conditions in which disagreement would be so widespread that integrity would barely be possible any longer, on the other. As the circumstances of integrity are the circumstances I assume pervade in our political community, it is necessary to show how they differ, first, from ideal conditions and secondly, from worse than ideal conditions. This is important in order to define exactly, first, why integrity is *necessary* in our political context; secondly, why it is *plausible* at all by contrast to the extremely incoherent picture given by legal realists; and, thirdly, why it is a *practicable* idea in ordinary pluralistic politics.

1. From Utopia to Ordinary Politics: the Necessity of Integrity

The first contrast is a contrast between the circumstances of integrity in a real world and the conditions of a utopian world. According to Dworkin, integrity would not be needed in a utopian state.[97] In such a state, indeed, 'coherence would be guaranteed because officials would always do what [is] perfectly just and fair.'[98]

[93] For instance, Waldron, 1999a, 203 ff regards compromise as making the law coherent. See also Bengoetxea/MacCormick/Moral Soriano, 2001, 71.
[94] For instance, Raz, 1995a, 312 ff refers to compromise as making the law incoherent. See also Dworkin, 1986, 178 ff.
[95] Waldron, 1999a, 189 ff. See Chapters 5 and 6.
[96] See Raz, 1995a, 316.
[97] See Dworkin, 1986, 176, 216.
[98] Dworkin, 1986, 192.
[98] See Waldron, 1999a, 192.

This means that, most of the time, correct conceptions of justice are necessarily coherent—and not that coherent conceptions of justice are necessarily correct. No matter how many people produce conceptions of justice in the utopian state, they would most of the time be correct and hence coherent. In a real world and in ordinary politics, however, people suffer from burdens of judgement and make mistakes. Accordingly, their conceptions of justice differ, thus leading to different decisions and hence possibly to incoherence among those decisions. Hence the *necessity* to respect integrity to make sure our divergent conceptions of justice cohere.

Since we disagree about our present and past decisions' respective qualities of justice, justice cannot provide us with a key to our way to go about producing further decisions. However, as coherence is taken by most of us as a necessary sign of truth, we should try to produce decisions that cohere with our past decisions on the matter. Of course, in some cases, incoherent decisions may be correct and coherent ones may be false. In case of incommensurable values, moreover, coherence might not be an element of correctness. However, all this shows is that coherence is only one dimension of moral and legal justification.[99] In most cases where we disagree about justice and the other dimensions of truth of our judgements of justice, we have at least some reasons to try to cohere with past decisions we do not regard as too blatantly unjust.

2. From Dystopia to Ordinary Politics: the Plausibility of Integrity

A second contrast to be drawn is the contrast between the circumstances of integrity in ordinary politics and the conditions of politics in a worse than real world where integrity would no longer be possible. Some critiques of integrity have argued that our real political world is actually much more chaotic and conflictual than integrity advocates are ready to allege. Institutions are organised and decisions are made in such a chaotic way that trying to reconstruct a coherent account of them is doomed to fail. According to these critiques, therefore, integrity is not a *plausible* virtue in politics.[100]

The strongest version of this critique has been made by authors belonging to one of the legal realist movements called Critical Legal Studies (CLS).[101] One may, however, find elements of this critique among authors who have distanced themselves from the CLS.[102] Their basic claim is that the law entails too many ideologies that struggle for the last word in ordinary politics and are therefore ready to compromise to obtain it.[103] Not only are there *contradictory* principles in past

[99] I do not think Raz, 1995a, 285 would disagree with this modest point.
[100] See Altman, 1986, 221.
[101] One of the best and clearest accounts of the difference between Dworkin and the CLS movement may be found in Altman, 1986, 216 ff. See for the same critique in earlier realist thought, Holmes, 1963, 32.
[102] See, for instance, Kennedy, 1998 or Unger, 1996.
[103] See on this point, Luhmann, 1988; Morgan, 2002.

laws and decisions that cannot be made to cohere *synchronically*, but the law often already *compromises* those or other principles synchronically according to very different weights, for instance for reasons of coherence,[104] thus making *diachronic* coherence even more difficult.[105] Thus, the claim and its challenge to integrity are not only *causal* ones, that pertain to the genesis of legal doctrines and principles, but they are also *logical* ones related to the lack of amenability of such compromised doctrines and principles to rational reconstruction.[106]

This challenge is an important one and cannot easily be discarded.[107] If reasonable disagreement and the phenomenon of social pluralism it gives rise to are the necessary conditions for integrity, they might also be fatal to it given the often incoherent compromises pluralism gives rise to in the law. This is what Raz means when he argues that Dworkin explains the law in a way which transcends the very inherent limitations of the workings of human institutions and officials which he emphasises to postulate integrity, and by transcending them he clearly misunderstands them.[108] Without adhering to some of the most critical objections of the CLS, it should be easy therefore for anyone who has observed political reality to observe 'the inherent limitations of the workings of human institutions'[109] and the 'vagaries of politics' of which law is a by-product.[110] It is imperative, therefore, to find a way out of this difficulty. Dworkin himself, who usually disparages quite quickly most forms of criticism, takes the charge of 'slavery to coherence for its own sake'[111] very seriously.[112] He says at some point about what he dubs the challenge of 'internal sceptics'[113] that:

> their work is useful to Hercules and he would neglect it at his peril, because it reminds him that nothing in the way his law was produced guarantees his success in finding a coherent interpretation of it.[114]

How then does Dworkin escape the difficulty pluralism and disagreement raise for his account of integrity? Unfortunately for our purposes, he does not give us many answers. By reconstructing the hints he gives us and by adding further elements, however, there is one comment and three arguments one could make to rebut the CLS critique.

[104] See Postema, 1997, 853.
[105] Altman, 1986, 221. See also Raz, 1995a, 312–13.
[106] Altman, 1986, 221.
[107] See Waldron, 2000b, 45. See also most recently, Waldron, 2005.
[108] See Raz, 1995a, 301. See also Kress, 1996, 536.
[109] Raz, 1995a, 297. Raz is right therefore to argue that the law cannot be said to *be* coherent.
[110] Raz, 1995a, 296. Along the same lines, Alexy, 1985b, 13.
[111] Dworkin, 1986, 163.
[112] See Dworkin, 1986, 272–73. See Kennedy, 1998, 119. This is perhaps because in a sense, although they differ on the *response* to the significance of official disagreement, both the pragmatist and Dworkin agree on its quality as a *central circumstance of politics* and on the need felt in political morality to remedy it: Dworkin, 1986, 153. See also Dworkin, 1986, 166.
[113] See Dworkin, 1986, 78, 269–75.
[114] Dworkin, 1986, 273. See also Dworkin, 1986, 184.

To start with the *comment*, there are contradictory principles in the law that should not be compromised or else the compromise that would result might be an internal one. In such cases, coherence can only be attained by respecting one or the other principle depending on which one was implemented in past law, in case of diachronic coherence, or which one gains a sufficient majority, in case of synchronic coherence. It is an established fact, however, that some conceptions of justice enacted in the law are *internally compromised* and hence already incoherent *per se*.[115] These cases are, however, quite isolated. Moreover, as Raz himself recognises, when a choice of ranking is made in such cases, it is possible to ensure local coherence of future laws with this ranking, whatever the compromise and the ranking were in the first place.[116] One could therefore hope that, gradually, coherence could be attained even in these cases. Even in pluralist accounts of morality and law, then, legal coherence may succeed in transcending moral and social incoherence.[117] If these are the combinations of principles the CLS have in mind and if they can be assessed in the way I just did, then integrity is not prima facie implausible. Furthermore, there are *three arguments* that may help rebut the CLS objections.

First of all, one may use one of Dworkin's arguments to show that integrity 'tries to impose order over doctrine, not to discover order in the forces that created it.'[118] As such, one need not show that coherence is there to be found to make an argument for the plausibility of integrity in practice. Roberto Unger is right to say that there is no 'immanent moral rationality' or immanent coherence whose message could then be articulated by a single cohesive theory.[119] However, this misses the point of integrity.[120] It suffices for our case to show that it is possible to unpack and assess the different weighings that have been made in the different combinations of principles the law encompasses, and then recombine the principles in a coherent way through *reconstruction* rather than discovery.[121] In this sense, integrity may be said to propose a form of *heuristic* for dealing with disagreement[122]; integrity makes a normative point, not an empirical one. Path-dependence renders integrity a difficult exercise, but it also makes it an optimising one, as ensuring more integrity now might generate more in the future. It is

[115] DWORKIN, 1986, 269–75. See also his account of checkerboard statutes, DWORKIN, 1986, 178 ff.

[116] RAZ, 1995A, 317–18. This is not an argument for the coherence of existing compromises of that kind, but only an argument as to how we should proceed once they have been made.

[117] See RAZ, 1995A, 316 ff on the value of local coherence in case of social and moral pluralism.

[118] DWORKIN, 1986, 273. See also DWORKIN, 1986, 45–86 on legal interpretation as constructive interpretation.

[119] See UNGER, 1996, 37, 40, 67 ff For the same critique, see WALDRON, 1998B, 514.

[120] In fact, many critiques of integrity make the same mistake. See, for instance, RAZ, 1995A, 289, 292.

[121] See MACCORMICK, 1990 for this kind of reconstructive response to CLS and deconstructionism, both *of* the law and *in* or *through* the law. To this heuristic and reconstructivist approach, some critical legal scholars, and Kennedy in particular, have replied that ideology is omnipresent and that there is no more determinacy in claiming pre-adjudicational legal coherence than in reconstructing post-adjudicational legal coherence (KENNEDY, 1998, 178–79). I assumed in the introduction to the present book, however, that we can retain minimal liberal standards such as equality or fairness, thus providing sufficient determinacy to coherent reconstruction of the law in case of disagreement.

[122] WALDRON, 1999A, 191.

not because the law *is* untidy, as Raz puts it,[123] that it *should* be so and that we *should* therefore leave it in this untidy state in the future.[124] As Dworkin contends:

> we know that our own legal structure constantly violates integrity. We cannot bring all the various statutory and common-law rules our judges enforce under a single coherent scheme of principle. But we nevertheless accept integrity as political ideal. It is part of our collective political morality that such compromises are wrong, that the community as a whole and not just individual officials one by one must act in a principled way.[125]

Critics may object, of course, that even imposing order is not something that is logically possible or else legitimate as it would, in most cases of combinations of principles just described, go beyond reconciling conflicting principles and amount to changing the law. There are two counterarguments one could make here.

First of all, this mere *possibility* should not deter us. Coherence is a matter of degree and integrity is an optimisation principle.[126] On this account, integrity should be implemented to the highest degree possible given the circumstances.[127] This is implied, I take it, in Dworkin's conception of integrity as requiring that the community's conception of justice be *as coherent as any individual conception might be.*[128] As Postema rightly argues:

> integrity regards coherence as an *ideal*, a normative *project*. Thus, our best efforts may only achieve an approximation of coherence. This is especially true of law.[129]

Secondly, the *legitimacy* issue is a more difficult one. In the case of legislative integrity, however, it does not have to concern us too much as new laws usually change past laws.[130] In the case of adjudicative integrity, there is an argument for

[123] Raz, 1995a, 314.

[124] This difficult relationship between the *is* and the *ought* in terms of coherence and integrity is crucial to grasp as it creates different levels of argument which are sometimes conflated. Coherence and integrity may refer at once (i) to an actual state, (ii) to the state it can be made into by reconstruction and (iii) to the action of putting something into that state. This triple dimension of integrity makes the assessment of any analytical account difficult. For instance, Raz's critique of general coherence concentrates on the actual state of incoherence of the law, whereas his defence of local coherence concentrates on the state in which the law could be put and on the action of preventing it from being incoherent.

[125] Dworkin, 1986, 184.

[126] See Alexy, 2000, 294 ff. See also Waldron, 2004a, 329–30 on Dworkin's integrity as an attempt rather than an outcome. See eg Dworkin, 1986, 190, 239, 264.

[127] On this idea of optimisation, see Alexy, 2000, 294 ff. Of course, Dworkin should not be able to use this argument, given his belief in the soundest theory of the settled law and in the single right answer. See Altman, 1986, 227 ff. See, however, Dworkin, 2004b, 388 on the distinction between 'pure integrity' and 'inclusive integrity.'

[128] See Waldron, 1999a, 193 on this point.

[129] Postema, 1997, 827, 854.

[130] The idea of changing the law has gradually become little more than a scarecrow, as much more change is being done to the law through interpretation than through actual legislation and legislative repeal.

such reconstructive change.[131] It goes along the line that, in hard cases, ie cases where the law gives no clear answer as to what should be done, judges have discretion to establish what the law is and should do so as well as the legislature would, ie by respecting integrity.[132]

3. Back to Ordinary Politics: the Practicability of Integrity

It has been a constant critique of accounts of integrity in the past that they do not provide details of how they could be practically implemented. It is my point in this section to present what the 'natural limitations' of integrity are in ordinary politics; they are necessary for my account of integrity not only to be *plausible* on grounds assessed in the previous section, but also to be a *practicable* one. There are two main limitations I will present here, but there may be more and my aim is not to be exhaustive: object-related limitations and process-related limitations.

a. The Object-related Limitations of Integrity

As mentioned before, the law is deeply untidy and much of it seems incoherent. The question is to determine how much of it *is* really incoherent, in order to determine how difficult or practicable it is to make it more coherent.

In case of internal compromise, as we saw earlier, contradictory principles, mistaken conceptions of principles or absolute principles are combined. The result is morally incoherent and there is no scope for legal coherence. However, to prevent the situation from becoming truly incoherent and incurable through the multiplication of those forms of compromise and the next type of compromise among those different forms of compromise, integrity should be respected and a single compromise chosen. This is the type of local coherence in moral pluralism Raz has in mind.[133] Moreover, what is relevant for our purposes in this section is that internal compromise could actually be prevented if integrity were respected at an early stage, thus enabling integrity in many more cases in the future. Integrity is indeed path-dependent and may be at once a current state, a requirement for the future and a future state. There is a sense, therefore, in

[131] Accounts of adjudication that use coherence as an argument against pure discretion need to produce a clear and determinate account of coherence that enables judges to decide in hard cases without having recourse to 'judicial legislation.' See KENNEDY, 1998, ch 2 on this point. See also GREEN, 1989A, 108. See also HABERMAS, 1998A, 272 ff who argues that the role of coherence is necessarily vague and insufficient, even though an elementary postulate to rationality. See for the same critique: ALEXY, 1996A, 1028.

[132] This is what art. 1 of the Swiss Civil Code states and it allows me to escape (momentarily at least) the democratic critique of integrity (see eg UNGER, 1996, 72). In fact, one might even want to argue that integrity actually also promotes democracy by forcing new decisions to take past ones into account, especially in the case of adjudication, and hence perpetuates the legal narrative and deliberation. See Chapters 6, 9 and 10.

[133] RAZ, 1995A, 317.

which the earlier we realise the value of integrity, the less limitations integrity will encounter, the more practicable it will be and the less criticisable it will become.

b. The Process-related Limitations of Integrity

A second point that needs to be raised in relation to the obligation to respect integrity is the issue of process practicability. It is important to give an answer to this question as it might jeopardise the circumstances of integrity, just as much as object-related limitations. As Raz rightly puts it:

> coherence is in fact very difficult to establish. It requires intellectual capacities, formal training, and a command of information about the law generally.[134]

With respect to *diachronic* coherence, first, the difficulty is clearly not too high, as past laws and decisions should be available to anyone. Of course, there may be limitations in time, economic means and subjective abilities of the relevant authorities, which may impair retrieving past principles implemented in the law. Moreover, there is an important issue of interpretation here, since the different principles used and their weighings are rarely clearly signposted in the law. There might indeed be a variety of views as to which exact principles are implemented and how they are weighed in each law or decision. In the case of *synchronic* coherence, secondly, the degree of difficulty is higher. It is not always clear, indeed, which are the reasons and principles to cohere with when these are produced within the same procedure. They are not always raised or even expressed clearly in deliberation and are often simply assumed.[135] Provided the difficulties are not deeper than that, however, integrity remains a practicable albeit limited virtue.

There is a further and more problematic threat to the practicability of integrity and that is *disagreement* about integrity. Although disagreement seems to be a matter of concern for practicability at first sight, this concern can easily be discarded. First, by contrast to justice, integrity is an *optimisation* principle; as such, any degree of it, provided it is the best average we can achieve given the circumstances, will suffice. Secondly, integrity is a second-order principle that aims at pre-empting the evaluations that make first-order judgements of justice and fairness controversial ones and, as such, it should generate less disagreement.[136]

IV. THE VALUE OF INTEGRITY

Now that we have established what integrity requires and how necessary, plausible and practicable a virtue it is, it is time to get into the heart of the matter and address the question of its independent value. The point of an argument for

[134] Raz, 1995a, 314 note 64.
[135] Hence Pettit's, 2001b and 2002a different solutions would not escape that difficulty.
[136] See for a similar argument, Waldron, 1999a, 197. See also Chapters 6 and 9.

the value of integrity is to show from different perspectives what the value of legal and political integrity is or, in other words, what is good about *coherent* law. It is in part about what is good about *law* when it is coherent.[137] As such, the argument relates to some of the constitutive elements of the moral value of the rule of law.[138] What concerns us here, in other words, is the law-relative *moral value* of political integrity or why it is that integrity makes the law more justifiable.[139] Before turning to these arguments for the value of integrity, however, it is useful to start by assessing the independence of the principle of integrity from other principles and in particular from the principle of justice.

1. The Independence of Integrity: the Service Conception of Integrity

One of the arguments one often encounters against integrity is that it is parasitic on justice and amounts at the most to one of its constitutive elements. As such, it lacks independence. One refers to it as synonymous to the principle of consistency internal to justice or to the principle of equal concern.[140] This point should not be confused with another related point: the question of the conflict between justice and integrity. If integrity is regarded as an independent principle, then the question arises of how it relates to justice when it conflicts with it, as it is taken for granted that independent principles conflict. I will establish in this section that integrity's independence of justice need not mean that both principles conflict *stricto sensu* or at least not in all cases.

The argument as to the lack of independence of integrity has been made most famously by Réaume,[141] but also by others since then.[142] The gist of their argument has been the checkerboard statutes' illustration of integrity I discussed earlier in the book.[143] Checkerboard statutes are statutes that compromise principles internally by allowing each competing viewpoint to be reflected in the rules produced even if they are false or at least unreasonable, hence the checkerboard

[137] It is interesting to see that we feel the need to provide a justification for integrity as a justificatory principle in the law, but not for justice. In this sense, coherence or integrity may be compared to other moral values or principles like toleration or mutual accommodation that are to be justified independently and cannot simply be assumed to be something of value.

[138] See Raz, 1979, 220 on these elements.

[139] I argued earlier that integrity has a justificatory role in law and the time has come to explain why this is so or, in other words, what it is about integrity that makes it valuable in law. The law-related nature of integrity does not make it a legal principle; it remains a *moral principle* although it applies to the political process and the law in particular. I am not therefore interested in a legal principle of coherence in this chapter, but only in a strictly moral one, even if it happens to have a legal translation in practice, as is the case in the European context, for instance. See Besson, 2004a.

[140] Réaume, 1989, 407–8. See also Postema, 1997. See most recently, Smith, 2005. True, Dworkin, 1986, 165–66 talks of 'treating like cases alike,' but clearly adds that integrity is 'a particular demand of morality.' See also most recently, Dworkin, 2004a.

[141] Réaume, 1989, 392 ff.

[142] See Raz, 1995a, 296, 298; Alexander/Kress, 1997, 295.

[143] See Chapter 8.

metaphor. They constitute Dworkin's central example of why we need to postulate an independent principle of integrity in the absence of other arguments to support our intuition against checkerboard statutes.[144] Although I think that integrity can be said (and not only postulated) to be an independent principle, I do not share Dworkin's views about checkerboard statutes. I tend to agree with his critics that justice may also explain our rejection of such compromises.[145] I have argued for this earlier in the book and will not repeat the argument here.[146] What the justice argument against checkerboard statutes shows is that there is an independent problem of justice with them. Dworkin's argument for postulating integrity *qua* only argument against checkerboard statutes therefore fails. This does not demonstrate, however, that integrity is not an independent virtue and principle. There are four arguments to that effect.

First of all, the argument of justice does not show that an integrity and coherence argument cannot also be made separately against such statutes. To be independent of justice, integrity need not be conflicting with it. It simply provides us with an *additional argument* for justifying one or the other law or decision, thus helping us out of our disagreements over justice. To take an example, it is not because both justice and fairness condemn plural voting that fairness is not an independent principle and cannot provide an independent justification against plural voting. Thus, it might be unjustified to allow abortion for women with blue eyes simply on grounds of justice and equality, but it might also be unjustified to do so on grounds of synchronic and diachronic coherence even if the checkerboard statute may not be deemed unjust.

Secondly, what the critique of integrity's independence from justice and other principles misses is that most people, including Réaume and other critics, are ready to accept that, in some cases, justice requires breaking with the past.[147] Thus, they cannot avoid accepting that principled consistency is a separate principle or virtue. Consistency is not required by justice in those cases and in fact there is no requirement of consistency with just solutions since past solutions are usually regarded by some individuals as being unjust. In this context, integrity cannot be confused with 'internal consistency' to the principle of justice, as it conflicts with it, at least in a loose sense of conflict.[148] How else, then, could we justify the intuitive dilemma between justice and integrity with which we started this chapter, than by seeing integrity as an independent principle?

Thirdly, even on Dworkin's account, checkerboard statutes are only one instance of incoherence in which the value of integrity has to be postulated to make sense of our intuitions against incoherence. Dworkin also mentions the problem of incoherence among sovereign constitutional laws and decisions

[144] Dworkin, 1986, 178 ff.
[145] See Réaume, 1989, 396 ff.
[146] See Chapter 8. See also Besson, 2003a.
[147] Réaume, 1989, 394–96.
[148] Contra: Réaume, 1989, 400.

and the importance of integrity in the federal context.[149] Finally, most of Dworkin's examples are inspired by cases of diachronic incoherence; in these cases, integrity is flouted not (only) through internal compromise and checkerboard statutes, but through the implementation of other inconsistent principles or combinations of principles in new laws and decisions and thus through 'checkerboarding' the law as a whole.[150]

Finally, even if it is granted that integrity may be independent from justice even in cases where it does not conflict with it and that in some cases integrity requires departing from what one thinks is just, it is important to note that the independence of integrity from justice does not rely *logically* on the possibility of conflict between them given the *special nature of the principle of integrity*. Integrity is both relative to justice and independent of it; it relates to it, but only when there is disagreement about it. This explains how it may look parasitic on justice, but still be regarded as an independent principle.[151] One may therefore refer, to borrow Postema's expression, to the *service conception of integrity.*[152]

Waldron refers to circumstances of reasonable disagreement about justice as 'circumstances of integrity' and by that he means that integrity only matters when there is disagreement about justice.[153] In this sense, integrity may also be described as a *meta-justice* principle or a principle of justice in the ordinary conditions of politics. It is related to justice *substantively* in the sense that its object is to deal with disagreement about justice.[154] It is also, however, independent from it *formally* since it does not share the same conditions of application and disciplines as our conceptions of justice. It is not contradictory therefore to regard integrity as being at the same time *relative to justice* and *independent* from it.[155] In Postema's terms, justice is integrity's 'guiding star.'[156] This explains how integrity may be independent from justice, but without being able to conflict with it *stricto sensu*. This idea is summarised by Postema's following passage on integrity:

> Integrity makes sense only among people who want justice, but disagree about what justice requires. In this sense, integrity depends on and serves justice. But in this real world of politics it serves justice by displacing it. When a person committed to justice

[149] Dworkin, 1986, 186.
[150] Compare Dworkin, 1986, 165 and 178.
[151] This is also what Dworkin means when he argues that integrity is related to and drawn from the *political* virtue of equality, but is still distinct from it *qua official* or *judicial* virtue. See Dworkin, 2003b, 660; Dworkin, 2004a.
[152] See Postema, 1997, 825 (emphasis added): 'Although distinct from other political values, [integrity] takes its moral focus from the *service* it renders more fundamental values, in particular justice and fidelity.'
[153] See Waldron, 1999a, 195 ff; Waldron, 1999a, 189: 'The task of integrity is to deal with what happens when principles of political fairness legitimate the making and enforcement of decisions in one and the same political system by partisans of competing views about justice.'
[154] As Dworkin, 1986, 263 argues: 'integrity makes no sense except among people who want justice and fairness *as well*' (emphasis added).
[155] This is the distinction Réaume, 1989, 393 misses when she claims that integrity cannot be both independent from justice and relative to or 'parasitic' on it.
[156] See Postema, 1997, 826.

> in her community recognizes that there is a sincere, reasonable and principled disagreement about what justice requires, the pursuit of justice changes direction. In the circumstances of integrity, justice is pursued obliquely: integrity replaces justice as the primary target. It requires members of a community to ask themselves: Because as a community we aspire to justice, to what justice-approximating principles are we committed in virtue of our past collective decisions? *Integrity is justice in political workclothes, with its sleeves rolled up.*'[157]

2. Three Arguments for an Independent Principle of Integrity

As I said before, those who have argued for coherence and integrity after Dworkin have only very rarely provided detailed arguments as to the value of integrity itself. In fact, even Dworkin himself only postulated integrity.[158] For reasons of space, I will only present three arguments and this presentation should not be understood as an exhaustive one: the argument of public morality, the argument of communal responsibility and the argument of authority *qua* authorship. All three arguments can be endorsed separately, but they can also be combined in a reinforced account of why integrity is justified. They all approach the value of coherent law, but from the perspective of the officials, the community or the individuals, on the one hand, and from the perspective of respect for the reasonable divergence of views in a pluralistic society, the value of a community unified in principle or individual autonomy, on the other.

a. The Argument of Public Morality

The first argument for integrity is an argument of public morality. In what follows, I will first assess the contours of the public duty of integrity and will then turn to the link between integrity and political judgement. Finally, I will discuss the relationship between the public duty of integrity and private and public duties of justice.

i. The Public Duty of Integrity

Public morality is the morality that applies to individuals who take on a public role. It tells us how officials and people in institutions should act. According to Thomas Nagel, arguments of public morality claim that there is 'something special about public roles and public action' and that they therefore add further moral demands onto the moral demands on the individual or even alter them.[159] On this account, public officials accept special obligations to serve interests that their offices are designed to advance.[160] Some or most of public morality then may be explained in terms of a *theory of obligation*; whoever takes on a public role

[157] Postema, 1997, 835 (emphasis added).
[158] See Dworkin, 1986, 183 and Rey, 1998, 101–2. See also Waldron, 1999a who only argues for the circumstances of integrity and not for the latter's justification.
[159] Nagel, 1979, 77.
[160] Nagel, 1979, 89.

assumes the obligation to serve a special function and the interests of the group as a whole.[161] As such, public morality is distinct from private or individual morality, although it might derive from it or at least share a common basis with it.[162] It is not the place to argue for or against derivability of public morality from private morality, however. It will not concern us whether the general principles of private morality yield additional constraints on public action, on the one hand, or whether higher standards of concern are held by officials independently of their private morality, on the other. What matters here is that such higher constraints are conceivable on the basis of common sources of public and private morality.

A public morality argument for integrity would claim the following.[163] There are moral constraints of integrity that apply to individuals who act as public officials that go beyond the individual moral constraints that apply to them.[164] Although an individual might hold a view of what is just in a particular case that is perfectly coherent with and complies with her individual morality,[165] holding such a view *qua* official might be contrary to public morality if that view does not cohere with other official views expressed earlier in the law or during deliberation.[166] It would not, therefore, show sufficient political integrity.[167] In this sense, integrity is part of individuals' *communal responsibilities.*[168] Waldron's argument for the circumstances of integrity entails an argument of public morality in an embryonic form. There he states that:

> perhaps there is nothing inappropriate about people advancing particular views of justice *qua* citizens, *qua* voters, *qua* political partisans. . . . When it comes to officials, however—legislators, executive officers, and judges, those empowered to act in the name of the whole society—we must be a little more careful. To act in the name of a society in circumstances of fairness is to act in a situation where no view about justice (including one's own view) is uncontested. In those circumstances, it is incumbent on the official to proceed in a way that shows some respect for the others who will be bound by his decision but who may not necessarily agree with its grounds.[169]

[161] This is what Weber, 1991, 115 ff calls 'pre-eminent qualities' of politicians or the *ethos* of politics as a 'cause.'

[162] Nagel, 1979, 79.

[163] See Dworkin, 1986, 173–75 on this very disjunction between private and public morality. Of course, Dworkin regards officials' responsibility as derivative from the community's and would not argue for integrity on the basis of public morality alone.

[164] There can very well be a duty of *public* morality to act in a *legally* coherent way. Thus, endorsing a public morality argument for integrity cannot be identified with endorsing any form of moral coherentism.

[165] For there to be a public morality argument for integrity, there must not necessarily be a duty of integrity in private morality. The analogy with private morality is only necessary for communal responsibility or community personification types of arguments.

[166] See Postema, 1997, 837 ff.

[167] Although it seems contradictory, it is possible for the same official act to be conform to private integrity and contrary to public or political integrity and vice versa; there need not be a violation of both at the same time.

[168] See Waldron, 2004a.

[169] Waldron, 1999a, 202.

Waldron describes his argument as an argument of the *appropriate sense of community* and seems therefore to be making an argument of public morality for integrity.[170] He does not argue for it at more length, however. He claims indeed to be arguing for the circumstances of integrity and not for integrity itself.[171] It is my aim in this section to try to show how such an argument could be pursued successfully. To do this, I need to establish what it is that makes the virtue of integrity an element of the bundles of obligations one accepts when one takes up a public role in a community. What explains the difference of content between public and private obligations is the *impersonal* nature of public action.[172] Not only does this imply a heightened concern for results, but it also entails a stricter requirement of impartiality and respect. Public officials should treat people in the relevant population equally, but they should also show them equal *respect*. This implies more than enacting laws that are just and equal, as it also requires those laws to respect people in their reasonable differences of view about justice and equality.

True, it is part of the exercise of an official function to speak what one thinks is right and just in each case[173]; there is not indeed much else one can do but trust our officials' judgements about justice. Waldron talks rightly of making judgements in one's own voice as 'the default mode of all political action.'[174] However, consciously imposing one's views of justice through laws without any further attention to the other views represented in the community, either as expressed in past law or in the current deliberation process, seems to lack the kind of respect one expects from officials. Of course, it is not always possible to respect all views by accommodating them or by conforming to them and a choice has to be made in the end. But, in circumstances of reasonable disagreement, officials should try to express a view of justice that can be reconciled as much as possible with others' views in the political community. These are best reflected in past laws and decisions[175] which announce the community's standards,[176] hence the obligation to

[170] Waldron, 1999a, 205.

[171] Waldron, 1999a, 189, 191. If that is so, however, it is not quite clear why he is mentioning in brackets at that point that this sense of community must be appropriate 'for making power and coercion legitimate' and 'for evoking allegiance and a sense of obligation from all citizens' (Waldron, 1999a, 205).

[172] See Nagel, 1979, 82 ff.

[173] Nagel, 1979, 80. See Chapter 8.

[174] Waldron, 1999a, 203 by reference to Dworkin, 1986, 256: 'Different judges will disagree about each of those issues and will accordingly take different views of what the law of their community, properly understood, really is'. See also Dworkin, 1986, 162: 'any judge's opinion about the best interpretation will . . . be the consequence of beliefs other judges need not share.' See most recently, Dworkin, 2003b, 662; Dworkin, 2003c, 7.

[175] One may object that these views are only the views of a past majority and that integrity prevents a new majority from changing the community's views on justice. See Chapter 7 for an argument for majority rule and why it is itself founded on the value of equal respect. Moreover, it is always possible for the legislature to repeal past laws and decisions and if this is the will of the new majority, then integrity does not apply in the absence of past laws and decisions on the issue. In most cases, legislatures will be reluctant to repeal laws to enact new ones in all cases where they happen to think past conceptions enacted in the law are unjust, hence the value of integrity. This is a hypothesis Raz, 1995a, 316–17 considers and calls the 'dilemma of partial reform': see Chapter 8.

[176] See Finnis, 1987b, 161 on coherence as a form of 'loyalty of officials.' See also Waldron, 2003a.

make sure new laws and decisions cohere with those as much as possible in case of disagreement. This is particularly important given that most laws are adopted nowadays by representatives rather than through direct participation; the obligation of coherence with past laws or currently expressed views provides a means therefore of counterbalancing the absence of citizens' disagreement in the decision-making process.[177]

ii. From Integrity to Political Judgement

It is important that the public attitude of integrity is not purely individual and is reflected in officials' *intersubjective reasoning*. It requires from officials that they render political judgements as members of the community as a whole. This implies, for instance, intensive deliberation,[178] as well as having recourse to active modes of descriptive and reflexive representation of the type discussed in an earlier chapter.[179] In this sense, it differs from Dworkin's purely protestant and individual responsibility for imagining what one's society's public commitments to principles are, and what these commitments require in new circumstances.[180] As Postema rightly argues, 'the community achieves integrity only when its members seek *as a community* to act from a coherent vision of justice.'[181]

One may find support for this argument of public morality in Arendt's conception of *political judgement.*[182] The relation of judgement, and especially political judgement, to morality in Arendt's theory is fraught with difficulty and her theory of judgement, more generally, was never completed.[183] *Judgement*, according to Arendt, is the faculty which brings *thinking*—solitary, abstract and concerned with invisibles—down to earth, manifesting it in the world of appearances; judgements are therefore the by-products of thinking, and amount in the political realm to political opinions and, in the end, decisions that are constitutive of the law. In her theory of judgement, Arendt attempts to reconcile the Aristotelian conception of political judgement as an aspect of the *phronesis* with the Kantian *Critique of Judgement*'s understanding of practical judgement as the faculty of 'enlarged thought or mentality' (*erweiterte Denkungsart*) or of 'representative thinking.' This faculty consists, according to her, in being able to 'think in the place of everybody else'[184]; it requires the capacity for worldliness, that is an interest in the world and in the human beings who constitute the world.

Arendt's account becomes interesting for our purposes when she contends that the political ability of judgement requires from the participants in the political

[177] I have argued in detail for this relationship between disagreement, representation and integrity in Chapter 10.

[178] See MICHELMAN, 1986B, 68–69, 76.

[179] See Chapter 10 on the importance of understanding representation as a two-way relationship.

[180] DWORKIN, 1986, 413. See more recently, DWORKIN, 2002, 1864; DWORKIN, 2003B, 662; DWORKIN, 2003C. For a critique of Dworkin's method of interpretation as too individualistic: POSTEMA, 1987. See also GREEN, 1989A, 107–8; HUNT, 1992, 37–38; ALTMAN, 1986, 232–34; HABERMAS, 1998A, 272 ff.

[181] POSTEMA, 1997, 828.

[182] See in particular ARENDT, 2001.

[183] See the introduction by and the chapters collected in BEINER/NEDELSKY, 2001.

[184] ARENDT, 2001, 19–20.

process that they take other different positions into account, thus generating toleration, mutual respect[185] and accommodation rather than intolerance and mutual entrenchment.[186] Political judgement on this account is meant to combat the widespread tendency to develop a single *Weltanschauung* individually that would then be held to constitute the key to every political issue. Interestingly, this last point in Arendt's account of political judgement may be compared to a passage where Dworkin contends that:

> no one should be left out, we are all in politics together for better or worse, no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall.[187]

There seems therefore to be strong evidence that Arendt's account of political judgement could also be taken to include an obligation of coherence with past views and judgements, on the one hand, and with currently defended views, on the other. It is only if a judgement could be made by others as well, ie if it coheres with the community's past and current views, that it may become a truly valid political judgement. Integrity could even be said to amount to a condition of legal validity in Arendt's account. According to her, only a political judgement in this sense is endowed with a *legal or political validity* and *legitimacy*. Indeed, 'its claims to validity can never extend further than the others in whose place the judging person has put himself for his considerations.'[188] This point is confirmed by what Arendt calls the crucial criterion for political judgement, ie *communicability*. The standard for deciding whether judgements are communicable is indeed to see whether they could fit with the common sense of others[189]:

> The kind of understanding—seeing the world (as we rather tritely say today) from the other fellow's point of view—is the political insight par excellence. If we wanted to define, traditionally, the one outstanding virtue of the *statesman*, we could say that it consists in understanding the greatest possible number and variety of realities—not of subjective viewpoints, which of course also exist, but do not concern us here—as those realities open themselves up to the various opinions of citizens; and, at the same time, in being able to communicate between the citizens and their opinions so that the commonness of this world becomes apparent.'[190]

Respect for diverging views in current deliberations or for principles implemented in past laws should not be regarded as an obstacle to *moral progress and change*. It is, on the contrary, a way to ensure that changes lead to true progress by preventing radical changes that do not fit smoothly with past decisions and laws

[185] See on respect, ARENDT, 1998, 243.
[186] See O'NEILL, 1990, 69, 87 on the close relationship between toleration and political judgement in Arendt's account.
[187] DWORKIN, 1986, 256.
[188] ARENDT, 1968A, 221.
[189] See RICOEUR, 1995, 147.
[190] ARENDT, 1982, 84 (emphasis added).

and hence diverging views in the community. Once consistency with those views is ensured, however, coherence does not prevent change, as long as the new laws or decisions can be inserted into a common narrative[191] and hence respect others' views in the democratic community. Arendt's notion of enlarged mentality avoids the choice between independence that risks blindness and capitulation to collective opinion.[192] This is why, in particular, Arendt's account cannot be criticised for not providing ways to accommodate moral and political pluralism in judging.[193] In fact, and precisely for that reason, integrity ultimately remains an individual exercise in the end.[194]

iii. The Relationship between Integrity and Justice in Public Morality

Even if all this is granted, a common and very intuitive objection that may be raised at this point is that the obligation of public morality to respect integrity is bound to clash with another obligation of public morality, the obligation to do what is just or in the public interest.[195]

Dworkin acknowledges the difficulty and the likelihood of conflict between the political ideals of justice and integrity. He contends that 'justice must sometimes be sacrificed to integrity'[196] and that a political community is 'not automatically a just community.'[197] He also claims, however, that the weight of integrity might be less in cases where the violation of justice is particularly serious, thus allowing for justice to take precedence over integrity in some cases.[198] The difficulty is that Dworkin says very little about how we should go about solving this dilemma between duties of justice and integrity.[199] He leaves it, as in other cases, to officials' individual judgement.[200] As with any obligation, the obligations one accepts by taking on a public role involve the risk of being required to act in ways incompatible with other obligations and principles which one accepts as part of this role or which one already has as a result of private morality.[201] It is very important to distinguish those two forms of moral conflict, as they have led to much confusion in the literature.

First of all, the conflict between the public obligation of integrity and the public obligation of justice: such cases are difficult cases. Prima facie, indeed, one may contend that the public official will see that the limits imposed by public morality itself are being transgressed if justice is violated in respecting integrity. As Nagel

[191] See on 'contemporary legal practice seen as an unfolding historical narrative,' DWORKIN, 1986, 225.
[192] See BEINER/NEDELSKY, 2001, xv.
[193] See FRASER, 1997, 171–72.
[194] See DWORKIN, 1986, 256. Hence the fact that the judge must rely on his own individual best interpretation when deciding when to respect integrity as a start (see DWORKIN, 1986, 227) and when to restrain from doing so in case of injustice in the end (see DWORKIN, 1986, 214–19).
[195] See on this challenge, RAZ, 1995A, 312; RAZ, 1998D, 3–4, 13. See also KRESS, 1996, 550–51; ALEXANDER/KRESS, 1997, 308 ff.
[196] DWORKIN, 1986, 195.
[197] DWORKIN, 1986, 213.
[198] DWORKIN, 1986, 381 ff.
[199] See Chapter 8.
[200] See DWORKIN, 1986, 227.
[201] See NAGEL, 1979, 90.

says, 'at this point, there is no substitute for refusal and, if possible, resistance.'[202] The problem is that obligations of justice and obligations of integrity do not clash as same-order obligations. As Waldron rightly argues, we only have reasons to act on the second-order reason for integrity once we do not have clear first-order reasons for justice in a particular case.[203] The duty of integrity only comes into the picture when it is unclear what the obligation of justice requires, not individually, but for the group as a whole. In fact, according to Postema, the objection that integrity demands that we abandon our moral principles rests on a misunderstanding about what justice itself requires; in the circumstances of integrity, '*justice itself* demands that we seek some common understanding of the requirements of justice,'[204] as I argued in the context of the justice-based need to coordinate.[205] The conflict between integrity and justice is not therefore a true conflict theoretically, as it is solved at a higher level of morality; although they are independent principles, integrity and justice are not competing ones in public morality.[206]

If integrity and justice seem to conflict at first sight, the reason is to be found in a second type of conflict: the conflict between the public duty of integrity and the private duty of justice.[207] What I mean by a private obligation of justice is one's private obligations to act in a way that one thinks just both in the private and public realms.[208] An official *qua* individual might encounter a clash between her obligation of integrity and her obligation to decide in a way that is just or in the public interest according to her private morality. Max Weber is hinting at a similar dilemma in his chapter 'Politics as Vocation' when he states that:

> we must be clear about the fact that all ethically oriented conduct may be guided by one of two fundamentally differing and irreconcilably opposed maxims: conduct can be oriented to an 'ethics of ultimate ends' or to an 'ethics of responsibility.'[209]

This is the case Dworkin and Waldron have in mind when they contend that there are extreme cases in which private judgements of morality could and will take precedence over public duties of integrity.[210] Officials may indeed judge in some cases that respecting integrity and cohering with past law or with currently defended conceptions of justice may clearly violate important principles of justice. In such cases,

[202] Nagel, 1979, 90.
[203] Waldron, 1999a, 196 uses this analogy with first-order and second-order reasons for action.
[204] Postema, 1997, 836.
[205] See Chapters 6 and 13.
[206] Waldron, 1999a, 198.
[207] This distinction is important and is not made by Waldron, 1999a, 208. It would help him, however, to save his higher conception of the separate moral orders of integrity and justice in public morality.
[208] Private morality is not limited in its application to the private sphere; individuals who do not take on official functions also act in the public sphere and have opinions of what is just for the community as a whole.
[209] Weber, 1991, 120.
[210] See Dworkin, 1986, 381 ff; Waldron, 1999a, 207–8.

they will have a dilemma between following their judgement of what is just in the particular case and trying to cohere with past laws or presently defended conceptions of justice which they regard as less just 'from a utopian standpoint.'[211] The answer is a deeply personal one, as it depends on each individual's private morality. As such, there is no single moral threshold of injustice that can be developed here. It suffices to say that there may be circumstances in which a particular individual or group of individuals might find past law so unjust compared to potential new law that they choose to give precedence to their duty of justice over coherence. In such cases, private morality eclipses some duties of public morality, hence weakening the community ties of respect. Thus, the final decision to abide by the requirements of public morality or not seems to remain a purely individual one.

Even if Dworkin and Waldron accept the existence of this deep dilemma, I think that they do not give that fact sufficient *moral* attention.[212] There are reasons for the individual character of this final decision. Waldron goes too far, for instance, when he contends that 'the existence of conflicts . . . between justice and integrity is a matter of purely personal politics, a tendentious belief.'[213] Public and private morality are not as disconnected as this would make it seem. Not only do they have common sources, but even if they are not necessarily derivable from each other, officials are individuals before they take up their public role.[214] As such, they are subject to both forms of morality at the same time, hence the inescapable nature of clashes. As neither private morality nor public morality are ultimate,[215] it would be wrong to look down on individual dilemmas when the public obligation of integrity conflicts with the private obligation of justice. There is a sense in which it is only because such decisions are possible in some extreme cases that integrity may be a virtuous attitude to adopt in other cases.[216] This point has been rightly captured by Weber, when he states that '[A]n ethics of ultimate ends and an ethics of responsibility are not absolute contrasts but rather supplements, which only in unison constitute a genuine man—a man who *can* have the "calling for politics."'[217]

b. The Argument of Communal Responsibility

A second interesting argument for integrity is the argument of communal responsibility or of personified community. This argument has been made most famously

[211] DWORKIN, 1986, 213.
[212] In both cases, it is because their account cannot afford to undermine the strength of the obligation of integrity.
[213] WALDRON, 1999A, 199.
[214] As such, it is misleading to contrast the official's point of view with the 'participant's point of view,' as WALDRON, 1999A, 198 does. Officials have an individual point of view that may conflict with their official point of view and in both cases they are the same person, rather than an official and a participant.
[215] NAGEL, 1979, 79.
[216] See MICHELMAN, 1986B, 67–68 who refers to this paradox as revealing the true notion of integrity as resulting from 'a combination of *responsible choice* and *constraint*.'
[217] WEBER, 1991, 127.

by Dworkin; according to him, 'the community has its own principles it can itself honour or dishonour, that it can act in good or bad faith, with integrity or hypocritically, just as people can.'[218] With respect to integrity, this means the following:

> The particular demand of political morality is not in fact well described in the catch phrase that we must treat like cases alike. I give it a grander title: it is the virtue of political integrity. I choose that name to show its connection to a parallel idea of personal morality. We want our neighbours to behave in their day-to-day dealings with us in the way we think right. But we know that people disagree to some extent about the right principles of behaviour, so we distinguish that requirement from the different and (weaker) requirement that they act in important matters with integrity, that is, according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically. The practical importance of this latter requirement among people who know they disagree about justice is evident. Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are. We assume in both the individual and the political cases, that we can recognize other people's acts as expressing a conception of fairness or justice or decency even when we do not endorse that conception ourselves. This ability is an important part of our more general ability to treat others with respect, and it is therefore a prerequisite of civilization.'[219]

Three subarguments should be distinguished within this argument of communal responsibility: an argument as to personal integrity, an argument as to the personification of community and an argument as to the responsibilisation of community for a breach of integrity. All three have to be successful for the general argument to be made.

i. The Personal Duty of Integrity

The first element one has to establish is that coherence is a moral requirement of individuals themselves. This is something many are ready to believe intuitively and even to assume normatively, and often without further argument as to how this should be the case.[220] Others assume that integrity and coherence are requirements of rationality.[221] For instance, Pettit thinks that, because of the requirements of reason, people 'do not endorse inconsistent or otherwise incoherent sets of

[218] DWORKIN, 1986, 168.
[219] DWORKIN, 1986, 166.
[220] See, however, CALHOUN, 1995 for an argument for the value of integrity in interpersonal morality.
[221] See the following logical proof: (1) p or not-p, (2) p, (3) p or q, (4) not p, (5) q. I am not arguing that individuals do not believe in conflicting principles nor that they do not compromise such independent principles in practice, but only that most of them intuitively reject internal compromise. On the origins of the axiom of contradiction in Western ethics, see PLATO, 1990, 482: 'Since I am one, it is better for me to disagree with the whole world than to be in disagreement with myself.'

propositions; they do not fail to derive conclusions that are supported, even saliently supported, by what they already endorse.'[222]

By contrast, Dworkin argues for the duty to show personal integrity in a more *intersubjective* way.[223] He contends that because people disagree about what should be a just conduct, we cannot expect our neighbours to behave toward us in a way *we* think is just. However, we can at least expect them to behave with integrity, that is to say consistently in accordance with *their* conception of justice. As in the political context, it is important to situate the duty of personal integrity in the circumstances of integrity, ie circumstances of reasonable disagreement about justice. The intersubjective nature of individual integrity explains the difficulties some critiques encounter when they try to make sense of Dworkin's independent value of personal integrity.[224] Starting from an intrapersonal account of personal integrity, they argue that the lack of consistency of the neighbour who changes her behaviour can be assessed fully in terms of justice.[225] However, integrity does not require consistency *per se*, but only consistency when others might suffer from one's inconsistency and hence when inconsistency amounts to a lack of respect. People may indeed rely on others' consistency and it is when they do that the analogy between individual integrity and collective integrity is most vivid given our general reliance on the state. It would be wrong, therefore, to assess integrity in terms of an individual judgement of justice only; it is because we have conflicting views about justice that we rely on people's past conduct to be consistent. This may mean, of course, that they might have to stick to a certain conception of justice they no longer regard as correct.

ii. The Community Personified

To show that the community can be held responsible for not being coherent over time, one has to establish that it can be personified and held accountable as a moral agent independently from the sum of the individuals which compose it. Are such personifications more than 'bad metaphysics.'[226] to borrow Dworkin's expression?

It is quite frequent in political and legal philosophy to refer to the legislature or the judiciary as social wholes whose intentions or decisions we talk about as independent entities'. However, in most of those cases, what we have in mind are

[222] Pettit, 2001b, 277. I take Pettit's argument of coherence to be an argument of the kind I am making here, ie an argument of substantive and principled coherence, rather than an argument of pure logical coherence or formal consistency. In this sense, I think he differs from other authors who work in the area of collective coherence as an extension of law and economics (see Brennan, 2001).

[223] On the relationship between reasonableness and intersubjective justification, see Chapter 4.

[224] See Réaume, 1989, 393: 'To argue that integrity is of value is to argue that continuing to act on a principle accepted in the past is *prima facie* justified and that departing from such a path is *prima facie* wrong.'

[225] Réaume, 1989, 394–95.

[226] Dworkin, 1986, 167.

groups of individuals whose mental properties we regard not as independent, but as 'summative and metaphorical.'[227] They are not therefore regarded as collective subjects or agents in the sense in which those imply the possession of mental properties.[228] Recently, however, some authors, among whom Ronald Dworkin and, in more detail, Philip Pettit,[229] have been arguing for so-called 'personified communities'[230] or 'integrated collectivities.'[231] These are groups that integrate members into collective patterns of judgement and decision that respect the demands of reason at the collective level.[232] As such, they become genuine collective subjects. Of course, this does not imply that political reality will naturally conform to this personification; all it amounts to is a *heuristic* device necessary to reconstruct political decisions along the lines of political morality.

iii. The Communal Responsibility of Integrity

The last step in the argument relates to the responsibility of the community. It is not sufficient to establish the existence of integrated groups with mental properties distinct from their members to make the argument integrity needs. Something else must be added in relation to such groups' moral responsibility that puts them on a par with individuals and in particular their interpersonal obligation of integrity. If the existence of independent collective entities is plausible, what still has to be shown here is what this implies that cannot already be done by holding the individuals in the group to their obligation of interpersonal integrity or at least to the public morality duties mentioned in the preceding section. I will start by discussing Dworkin's argument to that effect, before turning to Pettit's argument.

(a) Dworkin's argument: according to Dworkin, if subarguments one and two succeed, all it takes to make argument three is to show that, in its relations to individuals, the state acts in ways on which people, who might disagree with the justice of those acts, rely. This in turn triggers an obligation of coherence over time on the model of personal integrity. This argument is a respect-based argument of the kind I made under the heading of public morality. The ways in which it is implemented rely on individual responsibility of officials who act in the name of the community.[233] However, individual compliance is required on the basis of the relationship between the individual and the community, rather than on the basis

[227] Pettit, 2001a, 105. See Chapter 9.

[228] In fact, as Pettit argues, even the most recent arguments about collective action and coordination assume that the collective intention is a sum of individual ones. See, most famously in legal and political theory, Bratman, 1999a. See Chapter 9.

[229] See Pettit, 2001a; Pettit, 2001b; Pettit, 2002b.

[230] Dworkin, 1986, 168.

[231] In fact Dworkin, 1986, 187–88 is merely assuming that personification is possible.

[232] Pettit, 2001a, 113.

[233] See Dworkin, 1986, 171: 'The personification is deep: it consists in taking the corporation seriously as a moral agent. But it is still a personification not a discovery, because we recognize that the community has no independent metaphysical existence, that it is itself a creature of the practices of thought and language in which it figures.'

of public morality—although both forms of obligation may of course reinforce each other. According to Dworkin:

> the community as a whole has obligations of impartiality towards its members and officials act as agents for the community in acquitting that responsibility. . . . We need to treat group responsibility as logically prior to the responsibilities of officials one by one.'[234]

According to Dworkin, the integrity of law as a whole is one of the features that make *communities* genuinely *political* by granting them a character that makes membership in them intrinsically valuable. Dworkin's justification of integrity is based on an argument for *political legitimacy*. It is people's relationship to their community that explains the obligation to obey the law. And it is the fact that the law is an aspect of the community that requires its personification, ie its single voice, hence the appeal of integrity. Given the difficulties of this account of political obligation and the circularity of the argument for and from integrity,[235] I will concentrate on the first claim, ie the claim that integrity and the duty to respect past and current diverging views makes membership in communities intrinsically valuable and that this is what makes them true communities. According to Dworkin:

> [integrity is] the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed and interpreted in an overall principled way.'[236]

Support for this argument may be found in Kant's conception of the legal community and the rule of law. On Kant's model, a political and then legal community is needed and even compulsory, when we find ourselves living with people we cannot avoid interacting with and hence potentially quarrelling with.[237] Rather than depending on shared fundamental understandings and beliefs, community will arise, on this account, from the necessity to live together and to deal with our disagreements.[238] These conditions of disagreement are, in other words, the 'circumstances of community.' Only in these circumstances does the political community become a necessary feature of our social interactions. If this is how political communities are constituted, then, integrity seems to be one of the central virtues and responsibilities of a legal community. It is made necessary by the same circumstances of disagreement. If disagreement led to the constitution of a community, it should not be allowed to divide it again through legal incoherence.

[234] Dworkin, 1986, 175.
[235] See Raz, 1995a, 309.
[236] Dworkin, 1986, 214.
[237] Kant, 1991, 43, 121.
[238] See Waldron, 2000b, 171 for such an account of the community.

To avoid this, respect for diverging views expressed in the past and in current deliberations in a unifying effort is crucial. Synchronic and diachronic coherence in the law ensures stability and foreseeability, both values related to the *rule of law* and the value there is in having a legal system.[239] Only such a respectful and integrated legal community, therefore, can hope to maintain the reasons that led to its constitution in the first place and thus become a true community.[240]

(b) Pettit's argument: another argument for communal responsibility of integrity may be found in Pettit's theory of freedom. There are two parts to Pettit's argument; whereas the first one is easy to accept, the second raises difficulties which do not, however, jeopardise the first part of the argument for a collective duty of integrity.

First of all, according to Pettit, integrated collectivities are subjects that can enter into dialogue with individuals and with one another, thus giving rise to different commitments and moral responsibility at the collective level. As free selves, these collectivities cannot systematically elude past commitments nor omit to live up to them. In this sense, they should be subject to the requirements of personal integrity in the same way as individuals are. The need for collective coherence relies on two argumentative steps: (i) any group is going to generate a history of judgements; (ii) the group will not be an effective or credible promoter of its assumed purpose if it tolerates incoherence in its judgements across time,[241] hence the collective obligation of integrity. According to Pettit:

> to the extent that integrated collectivities bind themselves to the discipline of reason at the collective level—to the extent that they endorse a norm of living up to reason—they must be expected to live up to the words they authorize, and the deeds they perform, in the others that they say and do.'[242]

According to Pettit's second argument for collective integrity, the personification of the community is necessary in the case of groups which embrace a common purpose and cannot successively achieve this common purpose by merely relying on the mental properties of their members.[243] These groups develop mental

[239] See Raz, 1979, 214, 220. See also Raz, 1995a, 318 for a rule of law type of argument for local coherence.

[240] The European 'community' provides a very interesting case of application for this argument: see Besson, 2004a.

[241] Pettit, 2001a, 111.

[242] Pettit, 2001a, 116.

[243] Pettit, 2001a, 114. Pettit has a further argument for the communal responsibility of integrity that relies on his republican conception of the state being 'contestable' (Pettit, 2001b, 280 ff; Pettit, 2003b); this argument depends on the discursive dilemma argument showing that communal responsibility for coherence is needed. Since the latter does not succeed, then the former need not be examined separately in the present chapter. Moreover, contestability may also be ensured if coherence flows from the individual respect of public morality on the basis of my first argument for integrity in this section.

properties in their own right, in order to achieve their goal in a rational and coherent way[244] and hence to prevent collective *akrasia*.[245] Pettit's initial hypothesis is the *discursive dilemma*; in its diachronic version,[246] which corresponds better to the conditions of social and political life, the dilemma goes as follows:

> Suppose that over a period of time a group makes a judgement on each of a set of issues, deciding them all by majority vote and on incompletely theorized grounds: different members of the group as moved by different considerations. Sooner or later such a group is bound to face an issue such that how it should judge on that issue is determined by the judgements it previously endorsed on other issues. And in such an event the group will face the familiar problem that majority voting on the new issue may generate a collective pattern of voting, that is inconsistent in character.[247]

On the basis of this dilemma, Pettit's question is 'whether this discipline of reason is meant to apply to each individual, taken singly, or to the group taken as a whole.'[248] He chooses the latter on the grounds discussed before, but these grounds are not charitable enough to individual capacities to ensure political integrity. There are ways for the goals of such a group to be coherently attained through individual rational properties and this independently of a collective setting to do so.[249] I have argued, indeed, that there is an obligation of integrity that results from public morality and applies to individuals who endorse public functions. The reason for Pettit's downplaying of individual capacities of integrity may be found in his deliberation-based focus on the coherence of reasons or premises underlying decisions rather than on that of their outcomes themselves,[250] which, as I argued earlier, is not only easier to reach but also the only plausible degree of integrity that can be required in the circumstances of democratic politics.

Not all justifications for the necessity to establish a collective duty of integrity are convincing, but one may say that both the public morality and collective responsibility arguments could run alongside. This is particularly true of Dworkin's argument and of the first part of Pettit's argument. Integrity would be reinforced by a collective discipline of coherence in the cases where individual discipline fails and a collective discipline of coherence could make use of individual discipline and public morality. As such, this second argument can be a precious complement in setting the grounds of integrity. Of course, this only applies as

[244] See PETTIT, 2001A, 111–12.
[245] See PETTIT, 2003C who defines integrated groups as groups which can have intentional agency, but also means of preventing that intentional agency become disunified by collective *akrasia*.
[246] Strangely, KORNHAUSER/SAGER, 2004, 254 only consider Pettit's account of synchronic coherence.
[247] PETTIT, 2003B, 138. See also PETTIT, 2001B.
[248] PETTIT, 2001B, 277.
[249] See PETTIT, 2001B who presents different ways in which public authorities could establish collective settings for individual rationality to be channelled into producing coherent decisions.
[250] See KORNHAUSER/SAGER, 2004, 254 ff.

long as the ways to ensure the collective discipline of coherence do not undermine the individual means to respect integrity and the requirements of public morality[251]; indeed, there are suggestions, among Pettit's arguments, as to solutions to the discursive dilemma that would curb participatory freedom in direct, but also in indirect, democratic practices[252] and hence 'depoliticise' democracy, as he has recently put it.[253] If one adopts the stance defended in this chapter, those measures endanger the individual ability to comply with the public duty of integrity and the Weberian balance between individual justice and integrity.

c. The Argument of Authority Qua Authorship

After general considerations about the argument itself, I will argue for integrity on grounds of Raz's autonomy-based theory of authority and then defend it against Raz's own objections.

i. General

The third argument for integrity does not aim at making an independent argument for authority that could then justify the value of integrity. On the contrary, it relies on the general concept of authority itself to show that the authority of law requires law's authorship by those who are bound by it and hence legal coherence.

By contrast, Dworkin's account of integrity relies on an independent argument of authority *qua* source of associative obligations. He argues that 'a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force.'[254] In a nutshell,[255] law as integrity is one of the features that make *communities* genuinely *political* by ensuring them a character that makes membership in them intrinsically valuable. Membership in such

[251] There are, of course, further difficulties with PETTIT's, 2003A proposal, but I cannot expand on the issue here. Let me say, however, that the idea of depoliticising deliberation, while keeping it at the same time at arm's length of parliamentarian control, does not strike me as a very efficient depoliticising measure and reveals the illegitimacy of a full depoliticisation of democratic deliberations. Pettit does not seem to be very clear about the exact scope and means of the depoliticisation, anyway; he mentions polls instead of elections and ordinary means of political accountability, but sometimes also refers to the lack of complete inclusion in parliament or of direct participation, as well as to constitutional constraints.

[252] PETTIT, 2003B.

[253] PETTIT, 2003A, 23.

[254] DWORKIN, 1986, 188.

[255] See KRESS, 1996, 549; RÉAUME, 1989. As I explained before, I have renounced arguing against this argument of political legitimacy here, as its premises are very controversial. According to Dworkin, integrity is justified as it is the only way in which Dworkin's account of associative obligations to obey the law can be founded (DWORKIN, 1986, 214). This account is fraught with difficulties, however. First, it is not clear that accounts of authority are there to justify legal coercion as Dworkin seems to say they do. Secondly, it is not entirely clear sometimes whether it is not integrity that is an argument for Dworkin's account of associative obligations, rather than the reverse (see DWORKIN, 1986, 216 and GREEN, 1989, 104). I would tend indeed to take his argument to be an argument *based on* integrity for associative obligations to obey the law, rather than an argument *for* integrity based on associative obligations to obey the law.

a society may accordingly be regarded as a good in itself and the duty to obey the law may be understood as part of associative membership.[256] It should be clear by now how Dworkin's central argument for integrity amounts in fact not so much to a justification of the kind I am looking for in this section, but to a *postulation*[257] or *hypothesis*. This postulation is necessary for his account of the law *qua* justificatory enterprise for the exercise of state coercion[258]; only if integrity is postulated as a value may the community be a true community and its laws bind and coerce, thus enabling the law to justify coercion and hence to 'be' law in the Dworkinian sense of it. A further justification of integrity is not needed in his account.

Dworkin adds, however, that 'this is not the only argument for integrity.'[259] After mentioning other forms of potential arguments he does not pursue in detail, he presents the argument of authority *qua* authorship. We assume in our ideal of self-legislation, he says, that 'we are in some sense the authors of the political decisions made by our governors. . . . The ideal needs integrity, however, for a citizen cannot treat himself as the author of a collection of laws that are inconsistent in principle.'[260] This argument is best understood in the context of the social contract tradition, according to which laws should be such that each individual could recognise herself in them, as if she had drafted them. It is also possible, however, to offer a more contemporary account of political and legal authority that would justify integrity. The account of authority I have chosen is Joseph Raz's. It seeks to reconcile the idea of political and legal authority and of exclusionary reasons for action, on the one hand, with individual moral *autonomy* in making choices among different reasons for action that apply to a person, on the other. As such, it ties up nicely with the idea of authority *qua* authorship.[261]

ii. Razian Authority and Integrity

In Raz's account of authority, the law must be at least capable of claiming authority. For it to have authority, the alleged subject must be more likely to comply with reasons which apply to him if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.[262] This is what Raz calls the *normal*

[256] Dworkin, 1986, 168, 198, 206, 214. See Raz, 1995a, 309.

[257] See Dworkin's comparison between postulating integrity and postulating the planet Neptune, Dworkin, 1986, 183. See Rey, 1998, 98, 101–2 on postulations.

[258] Hence the *apparent circularity* in Dworkin's account between justifying integrity in terms of political obligation and justifying political obligation in terms of integrity. Once the justificatory nature of Dworkin's conception of law is made apparent, however, it is clear that integrity need not be justified, but only postulated for Dworkin's purposes. The difficulty resides in distinguishing the justificatory function of integrity in law, that was mentioned in the introduction, from the latter's own justification that is at stake here, on the one hand, and from the justificatory function of law, on the other.

[259] Dworkin, 1986, 188.

[260] Dworkin, 1986, 189.

[261] See also Postema, 1997, 855 for a similar account of authority that combines integrity or respect for others' diverging views of justice and coordination.

[262] Raz, 1986a, 53.

justification thesis. A second thesis to underlie Raz's account of authority is the *dependence thesis*. According to that thesis, the reasons for action given by the law have to correspond to existing individual reasons. Finally, for an alleged legal authority to be legitimate, the reasons it provides should preclude reasons which applied to the legal subjects prior to the authority's decision. This is the third thesis in Raz's account of authority: the *pre-emption thesis*.

I would like to argue in this section that it follows from these three theses that incoherent laws and decisions, which provide reasons which do not correspond to coherent individual reasons,[263] cannot have authority.[264] Incoherent laws and decisions give incoherent reasons for action that do not respect the dependence thesis because individuals' reasons tend to be more coherent. Nor do these reasons respect the normal justification thesis, as it is difficult to see how an individual may be able to follow her own reasons better by following incoherent ones.[265] The argument applies to synchronic incoherence as much as to diachronic incoherence. With respect to synchronic incoherence, first, internally compromised laws that combine non-independent principles or mistaken conceptions of principles gerrymander those principles, thus gerrymandering the reasons underlying them too. It is indeed difficult to see, in these circumstances, how such reasons may correspond to existing individual reasons and may help to comply better with them. With respect to diachronic incoherence, secondly, individual legal reasons may map onto individual ones, but the difficulty lies with reflecting the overall coherence of the individual scheme or reasons, on the one hand, and with the normal justification thesis, on the other. It is hard to see, indeed, how the law can help an individual act better than on the basis of her own reasons if it gives her reasons that are not overall coherent and lead to conflicting behaviour over time. Law's normativity can indeed be understood as a social device for providing cross-temporal meaning to rational agents' actions.[266] It can only do so if it ensures an overall level of diachronic coherence.

For the law to have the authority it claims, its authority should apply to officials in the first place. This in turn implies respecting the integrity principle, or else the citizens' obligations to obey will remain unwarranted; the relationship among officials is indeed *about* their relationship to citizens and their authority over them.[267] This is particularly important when the law's authority is accounted for on grounds of coordination, as it is in this book[268]; it is only when the law is

[263] Of course, this reasoning also applies to cases where values themselves conflict and cannot be brought into a morally coherent set of values. In those cases, indeed, although individuals already live with conflict, the law could add incoherence to their contingent ranking of conflicting reasons. If reasons are incommensurable, then, there is a sense in which the ranking chosen individually or in the law should be kept as coherent as possible in the future.

[264] I take values and reasons to be intrinsically related here; with the exception of rare hypotheses, in which it is a person's personality or her ambitions that dictate her moral behaviour, her reasons for acting in a one way and not the other are usually related to the value of this action (Raz, 2001a, 182–83, note 3 and 196).

[265] Raz, 1995a, 297 himself makes this argument, but goes on to criticise it in the following pages.

[266] See Postema, 2003, 232–34.

[267] See Waldron, 2003a, 67.

[268] See Chapters 6 and 13.

coherent and applies *en bloc* that it is able to provide the unique coordinating guidance that it is expected to give. Just as citizens sometimes have the obligation to obey laws they deem individually unjust for the sake of coordination in conditions of reasonable disagreement, so do officials sometimes have to enact laws and decisions they deem individually unjust for the sake of general coordination and hence of the authority of law in conditions of reasonable disagreement.[269] The exercise of political power should not be identified with partisanship[270]; it must claim legitimacy in the community *as a whole* and this cannot be done only on the basis of individual conceptions of justice some citizens reject.[271] As Waldron argues in the context of 'legal process' theory, invoking the example of officials A and B and the case in which B decides according to what he thinks right rather than to what has been decided in the past:

> for by ignoring A's decision, by holding out for his own, and by choosing unilaterally to run the risk of society's failing to settle on and implement a common answer to the question, he is making light of efforts that have been made already to solve these problems—efforts that depend for their success on the assurance of support from him and people like him. . . . To assure himself that his compliance with any number of these directives is not in vain, a citizen C1 must assume that officialdom is operating coherently *as a system*, so that (for example) C1 is not responding to Supreme Court directives on affirmative action while his fellow citizens C2, C3 etc. are responding to contrary legislative directives.[272]

There are three objections one may want to raise against this authority-based argument. First of all, the argument assumes that the authority of individual laws and decisions depends on the *overall* respect of the dependence and normal justification theses in the law as a whole. One may object that what really matters for Raz's conditions of authority to be respected is that they only be so in a particular case and in a particular decision, thus undermining the relationship between diachronic coherence and the authority theses. Raz's account of authority is indeed a piecemeal account of authority that justifies authority in *some cases*, but does not claim to establish law's general authority.

Although this is right, the objection is misleading. For an individual decision to be authoritative, it has to fit into an individual's whole structure of reasoning and hence earlier decisions providing reasons for action. Individuals may *have* an incoherent set of reasons for action. However, they do not usually *act* on isolated reasons, but tend to make sure these reasons cohere with other reasons they have before acting. Hence, if the normal justification thesis is to be respected, then the law should ensure it does not give individuals reasons to act that will diminish their ability to act coherently upon their other reasons.

[269] This echoes in other terms WALDRON's, 2003A, 69 conclusion.
[270] See DWORKIN, 1984A, 155.
[271] See WALDRON, 1999A, 205 ff.
[272] WALDRON, 2003A, 57.

Moreover, for the law to satisfy the dependence thesis, it has to offer reasons that correspond to coherent reasons individuals would ordinarily act upon. As Postema argues, law's distinctive normativity lies in its *path dependence*, not by accident, but by design.[273] It is central to the law's task of guiding intelligent human action that it enables rational self-directing agents to achieve a degree of coherence by anchoring present official deliberation and action in past decisions and past actions of citizens and officials.[274] There is more to law's normativity than single events of momentary guidance; momentary guidance cannot be achieved without reference to other guiding moments and hence without cross-temporal coherence.[275]

A second objection may read as follows. Raz's account of authority states that for the law to have authority, it is sufficient for it to be able to *claim* it. Thus, even if it is not really authoritative for reasons of incoherence in some cases, this does not jeopardise Raz's account of authority. Although this is true, Raz's account of authority *qua* claim only works if there is a sufficient number of cases in which the claim can be valid. As the opportunities for checkerboarding the law are important in circumstances of reasonable disagreement about justice, there must be evidence that the normal justification and the dependence theses can be satisfied in a sufficient number of cases before a valid claim of authority can be made. This requires, then, that the principle of integrity is recognised as an element of the authority thesis and as a minimal condition for authority *qua* authorship by autonomous individuals.

A third objection is advanced by Raz himself, when he contends that 'sometimes citizens are duty-bound to [regard the law as binding] because of the benefits of maintaining its authority in spite of all its defects.'[276] This objection does not succeed, however. Indeed, as Raz himself acknowledges, much of the law is prima facie incoherent and to make the cases of obedience to such laws cases of mere 'acceptance' or of 'instrumentalism' would transform those cases into paradigmatic cases of obedience to the law, thus undermining the normal justification thesis itself.[277] Cases of acceptance-based and instrumentalist obedience are cases Raz uses to show how his authority account can be made more general, but they are not part of his account of authority *stricto sensu*.[278]

[273] Postema, 2003, 234.
[274] See also Finnis, 1973, 65.
[275] See Raz, 1980, 189 on the identity of a legal system over time, quoted by Postema, 2003, 236.
[276] Raz, 1995a, 299.
[277] Raz, 1995a, 298 also makes a tentative argument based on coordination according to which incoherent laws could be said to contribute to coordination just as well as coherent ones. It is hard to see how this could happen, however, given the consistency dimension of coordination patterns among themselves. If the argument may work for synchronically incoherent law, it is clear therefore that it fails with respect to diachronically incoherent law and diachronic coordination. See Raz, 1995a, 318 himself on this very point and arguing that coordination may require local coherence in some cases. See also Waldron, 2001d, 786 on this point. Moreover, coordination is only one example of normal justification in Raz's account and incoherence remains a concern for the others.
[278] See Raz, 1995a, 299, 302, 354.

iii. Raz's Counterargument

Even provided the arguments made in this section prevail, there is still an important difficulty to address, namely the fact that Raz himself argues that his account of authority is undermined by integrity. We are in the paradoxical situation of having argued for integrity on the basis of Raz's account of authority, while Raz himself thinks that his account is not compatible with integrity.[279] Raz's critique of integrity in relation to authority may be broken down into two arguments.

First of all, Raz argues that some coherent accounts of legal sources are so original that they risk severing all connections with the reasons and norms first expressed by legal authorities; integrity would advocate acting on principles which may never have been considered or approved, either explicitly or implicitly, by any legal authority.[280] If this were true, it would deny any mediating role to those authorities. This argument is easily set aside, however. First of all, the new decision by which coherence with past laws and decisions is attained is itself an authoritative decision and as such, technically speaking, integrity does not contradict authority. Raz cannot be arguing against a new authoritative rule that changes the state of the law, as this is what legislation is about. True, in the case of adjudication, the situation may be a bit more difficult. However, integrity usually applies to adjudication only in hard cases, ie in cases where the reasons and norms uttered by legal authorities are unclear or non-existent. Secondly, coherence means that the new decision should be coherent *per se* and that it should be made so that it coheres with past decisions, not that those should be changed in order to make the new decision cohere with them. Of course, they are reconstructed in interpretation so as to be made coherent and for the new decision to be made coherent with them. However, this does not affect their content or their authority more than any other form of interpretation.[281]

Another argument Raz makes against integrity is that it denies the pre-emption thesis. If citizens deciding how to act determine the morally best reconstruction of the authoritative sources of law, then the identification of law depends upon the very considerations which the law was meant to pre-empt. This argument may be met once more. Citizens are not the ones to decide upon coherence, but authorities themselves. Moreover, the latter are merely looking at ways to pre-empt citizens' reasons in a way that is more in line with the latter's autonomy and with the normal justification thesis, by giving them pre-emptive reasons that are coherent. As such, they are only attempting to support the three theses of authority and not to undermine them.[282]

[279] See mainly his arguments in RAZ, 1995A.

[280] RAZ, 1995A, 325.

[281] There is a related difficulty that I have no time to discuss here and that flows from the danger of retroactivity in adjudication implied by coherence. On this critique, see KRESS, 1984, 1996. For a convincing response, see HURLEY, 1990. KRESS, 1999 actually changed his mind on this issue.

[282] See Chapter 13 for a re-interpretation of the three Razian theses of authority.

CONCLUSION

This chapter addressed the principle of legal coherence or integrity. It argued for the justification of both a diachronic and synchronic principle of consistency in principle in conditions of reasonable disagreement. The principle implies that legal decisions should be made to cohere as much as possible within themselves, but also with past decisions, as if they conveyed a single view of justice. This principle is justified as an independent political virtue and principle. It applies across the board, I argued, to all authorities and with respect to all sources of law. Of course, there will be cases where the heuristic of coherence will be limited by the vagaries of politics and profound inconsistency in the law, but also by value pluralism itself, but the principle of integrity is an optimisation principle and as such it can still claim to be general despite its practical limitations. In this chapter, I tried to make the idea of legal coherence or integrity more compelling by reinforcing and developing, with some much needed argumentation, an intuition Dworkin first revealed in his postulation of the virtue of integrity and Waldron recently pursued in developing his account of the circumstances of integrity: in conditions of persistent reasonable disagreement about justice and pervasive legal indeterminacy, decisions should be taken by institutions and authorities so as to show respect for the diverging views expressed in past laws and decisions and this can best be done by adopting coherent laws and decisions.

The principle of legal coherence or integrity is independent of the principles of justice and fairness while also being related to them; it should be understood as a *parasitic* or *meta-justice* principle that only enters the scene in cases where justice cannot be of any recourse for reasons of disagreement about it. I propounded three main justifications of the independent virtue or principle of integrity: first, grounds of public morality and respect for others in conditions of reasonable disagreement; secondly, grounds of collective action and communal responsibility; and, finally, grounds of legal authority and in particular of the normal justification thesis. All three arguments approach the value of coherent law, but from the perspective of the officials, the community or the individuals, on the one hand, and from the perspective of respect for the reasonable divergence of views in a pluralistic society, the value of a community unified in principle or individual autonomy, on the other. They provide elements of justification that may be combined or invoked alone in the progressive constitution of a true ethics of political responsibility and institutional cooperation. Only coherent laws and decisions can be vested with authority and legitimacy in conditions of reasonable disagreement where the law's main role is to coordinate our actions both at every single moment and across time, albeit in conditions that respect reasonable diverging views and opinions.

Of course, the public duty of integrity in circumstances of reasonable disagreement, to take the example of the public morality justification of integrity, can conflict with the private duty to justice. Officials may judge in some cases that respecting integrity and cohering with past law or with currently defended conceptions of justice may clearly violate important principles of justice. The

question they face then is when to break their public obligation of integrity to follow their private duty of justice. The answer is a deeply personal one, as it depends on each individual's private morality. As neither private morality nor public morality are ultimate, it would be wrong to look down on individual dilemmas when the public obligation of integrity conflicts with the private obligation of justice. There is a sense in which it is only because such decisions are possible in some extreme cases that integrity may be a virtuous attitude to adopt in other cases.

12

Conflicts of Constitutional Rights: Nature, Typology and Resolution

INTRODUCTION

> What is to be done? How do we choose between possibilities? What and how much must we sacrifice to what? There is, it seems to me, *no clear reply*. But the collisions, even if they cannot be avoided, can be *softened*.[1]

THE LAW DOES not tolerate conflicts among its norms and this is particularly true of conflicts of legal rights.[2] In fact, conflicts of rights in general, be they moral or legal, are generally regarded with concern, but also and maybe therefore with distrust.[3] The idea that morality may encompass inconsistent reasons or that the law may include norms[4] requiring inconsistent action has disturbed more than one moral and legal philosopher.[5] This is even more patent with rights given their rhetoric and symbolic function as absolute trumps of utility and of any consequentialist calculus.[6]

This attitude of disbelief towards genuine conflicts of rights also transpires from legal practice. It is generally a well-established fact that legal, and in particular constitutional or fundamental rights, on which this chapter focuses, can conflict.[7] Freedom of speech can conflict with the right to privacy, the autonomy of a

An earlier version of this chapter was presented at the Oxford Annual Colloquium in Legal Philosophy on 10 March 2003. On this occasion, but also independently, I received very helpful comments from Nick Barber, Timothy Endicott, Tony Honoré, Dimitrios Kyritsis, Tien Mu Ma, Timothy Macklem, Andras Miklos, Dwight Newman, Stephen Perry, Miriam Ronzoni, Tiziana Torresi and Suzanne Yang. Special thanks are also due to Thomas Pogge for his detailed critiques and comments and to Otto Pfersmann and Lorenzo Zucca for useful discussions on the issue.

1 See BERLIN, 1998, 2 ff (emphasis added).

2 By conflict of rights, I mean the case in which one or two rights give rise to incompatible actions and not the case in which different rights give rise to the same action (competition of rights).

3 See FINKELSTEIN, 2001A, 235: 'Contemporary rights theorists have generally *assumed* that rights cannot conflict.'

4 This chapter refers to legal 'norms,' 'rules' and 'principles' in the sense described by RAZ, 1972, 824, note 4.

5 See in particular FEINBERG, 1970, 4; WELLMAN, 1995, 271; THOMSON, 1986B, 49; THOMSON, 1990; STEINER, 1977, 767; STEINER, 1998, 233. See already KANT, 1991, 224 who argued that moral duties only conflict in appearance.

6 See WALDRON, 1993A; WALDRON, 2003B, 196 ff. See also SHER, 1984.

7 Although I concentrate on fundamental legal rights or constitutional rights in this chapter, I will refer to them more generally as legal rights. Interestingly, the distinction also exists among moral rights and most essays on the conflicts of moral rights are in fact addressing conflicts of fundamental moral rights. See eg WALDRON, 1993; KAMM, 2001, 239; and KAMM, 2002.

pregnant mother can conflict with the right to life of the foetus and the right to life of a person can conflict with her right to choose the time and manner of her death. Still, conflicts of rights are barely mentioned in most constitutional texts and decisions[8] and even when they are, very little information is given as to how to resolve them.[9] The general fallback position is that when conflicts occur, they can easily be solved to the advantage of all interests at stake by simply conciliating them.[10] There is generally no further mention of the precise ways to conciliate rights, of the relationship between criteria of conciliation and other rules of conflict that are used in some cases and of the reasons to privilege conciliation over other ways to solve conflicts of rights, such as giving full priority to one right over the other. Nor is there usually any mention of which authorities should be in charge of balancing rights and how they could be held accountable. Many difficult questions are raised by these conflicts and it is important to face them openly rather than hide behind the screen of legal unity.

This approach to conflicts of rights is even more surprising when one observes how widespread and persistent conflicts of rights are in practice.[11] In fact, not only is it impossible to avoid all conflicts of moral and legal rights, but, as I will argue, they are also beneficial in some cases. It is high time, therefore, for legal theorists to examine more precisely the nature and types of conflicts of legal rights and the ways in which the law may legitimately solve them. Some work has already been done with respect to conflicts of moral rights,[12] but very little has been done so far in the realm of legal rights.[13] Although there are many links between both

[8] It is easy to avoid conflicts of rights by not individuating the rights that are in conflict in a specific case or by individuating them in such a way that they do not conflict. Let us think, for instance, of the *Pretty* case; both in the House of Lords decision ([2001] 3 WLR 1598) and in the ECHR decision (decision of 29 April 2002), the issues were stated so as to present the conflict between the right to life and the right to personal autonomy as a problem purely internal to the right to life itself since the question was taken to be whether the right to life could entail a right to die and not whether both dimensions of the right to life could conflict. This is even more surprising as the lower court had recognised the existence of the conflict (Queen's Bench Division, [2001] EWHC Admin. 788, CO/3321/2001). Courts are not the only institutions to avoid or mask conflicts; legislatures often do too. The issue of the individuation of rights and of conflicts of rights is a difficult one, as we will see: see Harel, 1997, 101.

[9] See eg art. 36 al. 2 of the Swiss Federal Constitution, art. 18 of the Portuguese Constitution, art. 8 para. 2 to 10 para. 2 of the European Convention on Human Rights (ECHR) and art. 4 of the 1789 Declaration of the Rights of Man and of the Citizen.

[10] See eg *Kunstfreiheit* BVerfGE 81/1990, 278, 289 in Germany; *Liberté d'enseignement et de croyance*, DC 77–87, RJC I–52, DC 79–105, RJC I–71 and DC 80–127, RJC I–25 in France; *Michael Douglas, Catherine Zeta-Jones, Northern and Shell plc v Hello! Ltd* [2000] EWCA Civ 353 in Great Britain; *Jacubowski v Germany*, Serie A, n. 291–A, 1994 in the context of the ECHR; Case 8/1992, BJC 1991, 130, p. 50 in Spain; ATF 99 Ia 604, 618 cons. 4d in Switzerland. See more generally on the issue of balancing rights, Aleinikoff, 1986.

[11] See for the most recent relevance of these conflicts and their resolution, Waldron, 2003b on the legitimacy of the 'balance' between American citizens' security and alleged terrorists' civil rights.

[12] The issue has been touched upon before, but it seems to have been the centre of much more attention recently. See eg Steiner, 1977; Raz, 1984d, 211; Thomson, 1986b; Waldron, 1993a; Jones, 1994, 199–202; Wellman, 1995; Steiner, 1998; Simmonds, 1998, 113; Kamm, 2001; Finkelstein, 2001b; Montague, 2001; Kamm, 2002; Waldron, 2003b.

[13] This is quite surprising given that many of the essays I discuss on conflicts of moral rights have been published in legal theory journals or books. See eg Kamm, 2001; Kamm, 2002; Finkelstein,

types of rights and hence of conflicts, their extent is not entirely clear and needs to be assessed. Besides, the law has more resources to settle conflicts than morality and it is important to see how these resources may apply to conflicts of rights and how they help systematise and justify the kind of legal reasoning the balancing of rights requires in the end.[14] Conflicts of moral and legal rights raise very complex questions, ranging from issues of practical reasoning to questions of deontic logic. It would therefore be presumptuous to think one could do justice to such a difficult topic in a single chapter. The chapter will start by clarifying what moral and legal rights are and how they relate. It will then go on to discuss whether and why rights conflict. The next section will present the ways in which rights may conflict. Finally, in the last section, the chapter will address the issue of how conflicts of rights may be resolved or at least addressed.

I. THE NATURE OF RIGHTS

Part of the difficulty in addressing the issue of conflicts of rights is that the way we conceive of their origins, nature and resolution depends on how we conceive of the nature of rights in the first place.[15] Producing an introductory account of the nature of rights is made even more difficult in the context of conflicts of legal rights as the relationship between moral and legal rights itself is unclear. Some theories of rights assume that everything that is said about rights applies equally to moral and legal rights, whereas other theories have concentrated on either moral rights or legal rights.[16] In this chapter, I propose an explanation of conflicts of rights in general which can be applied to moral and legal rights equally, with the latter ensuring the legal recognition of some protected interests besides other institutional rights.[17] In the following discussion, I will therefore distinguish between moral rights and their recognition or constitution through legal rights.

1. Moral Rights or Rights in General

In this section, I will first present a modified account of the interest theory of rights, before presenting in more detail how rights relate to interests and duties.

2001b; Montague, 2001. There are exceptions, however, mostly in the continental tradition: see eg Peczenik, 1989, 189; Alexy, 1992; Simmonds, 1998; Steiner, 1998; Alexy, 2000; Sieckmann, 1994; Sieckmann, 1995; Alexy, 2003a.

[14] On the common nature of forms of practical reasoning despite the specificity of legal reasoning, see Raz, 2001b, 2.

[15] See eg the argument on the existence and frequency of conflicts of rights between Steiner, 1998 in the context of the will theory of rights and Kramer, 1998, 7 in the context of the interest theory of rights.

[16] See Hart, 1954; Hohfeld, 1978.

[17] See Raz, 1984a.

a. The Modified Interest Theory of Rights

Three main theories of the nature of rights have been defended with varying success: the will or choice theory of rights, the interest or benefit theory of rights and the status theory of rights.

The *will theory of rights* singles out the right-bearer by virtue of the power she has over the duty in question so that her choice is sufficient to discharge the other of the duty requirement.[18] There are many difficulties with this theory, including most importantly the fact that it does not allow discussion about rights in advance of determining who exactly is under the relevant duty.[19] Besides, by allowing the right-holder to set aside the duty-bearer's duties to respect her rights, the will theory of rights does not account for the existence of the rights we regard as inalienable and as linked to objective aspects of our wellbeing and in particular fundamental or human rights.[20] By contrast, according to the *interest theory of rights*, a person has a right if an aspect of her wellbeing (her interest) is a sufficient reason for holding some other person(s) to be under a duty.[21] It is the most influential theory of rights to date.[22] The advantage of the interest theory of rights is, first, that it makes it possible to argue for the recognition of a right before specifying which duties correspond to it.[23] Secondly, the interest theory does not preclude any of the means, and duties in particular, that could help protect the right—thus identifying the right with a sufficient ground for holding other individuals under all the duties necessary rather than in terms of the details of these duties.[24] Finally, the *status theory of rights*: according to this theory, rights express the recognition of a person's status as a being who has a high, even if not an absolute level of inviolability.[25] The status a right expresses is not so much in a person's interests as it is a status that makes her interests worth protecting. Such a right is based on a person's nature and is not necessarily related to any aspect of her wellbeing.[26]

An interpretation of the status theory allows us to keep an interest-based account of rights while attenuating some of its consequences. As Kamm rightly argues, applied strictly, the interest theory of rights implies that when many rights can be saved by infringing one, the one right should be infringed.[27] The reason is simple: the interest which generates the requirement to infringe the one right is exactly the same as the interest protected by each of the other rights at stake in the matter and as there are more rights on the one side than on the other, they should get

[18] See Hart, 1984, 77 ff. See, more recently, Wellman, 1997; Simmonds, 1998; Steiner, 1998.
[19] See Waldron, 1984, 10. See Harel, 2004, 193–97 for a more elaborate discussion and critique of both models.
[20] See Waldron, 1984, 9. See Hart, 1982, 193 for an admission of this point.
[21] See Raz, 1986a, 166 ff; Raz, 1984d, 195. On the different versions of Raz's definition of rights, see Kamm, 2002, 484 ff.
[22] See Raz, 1986a, 166; MacCormick, 1977, 192 ff. See also Raz, 1997b; Feinberg, 1980, 139–40.
[23] See MacCormick, 1977, 201.
[24] See Waldron, 1984, 10–11.
[25] See Kamm, 2001, 242–47 and Kamm, 2002, 492–93; Nagel, 1994 and Nagel, 1995, 85.
[26] See Kamm, 2002, 485.
[27] See Kamm, 2002, 506 ff.

priority.[28] The difficulty is that, although this may be true in some cases, it is blind to the circumstances in which a right is infringed. A status-based filter on rights, therefore, permits the application of the interest theory to be finessed to prevent cases of infringement of rights that would deny any status to the right-holder.[29] According to the modified interest theory of rights, then, most rights are based on interests, but some aim at recognising a person's status and inviolability which lie at the foundations of her interests. This is clearly the case of most constitutional or fundamental rights.[30]

b. From Interests to Duties

In the modified interest theory of rights, rights are intermediaries between interests and duties.[31]

Rights are founded on interests. Only interests of ultimate value can found rights[32]; they are interests which are regarded as fundamental for the wellbeing of a person. They include individual interests when these constitute part of a person's wellbeing in an objective sense. They also extend to others' interests and even to the common good in some cases.[33] For a right to be recognised, therefore, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.[34] This implies that a lot of weighing and balancing[35] will have to be done before a right is identified, in order to establish exactly where the special importance of the right lies.[36]

Rights ground duties. Rights are reasons for holding others in duty. Many have deduced from this that rights and duties are correlatives. The correlativity between them is not immediate, however.[37] As rights come logically into existence prior to the duties they then justify,[38] it is possible to have rights without duties.[39] Of course, once a specific duty is grounded, it will be correlative to the specific

[28] See WALDRON, 1984, 16.
[29] See KAMM, 2001, 244.
[30] Such a reinterpretation is in line with Raz's most recent contentions about the relationship between fundamental or constitutional rights and the common good and the fact that in some cases the stringency of rights seems greater than the weight of the individual interests it protects. See RAZ, 1992, 135 and RAZ, 1997B, 83. See also HAREL, 2004, 202.
[31] See RAZ, 1984D, 208. See also RAZ, 1986A, 181.
[32] See RAZ, 1984C, 192. On the *entities* which can have such ultimate-valued interests and the *nature* of these interests, see HAREL, 2004, 193–97.
[33] See RAZ, 1992, 135 and RAZ, 1997B, 83.
[34] See RAZ, 2001C, 202 on the importance of social practices when defining the scope and content of rights. See most recently, RAZ, 2003C and RAZ, 2003D.
[35] Hence, the weight or importance of a right depends on the weight or importance of the interests it protects. Talk of the 'weight' and 'balancing' of rights and interests is metaphorical. The expression of 'weighing and balancing' goes back to ALEXY, 1985A; ALEXY, 1992, 148–49; ALEXY, 2003A, 131. See for a critique of the quantitative computations of rights: WALDRON, 2003B, 192 ff; STEINER, 1994, 42 ff.
[36] See WALDRON, 1984, 14. See also RAZ, 1984D, 200, 209; MARMOR, 1997, 10.
[37] One may argue that this does not question the Hohfeldian conception of correlativity as the latter is meant as a stipulation, rather than as an empirical claim. See RAZ, 1998A, 24–49.
[38] See MACCORMICK, 1977, 199–202; RAZ, 1984D, 196, 200; KAMM, 2002, 480.
[39] It is also possible to have duties without rights. See RAZ, 1995A; FEINBERG, 1970, 4.

right which flows from the general right and which grounds it.[40] The relationship between rights and duties is therefore normative or justificatory, rather than symmetrical.[41] It follows that a right might provide for the imposition of many duties and not only one. Besides, rights have a dynamic nature and, as such, successive specific duties can be grounded on a right depending on the circumstances.[42] One right may therefore be correlative to many different duties across time.[43]

In these circumstances, one may wonder why there is a need for rights at all as *intermediaries* between interests and duties.[44] Interests may indeed change, thus changing the recognised rights. Rights themselves may change, thus questioning what had been recognised. Finally, duties themselves arise and change in relationship to the needs of protection of the interests recognised. In fact, it is this very dimension of change and conflict which justifies the recognition of rights. Not only do rights provide a way to save time and energy in terms of allowing us to rely on the superiority of some interests over others, but also, and more importantly, they provide us with an intermediary level of agreement.[45] Even if this agreement is not meant to last, it is a base we need to agree on in order to disagree further, about duties for instance. This is particularly true of fundamental rights, as they recognise and individuate interests over which we are bound to disagree later.[46]

2. Legal Rights

According to Raz, 'if rights are protected interests in that a person has a right if and only if an interest of his is a sufficient ground for holding another to be subject to a duty then *legal rights are legally-protected interests*.'[47] According to this definition, a legal right comes into existence in two steps.[48] First of all, an individual has a right if an interest of hers is sufficient to hold another to be subject of a duty. Secondly, her right is a legal right if her interest is recognised by law, that is if the law holds her interest to be sufficient ground to hold another to be subject to a duty.[49] This explains how, in some cases, a legal rule may seem to be conferring a right in protecting someone's interest without necessarily conferring such a right in practice because there is no such interest to protect or at least not in that way. In this case, the valid legal rule has the legal form of a legal right, but not its content.[50]

[40] See Raz, 1998a, 42.
[41] See Marmor, 1997, 3.
[42] See Raz, 1986a, 168–70; Raz, 1984d, 197–99.
[43] See Waldron, 1993a, 212 ff.
[44] See Raz, 1984d, 208–9.
[45] See Raz, 1986a, 181; Marmor, 1997, 15–16.
[46] See Chapter 9 in the constitutional context.
[47] Raz, 1984a, 12 (emphasis added).
[48] See Raz, 1984a, 14.
[49] See Raz, 1984a, 14.
[50] See Raz, 2001b, 6 on the normative gap that is intrinsic to reasoning with legal rules.

It follows that legal rights may be regarded as *moral rights*. Of course, not all moral rights are or should be legally recognised. Nor does it mean that legal rights necessarily pre-exist as independent moral rights. Some do and are *legally recognised moral rights*, but others are *legally created moral rights*.[51] In some cases, the law may change a person's interests, thus in a sense creating the interest which is the foundation of the right. As Raz puts it, 'legal obligations are real (moral) duties arising out of the law.'[52] The general account of moral rights defended in the prior section applies therefore to legal rights whether or not a legal right corresponds to a pre-existing moral right.

So far I have been addressing the issue of legal rights in general. The conflicts of rights we will concern ourselves with in this chapter are conflicts of *fundamental or constitutional rights*. Constitutional rights are regarded as more fundamental than other legal rights because they often protect common goods and not only individual interests. Besides, even when they protect fundamental interests, they do so in a way that pays more attention to people's fundamental status and inviolability than ordinary legal rights.[53] They are therefore usually entrenched and protected from ordinary legislative revisions. Thus, they differ both formally and substantively from ordinary legal rights.

II. THE NATURE OF CONFLICTS OF RIGHTS

After these few clarifications about the nature of rights, we can turn to the issue of whether rights can conflict and why this is the case. As before, I will distinguish between moral and legal rights.

1. Conflicts of Moral Rights or Rights in General

In this section, I will first argue that conflicts of rights are inescapable and will then go on to discuss and reject some of the sceptical arguments that have been made against this view.

a. The Inescapability of Conflicts of Rights

According to the modified interest theory of rights described above, the recognition of rights emphasises the moral importance of certain interests.[54] As part of people's wellbeing or as constituents of the common good in some cases,[55] interests often conflict with one another and hence conflicts of interests lie at the foundation of rights. This is due to moral or value pluralism, of course, but also to social

[51] See RAZ, 1984A, 16–17.
[52] RAZ, 1984B, 131.
[53] See RAZ, 1992, 135 ff and RAZ, 1997B, 83.
[54] See WALDRON, 1993A, 205.
[55] See RAZ, 1997B, 135; RAZ, 1992, 83.

pluralism and to people's different views about what is part of their wellbeing or the common good.[56] Like moral conflicts, therefore, conflicts of rights are not logically necessary, but they are pervasive.[57]

Given the intermediary nature of rights 'in arguments from ultimate values to duties,'[58] conflicts may arise at the level of interests, rights or duties. All three types of conflicts are usually regarded as conflicts of rights *lato sensu*. First of all, then, *conflicts of interests*. most conflicts of interests have to be resolved before some of these interests can be regarded as sufficient to give rise to rights. Interests will be weighed against one another and rights will only be recognised in a limited way according to the resolution of this weighing.[59] Conflicts of interests are essential in determining whether one has a right in the first place,[60] and hence whether this right can conflict with others later on.[61] Secondly, *conflicts of rights stricto sensu*. Despite the fact that some conflicts of interests are resolved before rights are recognised, conflicts may occur again among these rights.[62] This can be due to changes of circumstance giving rise to *external* conflicts of rights, ie conflicts that arise out of circumstances external to rights.[63] Conflicts may also occur by reason of the dynamic nature of rights. New rights may be derived from core rights and these rights may conflict with others.[64] Finally, interests themselves may change and the rights they ground too.[65] All these conflicts can be grouped under the heading *internal* conflicts of rights; as their origins lie in the rights themselves rather than in external circumstances.[66] Finally, *conflicts of duties*. Once rights are recognised, they justify creating duties. When rights conflict, therefore, it is mostly because duties conflict.[67] There are cases, however, in which duties cannot conflict, but where rights can conflict all the same, as we will see.[68] There are no limits to conflicts of duties given the dynamic nature of rights and the possible generation of successive duties due to the diversity of the interests protected or changes of circumstances more generally.[69] In short, then, all conflicts cannot possibly be resolved in advance before a right is recognised.[70] If rights gen-

[56] See MARMOR, 1997, 12–13. Of course, this does not exclude external sources of conflict among rights.
[57] See Chapter 5.
[58] RAZ, 1984D, 208.
[59] See MARMOR, 1997, 10; POGGE, 1989, 19.
[60] See MARMOR, 1997, 11.
[61] See RAZ, 1984D, 211.
[62] See POGGE, 1989, 19, note 7.
[63] One may think, for instance, of a change of circumstances of peace to a state of war. See WALDRON, 2003B, 197–98.
[64] See RAZ, 1984D, 197–99.
[65] See SCHAUER, 1982, 132.
[66] See STOCKER, 1990, 88 ff. This distinction reveals that not all conflicts of rights can be reduced to conflicts of interests and hence to conflicts of values.
[67] It follows therefore that the stringency of a specific right corresponds to that of its relative duty.
[68] Contra: WALDRON, 1993A, 206.
[69] See RAZ, 1984D, 200; WALDRON, 1993A, 212–15.
[70] See POGGE, 1989, 19, note 7. Contra: FABRE, 1998, 277–79 according to whom conflicts of rights are conflicts of interests only that can and should therefore be solved before rights are recognised in the first place, whether the latter are negative or positive rights.

erally provide us with an intermediary level of agreement after having resolved conflicts of interests and before resolving conflicts of duties,[71] it is also true that often the solution to the latter will require going back to the roots of conflicts of interests underlying conflicts of rights.[72]

b. Some Responses to Sceptical Arguments

If all this seems to follow from the modified interest theory of rights proposed before, not all moral philosophers agree with the inescapability of conflicts of rights.[73] If rights can conflict, this implies that even if a right is overridden by another one, it was nevertheless a real right, not just an interest to be weighed in determining what rights there are.[74] These conflicts are therefore a matter of concern for some given the special status usually recognised to rights in moral philosophy. While sceptical scholars diverge as to how conflicts of rights can be avoided, they all agree that they should and can be avoided. Some reject the idea of logical inconsistency in morality,[75] whereas others object, on a Kantian model, to any inconsistencies among moral injunctions.[76] Different accounts of the ways to avoid conflicts of rights have been put forward. I will discuss five of them here. They should not be confused with rules of conflict or modes to resolve conflicts, for they prevent conflicts from actually occurring, either by solving all conflicts before rights are assigned or by preventing them from occurring once rights have been identified.

First of all, *specificationism*: according to the specificationist theory of rights, the *scope* of rights can be specified in such a way as to prevent conflicts from occurring.[77] The right to life, for instance, can be constituted so as not to conflict with others' right to self-defence and to prevent the emergence of a right not to be killed. There are two main problems with specificationism. First, it cannot explain how we should deal with complex situations which no specifications could have foreseen.[78] Absolute determinacy cannot be attained in the domain of rights where interests and circumstances change constantly, thus giving rise to new specific rights and duties and hence potentially to new conflicts of rights and duties. Secondly, specificationism does not match our intuitions as to moral residues; we have

[71] See Raz, 1986a, 181; Marmor, 1997, 15–16.
[72] See Marmor, 1997, 16.
[73] Many of the authors who deny the existence of conflicts of rights do not hold an interest-based theory of rights: eg Nozick, 1974; Martin, 1993; Steiner, 1977 and 1998. See, however, Fabre, 1998 who holds an interest-based account of rights, but argues that conflicts of rights are to be solved before the rights themselves are assigned.
[74] See Kamm, 2001, 239.
[75] See Steiner, 1977 and 1998.
[76] See Wellman, 1995, 272; Montague, 2001, 261; Thomson, 1986b. See also Kant, 1991, §§ 235–36.
[77] See Wellman, 1995, 277; Feinberg, 1978, 102. See also Jones, 1994, 198 ff on ways to define the scope of rights more precisely and hence to limit cases of potential conflicts of rights.
[78] See Feinberg, 1978, 100; Finkelstein, 2001b, 295. See also Sher, 1984, 215. See also Jones, 1994, 200–1 on the impossibility of foreseeing all possible eventualities in a highly unstable society.

the intuition that compensation is due in case of conflict where some rights are protected and not others, even if this was specified and no right was truly infringed.[79]

Secondly, prima facie or *presumptive* rights: another approach is inspired from Ross' prima facie duties that may conflict but only prima facie and not 'all things considered.'[80] On this account, rights only hold prima facie and may be overridden by others when they seem to conflict with them.[81] It follows therefore that conflicts are not true conflicts 'all things considered' and hence do not imply any risk of moral inconsistencies.[82] There are two difficulties with this approach. The first difficulty is that moral residues and our intuitions in respect of compensation are left entirely unexplained.[83] Secondly, the prima facie account of rights does not give us any indication of how we should resolve conflicts of rights when these rights are equally strong[84]: either I may choose between my conflicting duties when they conflict, which would not be satisfactory, or I have an 'all things considered' duty to do both things, which leads us to a true case of conflict of rights and thus precisely to what was meant to be avoided in the first place.[85]

Thirdly, *limitations of rights to 'compossible' ones*: this is an approach Steiner suggests following Leibniz's idea of logical 'compossibility.' According to Steiner, conflicts of rights imply logical contradictions and should therefore be prevented from arising. The solution is to limit rights spatially and temporally so as to ensure a compossible set of rights.[86] There are two difficulties with this account. First, as Simmonds rightly argues, not all conflicts of rights imply logical contradictions.[87] If you have a duty to do A and a duty to do B which cannot both be respected, you can abstain from respecting one and thus prevent the occurrence of an actual conflict. Besides, if one applies Williams' contentions against the agglomeration of duties, there is a duty to do A and a duty to do B and not a duty to do A and B, thus eliminating any risk of logical contradiction.[88] Secondly, many conflicts of rights cannot be prevented by external measures such as the ones suggested by Steiner, since they can result from the rights' internal qualities.

Fourthly, the *'ought' implies 'can' objection*: according to this objection, when a conflict of rights arises by reason of external circumstances, such as cases in which

[79] See Thomson, 1986a, 39 on these two points. See also Finkelstein, 2001b, 295.

[80] See Ross, 1930, 28–29. See also on the notion of prima facie duty, Searle, 1978, 81; Nozick, 1968. In the context of conflicts of legal principles, Guastini, 1999, 168.

[81] See Peczenik, 1994, 160 and Peczenik, 1989, 175 ff, 187.

[82] See Frankena, 1955, 64; Thomson, 1986b and Thomson, 1990; Montague, 2001, 275–77; Gewirth, 1984, 177.

[83] See for a critique Williams, 2001, 134–35; Williams, 1973, 176. See eg Ross, 1938, 84 ff. See also Sher, 1984, 218–19 on what he refers to as the 'systemic approach.'

[84] I refer to the stringency of rights and duties to refer to how strong they are. By contrast, reasons or interests can be of different weight or importance and one only rarely refers to their strength or stringency.

[85] See Finkelstein, 2001b, 295.

[86] See Steiner, 1977 and 1998, 262 ff.

[87] See Simmonds, 1995, 306 and Simmonds, 1998, 181–86.

[88] See Simmonds, 1995, 336 by reference to Williams, 1973, 170 ff and 180.

I have a duty to help two people but I can only realistically help one, our duties or rights do not conflict, as there allegedly can be no 'ought' without a 'can.' This objection is only partially valid. First of all, practicality cannot be a requirement of justice itself. As such, if an 'ought' cannot be complied with for practical reasons, this does not affect its existence and hence the existence of a conflict of rights. Besides, both 'oughts' satisfy the 'can' separately. As agglomerating duties is not the right way to go,[89] the practicability requirement cannot prevent external conflicts of rights from occurring.[90] Moreover, the objection only applies to external conflicts of rights.

Finally, *rights* qua *side-constraints*: this approach to rights has been famously promoted by Nozick.[91] Although it was not meant expressly to be a way to avoid conflicts of rights, it severely limits their occurrence. According to Nozick, rights are absolute limits on the actions that are morally available to any agent. To understand rights otherwise would be to treat people as means.[92] As such, rights are essentially negative; they require the agent to refrain from performing actions of the specified type and agent-relative in the sense that each agent is taken to be concerned only with her own observance of the constraints. This account excludes conflicts of positive duties and conflicts of rights that are agent-neutral, when an agent has a duty to act to prevent a rights-violation by another agent. Although this account limits the occurrence of conflicts of rights, it also limits the types of moral concerns that can be protected as rights and hence contradicts many of our intuitions and practices; not only do we know of rights which justify positive duties, but they are often agent-neutral and only rarely absolute.[93] Besides, as we will see, conflicts of rights may also occur in the absence of conflicts of duties and among negative rights.[94]

In sum, then, there have been various suggestions as to how to prevent the occurrence of conflicts of rights, but none of them has been very successful and can exclude all conflicts. As Williams puts it, 'moral conflicts are not systematically avoidable.'[95] This should not worry us too much, however. First of all, conflicts of rights are *beneficial* in some cases. They reveal a questioning of what is in the common good and in our interests, but they also reveal the dynamic and progressive nature of rights in changing circumstances.[96] Secondly, while it is disturbing for some to see that rights, which are often regarded as superior interests and hence as 'trumps' on utility and other interests,[97] can enter in conflict themselves, the spectre of *utilitarianism* and trade-offs should not be feared within the realm of rights.[98]

[89] See Williams, 1973, 180.
[90] See Waldron, 1993A, 207.
[91] See Nozick, 1974, 28–29.
[92] See Nozick, 1974, 30–33, 169, 170, 179n, 238.
[93] See Thomson, 1986B, 54. See also Sher, 1984, 221–22.
[94] See Kamm, 2001, 240 and 2002, 499. See also Thomson, 1986A, 33 ff; Fabre, 1998, 276 ff. Contra: Waldron, 1993A, 204.
[95] Williams, 1973, 179.
[96] See eg Sabel/Simon, 2004.
[97] Dworkin, 1978, xi.
[98] See Marmor, 1997, 11 and Waldron, 1993A, 208 on this point. See also Sher, 1984, 221–22.

As I will argue, conflicts of rights need not be resolved by utilitarian trade-offs on the grounds of a principle of quantitative commensurability of all interests.[99]

2. Conflicts of Legal Rights

In this section, I will first argue for the inescapability of conflicts of legal rights, and will then go on to discuss some of the sceptical arguments that have been made against this point.

a. The Inescapability of Conflicts of Legal Rights

The three stages of conflict we distinguished in the context of rights in general apply in the realm of legal rights. Conflicts cannot therefore be prevented by the extensive and precise drafting of legal rights and duties in the first place.

It is interesting to note, however, that legal rights may also conflict for reasons which differ from those that apply to non-legal rights and which are related to their legal recognition. First, the *dynamic dimension of rights* also applies in the legal realm, thus providing reasons for legal change and therefore for the creation of new specific rights and duties.[100] The difference is that this dynamic need not match the dynamic of change of the pre-existing moral rights if there are any, thus adding to the probability of conflicts of rights. Secondly, some conflicts of legal rights are caused by the *legal nature of the rights-conferring norms*. This is the case, for instance, where conflicts of rights are generated by the indeterminacy of the law or the vagueness of the language in which a right-conferring norm is drafted. It seems, therefore, that conflicts of legal rights are bound to be even more frequent and inescapable than conflicts of moral rights, whether these pre-exist legal rights or not.

b. Some Responses to Sceptical Arguments

If there is, as we saw earlier, unease about conflicts of moral rights among moral philosophers, this is even more true among legal theorists. This is because the law's general *coherence* is a common concern among them.

Many European constitutional traditions are grounded on a coherentist approach to constitutional law and especially to constitutional rights. In these traditions, the principle of concordance or conciliation is often said to derive from the dominant and reassuring idea of a *unified constitution*, that is the idea of a coherent constitution in which all rights and principles can be respected jointly and without exception.[101] It follows from this representation of constitutional rights that conflicts can easily be resolved by means of conciliation to restore their pre-existing coherent order. Not only does this approach not correspond to the reality of balancing conflicting legal rights, but, more importantly, it misconstrues the meaning and

[99] See Waldron, 1993a, 211.
[100] See Raz, 1984a, 14–15.
[101] See Alexy, 1996b, 77–87; Dreier, 1996, Vorb. 98.

significance of legal coherence. Legal coherence requires the consistency in principle of the norms which constitute the legal system.[102] An important dimension of legal coherence, as we have seen, is that, although it is general, it is practically limited. The role of social and value pluralism in the law-making process implies that if legal coherence is to be defended, it can only apply in some cases.[103] Some legal norms are therefore bound to be inconsistent and there is no point in artificially making them cohere.[104] Not only would this be difficult, but it would even be counterproductive in many cases.[105]

It is important to keep in mind, however, that not all conflicts of pre-existing moral rights give rise to conflicts of legal rights. The law has resources not only to resolve conflicts of rights, but also to prevent them. One of these resources is, for instance, *legal rights specificationism*. The law's resources and especially constitutional law's resources allow for legal rights norms to include rules which specify the scope of rights in such a way as to prevent conflicts; rights can be *restricted* in conformity to the law, so as to prevent *violations* of those rights and hence true conflicts of rights.[106] Of course, legal specificationism has a limited scope given the complexity of the situations in which conflicts of rights might arise; not all conflicts of rights can be foreseen and legally specified in advance.[107] Besides, given the extent of legal indeterminacy and vagueness, total conflict prevention through legal specification is implausible.[108] Finally, as I explained earlier, total conflict prevention and the absolute determinacy of rights is not necessarily desirable legally.[109]

III. THE TYPOLOGY OF CONFLICTS OF RIGHTS

To establish a typology of conflicts, I will distinguish between moral and legal rights.

1. Conflicts of Moral Rights or Rights in General

Conflicts of rights occur *when one or more rights cannot be fully respected jointly*. Some also refer to this as to the *incompatibility* of rights[110] and others to their *inconsistency*.[111] Some authors even talk of *incompossibility*,[112] but, to avoid any

[102] See Chapter 11.
[103] See Raz, 1995a, 331 who argues against the absolute autonomy of legal reasoning on this basis.
[104] See Raz, 1995a, 296.
[105] See Simmonds, 1998, 196. See, more generally, on the role of moral pluralism in the law, Waldron, 1999a; Veitch, 1999; Kutz, 1994.
[106] See Hilpinen, 1985, 196–97. See eg art. 5 para. 2 of the German Grundgesetz or art. 8 para. 2 to art. 10 para. 2 ECHR. See also art. 36 al. 2 of the Swiss Constitution for an example of the distinction between 'restrictions' and 'violations' of rights.
[107] See Raz, 1972, 831–32. On the limits in the drafting of moral and legal rights, see Jones, 1994, 200.
[108] See Raz, 1995a, 331.
[109] See Simmonds, 1998, 196.
[110] See Nagel, 2001, 106–7; Waldron, 1993a, 211.
[111] See Schauer, 1982, 132.
[112] See Waldron, 1993a, 206.

confusion, I will only use this term to refer to the logical inconsistency of rights.[113] Twelve major distinctions will be drawn here, which can be combined to produce a multitude of different types of conflicts of rights. More distinctions can be found and the typology is not exhaustive.

First of all, the *object of the conflict*: most of the time, conflicts of rights are conflicts of duties.[114] This is because, most of the time, rights and duties correlate. There are cases, however, in which duties cannot conflict, because they are negative and imply a mere abstention on the part of the duty-bearer. In these cases, rights can conflict all the same; the liberties to take measures which the rights justify may conflict with the duties to abstain which they ground,[115] on the one hand, and positive duties of protection may be based in some cases on negative rights besides negative duties of abstention, on the other.[116] Let us take, for instance, the 'two people on a plank' dilemma, in which each person's duties are purely negative and do not conflict *per se*, but in which their respective interests, and hence rights to life, conflict; they justify taking measures to prevent the other person from staying on the plank which conflict with their mutual duties to abstain from interfering with the other person's right to life.[117] In what follows I will refer to conflicts of rights as implying both conflicts of rights only and conflicts of duties. It is worth noting that, in most cases, a right may ground many different duties of which only one or a few will conflict with other duties or rights.[118]

Secondly, the *types of rights at stake*: conflicts can occur among many rights of the same kind or among many different rights. One must therefore distinguish *intra-right* conflicts from *inter-rights* conflicts.[119] It is important to see the difference between two types of intra-right conflict, depending on which interests or dimensions of the right are in conflict. Each right may indeed protect different interests which give rise to different duties. For instance, within the right to equality between men and women, the formal dimension of equality may conflict with its material dimension; the right to affirmative action measures is grounded on material equality, but may conflict with formal equality. By contrast, in the context of an organ donation, the right to life of the beneficiary may conflict with the right to life of the donor in extreme cases. In this case, the two rights conflict in the same fashion or with respect to the same protected interests. Conflicts can oppose negative rights, positive rights or positive and negative rights.[120] Similarly, when a conflict takes place within the same right, positive and negative dimensions of this right may be in conflict. For instance, in the current debate over direct and active euthanasia, the right to

[113] See Steiner, 1977 and Steiner, 1998.
[114] See Waldron, 1993a, 206.
[115] See Kamm, 2001, 240 and Kamm, 2002, 499. See also Fabre, 1998, 275 ff.
[116] Contra: Waldron, 1993a, 206. See also Montague, 2001, 259. See, finally, Gewirth, 1996, 45.
[117] See Finkelstein, 2001b. I assume in this example that a right to x implies a permission to x.
[118] See Raz, 1984d, 200; Waldron, 1993a, 212–15.
[119] See Waldron, 1993a, 217.
[120] Most interests can give rise to both negative and positive rights and duties. This does not mean, however, that every positive right is also a negative right in that it also grounds negative duties or vice versa, except at a very general level of rights talk. Contra: Shue, 1980, 54–55.

life of a person is usually taken to conflict in its negative dimension, ie the right not to live, with its positive dimension as protected by the positive duty of the state to protect life. Furthermore, it is possible, following Kamm, to distinguish between pure positive rights, mixed positive rights and derived positive rights.[121] Pure positive rights are direct rights to a positive action, such as the right to decent housing. Derived positive rights flow from a violation or the prevention of the violation of a negative right, such as when I must help someone I have harmed. Finally, mixed positive rights are related to the prevention of the violation of negative rights by someone else, as when I must prevent you from harming someone.

Thirdly, the *number of rights at stake*: conflicts need not only oppose two rights or two duties; they can imply many different duties. This is particularly interesting when institutional duties are at stake, especially as secondary duties, for this gives a second-order dimension to the conflict. It is important to note that, in some cases, other unrelated rights will be influenced by the conflict of specific rights and by their resolution.[122] Fourthly, the *relationship between the conflicting rights and duties*: most conflicts of rights which oppose two or more rights encompass reciprocal duties. For instance, your right to abstain from trespassing on my land conflicts with my right to abstain from preventing you to exercise your freedom of movement. However, in some cases, the rights in conflict are not reciprocal. For instance, my right to life binds my bodyguard and yours binds your bodyguard who happens to be the same as mine, so our rights conflict because our bodyguard cannot save both of us at the same time, but they are not reciprocal as you have no duty to me and I have no duty to you.

Fifthly, the *types of right-holders and duty-bearers involved*: rights are usually individual and therefore the right-holders are usually individuals, but they may also be collective. Depending on whether one adopts an interactional or an institutional account of rights, individuals or institutions are the only duty-bearers, but usually rights fall into both categories and institutional duties add a secondary level of rights protection to primary inter-individual duties. Sixthly, the *number of agents at stake*: conflicts of rights can take place within the same person but also, and more frequently, among different people. One opposes *interpersonal* to *intrapersonal* conflicts of rights. For instance, in the context of direct and active euthanasia, the right of a person to determine the moment and manner of her death conflicts with another dimension of her right to life which is actively protected by the state. Seventhly, the *relationship between the rights and the agents*: conflicts of rights may be *agent-relative* or *agent-neutral*. They are agent-relative, when the rights and duties at stake are such that each agent is taken to be concerned only with her own observance of the constraints. Conflicts of rights are agent-neutral, when an agent has a duty to act to prevent a rights-violation by

[121] See KAMM, 2001, 240–41.

[122] One may think, for instance, of the case of a restriction of negative rights in case of conflict with other positive rights, which in turn can lead to the restriction of other unrelated negative rights by reason of the enhanced power of the state. See WALDRON, 2003B, 205 ff.

another agent. Let us imagine, for instance, that you have a duty to protect the life of X, but you also know that if you do not prevent Y from taking X's life, X will die; depending on whether your duty is agent-neutral or agent-relative you will have to prevent Y from acting or not and hence your duty might or might not conflict with Y's.

Eighthly, the *origins of the conflict*: conflicts of rights can be *external*, when they are triggered by external circumstances or *internal*, when their origins lie in the rights themselves.[123] For instance, the conflict between the state's duty to protect both the life of embryos and the personal freedom of the mother is internal. By contrast, the conflict between two people's right to life when they are lost at sea and there is only one plank to share between the two is external. Ninthly, the *nature of the conflict*: it is possible to distinguish between logical contradictions among rights and practical opposition.[124] First, then, the incompatibility among rights may derive from a *logical contradiction*.[125] It is the case when the right or the duty to do A and the right or the duty not to do A are in conflict. Secondly, the conflict can derive from the fact that the rights are *contrary to one another*. This happens when the right to do A and the right to do B cannot be simultaneously respected in practice independently from a logical contradiction between them. As we saw before, this is the most frequent case.[126] It should be noted that this distinction should not be confused with the earlier one. Internal conflicts of rights need not be logical contradictions. Let us imagine, for instance, that you want to make a Nazi speech and I am Jewish; your freedom of speech conflicts with my right to dignity and respect. The conflict is internal to the rights at stake and does not derive from external circumstances,[127] but it does not follow from a logical contradiction between the two rights. The two rights merely allow for contrary conducts in the particular case. Similarly, conflicts of contrary rights need not be external conflicts. Let us think, for instance, of the conflict between the mother's right to personal autonomy and to decide about her own womb and the right to life of the embryo; everyone would agree that the two rights are not logically contradictory and yet the conflict is not external, because it lies mainly in reasons internal to the rights themselves.

Tenthly, the *degree of conflict* between the rights at stake: rights can conflict entirely or only partially and it is interesting to examine the degree to which they conflict. Ross' distinctions among conflicts of norms can be extended to conflicts of rights and one may accordingly distinguish three types of inconsistencies: total-total, when the two norms are always in conflict, total-partial, when one of the norms can be applied without conflicting with the other one, and partial-partial, when both norms can be applied without conflicting except in some cases.[128] In Kelsen's approach to conflicts of norms, a complementary distinction can be drawn

[123] See Stocker, 1990, 88 ff.
[124] See Nagel, 2001, 106–7.
[125] See Ross, 1958, 128–29.
[126] See Simmonds, 1998, 181–86. Contra: Steiner, 1977 and Steiner, 1998.
[127] Of course, all conflicts of rights depend on external circumstances to a certain extent.
[128] See Ross, 1930, 128–29. See also Kelsen, 1979, 99 for a similar distinction.

among bilateral conflicts of rights, in which all the rights at stake conflict with each other, and unilateral conflicts of rights, in which only one of the rights conflicts with the others.[129] For instance, the embryo's right to life is in bilateral conflict with the right to personal autonomy of the mother. By contrast, the right to free speech is in unilateral conflict with the right to privacy, since the right to privacy does not conflict with the right to free speech unless the latter conflicts with the former.

Eleventhly, the *level of conflict*: some conflicts of rights are purely *abstract* in the sense that rights conflict even before being applied, but in most cases conflicts of rights are *concrete*. This is particularly true of conflicts of fundamental rights. Finally, the *extent of the conflict*: a distinction may be drawn between, on the one hand, a conflict that opposes general rights with all the more specific rights and duties they may give rise to, and, on the other, a conflict between only some of these specific rights and duties. One may oppose *general* to *specific* conflicts. The dynamic nature of rights and duties means that all the duties related to a right will only rarely conflict at the same time. As such, it is not usually the right in general that conflicts with other duties or rights, but only some of its more specific rights and their relative duties.[130] For instance, the right to free speech may give rise to a duty not to impose censorship, but also to a duty to protect speakers from the public. The state's duty to ensure a person's privacy may conflict with the former duty, but not with the latter.

2. Conflicts of Legal Rights

Conflicts of legal rights occur *when one or more valid legal rights are incompatible and cannot be fully respected jointly*.[131] Most of what has been said about the typology of conflicts of moral rights or rights in general applies to legal rights. However, some important variations in the context of conflicts of constitutional rights are worth mentioning.

First of all, the *state as duty-bearer*: most of the time, legal rights are taken to bind the state. In fact, even when fundamental legal rights bind individuals, there is usually a positive duty of institutions to make sure individual rights are protected, thus making the state the secondary duty-bearer.[132] For instance, the right to equal pay for equal work primarily binds individual employers, but it also binds the state as a secondary duty-bearer. One may distinguish, therefore, between *primary* and *secondary* conflicts of legal rights, depending on whether the conflict occurs with the primary or the secondary duty-bearer. The presence of the state as a secondary duty-bearer in most conflicts of legal rights will almost always give an agent-neutral

[129] See Kelsen, 1979, 99.
[130] See Waldron, 1993a, 212.
[131] See Pfersmann, 2000, 107. See also Sieckmann, 1995, 46; Hilpinen, 1985, 193.
[132] See Besson, 2003a on the importance of positive duties of protection of fundamental rights.

flavour to them. Moreover, with the state as a secondary duty-bearer in many cases, the number of duties at stake in a conflict will become greater.

Secondly, the *origins of the conflict*: there are increased chances of encountering external conflicts in the legal realm by virtue of the costs implied by the enforcement of legal rights.[133] Thirdly, the *degree of conflict*: most conflicts of fundamental or constitutional rights are partial-partial conflicts.[134] This is due to their broad scope of application. For instance, the right to free speech does not conflict in all its potential cases of application with the right to privacy although it may conflict with it in some cases. Finally, the *level of conflict*: most conflicts of constitutional rights are concrete, rather than abstract. For instance, the right to free speech will not necessarily conflict with the right to privacy at an abstract level, although when applied to concrete situations these two rights will often conflict.

IV. THE RESOLUTION OF CONFLICTS OF RIGHTS

The issue of conflict resolution will be addressed, first, by discussing different solutions to conflicts of moral rights and, secondly, by examining the legal solutions to conflicts of legal rights.

1. Conflicts of Moral Rights or Rights in General

a. General

Conflicts of rights should be resolved and we should produce an answer as to which right or duty should be respected or in which proportion.[135] Presumably, indeed, it is better to respect one right rather than none, or respect both of them partially rather than not at all.[136] True, there are cases in which no justifiable solution can be found. Moreover, most of the time, there is no precise logical or mathematical formulae which will help solve conflicts of rights. It remains, however, that some resolution or settlement needs to be found.

Although more and more rights' theorists mention and address the issue of conflicts among rights, very few have provided criteria to resolve them.[137] Rights do not differ in degree, we are told; no one right is more of a right than another.[138] When conflicts of rights have to be resolved, it is clear to us, however, that it is implausible to put all rights on a par and reconcile them by spreading the sacrifices

[133] See HOLMES/SUNSTEIN, 1999, 101.
[134] See eg GUASTINI, 1999, 169.
[135] See WALDRON, 2003B, 200.
[136] See WILLIAMS, 1973.
[137] See eg WALDRON, 1993A; KAMM, 2001 and KAMM, 2002. However, FINKELSTEIN, 2001B, 305–6 only mentions ways to resolve conflicts of rights in her conclusion. See also WELLMAN, 1995; STEINER, 1998; SIMMONDS, 1998; MONTAGUE, 2001.
[138] See FEINBERG, 1973, 66.

required of each right equally according to a distributive strategy.[139] Some rights, we know, are more stringent than others. Nor can we, according to the Nozickean utilitarianism of rights,[140] consider the fulfilment of rights a goal whose attainment has to be maximised, thus favouring, in case of conflict, whichever settlement maximises the protection of rights or minimises their violations independently from their relative stringencies. This approach, like the prior one, does not take the relative importance of the interests at stake sufficiently into account.[141] We also know, however, that rights' stringencies are *relative to one another*. The question, then, is how to measure their relative stringencies. At this point, some have argued that some rights have qualitative priority over others, while others have argued that the relative stringencies of rights are best assessed through a quantitative measurement of the relative interests they protect. In this section, I will first address the issue of the qualitative priority of rights and will then go on to discuss the quantitative weighing of rights. Once we have established the relative stringencies of the rights in conflict, I will discuss the choices, between prioritising stronger rights, on the one hand, and conciliating them with weaker rights, on the other.

b. The Qualitative Priority of Rights

One of the first questions which arises when attempting to resolve conflicts of rights is knowing whether some of them should have qualitative priority over others by virtue of the higher importance of the interests they protect. The idea of qualitative priority among rights corresponds to the lexical priority some say rights establish among the interests they protect and others, like utility, which they are meant to override[142] or, to use a Dworkinian term, 'trump'[143] either partially[144] or entirely.[145] If this is how rights come into existence, then, according to some authors, it is difficult to reconcile the idea of qualitative priority of rights, when confronted with other interests, with the idea of a mere quantitative comparison between rights when they conflict.[146] It has been suggested, by Rawls in particular, that some rights are more important than others and that different rights have the same sort of priority over one another as rights have over considerations of utility.[147]

One difficulty with the idea of such a *lexical ordering of rights* is that all the duties a right may ground are not equally strong in relation to the interests

[139] See Jones, 1994, 202. See most recently, Waldron, 2003b, 200 ff.
[140] See Nozick, 1974, 28–30.
[141] See Jones, 1994, 202. See also Sen, 1988, 193.
[142] See Waldron, 1993a, 209, 216.
[143] See Dworkin, 1977, xi and 190 ff.
[144] See Dworkin, 1984a.
[145] See Rawls, 1971, 42–45. See Hart, 1975, 230 for a critique of the prioritisation of rights in the Rawlsian account.
[146] See Waldron, 1993a, 219. See also Habermas, 1996, 256 on the difficulty of reconciling the idea of balancing rights with the 'strict priority' that is characteristic of 'normative points of view.'
[147] See Rawls, 1971, 243, 298.

protected by the right they are grounded on.[148] For instance, the right to life grounds duties like the duty to abstain from killing someone, but also the duty to compensate for violating the right to life; those duties would not rank equally in comparison to the right to free speech. It seems therefore that the solution to conflicts of rights may have to lie in weighing and balancing the different interests in conflict in a specific case rather than in recognising the general qualitative priority of one right over another. The problem, and hence the origin of the dilemma, is that, as in the case of conflicts between rights and goods, such an approach makes it hard to sustain any sense of the qualitative priority that a given right may have over some other right.[149] For instance, many of us would regard the right to life as more important than the right to free speech in general and as such would not be too troubled at first sight by granting some kind of lexical priority to the right to life in a particular case, even before weighing and balancing the rights one against the other.

Waldron's solution to this dilemma lies in the internal relation and *internal lexical priority*, which exists among rival interests in our conception of the rights-founding interests.[150] He takes the example of freedom of speech and of the internal limitation to this right, according to which the right cannot be used to suppress itself. Although Waldron is right to say that the balancing of interests that forges the constitution of a right limits the interests that may be recognised in invoking this right, this limitation of interests takes place before the right is recognised. What this implies is that if there were no right to free speech which one may use to abolish free speech, then no conflict of rights could occur in the first place, since such a right could not be recognised at all in the particular case.[151] This countervenes our intuition that we are facing a conflict of rights and not only of interests.

One solution would be to understand rights as having some limited degree of internal priority over other non-rights founding interests by virtue of being rights and then of having some degree of *external priority* among themselves on grounds of the priority they have over other non-rights based interests. This priority among rights would therefore be a function of the relative importance of the interests the different rights protect and hence in part of a quantitative weighing of the different rights. This *qualified lexical ordering of rights* would reconcile the sense of qualitative priority of some rights over others, yet also allow for differences in the stringency of the different rights and duties at stake on each side in a conflict, and also among themselves. Some rights and duties take lexical priority over others before a certain threshold is attained and this threshold may change from one right or duty to the next. Once the threshold is attained, however, weighing and balancing has to take place and the importance of the interests at stake

[148] This difficulty does not arise in a goal-based theory of morality where rights are instrumental to the goal that stands at the core of the theory: see JONES, 1994, 201.
[149] See WALDRON, 1993A, 219.
[150] See WALDRON, 1993A, 220–24.
[151] See RAZ, 1984D, 211.

must be compared.[152] Of course, not all rights will share the same thresholds; as long as one's right's threshold is not attained, no comparative weighing of the interests protected will take place. Besides, many rights will not have such thresholds. As we saw before, some rights are protected not so much in the interest of someone, but to protect someone's status or inviolability. It is in the case of conflicts with such status rights that the threshold of qualified lexical priority can be applied. One may, therefore, conclude, with Kamm, that the stringency of rights is not only a function of the *interests at stake*, but also of the *type of rights at stake*.[153]

Even if some rights may be accorded a kind of external qualitative priority over others in some cases, most conflicts of rights will require a quantitative weighing of the relative stringencies of rights in a particular case, either because there is no qualitative priority to be respected or because the threshold above which the relative stringency of rights should be measured relatively to the importance of their interests is reached. There is a sense, therefore, in which the uneasy symbolic and rhetorical reference to rights, as absolute trumps of utility and consequentalist calculus, has to give way, when confronted with the reality of rights.[154] We should develop a more realistic and less absolutist approach to the relationship between rights[155] and accept a certain amount of quantitative weighing and balancing.[156]

c. The Quantitative Weighing of Rights

The quantitative measurement of rights is sometimes also referred to as the weighing of rights. It determines the *relative* stringencies of the specific rights and duties involved in a conflict. It is commonly suggested that to determine these stringencies, we decide on the basis, first, of the stringency of the rights involved and, secondly, if the stringency is the same, of the number of rights that will not be respected.[157] In what follows, therefore, I will distinguish between the importance of the interests protected and the further correctives that are needed to reach a balanced account of the relative stringencies of the rights in conflict.

[152] Rights cannot therefore be said to be absolute in all cases. On this difficulty, see JONES, 1994, 190–94, 202–4. Different elements may affect a right's threshold of infringement to other rights above which a quantitative comparison of the rights' stringencies should be operated. One could think, for instance, in the case of the right to life's threshold, of a conflict between two people's right to life or of the conflict between a person's right to life and millions of others' right not to be ill, if the one person takes the unique dose of medicine that can save her, but could also prevent millions of others from being ill.

[153] See KAMM, 2002, 501.

[154] The reality of rights includes, for instance, uncontroversial concerns for the need to limit some rights in the interest of national security or public safety. See JONES, 1994, 190–94, 202–4.

[155] See even NOZICK, 1974, 30 on the possibility to restrict rights in order to avoid catastrophic moral horror and DWORKIN, 1978, 191 on the possibility of restricting rights in order to protect the *rights of others*.

[156] See WALDRON, 2003B, 197.

[157] See KAMM, 2002, 500.

i. The Relative Importance of the Interests Protected

The relative stringency of a specific right is usually said to be a function of the relative importance of the specific portion of the interests it protects.[158] The direct assessment of the importance of a protected interest in a specific case implies measuring the interest in its own context, thus achieving an isolated measurement.[159] As in the case of weighing and comparing material objects, it is important, however, to compare and measure the importance of the different interests on the basis of indirect but *common standards* or *metrics*.[160] As Kamm rightly states, 'the correct way to test for the relative stringency of rights in conflict is to test them in cases that equalize all factors in the contexts of the two rights.'[161]

There are many ways to measure the importance of the interests protected by rights in equalised contexts. Kamm suggests three main tests.[162] First of all, the *choice* test: if a choice has to be made between conflicting rights, this test enables you to determine which right you would sooner infringe. Secondly, the *goal* test: according to this test, the stronger the right, the stronger the goal must be for it to justify the infringement of the right. Finally, the *effort* test: this test evaluates which is the stronger right on the basis of the effort that one would have to make to avoid infringing it. All three tests present separate difficulties and none can be said to be really superior to the others. Moreover, they also face common problems. First of all, they may give rise to conflicting results.[163] Secondly, all three tests assume transitivity among rights. Not all rights are connected in such a way as to be ranked according to their passing these three tests. Even though the tests of stringency in equalised contexts allow us to avoid the problem of the direct incommensurability of rights[164] by comparing them through neutral standards, the relationship between these standards and the rights does not necessarily exist or is not necessarily the same.[165] Thirdly, as we will see, overriding considerations may question the weighing achieved among them. As Kamm puts it, 'these tests are at most *prima facie* considerations of the stringency of rights in comparison to other rights.'[166]

ii. Some Correctives

As we saw earlier, the relative stringency of a right does depend on the type of rights and its potential qualitative priority, on the one hand, and the importance

[158] See THOMSON, 1990.

[159] In what follows, I assume that the interests at stake can be easily determined. See SCHAUER, 1982, 143. On the societal dimension of the identification of rights, see RAZ, 2001C; RAZ, 2003C; RAZ, 2003D; HAREL, 2004, 202.

[160] See FABRE, 1998 and 2000B on *autonomy* as 'common metric' of the interests protected by rights. See also JONES, 1994, 201–2 on the absence of a common metric in rights-based theories of morality by contrast to *goal*-based theories (see GEWIRTH, 1996, 45 ff on *agency* or *degree of needfulness for action* as common metric).

[161] KAMM, 2001, 252.

[162] See KAMM, 2001, 252–53.

[163] See KAMM, 2002, 489.

[164] See RAZ, 2001A, 102–3, 196.

[165] See WALDRON, 1993A, 211; MARMOR, 1997, 13.

[166] KAMM, 2001, 253.

of the interests it protects, on the other. In the latter case, it also depends on other aspects of the relationship between the rights in conflict.[167] There are two types of correctives to the prima facie measurement of the rights' relative stringencies.[168]

First of all, the *way in which the non-fulfilment of a right would treat the right-holder*: stronger rights may not necessarily always take priority over weaker rights, when the conditions in which the latter's non-fulfilment takes place prevent it.[169] Depending on whether the infringement is direct or indirect, whether it occurs through action or omission or whether it is potential or actual, the relative stringencies of the rights in conflict will change. Let us imagine, for instance, the case in which a trolley is about to kill a person, if it is not redirected onto another person's leg. Although the interest in being alive is more important than the interest in not losing a leg, the way in which someone's right to physical integrity is infringed, ie by a direct intervention, affects the prior assessment of the relative stringencies of the respective rights.[170]

Secondly, the *number of right-holders at stake*: even if a right is *per se* stronger than another, this might not be true, when one right protects more people than the other one. For instance, in a modified version of the trolley case just mentioned, the trolley might kill two, if it is not redirected onto another person and kills her. In this case, all rights are equally strong *per se*, but this is only a first impression, since taking my life might save two on the other track. When the number of people affected by an infringement of rights is at stake, it is important to decide whether what matters is the aggregation of their losses or the loss each of them will suffer from having her right infringed. If two people lose their lives, it seems that their aggregated loss is higher than a single person's when losing her life, but if one looks at each of their losses individually, their interest no longer seems more important than hers.[171]

While it might be clear that one ought to save the greater number in a no-conflict case, the non-aggregation principle makes it difficult to necessarily privilege saving the greater number in case of conflict.[172] The rare circumstances in which numbers may count, therefore, are those in which the stringencies of the rights in conflict are equal,[173] on the one hand, and where the rights cannot be conciliated, on the other. If all the rights can be respected jointly at least partially, then numbers will not count. When rights cannot be conciliated, the stronger right takes priority no matter how many rights there are, given that they should not be aggregated. However, when rights cannot be conciliated and are equally strong, numbers may

[167] See KAMM, 2002, 501.
[168] See on other correctives, eg HAREL, 1997, 102. See also HOLMES/SUNSTEIN, 1999, 131.
[169] See KAMM, 2002, 496–97.
[170] See KAMM, 2002, 505.
[171] See KAMM, 2002, 490–91 by reference to THOMSON, 1990. See, more generally, for sceptic arguments in conflict situations, ANSCOMBE, 1967; TAUREK, 1977. Contra: OTSUKA, 2004.
[172] See on this paradox, OTSUKA, 2004.
[173] See THOMSON, 1990; KAMM, 2002, 500. See, more generally on the cases where numbers count, RAZ, 2003A.

count. In what follows, I will be concentrating mainly on cases in which numbers do not count or in which only two people's rights are at stake.

d. Conciliation or Prioritisation

Usually, people say that when a right is more important than the other, it should have priority and when rights have equal stringency, the greater number should get priority.[174] The difficulty is that this does not tell us what to do in practice. In the first case, we need to know whether we should prioritise or conciliate: should we give full priority to the stronger right or apply each of the rights partially according to their respective stringencies? In the second case where both rights are equally strong and there is an even number of rights at stake on each side, we need to establish whether and how we should try to conciliate them. In what follows, I will, first, take up the case where the rights have different stringencies and, secondly, examine the case in which rights have equal stringency.

i. The Case of Rights of Different Stringencies

When one right is stronger than another, it is as yet unclear whether it should get full priority over the other one or whether both rights should be applied in proportion to their respective stringencies. For instance, if my right to free speech is regarded as stronger than your right to economic freedom in a particular case, does it mean that I can say whatever I want or that I can only say what I want within the limits set by the relative stringency of your economic freedom when compared to my right?

Generally speaking, when complete conformity to the reasons that apply to someone is not possible, partial conformity should be preferred to no conformity at all.[175] The difficulty is that partial conformity could call for one of the reasons being conformed to fully or for both reasons being conformed to as much as possible given their relative stringencies. It is true, however, that we measure perfect compliance by reference to the complete satisfaction of all the reasons which apply to one at a given point in time, or during a given period, and not only by reference to single reasons. Thus, it is sometimes best, when we are unable to comply perfectly with all the reasons that apply to us, to comply partially with all of them, rather than completely with one and not at all with the others.[176]

There are cases, however, in which the nature of the rights themselves prevents them from being conciliated. This is true in particular of rights which cannot be applied partially or of rights whose respect is jeopardised by the application, even partial, of another right. This should come as no surprise, since what constitutes partial compliance is sensitive to an understanding of the reason to which one

[174] See KAMM, 2002, 500 by reference to THOMSON, 1990.
[175] See WILLIAMS, 1973.
[176] See RAZ, 2004A. See also RAZ, 2003A, 348 ff on degrees of compliance with reasons.

ought to comply. An example of such a right is the right to life. What is at stake here is not the inviolability which the right to life is expressing, and hence the relative qualitative priority that might be given to it in many cases even before any relative weighing among the rights in conflict is achieved. On the contrary, what matters here is that, as we saw earlier, in some cases the threshold of lexical priority is attained and the right may be weighed against other important rights and if necessary overridden. In such cases, however, it is clear that the choice between conciliation and prioritisation does not arise, as it is difficult to see how the right to life could only be applied partially. It will either have to be entirely overridden or override entirely the other rights in conflict.

ii. The Case of Rights of Equal Stringency

In some rare cases, all rights in conflict are equally strong. In these cases, there are even more reasons for conciliation than in the previous case.

A problem arises, of course, when one or all of the rights in conflict are such that they cannot be partially applied, as it is difficult to see how they could be conciliated in that case. By reference to what was said earlier, it seems that the equality of their relative stringencies makes the question even more difficult. Clearly, in these cases, one of the rights should get priority. The question is to know which one, since both are equally strong. As morality does not provide any means of deciding which one this should be, the solution is morally arbitrary. Reason gives us no guidance as to how to decide. One way of making this decision more fair could be *flipping a coin*.[177]

2. Conflicts of Legal Rights

Conflicts of legal rights are conflicts of legal norms albeit specific legal norms. It is generally accepted that a coherent rational normative order cannot tolerate the conflict between two valid norms without at least trying to resolve it.[178] All European constitutional orders entail the *possibility of infringing a right to respect another one in case of conflicts of rights*, either explicitly[179] or implicitly.[180] Most of the time, however, these norms do not provide explicit rules of conflict as to how this restriction should be operated.[181] It is important, therefore, to determine what modes of conflict resolution the law can and should develop.

[177] See Finkelstein, 2001b, 305.

[178] See Sieckmann, 1995, 46.

[179] See eg art. 36 al. 2 of the Swiss Constitution, art. 18 of the Portuguese Constitution and art. 8 para. 2 to 10 para. 2 ECHR.

[180] This is the case of the French Constitution and of the UK Human Rights Act 1998, for instance.

[181] One may argue that, in those cases, there is no conflict of rights *stricto sensu* as the law foresees the possibility of restricting a right to respect another one and hence specifies the scope of rights to prevent conflicts. The problem with those clauses, however, is that they are very general and do not provide any hints as to how this exercise in scope specification should take place in practice. One may hence refer at the most to a *general* form of rights specification as opposed to a specific one.

The elements I presented in the context of the resolution of conflicts of moral rights, I will argue, constitute the minimal and fundamental core of an account of the resolution of conflicts of legal rights.[182] True, the law has resources of its own to resolve conflicts. It will be one of the tasks of this section to show that there is something special about *legal reasoning with rights*.[183] It will quickly become clear, however, that all conflicts of rights, like other conflicts of legal norms, cannot usually be resolved merely by resorting to legal resources.[184] The resolution of conflicts of legal rights is a complex process which can usefully be disaggregated into different steps. I will distinguish between internal and external solutions to conflicts of rights[185]: *internal* solutions derive from the legal rights themselves and the legal system that coordinates them, whereas *external* solutions require evaluation and recourse to other means of resolution, when detailed legal guidance is no longer available.

a. Internal Resolution

Among internal solutions to conflicts of rights, it is important to distinguish between the different hierarchies the law sets among legal rights and the different rules of conflict it entails in their absence.

i. Hierarchy of Rights

One distinguishes between the formal and the material hierarchy of rights. A *formal hierarchy* consists of a hierarchisation of legal rights so that these rights are placed in various orders of priority according to their form rather than their content. Fundamental rights are regarded in most constitutions as superior norms. When they conflict with other legal norms, they therefore take lexical precedence according to the principle *lex superior derogat lex inferiori*. Within the group of fundamental rights, however, it is quite rare to see rights being given formal priority over others independently of a relative weighing of their stringencies.[186] In most European constitutional orders, fundamental rights are in fact usually regarded as equally ranked formally.[187]

A second form of hierarchy one rarely encounters is *material hierarchy*. In this case, some fundamental rights take precedence over others by virtue of their content rather than their form. Material hierarchies of constitutional rights used to be

[182] Contra: Pfersmann, 2000, 107–8. On the idea of a common core to legal and moral modes of practical reasoning, see Raz, 2001b, 2.

[183] For such an argument, see Alexy, 1992, 147 ff. See Raz, 2001b, 2; Raz, 1995a, 340. See also Peczenik, 1989, 175.

[184] See Raz, 1995a, 331.

[185] See Steiner, 1998, 263 on this distinction.

[186] This also applies when rights receive different levels of constitutional entrenchment, as in the type of model suggested in Chapter 9.

[187] One exception may be the Irish Constitution in which natural rights are regarded as supra-constitutional and hence as superior to ordinary constitutional rights. See also the eternity clause of the German Constitution and some of the basic rights thereby protected against constitutional revision.

common in the European and American constitutional traditions, but they have gradually disappeared.[188] It is the case, for instance, when the principles *lex posterior derogat priori* and *lex specialis derogat generali* apply. This is quite rare, however, in the context of conflicts of fundamental rights, as most of these rights were adopted at the same time and have more or less the same level of generality.[189] A more common example of material hierarchy may be found in the context of what is called the *core of fundamental rights* in the German tradition (*'Grundrechtskerngehalt'*). The core of a fundamental right corresponds to the core of the interests it protects, or, by reference to the terms used in the context of the qualified qualitative priority of certain moral rights, to a person's status. In principle, the core of a fundamental right is absolute and should be given absolute priority over other rights independently of any relative weighing among rights.[190] In reality, however, as in the moral case, when a certain threshold of infringement of other rights is attained, the core of a right can be weighed and balanced against other rights and in particular other fundamental cores when they are commensurable. As in the moral context, this threshold will vary from right to right and is a matter of moral judgement. Material legal hierarchy can be compared to moral qualitative priority among rights. It should come as no surprise, therefore, that it only rarely applies absolutely to constitutional rights. This explains why constitutional rights conflicts are often understood as *horizontal* conflicts or conflicts *stricto sensu*.[191]

ii. Rules of Conflict

In the absence of formal or material hierarchy of rights, the law can develop other internal modes of resolution which guide the actual weighing and conciliation of rights. These rules of conflict resolution can be material or formal.

(a) *Material rules of conflict*: material rules of conflict identify the cases in which a legal norm gives complete or partial priority to a right in case of conflict among rights. As such, they are distinct from legal rules of specification that prevent conflicts of rights from occurring by limiting the respective scopes of certain rights. They also differ from material hierarchies among rights. Whereas material hierarchies are established ex ante and are *absolute*, material rules of conflict are usually reconstructed ex post on the basis of past judicial decisions and only establish a prima facie ranking of the rights in conflict which still have to be weighed against each other.

Two main distinctions among rules of conflict resolution can be drawn. First of all, a rule of conflict may be *part of the legal right itself*,[192] but in most cases it

[188] See eg the now rejected American theory of 'preferred freedoms' that was based on the level of scrutiny applicable to the restriction of some civil rights. Another example, that is quite rare at the constitutional level, is the case where *preambles* provide a material ranking among rights.

[189] See eg GUASTINI, 1999, 369.

[190] See eg art. 36 al. 4 of the Swiss Constitution. See MÜLLER, 1993.

[191] See PFERSMANN, 2000, 107.

[192] See eg the UK Human Rights Act 1998, s.12(4). The *Zeta Jones* case (*Michael Douglas, Catherine Zeta-Jones, Northern and Shell plc v Hello! Ltd* [2000] EWCA Civ. 353) has established, however, that no absolute priority should be given to free speech over other rights before all rights are weighed against one another.

will be *independent from it* and govern the conflicts of different rights belonging to the same group of rights. An example of an independent rule of conflict would be the rule that states that when idealistic liberties conflict with economic ones, the former should take precedence.[193] Secondly, material rules of conflict can be *substantive* or *procedural*. They are substantive when the relative stringencies of some rights are explicitly pre-established. They are purely procedural, by contrast, when the relative stringencies of the different rights at stake are not explicitly pre-established, but can be deduced from procedural specificities or advantages that apply to some of the rights. An example of a procedural rule of conflict would be the case where the restriction of idealistic liberties or of inalienable rights is subject to more stringent procedural conditions than economic ones.[194] Another example is that of the stringency of constitutional revision rules depending on the rights entrenched.[195]

Not all conflicts of rights, like other conflicts of legal norms, can be resolved merely by resorting to legal rules of conflict.[196] First, rules of conflict are subject to the same conditions of indeterminacy and vagueness as other legal rules. Secondly, for reasons I explained in the second section of this chapter, absolute determinacy and coherence is not desirable in the law. In any case, material rules of conflict only establish the prima facie priority of one right over the other and this priority then needs to be assessed again in the weighing process. Since many material rules of conflict are ex post reconstructions from confirmed judicial precedents and decisions taken in concrete cases,[197] they raise important institutional issues to which I will turn now.

(b) Formal rules of conflict: formal rules of conflict foresee that, in case of conflict of rights, a specific authority has the competence to decide how the conflict should be resolved. Formal rules of conflict can be *explicit* or *implicit*. The resolution of conflicts of rights may belong to the explicit competences of a given institution, but may also fall into its ordinary range of competences by default and hence the rule of conflict is implicit.

There are two main authorities in charge of settling conflicts of constitutional rights. In most European constitutional orders, the competence to resolve conflicts

[193] Such an unwritten rule of conflict is applied in the Swiss adjudication of rights. See eg the Swiss ATF of 18 February 1991, EuGRZ 1992, 204, 206.

[194] See eg art. 5 para. 2 of the German Basic Law. See the ECHR case *Jacubowski v Germany*, 23 June 1994, Serie A, no. 291–A.

[195] See Chapter 9 on the different levels of entrenchment of constitutional rights.

[196] See RAZ, 1995A, 331.

[197] It is important to note, therefore, that the outcome of the conciliation or prioritisation of the rights in conflict constitutes a new legal norm, which may then become a precedent or at least a paradigm case thus constituting a framework in which to justify the conciliation or prioritisation finally decided. See MORESO, 2003A who speaks of 'paradigms' of conflict resolutions which constitute the background of our weighings and hence help justify them in each case just as precedents would, thus reconciling weighing and subsumption. See also ALEXY, 1996B on those rules of collision. See also SIECKMANN, 1995, 46; ALEXY, 2000, 296 who speak of 'conditional' priority of one right over the other.

of rights falls primarily within the province of the *legislature*.[198] When legislating, the legislature will very frequently come upon cases where rights conflict and will therefore have to resolve them. The *judiciary*'s competence in conflict resolution is usually triggered by the control of the constitutionality of legislative or other state acts by which rights are applied. In this context, the judge will very often be called upon to resolve a conflict which has or should already have been resolved by the legislature or the executive. In practice, most conflicts of rights are resolved either primarily or at least in the last instance by the judiciary. The problem is that, in some cases, conflicts of rights were resolved in one way or another by the legislature and then only brought to the attention of the judiciary, which not only questions, but often reverses the legislative resolution of the conflict.[199] Moreover, given the existence of a system of constitutional review in many European orders, the criteria used by the judiciary when resolving conflicts of rights also apply to the legislature, thus limiting the latter's independence.[200] Finally, in some cases, conflicts of rights that were never resolved by the legislature could be deferred to it for resolution, when the circumstances allow it. In all these cases, it is difficult to see why the judiciary has to be the default competent institution.

This raises well-known, albeit difficult, questions of democratic legitimacy. These issues are far too complex to be addressed in a chapter on conflicts of rights and have been partly addressed earlier in the book.[201] The question here is not so much why some rights should be accorded a superior status to ordinary legislation,[202] but why, provided they have a superior status, their conflicts should be dealt with mostly at the judicial level. True, as I argued earlier, a division of labour may be beneficial when deciding complicated issues like issues of rights.[203] The question is, however, on what issues this division of labour should operate and what its consequences should be. If fundamental rights are bound to be as contested as other rights, at least when they conflict,[204] there is no reason to divide the labour strictly between the legislature and the judiciary.[205] On the contrary, democratic and epistemological reasons justify vesting most of the competence for controversial conflict resolution in a large assembly of representatives like the legislature.[206] Another argument for the legislative resolution of conflicts of rights

[198] See art. 4 of the 1789 French Declaration of the Rights of Man and of the Citizen.

[199] See eg the German case *Kunstfreiheit* BVerfGE 81/1990, 278, 289 ff..

[200] See, in France, the Décision du Conseil constitutionnel *relative aux entreprises de presse* of 10 and 11 October 1984, RJC I–36 in which the principle of conciliation is declared applicable to all institutions including the legislature.

[201] See Chapter 9.

[202] See eg Waldron, 1999a, ch 12; Elster, 1988; Elster, 2000; Holmes, 1995; Bayon, 1998; Gargarella, 1998b; Moreso, 1998a.

[203] See Chapter 9.

[204] See Marmor, 1997, 12–13. See also Raz, 1992, 85, 88.

[205] One may find support for this contention in practice and in particular in the German case *Schleyer* BVerfGE 46, 160, 163, 165, in which the Federal Constitutional Court mentions its duty of *judicial restraint*.

[206] See for an excellent discussion of these issues, Waldron, 1999a, chs 11 and 13.

lies in the important choices in terms of redistribution and cost allocation implied by the partial or total infringement of some rights to protect others.[207]

b. External Resolution

As in the moral context, in the absence of a formal or material hierarchy of rights, legal rights need to be weighed, and perhaps conciliated, and these decisions need to be rationally justified. The resolution of conflicts of rights leads to infringing one valid right or all valid rights in conflict in order to protect the others totally or partially.[208] Even if there is a formal rule of conflict establishing the competence of an authority to resolve the conflict and a material rule of conflict prima facie guiding that decision, the manner in which this will be decided is not itself constitutive of a material rule of conflict and needs further justification.[209] One can distinguish three steps in the external resolution of the conflict[210]: the pre-resolution weighing, the choice between conciliation and prioritisation and the criteria of conciliation.

i. Weighing

In the absence of a formal or material hierarchy of rights, the competent authority will have to weigh rights against each other in order to establish their relative stringencies in a more definitive way. It would be absurd, indeed, to contend that in the absence of a resolution to conflicts of constitutional rights internal to the law, all rights *qua* legal rules should be deemed of equal importance and their conflicts resolved accordingly.

As a matter of fact, very few legal orders have transparent criteria as to how the weighing of legal rights should be achieved.[211] This is crucial if weighing is to amount to anything other than a purely subjective exercise in moral judgement, as some authors argue.[212] For the time being, we can assume that the weighing of legal rights in conflict may be achieved along the lines of the weighing of conflicting moral rights I discussed earlier.[213] This can be done by measuring the relative importance of the interests protected in each case. To do so, one can apply the three tests identified in the context of conflicts of moral rights and then the different correctives mentioned.

[207] See Holmes/Sunstein, 1999.

[208] See Sieckmann, 1995, 53.

[209] See Pfersmann, 2000, 109. See also Moreso, 2003a who denies the opposition between weighing and subsumption; according to him, weighing is only a step prior to the final subsumption.

[210] It should be noted that some authors, like Alexy and Sieckmann who refer to 'weighing and balancing,' identify weighing to conciliation and hence conflate these three steps. Of course, one may contend that they all belong to the same process of weighing and balancing and hence cannot really be distinguished in practice. However, as they do not necessarily follow from each other, I think we gain from distinguishing them conceptually at least. See eg Sieckmann, 1994, 46–47: '*Abwägung*.'

[211] See Sieckmann, 1995, on this issue.

[212] See Guastini, 1998a, 1998b and 1999 on the opposition between subsumption and weighing. Contra: Moreso, 2003a.

[213] See Sieckmann, 1995, 58–60. See also Guastini, 1993, 42–44 on the axiological nature of the weighing of rights.

ii. Conciliation or Prioritisation

In most European constitutional orders, once rights have been weighed against one another, they are conciliated as much as possible in proportion to their relative stringencies and this gives rise to a new independent legal norm. This requirement derives from the German *principle of practical concordance* or conciliation.[214] Even though this approach appears as intuitively correct and this even more so now that I have argued for it in the realm of moral rights, an argument still needs to be made for it in the legal context.

Two systemic but flawed arguments are usually put forward in favour of privileging conciliation over the full prioritisation of one of the rights in conflict. First of all, the relationship between *coherence* and *conciliation*: legal coherence requires, as we discussed before, a certain amount of consistency in principle in the law both diachronically and synchronically.[215] Diachronic coherence obviously does not require conciliation, however. Besides, there are other ways of ensuring synchronic coherence in each decision or law than to conciliate conflicting rights. Giving priority to one right over the other does not *per se* contradict consistency in principle. Secondly, the relationship between the *absence of formal hierarchy of fundamental rights* and *conciliation*: one may argue that in the absence of formal hierarchy, giving priority to one right over the other would be self-contradictory. This objection confuses the 'mobile hierarchy' of prioritisation with the 'fixed hierarchy' of legal rights I discussed before.[216] The priority of a right may not derive from its legal form, but from its content and the relative importance of the interests it protects. There is therefore no obstacle to prioritising this right when it is stronger than others once the rights have been balanced against one another.

Another set of arguments in favour of the conciliation of conflicting rights over their prioritisation relates to the *distinction between rules and principles*, on the one hand, and to the *identification of rights and principles*, on the other. The distinction between rules and principles does not, however, provide us with much guidance in the choice between conciliation and prioritisation of rights. This is not only because the distinction between rules and principles does not lie in the way in which they conflict or in which their conflicts are resolved, but also because many rights do not fall neatly into the category of norms to be optimised after having been weighed against one another.

First of all, the *distinction between rules and principles*: it is a highly disputed distinction.[217] It was first made by Esser and then developed by Dworkin in his attack on Hart's model of rules. More recently, Dworkin's conception has been

[214] See eg *Kunstfreiheit* BVerfGE 81/1990, 278, 289 in Germany; *Liberté d'enseignement et de croyance* DC 77–87, RJC I–52 in France; *Michael Douglas, Catherine Zeta-Jones, Northern and Shell plc v Hello! Ltd* [2000] EWCA Civ 353 in Great Britain; *Jacubowski v Germany*, Serie A, no. 291–A, 1994 in the context of the ECHR; Case 8/1992, BJC 1991, 130, 50 in Spain; ATF 99 Ia 604 in Switzerland.

[215] See Chapter 8.

[216] See Guastini, 1998a, 651 and Guastini, 1999, 171.

[217] See Esser, 1974; Dworkin, 1978, 14–80; Raz, 1972, 851 ff; Alexy, 1979; Alexy, 1985b; Alexy, 1992; Alexy, 1996b and Alexy, 2000.

slightly contested and amended by Alexy and others.[218] Whereas some think that the difference between these two types of legal norms is only a matter of degree of generality,[219] others view it as a qualitative matter.[220] According to the latter, rules apply as all-or-nothing norms[221] and definitive commands, whereas principles are commands to be optimised[222] and applied to the highest degree possible given the circumstances.[223] In case of conflicts of legal norms, the distinction is important, as it means that one of the rules in conflict will not apply and hence lose validity, whereas in a conflict of principles both principles remain valid but are conciliated to accommodate their relative stringencies.[224] This view is too absolute, however. Some legal norms, be they rules or principles, do not lose their validity by virtue of the fact that they conflict with others and are overridden. It may indeed be observed that when two rules conflict, their validity is not necessarily at stake, since qualifying them so as to avoid conflict would be very costly and complex.[225] Besides, rules, like principles, may be conciliated and optimised in some cases of conflict rather than prioritised according to their relative stringencies.[226] This is confirmed by the metaphysical examination of the difference in the kind of norms and reasons produced by legal rules and principles; if legal norms like moral norms are universal and there is no difference in the nature of legal norms, then the semantic difference between rules and principles cannot catch any significant normative difference among them.[227] Rules and principles are universal and indefeasible legal norms whose conflicts are to be resolved similarly. The distinction amounts therefore at the most to the following: some norms are more general than others and the former are usually regarded as principles, while the latter are usually considered as rules.[228]

Secondly, the *relation between rights and principles*: according to Dworkin and Alexy, rights are not rules but principles.[229] This is because when they conflict we do not regard one of them as being invalid but simply as receding before the other

[218] See ALEXY, 1985B, 14 ff.
[219] See RAZ, 1972, 838.
[220] See ALEXY, 2000, 295. See more generally on the debate, GÜNTHER, 1988; PECZENIK, 1989, 74 ff; SIECKMANN, 1990, 52 ff; WROBLEWSKI, 1990.
[221] See DWORKIN, 1977, 24.
[222] See ALEXY, 2000, 300.
[223] See ALEXY, 1992, 145.
[224] See ALEXY, 2000, 295–97.
[225] See RAZ, 1972, 831–32.
[226] See RAZ, 1972, 833.
[227] See REDONDO, 2004 on the important limitations of the particularist view of legal norms, especially in the context of conflicts of so-called legal principles.
[228] See eg RAZ, 1972. See also MORESO, 2003A on the implication of the absence of qualitative difference and in particular of a difference in terms of derogability or conditionality for the prima facie approach to rights and duties.
[229] See DWORKIN, 1978, 28, 90; ALEXY, 1992, 146–47. See eg MORESO, 2003A on conflicts of constitutional principles.

one in an optimising way.[230] As such, one should not give priority to one of them as one would in presence of conflicting rules, but all rights should be respected to the highest degree possible. I argued beforehand that this distinction between rules and principles is not a very clear one, as some rules behave like principles and vice versa.[231] Besides, as we just saw, conflicts of rights may often be resolved totally or partially through rules of specification or rules of conflict.[232] Finally, some legal rights, like the right to life, cannot be regarded as norms to be optimised and should be prioritised.

So, how can we reconcile these observations with the intuition we usually share that rights are to be optimised when they conflict? As we saw before, this intuition has been confirmed in the context of the resolution of conflicts of moral rights. When faced with partial conformity to the reasons that apply to us, most of the time these reasons require that we comply partially with all of them rather than only comply fully with one. It seems therefore that, once their resolution cannot be ensured by means of internal conflict resolution and in particular through material and formal rules of conflict, conflicts of legal rights should be resolved by conciliation. This applies when the relative stringencies of the rights in conflict are different, but also, and even more so, when they are equal.[233] There are a few cases, however, in which the *nature of the rights* themselves prevents their conciliation. This is true, by reference to what I said earlier in the context of the prioritisation of conflicting moral rights, in particular of rights which cannot be applied partially, like the right to life, or of rights whose respect is jeopardised by the application, even partial, of another right. In these cases, the stronger right should be given full priority over the other one. When this is not possible, because all rights are equally strong, then a pragmatic choice has to be made.

iii. Criteria of conciliation

Once rights have been weighed against one another and conciliation has been chosen over prioritisation, difficulties remain as to how to realise the rights to their optimal level in proportion to their respective stringencies. Criteria of conciliation are needed since having merely established the relative stringencies of the different rights in conflict is not enough to go about conciliating them. Since decisions of conciliation are the result of evaluative judgements, it is difficult to provide absolute and objective criteria of justification for them. It is important,

[230] See ALEXY, 1992, 146. Although it is clear from the gist of Alexy's argument, that rights should be optimised and hence conciliated as far as possible, some of his examples seem to promote conciliation while others clearly endorse prioritisation. See ALEXY, 1992, 149; ALEXY, 2000, 296 who refers to the German case BVerfGE 51, 234.

[231] See HART, 1994, Postscript, 259–63.

[232] See PFERSMANN, 2000, 108.

[233] SIECKMANN, 1995, 46 and ALEXY, 1992 regard weighing as a way to establish a relation of priority between rights, whereas rights could also be regarded as being equally strong and be conciliated all the same.

therefore, to nuance the approach generally adopted by European constitutional orders when they talk of achieving the *just* weighing and conciliation of conflicting rights.[234] Legal reasoning cannot be expected to provide one single solution to each hard case; it only creates structures of reasoning.[235] Some criteria of justification can, however, be found in the rational structure of conflict resolution itself. The evaluative judgements implied by the weighing and conciliation of rights should not indeed be identified with a purely subjective exercise.[236]

Infringing each right in proportion to its relative importance is not a recipe for success, since this might not necessarily make them compatible; more infringement on one side might be necessary than strictly required by the relative importance of the right that justifies it. This is due to the fact that not all rights have the same degree of required fulfilment or realisation. Besides, not all rights can be infringed to the same level without endangering their fundamental core; this minimal degree of realisation or fulfilment might differ from one right to another.[237] Conciliation should therefore be guided by the combination of at least two criteria: the *relative stringencies of the rights* at stake and the *degree of fulfilment or realisation each right requires* proportionally to its relative stringency. Once we have these two criteria, things may not be much easier, however. Depending on the *degree of conflict* among rights, the degree of required realisation of each right will be more or less dependent on the others'; if the conflict is bilateral as opposed to simply being unilateral, it might be more difficult to respect the relative degrees of required realisation of the rights in conflict. Furthermore, when conflicts are total-total rather than total-partial or partial-partial, it will generally be more difficult to find ways of accommodating both rights to a minimal level when conciliating them. Given these potential complications, and many others that may be added to them, it is difficult to see how conciliation can be achieved without further criteria or principles.

In most European constitutional orders, criteria of conciliation are usually reduced to the *principle of proportionality*.[238] It is also a principle some authors recommend in the context of the resolution of conflicts of rights in general.[239] This principle usually encompasses three elements: first, the infringement must be able to reach the objective (the rule of suitability); secondly, it must be

[234] See the German case *Kunstfreiheit* BVerfGE 81/1990, 278, 289 ff.

[235] See Alexy, 1992, 150. See further the debate between Alexy, 2003a, 134 ff and Habermas, 1996, 430 on this issue.

[236] This is what Moreso, 2003a means when he argues that weighing does not exclude subsumption, but is merely a prior step. Contra: Guastini, 1998a, 1998b and 1999 on the difference between weighing and subsumption.

[237] See on issues of *distribution* of rights' restrictions as a result of the balancing of rights when there are more than two people's rights at stake, Waldron, 2003b, 200 ff. See also Müller, 1993.

[238] See eg the German case *Kunstfreiheit* BVerfGE 81/1990, 278, 289 ff and the British case *Michael Douglas, Catherine Zeta-Jones, Northern and Shell plc v Hello! Ltd* [2000] EWCA Civ 353.

[239] See Alexy, 1985a, 100 ff and Alexy, 1992, 149 who speaks of the 'rule of collision' thus indicating that weighing and conciliation lead to a final subsumption through this rule of collision (on this distinction between weighing and subsumption, see the exchange between Guastini, 1998a and Moreso, 2003a). See also Sieckmann, 1994 and Sieckmann, 1995, 66 ff.

necessary to do so (the rule of necessity); and, thirdly, it must be the least restrictive measure possible to achieve the aim (the rule of proportionality in the narrow sense).[240] According to Alexy, the idea of proportionality in the narrow sense can be expressed by the following rule: the more intensive the interference in one principle is, the more important must be the realisation of the other principle.[241] The principle of proportionality was developed primarily in the context of conflicts of rights and public interests. When an interest is regarded as sufficiently stringent to infringe a right, the infringement should be proportional to be justified. The difficulty in the context of the conciliation of rights is that the infringements on all sides should be proportional; in most cases, indeed, each right will have to be infringed to a certain extent to be conciliated and this whether the conflict of rights is bilateral or unilateral. The adjustment of the three elements of the proportionality test to each side of the conflict seems therefore very difficult to achieve without becoming circular. Let us think, for instance, of the case in which my house is surrounded by your fields and that my right to free movement therefore conflicts with your right to property. My right to free movement may only require an infringement of your right to the property I have to trespass on to get out of my house that is proportional to the importance of my right, but the infringement of my right to free movement by your right to property should itself be proportional to the importance of your right. As such, one infringement to one right cannot be proportional to the importance of another without also being proportional to the extent to which the latter right can infringe proportionally the former right. It seems, therefore, that one way or the other, conciliating conflicting rights remains a difficult task that one may fulfil with more or less success and a variety of solutions.[242]

CONCLUSION

In this chapter, I questioned the widespread attitude of disbelief and minimisation one encounters in legal practice, but also in legal and moral theory vis-à-vis conflicts of rights. Conflicts of rights reveal the conflicts of values and interests which pervade our social and political life. It is essential to face them openly rather than hide behind the screen of moral and legal unity. Three main groups of issues were examined in this context: the origins and nature, the typology and the resolution of conflicts of rights. On each of these issues, the point was to contrast the answers given with respect to conflicts of moral rights with those given in the context of conflicts of constitutional rights. Constitutional rights, like all legal rights, are

[240] See ALEXY, 1992, 149 for a translation into English of these terms.
[241] See ALEXY, 1992, 150.
[242] ALEXY, 2003A, 136 attempts to defend the principle of proportionality in balancing rights against HABERMAS, 1996B, 430 whose position is similar to mine.

(moral) rights and as such their nature and conflicts share the same constitutive elements, even though legal rights and conflicts of legal rights also demonstrate some idiosyncratic specificities and raise normative questions of their own.

Conflicts of rights occur *when one or more rights cannot be fully respected jointly*. Given the intermediary nature of rights in arguments from ultimate values to duties, conflicts may arise at the level of fundamental interests, rights or duties. *Conflicts of interests* are usually solved before rights are recognised, but this need not be the case as interests may change. *Conflicts of rights* can occur even once the interests on which the rights are based have been conciliated. Finally, *conflicts of duties* usually correspond to conflicts of rights, but given that there may be many successive duties corresponding to one right, there can be many more conflicts of duties than of abstract or general rights. Some sceptical arguments have been brought forward against the existence of conflicts of rights. They fail to convince, however. First of all, the *specificationism* critique, according to which the scope of rights can be specified in such a way as to prevent conflicts from occurring, fails to explain complex situations, as well as our intuitions as to moral residues. Secondly, the idea of prima facie rights, according to which our conflicts are only prima facie conflicts, fails on grounds of moral residues, but also on the ground that it does not provide a solution to conflicts among equally strong rights. Thirdly, the *limitation of rights to compossible ones* that reduces conflicts of rights to a logical contradiction does not pay sufficient attention to the principle of non-agglomeration of duties. Finally, the idea of rights *qua side-constraints* succeeds in limiting conflicts of rights, but at the price of excluding positive rights and duties and agent-neutral duties.

With respect to the *typology* of conflicts of rights, there are different distinctions worth drawing. Most of the time, conflicts of rights are conflicts of duties, but there are exceptions in which rights only conflict. Conflicts can be inter-rights or intra-right and can oppose many rights of the same kind or different ones. They can oppose one or many rights. Conflicts of rights can oppose individual but also institutional right-holders and duty-bearers. They can be interpersonal or intrapersonal. Conflicts of rights can oppose reciprocal rights and duties, but also rights and duties that are not in a reciprocal relationship. They can be agent-neutral but also agent-relative. Conflicts of rights can derive from external or internal causes, and from a logical contradiction or a practical contrariety. Rights can be in total or partial conflict and conflicts of rights can be unilateral or bilateral. Finally, conflicts of rights may be general when they oppose all the duties they give rise to, or they may be purely specific.

Although more and more rights' theorists mention and address the issue of conflicts among moral rights, very few have provided criteria to resolve them. Some have argued that certain rights have qualitative priority over others, but others have claimed that the relative stringencies of rights are best assessed through a quantitative measurement of the relative interests they protect. I started by addressing the issue of the *qualitative priority of rights* and went on to discuss the *quantitative measurement of rights*. I concluded that although some rights have

a threshold above which they should have qualitative priority, most conflicts of rights can only be resolved through the quantitative measurement of the interests at stake. All interests and the duties they ground are different and vary according to the context. It seems, therefore, that the solution to conflicts of rights may have to lie in the weighing and balancing of the different interests in conflict in a specific case rather than in recognising the general qualitative priority of a right over another. The relative stringency of a specific right is usually said to be a function of the relative importance of the specific portion of the interests it protects. The direct assessment of the importance of a protected interest often implies measuring the interest in its own context, thus achieving an isolated measurement. As in the case of weighing and comparing material objects, however, there should be ways to compare and measure the importance of the different interests on the basis of indirect and equalised but *common standards* or *metrics*. Of course, some correctives are called for, such as the reference to the mode of restriction of the rights at stake and to the number of rights in conflict.

I then discussed the choice there is, once we have established the relative stringencies of the rights in conflict, between *prioritising* stronger rights, on the one hand, and *conciliating* them with weaker rights, on the other. Usually, people say that when a right is more important than the other, it should have priority and when rights have equal stringency, the greater number should get priority. The difficulty is that this does not tell us what to do in practice. In the first case, we need to know whether we should prioritise or conciliate. I argued that, when we face rights of unequal stringency, partial conformity is morally more justified than absolute priority, except of course in cases where the nature of one or some of the rights at stake prevents partial conformity from being respected. When we face rights of equal stringency, the same applies, except naturally in cases where the nature of rights prevents it. In such a case, all that remains is flipping a coin.

With respect to the resolution of conflicts of *constitutional* rights, things are slightly different. Neither constitutional theory nor constitutional practice provide clear directives. The widespread idea that all conflicts of constitutional rights can simply be resolved by conciliation as if there simply were a pre-existing coherent order of rights does not account for all the trade-offs that take place in practice. It follows from the common nature of moral and legal rights that elements of moral reasoning I discussed in relation to the resolution of conflicts of moral rights constitute a minimal and fundamental core in the resolution of conflicts of constitutional rights. This is the case in particular of the necessity to measure and balance rights against one another except in a few cases where the fundamental core of some constitutional rights takes qualitative priority. Although the law has resources of its own to resolve conflicts of legal norms, all conflicts of constitutional rights cannot usually be resolved merely by resorting to legal formal or material hierarchy. The same can be said of material rules of conflict resolution, which are very important but cannot provide more than a prima facie ranking among constitutional rights. Except in rare cases of qualitative priority regulated by legal rules of formal or material hierarchy, therefore, a quantitative weighing

and balancing of the interests at stake is necessary even once material rules of conflict have given a prima facie priority to one of the rights in conflict. As in the moral case, we do not have much guidance as to how to weigh constitutional rights, nor as to how to choose between conciliation and prioritisation. The difference between legal rules and principles does not, I argued, provide us with a clear verdict either. It is therefore the moral principle of partial conformity to conflicting reasons that should apply. What this implies is that, except in cases where the nature of the rights in conflict calls for prioritisation, conciliation should be operated according to the relative stringencies of the rights and the degree of minimal required fulfilment of each right.

Section Four: The Authority of Law

This last section of the book addresses the issues of *legal authority* and of *civil disobedience*. It comprises two chapters.

The first chapter discusses the question of *legal authority* and argues, more particularly, for a coordination-based account of legal authority. It develops further the argument about the need to coordinate and the law's essential role in ensuring political coordination made in the second part of the book and presents a justification of the prima facie obligation to obey the law based on the law's coordinating ability. The chapter also proposes a revised account of Raz's service conception of authority that reconciles the latter with contemporary democratic law-making procedures in particular.

In the second chapter, I argue that the moral weight and legitimacy that should be attributed to the law as a product of a procedure aimed at settling reasonable disagreement are closely related to the reasons the law offers for being obeyed in a *democracy*. I then turn to a justification of *civil disobedience* in conditions of reasonable disagreement that takes the coordination-based origins of the prima facie obligation to obey the law into account. Given the suggested account of the emergence of the rule of law in the face of disagreement, the law cannot avoid making claims that will be at odds with the sense of justice some of us have, thus limiting the grounds on which and the manner in which civil disobedience may be justified.

13

Coordination-based Obligations to Obey the Law

INTRODUCTION

> Contemporary political societies simply do not constitute cooperative schemes of the sort necessary to generate obligations.[1]

IN LINE WITH Simmons, many contemporary political and legal theorists do not regard participation in legal cooperative schemes as being capable of providing the basis for most of our obligations to obey the law in contemporary societies.[2] Many authors are ready to concede that coordination is an important feature of political and legal authority, but few of them consider it a necessary element or, more often, a sufficient ground for authority.[3] While a few irreducible authors still deny the central importance of coordination for the law and hence for legal authority,[4] most of them concentrate their arguments on the second horn of the dilemma: even if contemporary political societies were identifiable with cooperative schemes, that would not be sufficient to generate exclusionary obligations either because those schemes are not of the sort necessary to do so[5] or because no legal obligations *stricto sensu* can ever be generated by cooperative schemes.[6]

An earlier version of this chapter was presented in Wojciech Sadurski's seminar in legal philosophy at the EUI, Florence, in March 2004. I would like to thank all participants for their critiques and comments, and in particular Daniela Piana, Wojciech Sadurski, Daniel Smilov and Ruzja Smilov.

1 SIMMONS, 2001, 28.

2 I will not distinguish in the present chapter between 'obligations' and 'duties.'

3 See eg RAZ, 2003B, 259: 'While *I take coordination to be one of the central functions of government*, I do not believe that people who are in situations where they should coordinate their actions are necessarily aware of this fact' (emphasis added). Raz regards the ability to coordinate as an important element of political authority, but not of practical authority in general. Since a political authority is also a practical authority, its essential features are primarily those provided by the service conception of authority, thus making coordination an additional feature rather than a condition of political legitimacy or a conceptual criterion of political authority.

4 See eg SIMMONS, 2001, 25.

5 See eg RAZ, 1995A who argues that the law's coordination-based obligations are limited to a small subset of cases, where people are conscious of the existence of a collective action problem, such as, for instance, national security or environmental protection. In fact, Raz aims at rebutting the prima facie general obligation to obey the law by showing that in many cases the law does not make a moral difference sufficient for us to have to obey it even if it has de facto authority over us. If one agrees that the coordination-based obligation to obey the law is a piecemeal one that does not apply to everybody, but not for the reasons Raz mentions but because some individuals may not benefit from coordination in all cases where there is coordination, then Raz's objection loses part of its appeal.

6 See eg REGAN, 1989; GREEN, 1983.

In order to face this challenge and found an obligation to obey the law on grounds of coordination, one has to do more than establish, as I did in the second part of the book, (i) that there are pervasive disagreements over justice and matters of common concern that need to be settled by choosing any one salient option over the others in the partial conflict coordination problems these disagreements generate in politics, (ii) that the law is the best way of solving these coordination problems and (iii) that coordination may in fact be considered as one of the law's most important functions when it settles procedurally and institutionally moral conflicts that cannot be resolved informally.[7] One also has to demonstrate (iv) how this can justify the law's general claim to authority[8] and hence its claim to provide exclusionary reasons for action, that is to say justify the law's substantive authority or legitimacy. Having established, as I did earlier in the book, the *need* and the *value* of the coordinative authority of the law constitutes an important part of the task of justifying the law's coordination-based authority in conditions of reasonable disagreement about justice and is in fact one of its conditions,[9] but it is not sufficient to establish a complete *justification* of the law's practical authority.[10] What is at stake here is neither the purely contingent and accidental convergence of legal behaviour, nor the purely individual belief in the existence of a reason to obey the law, but the existence of an objective reason to obey by virtue of the cooperation of others.[11] The question is, in other words, whether the law's claim to authority can be regarded as justified or legitimate mainly on grounds of its coordinative function in conditions of reasonable disagreement about justice and, if so, how.

This issue has recently gained centre-stage in jurisprudential debates.[12] This is mainly due to Waldron's different attempts over the last ten years to promote a coordination-based conception of political and legal authority,[13] which culminated in his recent essay on coordination-based 'Authority for Officials' that revisits Raz's conception of authority.[14] In turn, that essay has actually led Raz to recently revise some of the basic tenets of his conception of authority.[15] More generally, the growing interest among political and legal theorists for the implications of collective action and team work has brought issues pertaining to

[7] See Raz, 1998d, 10: 'If we can show (1) that securing coordination is good, and (2) that the law is better at securing coordination than alternative methods, and (3) that its doing so has no adverse effects (or none serious enough to outweigh the advantage of doing so), then we can conclude that it has the task of securing coordination.' See Chapter 6.

[8] See Raz, 1995a, 215 ff. Transposed in coordination terms, this implies that the law should claim coordinative and fairness-based authority, but that it need not necessarily have it to be law.

[9] See Waldron, 2003a, 49. See Chapter 6.

[10] See Raz, 1979, 5. See also Waldron, 2003a, 49 in the context of authority *among* officials.

[11] See also Coleman, 2001, 90–91.

[12] It is actually quite an old argument in *political* theory: see eg Hart, 1955; Rawls, 1971; Rawls, 1999b; Rawls, 1999c; Klosko, 1990.

[13] See Waldron, 1993e; Waldron, 1999a; Waldron, 2003a. See also before him, Finnis, 1980; Finnis, 1984; Finnis, 1989, as well as Postema, 1982; Postema, 1996.

[14] See Waldron, 2003a.

[15] See Raz, 2003b for the first elements of this revision See also Besson, 2005a.

legal conventionalism and the normativity of coordination conventions back to the core of jurisprudential discussions.[16] Finally, under the pressure of democratic theory, legal philosophers have gradually become more sensitive to the collective and political nature of the law-making process and in particular to the implications of the democratic origins of law for legal legitimacy.[17]

In order to establish my argument in this chapter, it is important to start by introducing some definitions and delimitations in order to refine the scope of the enquiry. In the second section, I will assess the ability of the two main accounts of the nature of obligations to obey the law to accommodate coordination-based obligations to obey the law. In the next section, I will claim that those obligations to coordinate through law and to abide by the outcome of legal coordination can best be understood as associative obligations of fair play. A final section will look at the compatibility between this coordination-based justification of political and legal authority and Raz's three conditions of practical authority.

I. DEFINITIONS AND DELIMITATIONS

A few preliminary remarks and precisions need to be made before proceeding any further.[18] They can be divided in two groups: first, remarks pertaining to the *concept* of authority used in this chapter and, secondly, remarks pertaining to the *types* of authority envisaged.

1. The Concept of Authority

Three remarks about the *concepts* of authority and obligation I shall be using in this chapter are in order.

First of all, a working definition of '*authority*' should be given: it can be understood as a right (to rule) correlated to an obligation (to obey).[19] This chapter will mainly be concerned with *legitimate*[20] authority (in a just state) as opposed to de

[16] See eg KUTZ, 2000B; KUTZ, 2001A; KUTZ, 2001B; MARMOR, 2001; COLEMAN, 2001; SHAPIRO, 2002; GARDNER, 2002; PETTIT, 2002A who are inspired by the 'team work' accounts of eg BRATMAN, 1992; BRATMAN, 1993; GILBERT, 1990, but also by the game theoretical accounts of eg LEWIS, 1969; SCHELLING, 1963; SCHELLING, 1984; HARDIN, 1982. See Chapter 6.

[17] See eg UNGER, 1996; WALDRON, 1999A; WALDRON, 1999B; HERSHOWITZ, 2003; WALDRON, 2004B: BESSON, 2005A.

[18] For a good introduction to the Razian theory of authority, see HERSHOWITZ, 2003, 201–8.

[19] On the conceptual relationship between obligation and authority, see RAZ, 1986A, 23–28.

[20] Legitimacy is used here as a *normative* term to be distinguished from the purely formalist or legalistic use of the term to refer to the lawful origin of the decisions at stake, on the one hand, but also from its sociological use to refer to a generally accepted authority, on the other. It is important, however, to distinguish it, as I did earlier in the book, from (substantive) justification *stricto sensu* or at least from personal substantive justification as opposed to multipersonal or anonymous justification. See KUTZ, 2000A on this last point and Chapters 4 and 7. In what follows, I will be using the term 'authority' to refer to legitimate authority, unless otherwise stated.

facto authority, ie the power over people coupled with the *claim* to legitimate authority and a duty to obey.[21] Legitimate authority or, more simply, legitimacy must be conceived as *practical* authority if it is meant to resolve coordination problems; it is the competence to influence people's practical reasoning and give content-independent *reasons for action*, as opposed to mere *reasons for belief* which is the prerogative of theoretical authority.

Secondly, '*obligation*' should be understood as an 'ought' linked to an *exclusionary* reason for action, ie a reason not to act upon conflicting protected reasons for action the agent might have.[22] This type of reason for action is *non-instrumental* and *goal-independent*; it does not derive merely from the fact that adherence to it facilitates the realisation of the agent's other reasons or goals.[23] In its relationship to authority,[24] obligation must be understood as a reason to act upon peremptory reasons for action, ie an *obligation to obey;* when to have an obligation is understood as being bound by an authority, being bound to act upon this obligation is being bound to obey.[25] My argument only pertains to the *moral* obligation to obey the law *qua* law and not *qua* good law. It is useful to distinguish in this respect between three types of duties or obligations: the somehow circular *legal obligation* to obey the law or the 'must' that flows from the mere validity of the law, the *moral obligation to do the right thing* and hence to obey the law when it is right and the *moral obligation to obey the law merely because it is valid law*. In the present chapter, I am interested in assessing neither the purely legally normative claims of the law, the latter's factual efficacy nor its absolute moral justification. On the contrary, I will concentrate on the (moral) duty or obligation to obey the law *qua* law and in particular on the extent to which law's moral claim to be obeyed by virtue of its validity is legitimate. This is not to deny, however, that there can be other non-moral reasons for obeying the law, including self-interest, courtesy or fear.[26]

Finally, the obligations to obey the law I am concerned with here are *owed to our fellow citizens* generally, that is to those who cooperate with us in the working of the legal system, and *not merely to officials.*[27] In a democracy, the community of those whose convergence creates the law is usually identifiable with the larger

[21] The reverse is not necessarily true, however; a legitimate authority need not also be a de facto authority. On exceptions to this in the legal realm, see this chapter's last section.

[22] See Raz, 1999b, 178 ff on *exclusionary* reasons for action. See also Raz, 1979, 19; Raz, 1999b, 191–92; Raz, 2001c on what he also refers to as *protected* reasons for action. It is important to emphasise that the pre-emption thesis does not mean that exclusionary reasons exclude competing background reasons which *support* the same line of action. See this chapter's last section.

[23] Raz, 1979, 223–24; Raz, 1986a, 46; Green, 1989b, 799.

[24] Some authors, like Greenawalt, 1989, reject the connection between authority and obligation by virtue of the absence of a general obligation to obey despite our intuition that the law has general authority over us.

[25] I will be concentrating on *political authority* and *obligation* in a 'narrow' sense as an obligation to obey the state and its *laws*, *qua* main vehicle through which state's power is exercised, in contrast to obligations of good citizenship, for instance.

[26] See also Hart, 1955, 185.

[27] See Rawls, 1999c, 123. See also Finnis, 1989, 103; Postema, 1982, 196.

community of those to whom the law applies. Legal authority no longer amounts only to the right of an institution or of the officials which constitute it to bind its legal subjects. Concentrating on the authority of democratic law instead of law *tout court* changes our approach to the constitutive dimensions of legal authority.[28] Although one may distinguish the coordinating community of officials from the community of citizens, both are often joined.[29] In a democracy, citizens and officials are in a strong coordinative partnership and this coordinative effort generates similar duties for all of them albeit at different levels. After all, officials are also citizens in a democracy, albeit a special kind thereof and with special public responsibilities in coordinating citizens.[30] In this chapter, I will concentrate on obligations citizens owe to fellow citizens *and/or* to officials *qua* citizens.[31]

2. The Types of Authority

Additional caveats are in order with respect to the *types* of authority and obligations I will be discussing in this chapter. Not all forms of practical authority can correspond to coordination-based obligations to obey the law.

First of all, the chapter does not rely on the nowadays globally rejected claim that there is such a thing as a *general* obligation to obey the law.[32] It makes the less demanding claim that there are only *piecemeal* obligations to obey the law in modern societies,[33] especially if coordination is to constitute one of law's authority's main justifications.[34] Modern societies are less homogeneous than they used to

[28] See the last section of this chapter and Chapter 14. See eg HERSHOWITZ, 2003; WALDRON, 2003A; RAZ, 2003B; BESSON, 2005A.

[29] This point is important, since some authors, especially in the Anglo-American context, have sought to distinguish both cooperative communities; this distinction is made in particular in the debate that surrounds the positivist rule of recognition and its coordinating nature in the '*judicial community*.' See in particular COLEMAN, 2001; KUTZ, 2001A. Seeing judges and other officials as participants in a larger cooperative community would help to see their decisions as more coordinative or oriented towards a collective goal. It would also contribute to seeing the value of integrity as an independent political principle: see Chapter 11 for a discussion of the relationship between integrity and authority among officials. See also WALDRON, 2003A, 56–59 who, however, sees the inter-official relationship as a true relationship of authority distinct from that among citizens.

[30] These different coordination communities of officials, of citizens and of officials *and* citizens constitute layers in the different levels of coordination, coherence and representation discussed in Chapters 6, 10 and 11.

[31] WALDRON, 2003A refers to 'officialdom' and the important point to retain is that the obligation to obey is owed either to officials as a whole or to the institutions they constitute. Somehow, institutions and the law are constituted through coordination among citizens, hence the interchangeability of addressees. See COLEMAN, 2001, 100 ff. for a similar point regarding the acquired quality of legal official that depends on the participation of individuals in the legal practice.

[32] See even GREEN, 1989A, 94 who holds a consent-based model of political obligations.

[33] See RAZ, 1995A, 344, 352. See also RAWLS, 1971, 113–14 who holds that obligations of fair play cannot amount to general political obligations for all citizens generally. See also SINGER, 1972, 132 about the fairness-based obligation to obey democratic laws. See also SHAPIRO, 2002, 431.

[34] See, however, SIMMONS, 2001, 25–26 who understands the principle of fair play as claiming *general* obligations to obey the law, by contrast to obligations of consent.

be, more troubled about their own identity and about the coordinating role of government and the law in the social fabric. Besides, reality changes faster than it used to, thus generating legal change and a complex coordination dynamic with a multitude of salient equilibria, as I argued in the second part of the book.[35] The main objection to a general obligation to obey the law is that there can be no moral obligation, applying to all subjects and all laws, to obey law *qua* law, since there is only a moral obligation to obey the law in the cases where the latter makes a difference to individual moral obligations.[36] Hence its extent cannot but vary from person to person and their respective balance of reasons.[37] More particularly, democratic guarantees, which are necessary for the fairness-based obligation to obey coordinative majority decisions, cannot always be given in modern Western democracies.[38] And, if they are, they cannot be given across the board by granting the same rights to all in all circumstances. As such, not all majority decisions can a priori bind equally. It remains, however, that the law has an important coordinating role and this function generates obligations to obey the law for *most* people which are much more extensive than some authors think they are. By reference to Raz's account of authority, moreover, it is interesting to observe, besides the more inclusive claims to legitimacy of de facto authorities,[39] the existence of forms of quasi-obligations to obey that are contracted by consent or simply derive from identification with and respect for the law.[40] Thus, even though not all laws can be legitimate, they can claim to be legitimate in their coordinative function and hence inspire a certain respect.

Secondly, even when a coordination-based obligation to obey is given, I am not assuming that it is absolute. Like most moral obligations, it is merely prima facie and can therefore be qualified when some moral justifications for disobedience are provided. This has to do primarily with the protection of individual autonomy and respect for individuals' ultimate balancing of reasons.[41] Moreover, this chapter does not assume that there is a *single source of obligations.*[42] It seems plausible to hold that there is a single thought dominantly involved in political authority, such as coordination-based duties, while leaving open the possibility of the existence of other justifications for obligations to obey the law like expertise or

[35] See Gaus, 2002 re-interpreting Waldron, 1999a. See Chapter 6.
[36] Raz, 1995a, 343.
[37] As a consequence, Coleman, 2001, 95 and others' objection to the weak and one-dimensional nature of the type of reasons for action provided by coordination conventions does not hold.
[38] See Singer, 1972, 132. See also Rawls, 1971, 113–14.
[39] See Raz, 1995a, chs 15–16. For a coordination-based conception of de facto authority or of the 'law's pretence' of authority, Shapiro, 2002, 431. According to Raz, 1995a, the basis of de facto authority is the *claim* to legitimate authority *or* the attitude of *recognition* on the part of those to which it applies, whereas, according to Raz, 1986a, 65, both conditions should be present. See Waldron, 1993e, 20–21 on the connection between authority's effectiveness and people's recognition.
[40] See Raz, 1995a, chs 15–16; Raz, 1981, 125–31.
[41] See Wolff, 1990; Raz, 1986a, chs 2–4.
[42] Hence Waldron's, 1993e, 10 counterobjection does not cut any ice in the present account.

leadership, in the rare cases where they are clearly established and do not also call for coordination in the adverbial sense.[43]

Finally, coordination-based obligations to obey the law are best understood in terms of *different layers of different reasons* than in terms of a single reason that fits all situations. It is important in particular to distinguish the *root* reason to first coordinate through law from the *auxiliary* reason to abide by the salient coordinating outcome, although they are usually combined and difficult to separate in most cases.[44] It is not sufficient, indeed, and seems to get the cart before the horse to want to support the authoritativeness of a coordination convention by the fact that it is generated and maintained by those who are operating according to it. Of course, when a person fails to perform, she might be contributing to the weakening of the rule's authority, but this is because that authority derives from something other than her prior obedience to it,[45] something that *guides* her to comply with the rule. In other words, what needs to be determined is not only the *auxiliary* reason to abide by the coordination convention because it is a convention and hence is normative in its functioning, but the *root* reason for wanting to do things according to a coordination convention in the first place. In most cases, *root* reasons are *instrumental* to other reasons[46]; the latter may vary, while the root reasons to coordinate on those reasons are common in their instrumentality to the former.[47] *Auxiliary* reasons for coordination are usually *intrinsic* and may stem from fairness, solidarity or loyalty.[48]

II. THE MIXED PEDIGREE OF COORDINATION-BASED DUTIES TO OBEY THE LAW

If a coordinating rule of recognition or constitution is to become truly authoritative, there must be something that turns the rational and/or moral need and interest to coordinate along a salient point of reference into an exclusionary reason and obligation, first, to coordinate, and, secondly, to abide by the outcome of the coordinating scheme. Many grounds of political obligations have been suggested and defended in political philosophy. They can be divided into two main classes: theories of *natural duty* and theories of *acquired obligation*. My claim here is not to assess each of them in every detail, but only to find and defend the best account of a coordination-based obligation to obey the law. While some authors have defended a natural duty to coordinate through law, most authors regard their

[43] See Raz, 1995a, chs 15–16 for alternative reasons for or justifications of authority, other than coordination, such as expertise and leadership in cases of weakness of will. See a critique by Green, 1989b, 803–4. See Chapter 6 on legal coordination's adverbial nature and scope.

[44] See Marmor, 2001, ch 2 on the distinction between root and auxiliary or derivative reasons.

[45] Hampton, 1994, 27.

[46] See Gardner, 2002, 503 on reasons for teamwork or coordination.

[47] See Shapiro, 2002, 421 and Bratman, 2002, 511 on the formal goal of cooperation that can be shared by individuals committed to very different ideologies.

[48] See Gardner, 2002, 503.

coordination-based account of authority as founded on semi-voluntarily acquired duties. In response, in the third part of this section, I will argue that coordination-based duties are *mixed duties*; they are best understood in terms of complex layers of different natural and acquired duties to obey the law, rather than in terms of the former or the latter only.

1. Natural Duties to Coordinate

The theory according to which people have a natural duty to obey the law of a just state is a theory according to which the requirement of obedience is not contingent on anything people have said or done.[49] In this section, I will concentrate on natural duties to coordinate and to abide by the outcome of a coordination scheme rather than on duties of justice in general.[50] By reference to the distinction I drew earlier,[51] it is important to distinguish someone's root reasons for *accepting* coordination in the first place, from the auxiliary reasons for *abiding* by the coordination outcome.

a. Root Duties to Coordinate

Waldron's account of coordination-based obligations to obey the law is based on the natural duty to do what is just. He then develops this duty institutionally to mean that, when we disagree about justice, there is a natural duty to coordinate on a single conception of justice through various institutional settlements and hence to abide by the outcome of a just coordination scheme even if we disagree with the justice of that outcome.[52] Based on a Kantian model of political legitimacy,[53] it understands law's authority as based on the respect people owe to the legal settlement of pure or partial conflict coordination problems, when they need a common conception of justice and when the law-making process respects some minimal conditions of fairness.[54] Although I agree with most of Waldron's account of the moral need and interest to coordinate on matters of justice and its implications for legal obligation,[55] I do not believe actual obligations to coordinate and obey

[49] See Waldron, 1993e for such an account of coordination-based political obligations. See also Kis, 2002.

[50] A fortiori, general natural duties fall prey more easily to the objections I will discuss in this section and are even less plausible than natural duties to coordinate in the political context.

[51] See Kutz, 2001b; Coleman, 2001, 98; Himma, 2001; Marmor, 2001.

[52] This dimension is missing from Waldron, 1993e and might explain why Waldron's account remains essentially a justice-based one, while the proposed account is a mixed one.

[53] See eg Kant, 1996, 86, 307; Kant, 1991, 79. According to Kant, this moral duty to do what is right, and hence to coordinate through law and to enter the social contract in case of disagreement about the right, also implies a moral duty to abide by the derived legal norms, although one may not individually regard these norms as just. See Chapter 5.

[54] See Waldron, 1999a, 85.

[55] See in particular Waldron, 1993e, 22. See also Chapter 6.

the law can be identified *only* with natural duties that derive from our duty to do what is just in circumstances of reasonable disagreement.[56] There are three reasons for this normative gap: first, the scope of natural duties; secondly, the background of natural duties; and, finally, the stringency of natural duties.

i. The Scope of Natural Duties

The first objection to a purely natural duty to coordinate is based on the scope of natural duties to coordinate and to obey the law. Promoting natural and absolute values of justice as the basis of our political obligations may require us to support many political communities which hold those universal values, no existing political communities at all, or communities other than our own particular political community.[57] Since justice is by definition universal, a theory basing the requirement of obedience simply on the quality of legal and political institutions, ie the justice of coordinating institutions, is unable to explain the character of a person's allegiance to the particular society in which she lives.[58] This is an objection that is also known as the 'special allegiance objection.'[59]

True, there are cases in which we actually are obliged to the just laws of other countries, as for instance when we visit them, even if we have not actually consented to their laws. This is not sufficient to disqualify the special allegiance objection, however. First of all, visitors' duties in other countries may be explained on similar grounds to their duties to abide by their own countries' laws. Although this is not the case of consent-based duties, this reasoning can apply to semi-voluntary duties such as duties of fair play or other associative duties; visitors in other countries benefit from political and legal cooperation in those countries and should therefore do their share in the respective cooperative schemes. Secondly, even though we know we have to abide by those foreign countries' laws when we visit them, we usually have no such duties when we do not, although these laws are just laws. And this calls for an explanation which accounts of natural duties cannot provide.

Waldron's famous counterobjection to this point is that there is a political obligation for French officials *in France* not to obstruct justice in New Zealand.[60] Such an obligation would allegedly demonstrate that we owe respect to just institutions and cooperative schemes from which we do not benefit and to which we cannot be said to have either consented or to which we owe no semi-voluntary duties of fair play. This counterobjection does not cut any ice, however. One might share the intuition that it would be wrong for French officials not to do so, without buying into a natural account of political duties. First of all, one need not think that respect for other just institutions' laws amounts to a political

[56] Waldron, 1993e actually regards duties of fair play as derived or hybrid natural duties, thus potentially bridging the gap between both our accounts of coordination-based duties to obey the law.

[57] See Simmons, 2001, 68. Contra: Waldron, 1993e, 5 ff.

[58] See Dworkin, 1986, 193.

[59] See Waldron, 1993e, 5.

[60] See Waldron, 1993e, 9 ff.

obligation *stricto sensu*. Not all wrongs are made into legal prohibitions. Secondly, such an acknowledgement is not irreconcilable with an acquired or mixed account of semi-voluntary political obligation. If there is a political obligation in this case, it might be an obligation to obey French law, since there could be an international convention on inter-judicial cooperation that is part of French law by virtue of legal monism, rather than a direct obligation to obey New Zealand law. Moreover, French officials' cooperation might be related to the benefits they receive from judicial cooperation and peaceful relationship between France and New Zealand, and hence from a larger transnational or international cooperation scheme rather than directly from the New Zealand institutional order itself.[61] Finally, this counterobjection seems to miss the point of the 'special allegiance' objection; the issue is that there is something about political obligations to our own particular country that is distinct from our obligations not to undermine other just legal orders, even if the former can co-exist with the latter.

A way to reply to this last point would be to make the contingent argument that nationals of a country have more opportunity to aid their national institutions when they are just than others.[62] As Dworkin rightly argues, however, the problem with this distinction is that it is not a principled one and fails to capture the intimacy and special connection between nationals or national residents and national institutions.[63] A more principled approach to the distinction between insiders and outsiders has been put forward by Waldron. His coordination-based account of natural duties of justice makes a distinction in principle between the ability to support just institutions of nationals and national residents, on the one hand, and outsiders, on the other, which does not, however, relinquish a universal justice-based account of political legitimacy.[64] Waldron's account takes a Kantian line in emphasising the urge we have to leave a state of conflict for a temporarily and contingently limited political community where justice can be respected at a local level, before it can be so on a cosmopolitan scale. The problem with this argument, however, is that it ignores the fact that we nowadays have in some areas of the globe a corpus of international law and stable relations with neighbouring countries, that may be compared to a cosmopolitan scheme of justice, but still regard political obligations to our particular state as special. Besides, one may doubt whether it is justice *alone* that is at stake in Waldron's institutional argument. True, the actual administration of justice in the face of disagreement only benefits a limited range of people, thus making their natural duties more specific to a particular legal order. However, these duties are not based solely on justice, but on those institutions' potentially fallible conceptions of justice and hence must rely on other reasons we have to respect those institutions' conceptions. This

[61] See eg in the European context, Besson, 2004a.
[62] See Dworkin, 1986, 193.
[63] See Dworkin, 1986, 193.
[64] Waldron, 1993e, 14–15.

point leads me to the second objection to the natural account of duties to coordinate.[65]

ii. The Background of Natural Duties

A second objection to a purely natural duty to coordinate and obey the law is based on the background of natural political duties. Natural duty theories of political obligations based on the justice of the authority cannot account for the prior existence of a political and legal order, and hence of a coordination scheme. This objection is also known as the 'application objection.'[66] Natural theories of political duties fail indeed to explain how a particular institution or group of institutions comes to be the one to which individuals owe obedience and support. The natural duty theory is that our institutions and officials are entitled to compliance and support simply by virtue of the quality of organisation that they have put together. But do we really want to say that the only thing that determines the authority of an institution is the justice of its organisation, and hence abandon all interest in whether people have agreed to submit themselves to the directives of a particular authority or whether they have brought themselves under its authority by at least accepting benefits?[67]

Waldron's counterobjection is that his account, as opposed to the Rawlsian theory of natural duties, is actually founded on the institutional dimension of political and legal authority and hence on the latter's institutional background. As I explained earlier, his account takes a Kantian line in concentrating not so much on the duties to do what is just in general, but on the natural and justice-based duties to establish and abide by local institutions that help us resolve our local disagreements and conflicts over justice.[68] The interesting point is that Waldron contends that *other grounds for political legitimacy* are required to explain how a specific cooperative and institutional scheme as opposed to another happens to become the one we owe obedience to.[69] Waldron mentions the reason to choose the organisation or institution with greater popular support, although this seems to be re-introducing acquired duties through the back door. Waldron actually concedes this point,[70] but he very quickly qualifies his statement by severing any necessary connection to consent-based theories of political duties, and more generally any necessary conceptual link to acquired duties. According to him, consent is being suggested as *one possible ground for legitimacy* and not the only possible one. He claims that:

> the sheer existence of an institution as dominant and unchallenged may suffice to establish its salience, whether it is popularly supported or not. For another thing,

[65] Waldron, 1993e addresses both objections to the Rawlsian account of justice-based duties jointly, but it is important to dissociate them to understand where the failure lies in Waldron's account.
[66] See Waldron, 1993e, 7.
[67] See Simmons, 1979, 147–52.
[68] See Waldron, 1993e, 14–15.
[69] See Waldron, 1993e, 24 ff.
[70] Waldron, 1993e, 25.

> the consent that establishes legitimacy in this sense affects the duties not only of those who give their consent but of outsiders too.[71]

It is unclear, however, how this account of institutional salience and legitimacy can escape its consensual or at least semi-consensual dimension. First of all, it is difficult to see how a *just* institution may be *freely* deemed unchallenged and dominant without a certain amount of popular recognition. This might not correspond to an actual individual consent, but may be explained in terms of a semi-voluntary commitment to a cooperative scheme, for instance through the willing acceptance of cooperative benefits. Waldron's argument seems therefore to be targeting consent-based obligations rather than other acquired semi-voluntary duties such as associative duties or duties of fair play. True, this does not make of consent or semi-voluntary participation the direct and only ground of obligation, but it makes it a necessary condition of the partly justice-based obligation to coordinate.[72] Secondly, it follows from the argument I made earlier about outsiders' duties that these can be explained in terms of semi-voluntary coordinative duties that derive either from their own national legal systems or from the international legal order.

Thus, although revisited natural duties theories that focus on coordination duties may account for the special allegiance insiders owe to their legal orders, they cannot account *alone* for the institutional background required for coordination duties to arise. Semi-voluntarily acquired duties are usually called for additionally to explain how institutions' decisions happen to bind us independently of their substantive justice. Claiming the reverse would vest natural duties with a stringency natural duties theories are not prepared to claim and it is to this question that I will turn now.

iii. The Stringency of Natural Duties

The final objection relates to the stringency of a natural justice-based duty to coordinate and to resolve coordination problems through law. Even if it is true, as I argued in the second part of the book, that it is in people's rational and moral interest to coordinate when they disagree on justice and even if they do in fact need to coordinate in order to avoid conflicts, one ought to respect their autonomy not to do so, for instance when they think that legal settlements on some issues or institutional procedures may be too unjust for them to go along with cooperation in the first place.[73] By opposition to what Waldron holds,[74] it does not necessarily follow from the fact that the pursuit of justice and the avoidance

[71] Waldron, 1993e, 25.

[72] Of course, one may object that *preconditions* of political and legal authority such as power or a coordination structure are *not elements of the concept* of authority in general. Such a thin concept does not, however, account sufficiently well for predominant paradigms of political and legal authority in particular. See Waldron, 2003a, 66.

[73] See Hampton, 1997, 71–78. See Chapter 6.

[74] Waldron, 1993e, 22 ff drawing on Kant and Hobbes and who, naturally and without transition, goes from a *moral interest* in the establishment of a coordination scheme to *moral reasons* to coordinate.

of injustice are a moral imperative that the participation in a coordinating scheme in matters of justice, that may in some cases avoid further injustice but may also generate more injustice, is always such an imperative too.[75] Of course, in practice, as I argued in the second part of the book, we often do not have much choice other than to coordinate. Our interests are usually so strong that we feel compelled to coordinate, but this contingent fact does not dispense with the need to ensure minimal consensual or semi-consensual participation before identifying true coordination-based duties to obey the law.[76] Waldron seems to concede this point, when he acknowledges the role of consent in relation to political and legal legitimacy.[77] He does not go far enough, however. He contends, for instance, that:

> in general, the use of consent in relation to legitimacy is quite different in its logic from its use as a direct ground of obligation. In the latter case, consent is represented as a promise; in the former case, it is more *like a permission or nomination.*[78]

While Waldron is right to argue that consent is not the only ground for political and legal obligation and does not act as a promise, he underestimates two points. First of all, consent is not the only acquired duty to coordinate one may think of; as we will see in the next section, one may also propose semi-voluntary duties to coordinate that derive from the knowing and willing acceptance of benefits of cooperation or at least from the intentional participation in a cooperative scheme. Of course, as I will argue, these cannot account for coordination-based political legitimacy alone, but a mixed account of coordination-based duties gives a more important place to these semi-voluntary duties than Waldron's account of consensually permitted justice-based duties to coordinate. Secondly, consent or semi-voluntary participation in a coordination scheme does not only condition the salience of one coordinating option over another, but the actual operation of the coordination scheme itself. The latter depends indeed on the parties' consciousness and willingness to cooperate and on the assurance that they will.[79] It is not because consent or semi-consent *alone* cannot constitute direct grounds of obligation that they have to be relegated to mere markers of legitimacy. Thus, although there can be a *general* duty to coordinate based on justice, the *particular* duty to coordinate in a particular institutional scheme can only be triggered, in conditions of reasonable disagreement about justice, by an additional element of recognition of that particular institutional scheme and of participation in the scheme.

[75] See WALDRON, 1993E, 28.
[76] Of course, one may object that one can only consent to duties where certain preconditions for these duties are given, such as, in this case, the fairness of the scheme or the justice-based need to coordinate. This does not, however, dispense altogether with the added value of consent and of the importance of the appropriation of one's reasons.
[77] See WALDRON, 1993E, 25–26.
[78] WALDRON, 1993E, 25–26 (emphasis added).
[79] See Chapter 6.

b. Auxiliary Duties to Abide by the Coordination Outcome

After this discussion of root duties to coordinate, the time has come to turn briefly to auxiliary duties to abide by the coordination outcome. The latter's relationship to natural duties' theories follows the same pattern as root duties. This is understandable given their close *practical* relationship; without the trigger of participation in the coordination scheme, the root reason to comply with a particular scheme of coordination and hence a *particular* legal order or legal rule cannot arise, but this also implies, given the participation in the coordination scheme, that there cannot be such a root reason without an auxiliary reason and vice versa. And this may be why many authors overlook the distinction in the context of coordination-based authority.[80] Of course, this does not exclude the possibility of having a general root reason to coordinate by legal rules *in general* or constitute a legal order *per se* without yet also having a corresponding auxiliary reason. However, by the time there is a specific scheme of cooperation we should coordinate over, it is also because we have started doing so by accepting its benefits and hence have an auxiliary duty to abide by the coordination outcome. Besides, the reason for distinguishing them *conceptually* lies in the impossibility of accounting for the normativity of an auxiliary reason to abide by a specific coordination outcome without arguing for a root reason to coordinate in the first place.

Waldron's justice-based account of coordination duties does not distinguish between these two layers of coordination-based duties. It is clear, therefore, that, according to him, both types of duties can be explained purely in terms of natural duties. And they may well be, but only partly so. If the root reason to coordinate by constituting just coordination institutions can be explained in part by a requirement of justice in conditions of reasonable disagreement, then the auxiliary reason to abide by the demands of those just institutions will be in part based on the justice or, less controversially, the fairness of the coordination scheme.[81] This is what is usually expressed in terms of the fairness of the way in which a person is treated by the system and of the balance between the sacrifices and benefits required by the cooperative scheme. The other side of the coin, however, is that since the root duty to coordinate is in part also legitimated on grounds of the semi-voluntary association to a cooperative effort, for instance through the willing and knowing acceptance of benefits, the auxiliary reason is also justified in part by this semi-voluntary condition. Although it is unfair not to reciprocate in a cooperative scheme from which one is voluntarily benefiting and in which one is voluntarily participating, to regard the auxiliary obligation to cooperate as being incurred without some semi-voluntary participation in the first place, such as one's intentional going along with the practice or acceptance of the benefits, would constrain individual *moral autonomy* in a way that is too stringent.

[80] See eg Waldron, 1993e.
[81] See Waldron, 1993e, 28–29.

Coordination-based duties to obey the law cannot therefore be accounted for *only* on grounds of natural justice-based duties. The normative gap between the moral need to coordinate in conditions of reasonable disagreement and the emergence of a duty to coordinate is wide and this affects both the root duty to coordinate and the auxiliary duty to abide by the outcome of coordination. Although coordination-based duties to obey the law are clearly *partly* grounded on the justice-based general need to coordinate in conditions of reasonable disagreement about justice, on the one hand, and the fairness-based particular reason to abide by the outcome of a fair coordination scheme, on the other, something is missing in justice-based accounts that can limit the stringency and scope of natural duties to coordinate and provide them with a political and legal background. This additional feature may be found in accounts of acquired duties to coordinate.

2. Acquired Duties to Coordinate

Acquired obligations can be divided between obligations based on *consent* and obligations based on the willing *acceptance of benefits from others' cooperation*. Acquired coordination-based duties may therefore be grounded either in individual consent or in other intentional forms of commitment to a collective effort. Given the similarities in the natural duties' components of both root and auxiliary duties to coordinate, I will not distinguish between them in this section and will assume that their acquired duties' components match each other.

a. Consent-based Duties to Coordinate

Coordination-based duties are not purely consent-based, as when people see obligations to cooperate as purely voluntarily undertaken.[82] The arguments against purely consent-based duties are well-known. Such undertaking of obligations would be too difficult to obtain and too rare in practice to account for the importance of people's feelings of duty and responsibility toward the law. We should realise, therefore, that, by contrast to what is held by traditional social contract theorists, we are for the most part being born into political societies and becoming citizens of them without ever freely and individually choosing the duties attached to being members of those societies. Some authors reacted to this fact by propounding notions of tacit or even hypothetical consent. The difficulties with the latter are even more famous and I will not dwell on them here.[83]

Of course, this does not mean that the idea of acquired duty loses all its appeal. *Appropriation* of one's reasons to obey remains a central moral concern

[82] See Green, 1989b for such an account of consent-based role duties.

[83] These arguments are well-known. See eg Hume, 1978, 263: 'We may as well assert that a man, by remaining in a vessel freely consents to the dominion of the master; though he was carried on board, while asleep and must leap into the ocean and perish the moment he leaves her.'

when faced with legal authority. This is particularly relevant in conditions of reasonable disagreement about the requirements of justice and where the outcome of a just coordination scheme with which we should abide need not correspond to everybody's conceptions of justice. An alternative, that retains the appeal of acquired duties without, however, falling prey to the shortcomings of consent-based duties, is to be found in semi-voluntarily acquired coordination-based duties.

b. Semi-voluntarily Acquired Duties to Coordinate

Semi-voluntary obligations are not entirely a-conventional[84]; they amount to the reasonable expectations that are generated by the conscious participation in a community's cooperative scheme that is not obligatory in itself, but is morally and rationally licensed given the existence of widespread disagreement.[85] This conscious participation can take the shape of a willing and knowing acceptance of cooperative benefits, for instance. The semi-voluntary nature of these obligations allows us to capture some of the voluntarist force of traditional contract theory's accounts of political obligation without their shortcomings and to avoid a version of political obligation that would allow the mere passive participation in a cooperative scheme to naturally obligate their beneficiaries to reciprocate.[86] It therefore reinforces each individual's *right to moral independence*, as opposed to their right to decide for themselves in all cases, on the one hand, and to entire submission to others' will, on the other.

Interestingly, this account of semi-voluntary obligation also *bridges purely individualistic and purely collective accounts of consent to authority*. As such, it corresponds neither to the purely individual and voluntarist social contract model of agreement nor to the purely collective model of individual identification and association with a group; it requires something less than the former, as it does not require a one-off express individual consent in each case, and something less than the latter, as it does not demand the long-term identification with and passive belonging to a group. All it requires is an individual commitment to take part in a cooperative scheme and endorsement of a certain collective role and responsibility. In fact, we need not provide the evidence of subjective elements of association and identification to the political community other than the willing endorsement at one stage of a social role and responsibility through the acceptance of social and political benefits, for instance. The duties to obey our laws are ours not because we individually consented to them, nor merely because we are members of a group which generated these laws, but because we voluntarily took part in a coordination process and generated these laws together.

[84] See WALDRON, 1993E, 25; WALDRON, 1987B, 135–40 on a similar use of consent in relation to political legitimacy.
[85] See HAMPTON, 1997, 73, 78.
[86] See for a critique, NOZICK, 1974, 95.

A useful analogy can be made with Hume's conception of the *participation in coordination conventions,*[87] which is neither purely consensual in the classical contractualist or Lockean sense, nor absolutely morally obligatory in the Kantian sense of the social contract.[88] People have a moral and rational interest to coordinate and they will naturally tend to in the pervasive circumstances of partial coordination conflict over justice and public matters if there is an obviously salient equilibrium to be reached.[89] Once coordination conventions are entered into and practised voluntarily, in order to resolve conflicts in an institutional and pacific way, then further coordination and hence obedience to the law becomes morally binding. This is also what Arendt has in mind when she contends that law's authority cannot rest on more than *quasi-consent.*[90]

Even when we semi-voluntarily endorse duties to obey the law, it is unclear how acquired duties alone can generate exclusionary reasons in the absence of other considerations which validate this quasi-consensual commitment. Because one may not consent to anything, semi-consensual endorsement of coordination-based duties does not *alone* explain the importance of the reasons coordination schemes provide. If, as we saw before, justice-based considerations do not suffice to justify obligations to coordinate on their own, the same is true of semi-voluntary commitment alone; semi-voluntary participation and/or acceptance of benefits amounts to a necessary component of political duties in conditions of reasonable disagreement about justice, without, however, being sufficient. It relies on a prior moral justification of the cooperative scheme in conditions of reasonable disagreement about justice, when people disagree about whether they should cooperate and in which scheme they should cooperate.

3. Mixed Duties to Coordinate

The existence of semi-voluntary coordination-based obligations demonstrates the possibility of having relatively widespread semi-voluntary obligations to obey the law which arise out of one's conscious cooperative association with a political community and hence with the latter's formal instrument, ie the law. The semi-voluntary decision to go along with the legal practice and accept its benefits binds us to do what is required of us by that cooperative practice in exchange for its benefits. However, neither the obligation to coordinate nor those obligations themselves are purely voluntarily and individually undertaken; people have a moral interest in cooperating in the first place that triggers their acceptance of benefits, and once they have semi-voluntarily taken part in a coordinative enterprise and accepted its benefits, not to reciprocate and hence to disobey would disrupt a

[87] Hume, 1978, 490.
[88] See Hampton, 1997, 78 ff on the use of 'convention consent' in contemporary political theory. See also Chapter 6.
[89] See Arendt, 1970, xi, 193.
[90] Arendt, 1970, xi, 193.

justice-based requirement to coordinate and lead to unfair results, thus creating pre-emptive natural reasons not to do so.[91] The mixed nature of these obligations to coordinate is well expressed by Green's contention that 'one can choose not to be an undertaker, but not to be an undertaker with no duty to be decorous.'[92] In other words, the obligation to abide by semi-voluntarily endorsed coordination-based obligations is neither a purely acquired nor a purely natural obligation, but a *complex* mixed obligation.

Although there is a strong *need* and *interest* in coordinating and submitting to a single authoritative determination by the law rather than living in anarchy, there is no moral *obligation* to do so *before* one has voluntarily started to take part in a cooperative scheme or to accept its benefits. On this complex conception, the law's authority is in part acknowledgement of the *need for a common solution* in conditions of reasonable disagreement about justice, once we have semi-voluntarily constituted a coordination scheme (root duty) *and* in part respect for the *fair conditions* in which the common solution was arrived at once cooperation was semi-voluntarily engaged in[93] (auxiliary duty). The advantage of this approach is that the obligatoriness of respecting an institution's demands of justice in general is secured independently of consent, while consent or quasi-consent is still used to establish whether a particular institution may appropriately embody those demands in the first place and hence legitimately claim obedience in particular cases. As such, it reconciles individual autonomy with the existence of what Green refers to as pre-existing and objective *social roles* with the natural duties these roles impose, such as duties we owe as citizens of democratic institutions in particular.[94]

The obligation to obey the law is best understood, therefore, as a *multilayered obligation*. The first layer that amounts to the *root* reason to coordinate through law corresponds to the natural duty to do what is just, which is, however, nuanced in conditions of reasonable disagreement about justice and amounts at the most to a semi-voluntary duty to coordinate on justice in circumstances where we need to. The second layer of obligation that amounts to the *auxiliary* reason to abide by the outcome of coordination corresponds to the semi-voluntary coordination-based duty that derives from the freely adhered to coordination exercise and in particular the duties of fair play that derive from the latter's fairness.[95] In sum, this account of legal authority is based on duties of justice for the *general* duty to abide by coordinating law in the first place and on semi-voluntary fair play and cooperation duties for the *particular* duties to abide by coordinating laws in concrete cases. This complex

[91] See HAMPTON, 1997 87.
[92] GREEN, 1989A, 110; GREEN, 1989B, 819.
[93] See WALDRON, 1999A, 85 who seems, however, to found the obligation to obey coordinative law in natural and absolute duties of justice. See also WALDRON, 1993E.
[94] See GREEN, 1989B, 818–25.
[95] On the connection between obligations of fairness and obligations of fair play, see the next section.

mixture of root and auxiliary reasons, on the one hand, and of natural and acquired duties, on the other, ought to be distinguished from Rawls' account of duties of fair play that stem from the voluntary acceptance of benefits in a just and fair political scheme and which simply *add onto* natural duties of justice[96] or from Waldron's account of merely consensually *permitted* justice-based duties to abide by coordinative laws.[97] Both these accounts accommodate different layers of political and legal duties without, however, propounding a mixed account of those duties which combines natural and acquired duties.

III. COORDINATION-BASED OBLIGATIONS *QUA* OBLIGATIONS OF FAIR PLAY

When discussing the possibility for the law to generate non-instrumental obligations to obey that follow from the combination of justice-based duties to coordinate in conditions of reasonable disagreement and of semi-voluntary participation in the legal cooperative scheme, two types of political obligations come to mind. The first are commonly referred to as 'obligations of fair play' and the second as 'associative obligations.' Paradoxically, whereas the first type of obligation is commonly regarded as quasi-voluntary or semi-voluntary,[98] the second type is usually qualified by reference to its anti-voluntarism.[99] In this section, I want to argue that the mixed type of political obligation identified as being generated by the coordinating function of law is best understood as a *semi-voluntary obligation of fair play.*[100] I will start by presenting the four main constitutive elements of obligations of fair play. I will then assess the challenge that has been raised against one of them in more detail, ie the condition according to which law may be understood as a cooperative scheme. Finally, I will briefly explore a further condition one may want to add and which has attracted numerous objections in the legal context, ie the condition of the willing acceptance of benefits.

[96] See RAWLS, 1999C. See also RAWLS, 1971, 336–50.

[97] See WALDRON, 1993E, 11 on the possibility of multilayered political duties. See also WALDRON, 2003A, 54 who seems to have moved since then towards an acquired or mixed account of political duties.

[98] See SIMMONS, 2001. See also WALDRON, 1999A, 104 ff and 201, 239 ff whose account refers mostly to natural duties to coordinate, but who also explains them in terms of duties based on fairness. Contra: RAZ, 1995A, 352 who seems to think that it is the lack of a requirement of acceptance of the cooperative benefits that makes obligations of fair play, which he regards as moral duties, dubious ones and who does not see therefore how such obligations could be reconciled with the quasi-voluntary account of political obligations he sets up to endorse in that section.

[99] See eg DWORKIN, 1986, 195–96; GILBERT, 1990; GILBERT, 1993. See also COLEMAN, 2001, 90 ff who associates duties of coordination with Gilbert's associative duties.

[100] This choice is not exclusive of the associative nature of fair play obligations, given the latter's reliance on a cooperative scheme—even if the reverse is not true. In this sense, GILBERT's, 1990 and BRATMAN's, 1992 considerations also apply to this chapter's semi-voluntary obligations of fair play.

1. The Main Regime of Fair Play Obligations

To present the constitutive elements of fair play obligations, I will start by presenting the basic definition and will then argue against the addition of two further elements in Rawls' account.

a. The Basic Definition

Advocates of the 'principle of fair play'[101] or 'principle of fairness'[102] argue that the acceptance of benefits within certain sorts of cooperative schemes is sufficient in itself to generate political rights and obligations. More accurately, when applied to the law, this can be taken to mean, first, that the legal order is construed as a system of social cooperation, and secondly, that, in such a cooperative structure, we become bound when it would be unfair to go along with the legal practice and enjoy benefits derived from the law without contributing one's share to the production of those benefits. The first formulation of the principle of fair play was provided by Hart:

> When a number of persons conduct any *joint enterprise* according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have *benefited* by their submission. . . . The moral obligation to obey the rules in such circumstances is due to the cooperating members of the society, and they have the correlative moral right to obedience.[103]

We can understand Hart as saying that, in the situation of cooperation described, a beneficiary has an obligation to do his fair share by submitting to the rules of cooperation; others who have cooperated before have a right to this fair distribution of the burdens of submission. The account of fair play obligations I will adopt and revise here is Rawls'. It is more complete and refines some of the conditions underlying Hart's account of fair play obligations in the context of constitutional democracy:

> Suppose there is a *mutually beneficial and just scheme of cooperation*, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a *certain restriction of his liberty*. Suppose finally that the benefits produced by cooperation are, up to a certain point, *free*: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from

[101] See HART, 1955.
[102] See RAWLS, 1971, s. 18.
[103] HART, 1955, 185 (emphasis added).

> the scheme even if he does not do his part. Under these conditions a person who *has accepted the benefits of the scheme* is bound by a duty of fair-play to do his part and not to take advantage of the free benefits by not cooperating.[104]

Accordingly, there are three conditions for an obligation of fair play to arise: (i) there must be an active and mutually beneficial scheme of cooperation, (ii) this scheme involves at least a restriction of one's liberty and (iii) the benefits of the scheme can be received by someone, a 'free rider', who does not cooperate when his turn comes. Following Nozick's critique of Hart's obligations of fair play, one should add a fourth condition, according to which (iv) the benefits to a person from the action of others have to be greater than the costs to them of doing their share.[105] Different people benefit from social goods to different degrees depending on their character and dispositions.[106] The consequence will be that shares of burdens should not be the same for all citizens. However, if a person is not even ready to do her *proportionate* part, as opposed to an equal one, then it would be unfair of her to take any benefits from the scheme.[107] In circumstances of reasonable disagreement about justice, the proportionality of burdens and shares will be assessed on procedural rather than substantive grounds, as we will see.

b. Two Additional Elements

Rawls actually adds on two elements to his definition, which I have intentionally not incorporated in the proposed definition.

The first one is that *the benefits of the scheme of cooperation can only be obtained if nearly all participants cooperate*. The point of this qualification is hard to grasp. It is difficult to see how the inefficiency of a scheme, in which not all people need to cooperate, affects the lack of fairness of one's failure to cooperate. Consider Simmons' example of a community scheme to preserve water pressure: this scheme prohibits watering lawns in the evening, while in fact if half of the members watered their lawns, there would be no lowering of water pressure. Surely this is an inefficient plan, compared to alternatives. But once the plan was instituted, would a member be any more justified in watering his lawn in the evening than if only a few people's doing so would lower the water pressure?[108]

This point is related to the question of whether the lack of fairness of one's failure to cooperate has to be linked to the *harm* that is inflicted by doing so. According to Raz, for instance, even where it is unfair not to reciprocate for services received, or not to contribute one's share to the production of a good of

[104] Rawls, 1964, 9–10 (emphasis added).
[105] Nozick, 1974, 94.
[106] See Raz, 1989, 199.
[107] See Arneson, 1982, 617–18; Wolff, 1995, 93.
[108] Simmons, 2001, 4.

general public value, it cannot be unfair to perform innocuous acts which neither harm any one nor impede the provision of any public good.[109] If one follows this argument, then failing to cooperate after receiving benefits is only unfair if by this failure we deny someone else benefits within the scheme.[110] True, this inflicted harm makes the case even more objectionable, but it has nothing to do with considerations of fair play. Failure to cooperate is unfair when a person's failure to do their part takes advantage of the others, who act in good faith, whether or not their cooperation is necessary for benefiting other participants.[111] If I ride the bus without a ticket or cheat a little on my tax return, the effects of my free-riding on the benefits of others will be negligible or non-existent. Of course, unfairly taking advantage of the cooperative sacrifices of others may cause either *direct* harm to them, if the free rider uses all the drinking water of the neighbourhood or *indirect* harm to them, if the free rider's influential example causes others to defect from the scheme. However, in the political context as in others, the schemes supplying public goods can normally tolerate a substantial amount of free-riding without any direct or indirect harm to the schemes or their participants. Direct or indirect harmfulness to a cooperative scheme is neither a sufficient nor a necessary condition for unfair advantage-taking.[112]

The position I am defending here is analogous in this sense to what is known in political theory as *generalisation arguments*. Generalisation arguments are purely hypothetical arguments according to which, if the consequences of everyone's doing X would be bad, then no one ought to do X. Whether everyone will in fact be doing X, or is likely to, is irrelevant; what matters are the hypothetical consequences of everyone behaving in a certain way and thus not *playing their part* in the relevant framework, as in Socrates' account of civil disobedience.[113] This argument is used to object to someone's failure to share the *burdens of cooperation*, even when she knows that others will share them and that her own actions will not in fact have remarkable or harmful consequences. It does not matter for the validity of generalisation arguments whether they in fact do work,[114] for the point of the vault in Hume's famous analogy[115] is that it does not tumble if one stone falls. The same is true of law; disobeying a law usually has no effect at all on other people's conduct, even when they notice the disobedience,[116] but disobeying in certain conditions is unfair and there is an obligation to obey the law. In fact, the generalisation argument can be pushed even further to encompass cases where

[109] Raz, 1995a, 352. See, however, Raz, 1995a, 354 who does not maintain the necessity of a harm for the violation of one's semi-voluntary obligation to obey the law that follows from one's belonging to a political community.
[110] See Smith, 1973 for such an argument.
[111] Simmons, 2001, 4–5.
[112] See Simmons, 2001, 30–31.
[113] See Kraut, 1984, 42, 128 ff.
[114] See Ullmann-Margalit, 1977, 58 on the shortcomings of the generalisation argument and its purely *persuasive* force despite its dubious logical status.
[115] See Hume, 1975a, II, 305.
[116] See Raz, 1995a, 349.

one is not sure that all others will reciprocate and that one's cooperation is essential. Whether or not one's participation is the decisive element to others' cooperation and the success of the cooperative scheme, once people have accepted benefits from the cooperation of others, they should reciprocate by cooperating further. This enables us to escape the important epistemological limitations of the assessment of the decisive nature of one's cooperation to the scheme.[117]

The second additional element in the Rawlsian account is *the justice of the cooperative scheme*. This claim is part of a more general thesis according to which we can never be bound to support or comply with unjust arrangements. It follows from Rawls' claim that all political obligations are accounted for by the principle of fairness, conjoined with the absence of any natural duties which could account for such a bond.[118] It is difficult, however, to see how the lack of justice of the *purpose* of the cooperative scheme would affect the special relationships between participants. A fair share of the burdens is owed by a benefiting participant simply because others have equally sacrificed to allow them to benefit. Besides, coordination is usually called for in case of conflict over justice, and the salience of the coordinative settlement cannot therefore depend on its justice.[119] In fact, since as we saw before, coordination is at least in part a natural justice-based requirement in conditions of disagreement about justice,[120] controversial conceptions of justice cannot be made a condition of its legitimacy. The condition could then only amount to the *fairness* of the coordination scheme. The argument based on the lack of fairness of the *distribution* of benefits within the scheme, which is prima facie more plausible, does not seem to fare any better.[121] True, it is part of her intuitions about fair play that a person is bound to do her *fair share* only if she is allocated a fair share of benefits. However, this intuition only applies individually to the proportionality between benefits and burdens and not to all shares in the cooperative scheme. What matters is that I receive a fair share and reciprocate fairly, whether or not someone else actually receives and reciprocates more or less than their fair share, and hence independently of a fair distribution of benefits overall.

2. A General Challenge: Law as a Cooperative Scheme

Typically, counterarguments question the passage from the objective contention that law has an essential coordinative function in most cases, on the one hand, to the subjective realisation that it has and to the consciousness of taking part in a cooperative scheme as legal subjects, on the other. According to Simmons, 'there

[117] See Chapter 6.
[118] Rawls, 1971, 112.
[119] See Chapter 6.
[120] See eg Waldron, 1993e.
[121] See eg Rawls, 1971, 112.

is no consciousness of cooperation, no common plan or purpose' in organised political societies and, therefore, the latter do not amount to 'cooperative schemes.'[122] Some critiques concede the existence of conscious cooperation, but limit the awareness of coordination problems and coordination schemes, and hence the motivation to coordinate, to a subset of cases where concerted collective action is obviously required, such as national security or environment protection.[123] As Raz contends, 'While I take coordination to be one of the central functions of government, I do not believe that people who are in situations where they should coordinate their actions are necessarily aware of this fact.'[124]

I think that this concern is well founded.[125] For fair return to be due for services, people must be collaborating and working together consciously and intentionally. True, no explicit agreement on a plan for cooperation is necessary, but cooperation requires a proper motivation and a correct understanding of the situation and of the correct behaviour to achieve coordination. This follows from the nature of coordination whose optimal operation depends, I argued in an earlier chapter, on people's willingness to place coordination over their individual conceptions of justice and hence depends on conscious cooperation on the part of all participants.[126] It is such conscious sacrifice for the common interest, rather than the mere rendering of services, that gives rise to associative demands; people act in such contexts only because they think they have reasonable grounds for believing that others will freely make the same sacrifices and reciprocate to theirs.

Given that this is what ought to be established for political societies to constitute large cooperative schemes as much as small-scale ones, it is not unrealistic to understand our political actions as a conscious cooperative structure.[127] Of course, this is not to deny the existence of other independent philanthropic and moral motivations, on the one hand. Nor would I want to deny, on the other, that some of us do not hesitate to drive at excessive speeds, cheat on their tax return, consume legally prohibited substances, etc. In a predominant class of cases, however, we can be taken as consciously regarding the law as the best means to ensure coordination on matters of common concern. It is worth observing that the content of this conscious commitment may be quite vague at the start and only become more precise with time and through further cooperation.[128] It is sufficient, in order for people to start cooperating consciously, that they share a minimal understanding of what they want to cooperate for and what the cooperative structure is, even if they still disagree on many core elements of the cooperative scheme.[129] It is indeed the point

[122] Simmons, 2001, 25.
[123] See Raz, 1995a, chs 15–16.
[124] Raz, 2003b, 259.
[125] Contra: Arneson, 1982, 631–33; Klosko, 1992, 52–53, 148. These authors seem to think that no spirit or consciousness of full-blooded cooperation is necessary for obligations of fair play to arise.
[126] See Chapter 6.
[127] Contra: Simmons, 2001, 40 ff.
[128] See Gilbert, 1993, 125.
[129] See Bratman, 1992 and 1993.

of the coordination scheme to channel and control disagreement according to fair procedures, such as majority voting, for instance.[130]

In response to this general contention, two main counterarguments have been brought forward, albeit without success. First of all, critics refer to massive *impersonality* and a long tradition of taking the benefits received from a cooperative scheme without much thought and regarding the burdens associated with the scheme as inevitable.[131] The situation is not as impersonal as it seems, however. It suffices to think of the pervasiveness of disagreement on some of the public goods provided and the manifest injustices of their financing, as well as on other moral matters.[132] Disagreement, and the constant need to settle it, remind us all the time of the benefits of coordination on controversial and difficult issues, and thus of the cooperative nature of most of our political interactions despite our *habits* of obedience in other cases. Secondly, another source of scepticism is related to the use of coercion and *punishment* to ensure respect for the cooperative scheme's rules and the considerable *distance* this establishes between the origins of the enforced rules and the people on whom they are enforced.[133] This objection fails, however. Punishment itself is the benefit of a cooperative scheme in which we cooperate[134]; we have realised the need for sanctions and coercion when the main need for coordination was not sufficient for first-level cooperation to take place. It is the consciousness of why we need sanctions that makes us aware of the need to coordinate in the first place and thus of the cooperative structure of our political efforts.

3. An Additional Condition

After presenting the additional condition of the positive acceptance of benefits, it is useful to discuss a general challenge to the idea of acceptance of benefits and a specific challenge to its application in legal practice.

a. The Condition: the Positive Acceptance of Benefits

There is an additional condition of fair play obligations which one finds in Rawls' account of the fair play principle. Rawls moves from Hart's requirement of mere *benefaction* to the fifth and final condition of *positive acceptance* of benefits: only a participant who has accepted benefits from the scheme is bound by an obligation of fair play. This distinction is a difficult, but crucial one.[135] Although no deliberate

[130] See Hampton, 1997, 111. See Chapter 6.
[131] Simmons, 2001, 41.
[132] See Arneson, 1982, 633.
[133] Simmons, 2001, 41.
[134] See Waldron, 2003a who distinguishes between murdering someone and cursing one's mother on these terms.
[135] See Hume, 1978, 263, 548 and 566 on the opposition between express, tacit and hypothetical consent.

undertaking is necessary to become obligated, by contrast to a consent-based account of political obligations, a tacit benefaction or reception of benefits is not sufficient either.[136]

A Humean example might help grasp the distinction. According to Hume, if I am brought onto a vessel against my will where I am forced to drink an experimental potion, the fact that I may have benefited from the good consequences of the drink does not mean that I have accepted the benefits that I have received. To have accepted a benefit, I must have wanted that benefit when I received it or must have made some effort to get it or at least not actively attempted to avoid receiving it. What makes considerations of *fairness* an issue is not mere benefaction from the efforts of others, but benefaction where failure to reciprocate would *take advantage* of others. And we do not take advantage of others unless we *choose* to profit from their good faith without reciprocating.

b. A General Challenge: the Idea of Acceptance of Benefits

It is on this last element that the principle of fair play has encountered most resistance. The most famous argument made against it is Nozick's and it reads as follows:

> Suppose some of the people in your neighbourhood have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not. Though you benefit from the arrangement, you may know all along that 364 days of entertainment supplied by others will not be worth your giving up one day. You would rather not have any of it and not give up a day than have it at all and spend one of your days at it. Given these preferences, how can it be that you are required to participate when your scheduled time comes?[137]

There are many counterobjections to Nozick's objection against obligations of fair play. I will only take up the two most important ones here.

First of all, Nozick does not draw any distinction between the obligations of a *participant* and the obligations of an innocent *bystander*. He is certainly right about the innocent bystander and the fact that, although she receives incidental benefits from the cooperative scheme's operation, she has no significant

[136] Contra: Soper, 1984 who argues that (i) mere benefaction (ii) by an authority acting in good faith is sufficient to ground an obligation to obey the law.

[137] Nozick, 1974, 93.

relationship to it and thus no obligation to cooperate. 'The fact that we are partially "social products" in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long forgotten people, does not create in us a floating debt which the current society can collect and use as it will.'[138] However, this reasoning cannot apply to the case of the insider or participant in the scheme. True, it is difficult to draw a precise line between a participant and an outsider, and one may want to say that a participant must either have pledged their support or tacitly agreed in the scheme after its institution or have played some active role in the scheme after its institution. These last conditions would make the principle of fair play collapse into a principle of tacit consent, whereas the idea of participation was produced in the first place to avoid the shortcomings of consent-based accounts of political obligations by drawing on the *acceptance* of the benefits of a cooperative scheme. This distinction between *receiving* benefits, *accepting* benefits and *tacitly consenting* to the obligation to reciprocate is crucial to semi-voluntary accounts of political obligations and seems to have been overlooked by Nozick's critique of fair play obligations.[139] The principle of fairness, understood as generating obligations for the participants in the cooperative scheme who have voluntarily accepted benefits, but who have not voluntarily undertaken those obligations, streamlines social contract theory by eliminating that theory's awkward dependence on dubious accounts of tacit consent.

Imagine that, in the Nozickean neighbourhood, there is also a problem with water supply. Some of the members give their consent to dig a public well and others clearly refuse. Jones is one of the dissidents. However, once the well is dug, Jones goes to the well at night, knowing that the water will never be missed. It seems clear that Jones is a free rider and although he has not consented to the cooperative scheme, he has an obligation to do his part within it for he has accepted its benefits and has gone along with it, by contrast to what happens in Nozick's example of the programme that involves 'thrusting books' into unsuspecting people's houses[140] and then requiring them to pay for them. Certainly by *going along* with a scheme, we lead others to expect certain future performances from us, as in Gilbert's joint commitments. This, however, does not show that we have *consented* or *undertaken* to perform according to these expectations. Of course, we still need to clarify what we hold as an 'acceptance' of benefits. In short, to have accepted a benefit, an individual must either (i) have tried to get the benefit *or* (ii) have taken the benefit willingly and knowingly.[141]

Secondly, Nozick lacks a *clear notion of benefits*, although this notion can easily be provided. To start with, the kind of benefits at stake in the legal cooperative

[138] Nozick, 1974, 95.
[139] See Arneson, 1982 for the same critique of Nozick.
[140] Nozick, 1974, 95.
[141] Simmons, 2001, 18.

scheme are *public goods* only.[142] Such goods are public when they are non-exclusively enjoyable, that is to say when the distribution of their benefits in a society is not subject to voluntary control by anyone other than each potential beneficiary controlling their share of benefits.[143] It does not matter whether their public nature in this sense is contingent, as in the case of public water supply or clean air, or inherent, as in the case of the general beneficial features of society that amount to truly collective goods. It is useful to distinguish between '*readily available*' and '*open*' *public goods*, depending on how difficult it is for each potential beneficiary to exercise control over their own share of benefits.[144] In the common case of 'readily available' goods, to borrow Simmons' expression, clear cases of acceptance of benefits as opposed to receipt are easy to find[145]; getting such benefits involves going out of one's way, as when one has to switch on the television in order to watch a national broadcast programme. By contrast, 'open goods' or benefits cannot be avoided without considerable inconvenience, as in the case of someone who wants to opt out from the security of a system of national defence. The benefits of Nozick's examples are of the latter kind, for one cannot avoid receiving them except by the exaggerated inconvenience of keeping indoors with the windows shut. As Nozick comments, there is surely no reason why, when the street-sweeping scheme comes to your town, you must 'imagine dirt as you traverse the street, so as not to benefit as a free rider.'[146]

In the case of legal coordination, the benefits at stake amount not only to those public goods we can only achieve by concerted action such as the protection of the environment or national security, but also to most public goods by virtue of legal coordination's adverbial and repressive function. As I argued in the second part of the book, indeed, most of the law's coordination role can be located in avoiding that people take the law in their own hands either in controversial moral cases, such as abortion for example, or in non-controversial moral cases, such as murder for instance, since exceptional cases call for sanctions or other coordination instruments that constitute signals of salience and public settlement. In other words, the values encapsulated by the rule of law as a whole may be regarded as benefits of legal coordination.[147]

c. A Specific Challenge: the Acceptance of Legally Procured Benefits

It is at this point that most authors reject the plausibility of the semi-voluntary obligations of fair play; they contend that the situation is more complicated for

[142] See Arneson, 1982, 618.
[143] Raz, 1989, 198.
[144] See also Arneson, 1982, 618–19 who distinguishes between 'collective' and 'pure public' goods.
[145] Simmons, 2001, 19.
[146] Nozick, 1974, 94.
[147] See Chapter 6 on the role of the rule of law in partial conflict coordination problems.

the authority of social norms than for the rules of a game's authority.[148] Thus, according to Raz, obligations of fair play are of dubious validity, when one has no choice but to accept the benefits, and even more generally, when the benefits are given to someone who does not request them, and in circumstances which do not imply an understanding concerning the conditions attached to their donation and receipt.[149] Although it is difficult to see when exactly open benefits have been accepted, I hold that it is possible to *reject* and hence also *accept* a benefit that is *unavoidable*. True, it would be difficult to accept such a benefit by trying to get it or reject it by trying to avoid it, but the second way of accepting social benefits can very well apply. Thus, it is only if we take the open benefits (i) willingly *and* (ii) knowingly that we can be said to have accepted them and hence be bound by the cooperative scheme.[150]

i. The Willing Acceptance of Benefits

Many open benefits of government can be seen as being accepted *willingly*. Taking benefits willingly implies that they have not been forced upon us and that they are regarded as worth their obvious costs, or, in other words, that the balance of cooperation is regarded as fair.[151]

First of all, there are very *few public benefits that we clearly reject* and that are therefore forced upon us. We even accept benefits that we do not always use, such as the benefit of medical care's availability. This is because we have generally come to accept that we will do less well in the long run working on our own[152] and not accepting cooperatively supplied public goods.[153] True, some of us will still strongly prefer self-provision and will often be coercively prevented from doing so by the law.[154] In such a case, benefaction of public goods cannot be regarded as operating through acceptance and no obligation of fair play would arise. However, the cases where people do not see the need to cooperate are rare in modern societies where public benefits are complex and difficult to ensure individually. Besides, people are aware that most public benefits are interdependent and free-riding in some cases endangers the supply of other public benefits which are more generally accepted.

[148] See SIMMONS, 2001, 20 ff.

[149] RAZ, 1995A, 352. What puzzles me is that most of these accusations also apply to the account of semi-voluntary obligations Raz endorses at the end of his paper, since legal obligations are allegedly not always more freely and intentionally endorseable than duties of friendship.

[150] See also ARNESON, 1982, 633; GREENAWALT, 1989, 135–36.

[151] I agree with SIMMONS, 2001, 38 that a defence of the cooperative nature of political organisations has to accommodate efforts of self-provision and the psychological costs of cooperation.

[152] See HUME, 1978, 363. Hence, SIMMONS', 2001, 34 example of the trench does not work in the long-run reality of political life.

[153] I agree with SIMMONS, 2001, 35 on the quasi-voluntary nature of obligations of fair play and the fact that it is the acceptance of public benefits rather than their public nature and value that is at stake here (contra: ARNESON, 1982, 619–21; KLOSKO, 1992, 39–48), although I disagree with Simmons on the lack of plausibility of the acceptance of those goods in modern political societies.

[154] See SIMMONS, 2001, 36.

Secondly, although we may sometimes think that some benefits require *too high a price in cooperation*, these instances do not constitute the majority of cases in which we accept benefits in political communities. Cooperation in political society operates mostly at the level of *packages of rules.*[155] It follows that burdens and benefits tend to balance each other within the package as a whole.[156] For instance, the costs of stringent anti-discrimination laws may lead some members of the ethnic majority to reject those laws and the few benefits they might get from them in the long run.[157] The problem is that the whole point of redistribution might hence be threatened if they reject them, thus leading to compensation through other rules and benefits in the same package, such as subventions to private employers, etc. When, despite the global package-based perspective, some participants regard a specific rule as imposing an unfair and disproportionate sacrifice on them, this dispenses them from a fair play duty to abide by that rule rather than by the whole package or at least from abiding by that rule to a degree that is disproportionate to their costs. In fact, cases of disproportionate impact on some participants may play a role of trigger for collective legal revision and change. Reality can change and the fact that most people regard the costs of accepting some benefits as being too high may well mean that we should stop coordinating on that issue before the need to do so arises again. Once more, it is important to emphasise the complex dynamic of legal coordination and the possibility of reaching different fair and legitimate coordination equilibria across time.[158]

There is a sense in which there must be some *reasonable basis* for sceptical beliefs if they are to block obligations from arising under the principle of fairness.[159] Imagine someone who is racially prejudiced and believes wrongly that the ratio of benefits to costs between blacks and whites ought to be different or someone who is convinced of the disproportion of their contribution to the benefits but never bothers to check the factual evidence to the contrary available in daily newspapers, for instance. Ideally, the acceptance of benefits should *be* worthwhile for an individual rather than being so because she *thinks* it is.[160] The difficulty is that we cannot often convince each other of the objective value of everything we take as being worthwhile and of the fairness of the distribution of goods; a minimal standard of reasonableness seems therefore to be a good way to distinguish between purely whimsical preferences and more justifiable evaluations of the proportionality of costs to benefits of cooperation.

[155] Christiano, 2000, 533.
[156] Of course, what remains to be established is the exact *scope* of this package of rules and whether it extends to the entire legal order or is only limited to legal rules in a certain related subject matter.
[157] See Christiano, 2000, 532–33.
[158] See Gaus, 2002.
[159] See Arneson, 1982, 632.
[160] See Wolff, 1995, 96.

ii. The Knowing Acceptance of Benefits

Many open benefits of government can be seen as accepted *knowingly*. Taking benefits knowingly involves that we know that they are provided by the cooperative scheme in which we are consciously taking part.

Primarily, the reasons for this pertain to the *knowable circumstances of benefaction*. First of all, it would be wrong to argue that most citizens do not *notice the benefits they receive*. The fact that people notice when they do not receive them or receive them in an insufficient way shows that people cannot but be aware of their existence. More generally, the increasing scarcity of public goods should make those who receive them aware of the cooperative effort in which they originate. Besides, in most cases, people fight over the quality of public goods and different elements of their distribution; their nature and the principles of their distribution are essentially contestable and thus lead to a constant re-evaluation. Secondly, the fact that people believe that they purchase those benefits with the *tax* they pay does not make any difference. We are all aware of the fact that taxes add up to a sufficient amount through cooperation in paying them. Finally, if people get the impression that they owe nothing to others, but only to their *government*, it is only because, when simple coordination conventions are difficult to enforce on a large scale, we resort to more complex ones which imply the use of law and legal institutions, thus concentrating the origins of some benefits in a central government. This is a practical question and does not affect our knowing acceptance of a cooperative benefit, especially in a democratic state where we regard ourselves as active participants in collective self-government.

Secondly, *negligent ignorance* of the cooperative source of the benefits one enjoys does not exempt one from obligations of fair play.[161] This is a crucial point, for most cases of ignorance of the origins and value of the political benefits one enjoys cannot be excused for the reason that they are very often negligent; negligence is assessed on the basis of the information one could have in all good faith prior to the acceptance of benefits and, in organised political societies, this information is provided everywhere. In conditions of reasonable disagreement about justice, people should be aware of their differences of opinion and owe respect to other reasonable views about justice and matters of common concern. It follows therefore that a certain degree of readiness to coordinate when possible and a *responsibility* for not being sufficiently attentive to coordination problems and schemes can be deduced from the pervasive fact of reasonable disagreement. Besides, contrary to what some authors think,[162] the expectation of reciprocation rather than of mere payment is usually made clear through the difference between what we give, as part of a whole, and what we get, and the comparison with other benefits for which cooperation is more evident.

[161] See Arneson, 1982, 632; Wolff, 1995, 96; Klosko, 1992, 48–54.
[162] Simmons, 2001, 32–33.

IV. RAZ'S THREE CONDITIONS FOR AUTHORITY

1. General

Recent philosophical discussions of political and legal authority have been significantly influenced by Raz's seminal account of authority and, in particular, by his three theses of authority: the pre-emption thesis, the dependence thesis and the normal justification thesis.[163] As such, it is crucial to see how the coordination-based account of political and legal authority presented here can be accommodated by Raz's conception of authority. This is even more important as recent accounts of legal authority have moved away from traditional categories of justification and have recentred on the authority of legislation and democratically adopted laws.[164] This calls, therefore, for a more general re-examination of Raz's 'service conception'[165] of practical authority in the specific collective and procedural circumstances of political and legal authority.

It is an important aspect of Raz's abstract conception that it can be understood as *complementary* to other more concrete accounts of legal authority. It is indeed a theory about practical authority in general, and not only about political and legal authority.[166] The three theses are *claims about how any authority should ideally operate* and hence about the standards which any justification of authority should fulfil. They should therefore be distinguished from the different *justifications of political and legal authority* themselves, such as expertise or coordination, for instance.[167] This distinction corresponds roughly to the distinction between the general reasons for authority and the particular reasons for the authoritative directives and hence for abiding by them[168]; this normative gap corresponds to the distance between the recognition of the general legitimacy of certain institutions or procedures in a given class of cases, on the one hand, and their actual legitimacy in a precise case, on the other.[169] It is crucial to

[163] RAZ, 1986A, 46 ff. See Chapter 11.

[164] See WALDRON, 2003A, 69 and WALDRON, 2004B for the same effort. See also HERSHOWITZ, 2003; BESSON, 2005A.

[165] Raz's service conception of authority reflects practical authority's *subservience to individual moral reasons*.

[166] The fact that the Razian conception of authority is a conception of practical authority in general does not necessarily imply that it should be able to account for political and legal authority *without further conditions*. These are restrictive conditions, however, whereas, as we will see, some instances of public authority cannot even be captured as a general practical authority in the Razian conception as it is.

[167] See GREEN, 1989B, 803 for this distinction.

[168] See RAZ, 2001C, 12 who takes the example of a rule by a club committee: '[t]hat it is good to uphold the authority of the committee is a reason for the validity of its rules, including the rule that one may not bring more than three guests to social functions of the club. But the desirability of upholding the authority of the committee is not a reason for not bringing more than three guests (not that is, under this description).'

[169] It is important not to confuse this distinction with the one I drew earlier between the justice-based duty to coordinate in general and the mixed semi-voluntary duty to abide by the laws of a particular institution and cooperative scheme.

understand, therefore, that not only do general justifications of authority such as the proposed coordination-based account not suffice to legitimate authority without the additional three theses of the service conception, but also that the service conception of authority cannot account for the legitimacy of public authorities on its own.

A legitimate authority should be such that it can both *be an authority* and be a *qualified or good authority.*[170] General justifications of authority, such as coordination-based ones, account for the capacity of a political and legal institution or procedure to be an authority, while the service conception of authority provides the additional elements required for that authority to be a legitimate authority. Raz's objection to this argument could be twofold. First of all, the argument does not apply to theoretical authority since a qualified theoretical authority is an authority independently from other elements such as public recognition or consent. And if the argument does not apply to theoretical authority, there is no reason why it should apply to practical authority. This objection fails, however. One may argue, on the contrary, that the difference between theoretical and practical authority, on the one hand, and between practical authority in general and political and legal authority, on the other, justifies a differentiated conceptual treatment. Secondly, according to Raz, the argument does not cut any ice since an authority is bound to be a good authority. This argument fails again, however. A conceptual distinction might be worth making even if in practice its two prongs are always joined. One may argue, indeed, that it is important for an authority's claim to legitimacy, even before it is legitimate, that the authority *is* such that it can claim to be legitimate. Besides, the point of the argument is to say that the two conditions are cumulative in the sense that it is only if the institution can *be* an authority that it in turn can *qualify* as a good authority. In the present case, it is only because there is a fair and public coordination scheme in which people voluntarily accept benefits that the corresponding obligations can become exclusionary reasons if they fulfil the three Razian theses.[171]

Thus, the normal justification thesis, as well as the two other theses, should not be seen as competitors with other theories of legitimacy, in the sense that they are held to apply independently, but rather as their basic conditions.[172] One may want to refer to their function as a filter since they screen potential justifications and establish criteria for their validity. They apply to any justification, whether purely procedural or more substantive.[173] As such, Raz's three theses of

[170] I owe this distinction to Joseph Raz's seminar on law, morality and authority at Oxford in Hilary Term 2004.

[171] Raz cannot escape this counterobjection by claiming that those elements belong to the conditions of de facto authority only and make it such that it can claim legitimate authority. Given the difficulty of envisaging a legitimate political and legal authority without knowability, publicity and coordination, this would make de facto authority a conceptual condition of legitimate political and legal authority and that is not the point of de facto authority in the Razian theory of authority.

[172] Contra: Hershowitz, 2003, 216–20.

[173] See eg Waldron, 2003a.

authority should be able to accommodate traditional and substantive accounts of political and legal legitimacy, as well as more recent procedural accounts of the type proposed here in the context of political and legal coordination, in order for them to become complete accounts of political and legal authority. The reason to abide by a certain legal directive is a *combination* of the general reasons to have an authority *and* of the reasons entailed by the respect of the three Razian authority theses.

Even if one concedes that the coordination-based account of authority proposed in this chapter needs to be checked against Raz's conception of authority and that the latter can only apply with the former, one may still object that the coordination-based account of political and legal authority is bound to fail the test. At first sight at least, Raz's account does not admit that the *obligation to obey the law* that is meant to prevent others from 'taking the law into their own hands,' ie what I have described in this chapter as the semi-voluntary obligation to coordinate one's behaviour according to a single rule independently of its content, shows 'that the law or government had *authority* over me regarding the issue in question.'[174] In this section, I would like to take up this challenge and argue that legal coordination conventions *lato sensu* fulfil the conditions necessary for them to acquire authority in the Razian sense. There are three theses that need to be satisfied before a law can be justified in claiming authority on Raz's account: the pre-emption thesis, the dependence thesis and the normal justification thesis. Before examining those three theses, however, it is important to establish whether or not the reasons to coordinate which the law provides can be new reasons for action as required by the Razian model.

2. Legal Reasons to Coordinate

Even though one concedes the law's central coordinative function, one need not necessarily regard this function as sufficient to provide a justification of law's authority. It is commonly accepted that deferring to the law's authority involves setting aside the reasons and reasoning one might use if there were no authority. Some authors, however, have objected that the signalling and marking of the salience of one of the coordinating options through law does not suffice to ground any claim for *respect* and *authority*, since they do not add any new reasons for action to the existing array of coordinating reasons that participants already have.[175] All they do is provide new information.[176] According to Raz and others, therefore, the law is at most *instrumental* in securing desirable sorts of coordination in most cases.[177] Although coordination can provide a justification

[174] Raz, 1995a, 347.
[175] See Regan, 1989; Green, 1983, 320–21. See also Christiano, 2000, 526 ff.
[176] See Raz, 1990, 7.
[177] See Raz, 1995a, 352. See also Green, 1989b, 806; Green, 1983, 299. See also Raz, 1979, 233–49.

of legal authority in some limited cases where collective and concerted action is needed, it cannot provide a general justification for law's authority.[178]

This objection misses the whole point of legal coordination, however. First of all, as I have argued in another chapter, without the law, no large-scale and fair coordination could occur.[179] As a result, once the legal order has been created, coordination through law cannot be compared to other instrumental modes of salience-marking and coordination; the law makes salience clearer and more flexible and provides all necessary levels of coordinated procedures to implement the salient option in a general and non-discriminatory way.[180] The law's input amounts, therefore, to more in these cases than a mere coordinating instrument; the law changes the nature of coordination into a public exercise and is a constitutive element of political coordination.[181] Without law, we simply would not individually act upon and hence respect the reasons we do respect collectively through legal coordination. And this is precisely the point of practical authority.[182] Secondly, this criticism overlooks the precondition for something like law to provide signals of the appropriate sort.[183] For the law to be able to provide the last resort signal, people must in advance adopt a certain *attitude* to it.[184] This is reinforced by the fact that the legal order can be understood as a *shared and public practice* among those whose common interest is implicated in the questions that arise for coordination and settlement. This practice is, according to Waldron, that of looking to the public procedure for the solution of problems of this sort, being alert to its dispositions and refraining from doing anything to diminish the confidence of others in the appropriateness of regarding the outputs of this procedure as salient in the coordination situations addressed.[185]

3. Conformity to the Three Theses

a. The Pre-emption Thesis

According to the first authority thesis, it is central for the law and its authority that recognising and following something as law must be an alternative to trying

[178] This type of instrumentality of the law towards coordination should not be confused with the law's coordination-based reasons' instrumentality to other root reasons such as justice or one's overall morality; in these cases, the obligations are not instrumental *per se*, but only among themselves. The law can be of intrinsic value as a coordinating practice without, however, implying that that practice itself and the legal reasons it provides are not of instrumental value to further goals and reasons.

[179] See Chapter 6.

[180] See Finnis, 1989, 101 ff. See also Finnis, 1984, 117–20.

[181] Similarly, when the law is vested with authority due to its expertise, one does not claim that the reasons the law gives are instrumental to the reasons one already has to obey expert advice.

[182] See Raz, 2003b, 260.

[183] Raz, 1989, 1153, 118: 'The law endorses the course of action it requires with salience precisely because it is recognized as authoritative by the population.'

[184] Waldron, 2003a, 53–55. See also MacCormick, 1995b, 78 on the relative *heteronomy* of law.

[185] Waldron, 2003a, 54.

to figure out for oneself what is to be done about the matter that the law addresses. What the thesis amounts to is the idea that the subjects of an authority can benefit from its directives '*only if* they can establish their existence and content *in ways which do not depend on raising the very same issues* which the authority is there to settle.'[186] This is also what Raz calls the *content-independence* of authoritative directives, that is to say the fact that they owe their status as reasons to features other than their content. It is only so that they can make a *practical difference* to the deliberations of those to which they apply.[187] According to the pre-emption thesis:

> the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[188]

This condition is respected in the present account, since the point of the legal settlement of our coordination problems is precisely a matter of setting aside the substantive reasoning that brought us to a partial conflict coordination problem.[189] Legal coordination will only be possible if it is possible to identify the salient decision without having to engage in the reasoning that was necessary to get to that decision and, most importantly, without having to disagree again on what it should be. The only departure from the pre-emption thesis, however, lies in the *identification of the authority* of a particular law. In the present account, this identification results, first, from the awareness of a question of common concern that needs coordination,[190] and secondly, from the awareness of others' participation in a coordinative effort.[191] If one follows the pre-emption thesis too strictly, however, the law must, in order to be authoritative, precisely pre-empt the subject's own reasoning in determining when we are actually facing a coordination problem and when we need authority,[192] thus implying that there is a way of identifying the law's authority without having to engage in the sort of activity that was necessary to produce it and without figuring that we are actually facing a coordination problem.

[186] Raz, 1995a, 203.
[187] Beyond the three theses discussed here, Raz's account of practical authority also entails two additional theses which are interrelated in the legal context: the practical difference thesis and the sources thesis. I will not discuss them separately in this chapter, but it is worth emphasising the ambiguous relationship between *validity* and *authority* in Raz's theory of law. The sources thesis seems indeed to connect legal validity to some constitutive elements of authority, and of de facto authority in particular, such as the pre-emption thesis and the practical difference thesis.
[188] Raz, 1986a, 46.
[189] See Finnis, 1989, 101 ff. See also Waldron, 2003a, 60.
[190] See Waldron, 2003a, 60–61.
[191] See Waldron, 2003a, 59
[192] See Raz, 1990, 10; Raz, 1995a, 203, 209.

This discrepancy need not worry us too much, however. Even in Raz's account, *true respect for and acceptance* of a coordinative decision as being authoritative, by contrast to mere submission to it,[193] cannot arise without first observing that the question is one of common concern that needs coordination and that there is a coordination scheme at work. All an exclusionary reason does is pre-empt people from *acting* for an excluded reason and *not from thinking* about it or concurrent reasons.[194] One needs, indeed, to be able to identify an authority and determine whether it has the authority it claims in certain classes of cases, before the authority can apply and pre-emption can take place.[195] This ability to be an authority may lie in its coordinative abilities where coordination is needed or in its expertise where expertise is needed. One may refer to this additional condition to the pre-emption thesis as the pre-condition of *knowability of authority.*[196] Raz has recently conceded this point and contends that:

> it seems plausible to *add a condition* for the legitimacy of an authority. Something like a requirement that people over whom it has authority *should have reason to find out, and should be able to find out whether it has such authority* (at a cost not disproportionate to the benefit in tracking the reason its supposed authority can bring). Perhaps it should also be a condition of the authoritative standing of any directive that those subject to it have reason to find out whether it exists and can find out its content.[197]

b. The Dependence Thesis

A further complication arises if one compares the present account of coordination-based authority with Raz's dependence thesis. What the thesis implies is that there can be no separate set of reasons for authorities to use that would not in principle be appropriate for the subjects of the authorities to use.[198] According to the pre-emption thesis:

> all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directives.[199]

[193] See WALDRON, 2003A, 60–61 on this contrast.

[194] See RAZ, 1999B, 184. This is not something DWORKIN, 2002, 1672 seems to take into account.

[195] For obvious reasons pertaining to the pre-emption thesis, the knowability and the identification of authority cannot be a case by case issue.

[196] This process of identification of an authority is clearly evaluative. One may therefore question its compatibility with Raz's practical difference thesis, but more particularly with the sources thesis. There remains a gap, however, between identifying an authority in a *general class of cases* and determining the merits of each of its decisions. Besides, there will be less disagreement about regarding a procedure or an authority as *coordination-able* than about regarding it as providing one with expertise. Finally, Razians might want to reduce the scope of the practical difference and sources theses to cases of de facto legal and political authority, ie a claim to legitimate authority, for the recognition of which the three other theses including the pre-emption thesis and its knowability addendum need not be given. It is not entirely clear, however, how this last move might be of interest to any account of authority whose ultimate claim is bound to be legitimacy. See also DWORKIN, 2002, 1668–69.

[197] RAZ, 2003B, 264 (emphasis added).

[198] WALDRON, 2003A, 62.

[199] RAZ, 1986A, 47.

In a coordination case, the problem arises from the fact that very different sets of reasons dictate the different participants' conflicting opinions about what should be done. By the time they decide to coordinate their decisions and actions, therefore, the set of reasons underlying the salient directives cannot correspond to all the potential reasons underlying each of the individual opinions.[200] In fact, the presence or possibility of an authority changes the nature of the choices that the participants face, thus making it difficult to associate the authoritative set of reasons with each and all of the choices possible, apart from the existence and actions of the authority.[201] For instance, the emergence of a coordination problem and the possibility of coordination give rise to coordination reasons which people might not have had before. As Waldron argues, Raz's model *per se* is appropriate only in cases where a person's choice on the merits roughly identifies with the choice on the merits as options for the entire population, that is to say in cases where there is no need for coordination.[202]

Interestingly, Raz now concedes this point. His recent re-interpretation of the thesis states that it does not require that the reasons for action provided correspond perfectly to existing individual reasons for action. This would indeed imply that the existence of a public authority could not enable us to achieve desirable goals which would be unachievable without it. All the dependence thesis requires, therefore, is that we had the abstract reasons which the public authority gives us new opportunities to pursue, even though we did not have the opportunity to do so on our own.[203] This is compatible with coordinative reasons whose dependence relationship is *more indirect* and less straightforward in cases where the coordination problem and the presence of an authority change the nature of the choices people face, than in cases where the authority is only concerned with the behaviour of one person at a time.

c. The Normal Justification Thesis

According to the normal justification thesis, we must be able to comply better with our own reasons by abiding by authoritative decisions than on our own, whether or not we believe we do. The normal justification thesis is not based on a subjective assessment of what is in our reasons' best interest, but on an objective truth. According to Raz:

> the normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them rather than if he tries to follow the reasons which apply to him directly.[204]

[200] See WALDRON, 2003A, 61.
[201] See WALDRON, 2003A, 62.
[202] See WALDRON, 2003A, 62.
[203] See RAZ, 2003B, 260.
[204] RAZ, 1995A, 198; RAZ, 1986A, 53.

At first sight, this thesis seems to justify authority on the basis of what would have happened *otherwise*, and not on the basis of an *actual* practice of coordination. As such, the present account of coordination-based obligations to obey the law seems to be incompatible with it. As I will argue, however, the normal justification thesis is in need of thorough revision, if it is to accommodate the reality of *public* and *collective* decisions in conditions of reasonable disagreement.

i. A First Challenge: the Need for Public Identification

As Waldron argues, the thesis fails from the start to capture an important dimension of political authority revealed prominently in coordination cases: its public and shared dimension.[205] Before a person or an institution can be regarded as an authority, and as providing people with authoritative rules that will make a practical difference to their own individual reasoning, it ought indeed to be publicly known as such and its procedures be supported by a shared and coordinated practice of recognition. Only so can it then provide the salient decisions necessary for political coordination and hence be able to make a difference at the individual level. As Waldron argues, 'it may be quite inappropriate for me to regard A as a public authority unless I am sure that many others do in fact so regard it (or are prepared to do so if they see that enough others are prepared to do so if . . . etc.).'[206]

This important *procedural dimension* of the normative justification thesis in the political context deserves to be revealed.[207] In fact, as I argued earlier in the context of the pre-emption thesis, Raz has recently conceded this point about the *knowability of authority.*[208] It is, he argues, an essential element of the objective nature of a legitimate authority that it can be known as such, ie that it can be known as potentially and generally fulfilling the three conditions of legitimate authority.[209] When transposed into the context of the normal justification thesis, this concession implies that for public authority to be legitimate, people must be able to find out whether it has the public qualities required to then have authority over each of them individually.[210] Since it is only if people see there is a coordination problem and a coordination scheme that they will coordinate, and since it is only if they coordinate in those cases that they can comply with the normal justification thesis, the latter cannot be conceived without this procedural dimension.

[205] Waldron, 2003a, 65.
[206] Waldron, 2003a, 66.
[207] See Waldron, 2003a, 63 ff.
[208] Raz, 2003b, 264.
[209] By contrast to the knowability condition of the pre-emption thesis that is a general and subjective condition, the normal justification thesis is an objective and case by case condition of authority.
[210] See Raz, 2003b, 262. This also seems to follow from Raz, 1986a, 75–76 who argues that pre-existing effective power is one of the necessary preconditions of legitimate political authority. See also Marmor, 2004, 19 on the need for law to be *promulgated* to be able to provide reasons for action.

ii. A Second Challenge: the Need for Collective Decision-making

Given the conditions of reasonable disagreement that prevail and the democratic procedures through which we reach our decisions, one needs to go even further in the proceduralisation of the normal justification thesis.[211] This has to do with the type of justification and legitimation we can require of an authority in circumstances where people disagree about the substantive justification of the decisions they should regard as authoritative. In principle, it should be possible to keep the subjective identification of public authority required by the pre-emption thesis distinct from its objective justification. Although this might be true in principle, it does not take the conditions of disagreement and circumstances of politics seriously enough. The normal justification thesis should be able to accommodate the fact that democratic authorities make their demands *ex hypothesi* on people who think they have good ground for believing that the majority or any other authority *is mistaken*.[212] In other words, any theory that makes legitimate authority depend on the goodness of political outcomes is self-defeating, for it is in many cases precisely because people disagree reasonably about the goodness of outcomes and hence about the *normal* justification thesis, that they need to set up and collectively recognise an authority and engage in democratic coordination procedures.[213]

Of course, as Raz acknowledges, it is part of the idea of practical authority that to protect our individual reasons, we might have to deviate slightly from them through accepting the indirect decisions of an authority that would thus help us comply with them better than on our own.[214] Things differ hugely, however, depending on whether it is a private or a public authority one is contending. The recognition and hence the establishment of public authority, although it aims eventually at binding individuals, whether in collective or purely individual actions, cannot be about *individually* identifying the best practical authority, by contrast to the recognition of private authority on private matters; it is indeed about *collectively* finding the best way to coordinate diverging opinions on matters of *common concern*. As such, the identification and establishment of public authority necessarily restricts the possibility of respecting a substantive form of normal justification thesis at an individual level. Paradoxically, the only way to respect the moral reasons that apply to us individually, and hence to respect the normal justification thesis in conditions of reasonable disagreement about justice, is precisely to go by coordination procedures which render a perfect match with our individual reasons very unlikely.[215]

[211] Paradoxically, this is not an argument WALDRON, 2003A formulates.

[212] See WALDRON, 1999A, 101.

[213] See RAWLS, 1999C, 122.

[214] I owe this idea of *deviance* to Joseph Raz's seminar on law, morality and authority at Oxford in Hilary Term 2004.

[215] Of course, coordination implies better compliance with one's individual reasons to coordinate, but these are not the main individual moral reasons at stake in the context of the normal justification thesis. There is indeed a difference between reasons to have an authority and reasons this authority provides us with. This confusion might explain why WALDRON, 2003A does not see fit to go further than the first challenge, although the normal justification thesis, as Raz understands it, is not compatible with his account of natural duties to coordinate in WALDRON, 1993E.

From the moment we recognise the procedural and collective dimension of the normal justification thesis, there can be no return to a purely substantive and individual account. It would be absurd to emphasise, on the one hand, the dependence of the normal justification thesis on the existence and identification of a public coordination scheme as the only way of complying with the former, while requiring, on the other, that authoritative directives comply individually with reasonably contested substantive standards of justice. Of course, this does not amount to eliminating all objectively substantive elements from it. As Hershowitz argues, this would make the normal justification thesis entirely empty.[216] It should, on the contrary, be conceived as a hybrid of both the procedural and substantive dimensions on the model of the minimal substantive legitimacy of procedural legitimacy I discussed earlier in the book.[217] In short, this revised account of the normal justification thesis should attribute authority to the outcome of a law-making *procedure*, in which we are intentionally taking part, provided this law-making scheme itself, as opposed to its outcome, is *fair* in each individual case.[218] The law-making procedure's fairness should be assessed in each case by reference to certain minimal *objective* moral standards, such as the protection of basic procedural equality in a democracy.[219] And this in turn would reconcile coordination-based fair play obligations to obey the law with the normal justification thesis.

CONCLUSION

This chapter discussed the question of *legal authority* and argued, more particularly, for a coordination-based account of legal authority. It further developed the argument about the need to coordinate and the law's essential role in ensuring political coordination made in the second part of the book and provided a justification for a prima facie obligation to obey the law based on the law's coordinating ability. What remained to be established in the present chapter was whether the law could actually give exclusionary reasons for action in its coordinative function.

[216] See HERSHOWITZ, 2003, 219–20: 'So conceived, the normal justification thesis would accommodate all theories of legitimacy that turned out to be true; hence it ceases to be a competitor with other candidate theories of legitimacy.'

[217] See Chapter 7.

[218] As I argued before, what matters for fair play duties and now for the revised normal justification thesis is the *individual* fairness of the coordination scheme rather than its *general* fairness. In this sense, I think that HERSHOWITZ, 2003, 220 misses the argument by blaming procedural reinterpretations of the normal justification thesis for diluting the distinction between making better decisions about the matter the directive regards and making better decisions about such questions more generally. Of course, any coordinative procedure will lead to coordination and hence to a desirable result, but this does not undermine the fact that there must be, first, a matter of common concern in the specific case on which coordination is needed before we can coordinate, and secondly, an individual decision to coordinate. Besides, coordination only generates obligations when the condition of individual fairness is respected.

[219] See SINGER, 1972, 63 ff, 68. See also HAMPTON, 1997, 113.

From a general and conceptual perspective, my argument was not that there is a *general* obligation to obey the law based on its coordinative function, but that the law has an important coordinating role and that this function generates obligations to obey the law for *most* people which are much more *extensive* than many authors think. As such, the recognition of coordination-based obligations does not exclude other sources of legal authority, such as consent-based or expertise-based duties to obey the law. Besides, this coordination-based obligation to obey the law is only prima facie. The argument in the chapter had three main parts.

First of all, I argued that this complex coordination-based obligation to obey the law is neither a purely natural duty of justice nor a purely acquired duty, but a mixed duty that presents the advantages of both and the disadvantages of neither. It is a *semi-voluntarily* acquired obligation that is best understood as an *obligation of fair play*. The voluntary decision to go along with the legal practice and accept its benefits binds us to do what is required of us by that cooperative practice in exchange for the benefits of that practice, although those obligations themselves are not voluntarily and individually undertaken. In other words, although there is a strong moral *need* and *interest* in coordinating and submitting to a single authoritative determination by the law rather than living in anarchy, there is no root obligation to do so *before* one has voluntarily started to take part in a cooperative scheme and to accept its benefits. And even then the auxiliary obligation to abide by the outcome of this cooperative scheme is not a voluntary one, but a fairness-based one. The obligation to obey the law is best understood, therefore, as a *complex and multilayered obligation*: first, there is an obligation to do what is just, but given the circumstances of disagreement about justice, this obligation can only apply when there is coordination and hence only in a clearly demarcated political entity as opposed to across the board, thus calling for a more concrete semi-consensual fairness-based obligation to abide by the outcome of a fair coordination scheme of which one has knowingly and willingly received the benefits. In other words, the root reason to coordinate and have a legal system is justice, but in conditions of reasonable disagreement about justice, it is combined with the participation in a coordinative scheme, and the auxiliary reason to abide by the coordination outcome is fairness-based although it cannot be triggered without the voluntary participation in a coordination scheme.

Secondly, I defended fair play obligations against their detractors. I argued that open public goods can be *willingly and knowingly accepted* through voluntary participation in the legal cooperative scheme in a way that is distinct from both tacit consent and mere benefaction. I also established that contemporary legal systems can be regarded as *cooperative schemes* on a very large scale in which one may choose to participate or not. This linked up with the argument I made for understanding coordination as one of the law's main functions at the end of the second part of the book.

Finally, I argued that this account of political obligations can be reconciled with Raz's *three conditions for the justification of authority*. The reasons coordinative law provides are non-instrumental and non-redundant reasons for action

which make a difference to individual reasoning. As such, the coordination-based justification of authority complies, first, with the dependence thesis. Secondly, it also complies with the pre-emption thesis, provided the latter is extended sufficiently to take into account the necessity of being aware of the existence of a coordination scheme for the reasons to abide by its outcome to apply. Finally, I argued that the normal justification thesis should be amended to take pervasive disagreement and the need to coordinate about justice into account. This implies, first of all, reconciling the normal justification thesis with the public dimension of legal authority, especially in conditions of collective coordination where we need to be aware of the existence of a coordination scheme and of the others' participation. Moreover, I argued that the normal justification thesis should be adapted by nuancing the substantive nature of the justification and by introducing an element of procedural coordinative justification which would account for disagreement over the justice of the outcome and hence for disagreement over the substantive normal justification thesis itself. This procedural element could be the condition of a minimal form of fairness exemplified in the majority rule, for instance, that is to say the condition that all dissident opinions have had an equal say and vote in a coordinative process where they know that they would not reasonably converge and therefore need to coordinate on any rule rather than having none.

14

Democracy, Disagreement and Disobedience

INTRODUCTION

> Civil disobedience is a feature of our political experience, not because some people are virtuous and others wicked, or because some have a monopoly of wisdom and others of ignorance. But *because we disagree*, sometimes profoundly, in the way independent people with a lively sense of justice will disagree, about very serious issues of political morality and strategy. So a theory of disobedience is useless if it declares only that people are right to disobey laws or decisions that are wicked or stupid, that the rightness of the disobedience flows directly from the wrongness of the law.[1]

AS EXPLAINED AT length in this book, reasonable people disagree sincerely about issues of justice in contemporary pluralistic societies and this even after democratic deliberation has reached an end.[2] Despite, or more precisely because of the fact of reasonable pluralism, it is also often taken for granted that the democratically adopted laws of a (nearly) just state should be obeyed as the fairest mode of conflict-settlement and coordination.[3] Things are not as easy as they appear, however. First of all, it suffices to observe our daily violations of the law, such as breaches of the speed limit, for instance, to see that *we do not always feel morally obliged to obey the law of a just state and this despite the law's claim to obedience*. I discussed this phenomenon in the prior chapter and argued for a piecemeal conception of coordination-based authority that leaves a scope for other grounds of authority or even for individual cases where people are not bound by law. Secondly, and this will be our object in the present chapter, there are more and more situations in which we need to coordinate our actions, do in fact take part in a fair coordinative effort, are morally obliged for that reason to obey the law and do not want in any way to limit our loyalty to a just and democratic constitutional state, but where our reasonable disagreements about justice, and the *sometimes deep evaluative conflicts between law and morality that*

A very early draft of this chapter was presented at the University of Bern in November 2001 under the title 'Autorität und Widerstand.' I would like to thank all participants for their comments and critiques.

1 DWORKIN, 1985, ch 4 (emphasis added).

2 See WALDRON, 1999A, 93.

3 See Chapters 7 and 13.

result from them, lead us to breach the law on some issues. In extreme circumstances, people may not be satisfied with the existing legal means of contestation, and may have to resort to illegal means either to exempt themselves from what they regard as leading them to commit an injustice or to ask for a reconsideration by the majority. What should we then hold of the extent of coordination-based legitimacy of the law's claim to obedience in pervasive conditions of moral disagreement and what are the limits of the prima facie obligation to obey democratic law in those conditions?

The paradoxical issue of the limits to the duty of obedience in a democratic and relatively just constitutional state, when people find law unjust and reasonably disagree with it, is a perennial one. It dates back to Antigone's resistance to the unjust orders given by the tyrant Creon who refused her brother an authentic burial ceremony or to Socrates' obedience and submission to a capital punishment that was unjust despite being democratic.[4] More recently, the question has been revived in the twentieth century by the struggles of Martin Luther King or Mahatma Gandhi. Why then re-open the debate at the close of this book? There are two main reasons for this. First of all, these questions are still *very topical* and in fact there is a resurgence of cases of civil disobedience and resistance in contemporary liberal societies. Secondly, the fact of *reasonable disagreement* on matters of justice sheds a new light on the issue.

Given the account offered in this book of the law's legitimacy that is founded on the law's ability to coordinate our actions on contested issues of common concern, the law cannot avoid making claims that will be at odds with the sense of justice some of us have. In fact, as I will argue, the moral weight and legitimacy, that should be attributed to the law as a product of a procedure aiming at settling reasonable disagreement, are closely related to the reasons the law offers for being obeyed in a democracy.[5] Given this basis of legal authority, people will often find themselves under a moral obligation to participate in a legal scheme that they regard as undesirable on grounds of justice.[6] Thus, if law's main authority is based on the need to coordinate our actions in the face of disagreement about justice, then not only can the objective standard of justice not be used as a threshold for justified resistance, but the fact of moral disagreement itself and individual claims to detain the objective right answer can hardly constitute a general justification for disobeying the law without further qualifications either; law cannot be said to be in crisis and its authority limited simply because it conflicts with the firm and conscientious moral convictions of the individual citizen in conditions where people with diverging opinions have started to fairly coordinate their actions. Hence the need to re-examine the constitutive elements of resistance and disobedience to the law, its potential justifications and their limitations in the light of disagreement. The present chapter is structured as follows. In a first section, I will discuss where the *authority of democratic law* may be said to lie. The second

[4] See Müller, 2002, 151 ff on Antigone's resistance.
[5] Compare Waldron, 1999a and Singer, 1972. See also Wertheimer, 1999, 181.
[6] See Waldron, 1999a, 7.

section will *present the different concepts* that are implied in the larger concept of resistance to law in a democratic constitutional state. In the third and final section, I will examine whether and how these forms of resistance can be *justified*.

I. THE AUTHORITY OF DEMOCRATIC LAW

Having established that the law can claim coordination-based authority on most of its citizens in the prior chapter, it is interesting to see which law-making *procedures* can claim to produce authoritative law. An authoritative law-making procedure needs to ensure coordination efficiency, but also inclusiveness and fairness. In this respect, I will argue that democratic procedures not only constitute good coordination procedures, but amount to the fairest and hence to the most legitimate coordination procedures in circumstances of reasonable disagreement.[7]

When a democratic decision is made by a majority of equal votes, the members of the group, who are voluntarily taking part in the procedure, have a special reason to respect and obey it, even if they disagree with the outcome on grounds of justice. This obligation to obey the law and to abide by its pre-emptive reasons can be grounded in the right to *equal say* in collective decision-making that respects and benefits all voluntary participants in the democratic cooperative scheme,[8] and hence in the fairest compromise *qua* process one may strike in circumstances of reasonable disagreement.[9] This argument for the authority of democracy is based on the same pattern as the fair play argument I made before for the coordination-based model of legal authority more generally.[10] If one thinks of the democratic constitutional order of legal procedures as a scheme of social cooperation, then one can say that (i) if one has intentionally gone along with the practice and has accepted the benefits of its operation, *and* (ii) if this operation allows for equal representation of one's dissenting opinions, then one has a prima facie obligation based on the fairness of the scheme to abide by the outcome of its procedures when one's turn comes.[11]

In fact, the majority rule *qua* coordination procedure not only fulfils all the conditions of coordination-based authority, but also respects the normal justification thesis better than other fair coordination schemes. By protecting the equal participation of all, majority rule, and democratic law-making procedures more generally, protect the *general* fairness of the distribution scheme and not only

[7] This should not be taken to mean that non-democratic modes of coordination cannot fulfil the conditions of legitimate authority, but only that democratic modes of coordination clearly fulfil them better.

[8] See WALDRON, 1999A, 102 ff.

[9] See Chapters 7 and 8. See also SINGER, 1972, 32.

[10] See WALDRON, 1999A, 103–5. See also HAMPTON, 1997, 104 ff.

[11] See SINGER, 1972, 45–59. See also RAWLS, 1999C, 12. See also KUFLIK, 1977, 320: people in the minority 'will think of themselves as incurring a *prima facie* obligation of "fair-play" to go along with what results from a fair procedure in which they have actually participated.'

the *individual* fairness of the balance between the benefits received and one's share in the cooperative effort. Of course, for obligations to arise out of this model, minority rights and rights of equal participation must be respected in each individual case.[12]

II. DISOBEDIENCE TO DEMOCRATIC LAW

Imagine that you have a prima facie coordination-based obligation to obey specific democratic laws. Think then of the case where you consider that there is some deep injustice in those laws and that as a result you disagree fiercely with them. What would be the appropriate behaviour for you to adopt? One may think of three main alternatives in such a case. First of all, you could simply assume that you have had the *same chance as others to participate* and express your dissent during the democratic process. As a consequence, you should therefore *remain quiet and obey the law*. Secondly, you could also decide to *express your dissent further through the legal procedures in which resistance is institutionalised in a democratic constitutional state, and then obey the law, whether or not your dissent has been heard.* These institutional and non-institutional, but legal and peaceful means of '*legal resistance*' are, for instance, passive resistance, authorised protesting rallies, etc. Legal resistance partakes of the conviction that disagreement is an integral part of politics that does not simply stop when a law has been adopted and the democratic process has come to an artificial closure dictated by time constraints. Finally, you could decide that legal means of expressing your dissent are not sufficiently effective or are subverted by the majority's views, and choose *illegal resistance* or *resistance stricto sensu*. This is the type of resistance one usually has in mind in this context. It is important to distinguish between two main types of resistance, depending on whether it is oriented against the *state system* as a whole or merely against some of its *laws*[13]: large-scale resistance and small-scale resistance.

1. Large-scale Resistance: Revolutionary Resistance

When resistance is oriented against an illiberal or unjust system, it is called *large or system resistance,* as well as *revolutionary disobedience*[14] or *militant resistance.*[15]

This type of revolutionary resistance to a political system as a whole is by definition not usually legitimate in a constitutional state. However, it is difficult

[12] See KUFLIK, 1977, 318. See also RAWLS, 1999C, 126.
[13] On the distinction, see RHINOW, 1984, 11.
[14] RAZ, 1979, 263.
[15] RAWLS, 1971, 363.

in practice to distinguish a constitutional state governed by the rule of law from a state in which the rule of law is undermined. The boundaries between those two states are vague.[16] In fact, there is no constitutional state that can entirely escape the danger of being perverted. History shows that constitutional states could often have been saved by revolutionary means. It follows, therefore, that some forms of resistance against the system may have to be allowed or at least tolerated in a constitutional state too, in order to avoid it once being too late and the rule of law being entirely subverted.

In the long history of resistance against tyranny in the story of mankind, different criteria have been progressively developed in this respect. First of all, there must be a situation of *social urgency*, where, for instance, a criminal authority uses its power in order to threaten and endanger the population physically or psychologically. Secondly, resistance presupposes the *blatant abuse of state power*, such as, for instance, an attack on the common interest. Thirdly, resistance only comes into consideration as a subsidiary means when all legal and peaceful means have been exhausted. In other words, resistance should be the *ultima ratio*. Another conception would threaten public security and in some circumstances even lead to anarchy. Fourthly, resistance should be *proportional to its aim*. Finally, resistants should possess sufficient *insight* and should only act for the good of the community and not only in their own self-interest. Revolutionary resistance is a difficult and rare occurrence and it will therefore not be discussed any further in this chapter. Accordingly, the concept of resistance will be used in this chapter to refer to small-scale resistance and civil disobedience in particular, although its strict linguistic use, at least in German legal writings, usually identifies system resistance.[17]

2. Small-scale Resistance and Civil Disobedience in Particular

The type of resistance at stake in this chapter is *small-scale resistance* or *resistance in the constitutional state*. It is also called *norm resistance* since it is oriented against individual legal norms rather than against the existing political and legal order as a whole. Although the distinction is not always easy, there are two main forms of norm resistance in the constitutional state that one may distinguish along the lines of the publicity/privacy divide, the instrumental/defensive divide and the political-moral/ethical motivation divide: *civil disobedience* and *conscientious objection*. For reasons of space, this section will focus on the former only. After a general presentation of the concept of civil disobedience, I will present some of its constitutive elements.

[16] See Kaufmann/Backmann, 1972, xii.
[17] See, for instance, Dreier, 1983a and Habermas, 1984.

a. General

The concept of civil disobedience is a very *controversial* one.[18] In the course of political history and thanks to doctrinal development, different constitutive elements have gradually been distinguished. Although civil disobedience is as old as Prometheus' disobedience of Zeus and Antigone's defiance of Creon's edict, the theory of civil disobedience that we now know was developed in the middle of the nineteenth century by the American thinker Thoreau. Thoreau is still famous for his refusal to pay tax in protest against slavery.[19] The idea was then developed further in the 1950s mostly in America especially in relation to mass civil disobedience against the Vietnam draft and within the civil rights movement's battle to introduce legislative amendments and social change. In Europe, the idea of civil disobedience only became familiar in relation to the peace movement in the 1980s and to Greenpeace activism. In Germany and Switzerland, in particular, the notion became heavily discussed after the Second World War and especially during the 1980s. As a result, although the concept that is used both in the German and Anglo-American worlds is roughly the same, conceptions differ greatly. German discussions have traditionally focused on system resistance and disobedience to tyranny such as civil war, rather than on small-scale resistance and civil disobedience as in the Anglo-American context.[20] Of course, things started to change in the 1980s in Europe with growing concern for pacifism and, most recently, issues of global justice.

A presentation of the different conceptions of civil disobedience that were developed in the history of the concept would go beyond the scope of this chapter. In short, the term refers to the *refusal of citizens to abide by the laws* of a legitimate state authority. Disobedience is *civil* because it is part of the political life of the society, in the sense that it is the deed of citizens in a public forum.[21] One of the most widely received definitions of civil disobedience is Rawls.' According to him, civil disobedience is '*a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.*'[22] This definition is inspired by Bedau's conception of civil disobedience. According to this definition, someone exercises civil disobedience when and only when he acts illegally, publicly, non-violently, out of conscientious reasons and with the intention to resist to a law or to prevent the government from applying some political measures or decisions.[23]

b. Some Constitutive Elements

In the following I will discuss each of these constitutive elements in more detail. They are (i) illegality, (ii) publicity, (iii) political and moral motivation,

[18] See Remele, 1992, 93.
[19] See Thoreau,1960, 9.
[20] On the imperfect overlap of these conceptions, see Hassemer, 1985, 328.
[21] See Bedau, 1991, 7.
[22] Rawls, 1971, 364.
[23] See Bedau, 1991, 661.

(iv) non-violence, (v) exhaustion of all legal recourses and procedures and (vi) acceptance of the consequences of one's act and one's punishment in particular. While the first three conditions are commonly recognised, the others are less steadily present in the various definitions offered in the literature.[24]

i. Illegality

Resistance consists in *the conscious breach of a valid legal rule*. In order to speak of true resistance to the law, there should be a *legal* obligation to obey the law and hence a *valid legal norm at the time of the illegal action*. If there is no valid law at that time or if the law is not breached, then resistance is not illegal and there is therefore no resistance *stricto sensu*. Since the relevant time for the breach of a valid legal norm is the moment of the disobedient action, an ulterior judicial decision over the invalidity of the rule, that is regarded as unjust, is irrelevant to the qualification of an act of resistance. Of course, this is not to deny that it may provide it with an a posteriori legal justification, as we will see in the next section. Similarly, the dissenters' belief in the invalidity of the law they disobeyed may be taken into consideration in the evaluation of the moral justification or at the level of the determination of the sanction, but it cannot render the law invalid and disobedience legal.

True, some authors, and natural lawyers in particular, could object that, if resistance is justified on the grounds that a law is unjust, then that law was never valid and there can be no talk of illegal resistance. This question is among the most controversial ones in legal philosophy and I cannot obviously do justice to it here.[25] Let me say, however, that no serious legal philosopher would state the direct relationship between mere injustice and invalidity in such a way nowadays; this would lead to blatant legal insecurity and thus to a threat to the rule of law.[26] Of course, this is not the last word on the question; injustice cannot take priority over justice just on grounds of legal security. Limitations to legal security should, however, be kept to a minimum and be limited to extreme cases of injustice, for instance in case of blatant injustice, by reference to Radbruch's famous formula.[27] A question remains as to how to determine whether such a blatant legal injustice has occurred. The difficulty is naturally, in conditions of persistent and pervasive reasonable disagreement, that, except in rare and extreme cases, no one can say what justice consists in with sufficient certainty and unanimity to allow for a watertight limitation of legal security and trust.[28]

[24] The more restrictive the definition of resistance is, the more justifiable it is too and vice versa. See Remele, 1992, 93. See also Raz, 1979, 265.

[25] See Remele, 1992, 97 ff.

[26] See Finnis, 1980; Finnis, 1996; Finnis, 2001 for the new natural law's position on the relationship between law's moral rightness and its validity.

[27] See Radbruch, 1946, 105 ff: 'In the case where justice is completely set aside, where equality that is at the core of justice is consciously negated by positive law, then the law is not only unjust law, but it even loses its legal nature.'

[28] See Alexy, 2003d for an attempt at providing such criteria.

ii. Publicity

An act of civil disobedience should be public; it cannot amount to a private and discrete action, for then it is at the most an act of punctual self-exemption or, in other words, conscientious objection. To borrow Rawls' terms, civil disobedience can be compared to a public speech or an *appeal to the majority* that expresses deep and conscientious political convictions that are in conflict with the result of democratic deliberations.[29] As I explained before, civil disobedience is more than the consequence of moral disagreement, the response to which is a fair and democratic decision and hence a coordination-based duty to obey the law. It reflects further disagreement with that mode of conflict-settlement or its content.[30] As such, it amounts to a protest *oriented at the majority*. It should therefore take place in the public sphere.[31]

The ways in which this form of political protest is concretised are flexible. First of all, the relationship between the law which is disobeyed and the law whose amendment is required may be *direct* or *indirect*. In other words, the laws that are breached need not always be the laws against which the protest is oriented.[32] For instance, street blockades may not aim at protesting against traffic laws, but, on the contrary, against the peace-threatening capacities of the army whose barracks are thus blocked. Secondly, civil disobedience may be *active* or *passive*, although purely passive civil disobedience is rarer.[33] Thirdly, civil disobedience that is instrumental and strategic in the sense that it aims at changing the law, may be *persuasive* or merely *confrontational*. Dworkin distinguishes, for instance, between strategies that aim at convincing the majority to change its position about the morality of something and modes of action that do not aim at conviction, but aim at showing to the majority the price it could end up paying for not amending its decision.[34] Raz shares this distinction, but qualifies it by opposing effective disobedience to expressive disobedience.[35]

iii. Political and Moral Motivation

Civil disobedience to law in a just and democratic constitutional state should be *morally motivated*. It should therefore be distinguished from free-riding or other forms of self-interested resistance, such as not stopping at a red light when there is no one waiting to cross the road. This kind of moral motivation is usually described as conscience-dictated. It amounts to more than just subjective

[29] Rawls, 1971, 366.
[30] See Singer, 1972, 104 ff.
[31] By 'public sphere,' I mean both the institutional and non-institutional spheres of public debate, ie public areas of civil society and political society. See Young, 1999b; Besson, 2005d.
[32] See Greenawalt, 1989, 236.
[33] See Remele, 1992, 64 ff. See the discussion that took place in the Israeli Supreme Court in the *Zonshein* case about the moment at which an act of conscientious objection becomes civil disobedience. See *Zonshein v Judge-Advocate General* HCJ 7622/02 (not published, delivered 30 December 2002).
[34] Dworkin, 1985, 109.
[35] Raz, 1979, 264 ff.

conscientious convictions, however. It must follow reasons that are accessible to all reasonable citizens in the public forum. The qualification 'political and moral' is therefore meant to cut civil disobedience's motivations off from integrity-based motives that do not aim at increasing the awareness of the political community, but merely at refusing obedience for intimate ethical reasons. This kind of disobedience is also called *conscientious objection*.[36]

One should note that the political and moral nature of the motivations does not mean that they should consist in a *common moral view*, of which the majority ought to be reminded of. The latter could well be asked to reconsider its decision in the light of reasons that it does not share. The former approach is Rawls', however. According to him, civil disobedience 'addresses *the sense of justice of the community* and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected.'[37] This conception of a single sense of justice results, as we saw earlier in the book, from Rawls' liberal rationalism and his content-based or normative conception of public reason.[38] This is not the place to discuss Rawls' theory of justice as a whole, but let me state why I think that this approach is flawed with respect to the justifiability of civil disobedience. First of all, it presumes that it is *possible to determine in advance of our democratic debates which moral and political conceptions are right and hence which ones people should agree on*. As such, it is not very plausible and holds more of the ideal than of a true democratic state. Secondly, the conception also presumes that the views which are not common and hence not in the majority are necessarily wrong. In pluralistic societies, in which reasonable people constantly disagree about justice and the right, such a conception is either *too restrictive or not plausible*. As Singer argues, if disobedience is an appeal to the community, why can it only be an appeal which invokes principles which the community already accepts?[39] The contrary would lead to the elevation of the conception of justice held at present into a standard valid for all times. Civil disobedience aims in most cases at proposing views that differ from those of the majority by inducing the latter to rethink its conception of justice. Finally, the Rawlsian view excludes principles that originate in *religious or personal ethics*. This is an exclusion that is regrettable, since often purely moral questions enter political debates and generate disagreement and disobedience.[40] In fact, religious and personal values and reasons may only count as valid justifications of civil disobedience when the reasons to obey the law in the first place include similar reasons and values.[41]

[36] This distinction is a difficult one to hold in practice and rests on a very slight difference between states of mind. This is actually an issue that came out in the *Zonshein* case about 'refuseniks' in Israel in the context of the passage from selective conscientious objection (objection to service in the occupied territories and not to armed service generally) to civil disobedience *stricto sensu*.

[37] Rawls, 1971, 364 (emphasis added).

[38] See Chapters 2 and 4.

[39] Singer, 1972, 84 ff.

[40] See Singer, 1972, 84 ff; Gans, 1992, 4. See more generally Waldron, 1993c; Finnis, 1998; Bohman, 2003. See also Chapters 1 and 4.

[41] Gans, 1992, 4 and ch 4.

iv. Non-violence

It is commonly held among theorists that civil disobedience should be non-violent. This follows from the view that associates civil disobedience with a public appeal to the majority.[42] A clear line between non-violent and violent disobedience cannot be drawn, however. Some authors go as far as to require the absence of violence *qua* damaging behaviour to objects and not only to people. Usually, however, what is meant is that violence *qua* behaviour that injures human beings or even kills them is regarded as irreconcilable with civil disobedience.

Others do not regard non-violence as a necessary element of civil disobedience. Thoreau wrote, for instance, in relation to his resistance against slavery, that he wished neither to kill nor to be killed, but that he could well imagine circumstances in which neither of those two could be avoided. Raz, as well as German authors like Dreier[43] and Leiser, do not exclude violence in every case either, although they insist that violence should never be targeted at people. According to Raz, the relationship between non-violence and civil disobedience depends on whether or not one aims at considering the latter as a right or not.[44] Indeed, as I said before, if one aims at a large justification for civil disobedience, or indeed at acknowledging the existence of a right to civil disobedience, then limiting the extent of that right according to strict constitutive elements is necessary.[45] Conversely, if one opts for a loose definition of civil disobedience where violence may be used in some cases, then it will be more difficult to provide a broad justification for it or even for a right to civil disobedience.

v. The Exhaustion of Legal Means: Ultima Ratio

In principle, all legal means and proceedings should be exhausted before one resorts to civil disobedience. Democracy provides dissenters with the means and places to express their dissent publicly and these means should have been used before a democratically legitimate form of civil disobedience can take place. As Habermas puts it, civil disobedience amounts to the intentional breach of specific legal rules, without aiming at jeopardising the legal system as a whole.[46] It consists, in other words, in a form of resistance that fits into the institutional system of contemporary democracies and cannot therefore go without respecting that system. Frankenberg describes this specificity as *system-immanence*; civil disobedience does not aim at restituting a status quo ante, it is not revolutionary but merely evolutionary.[47] Civil disobedience does not aim at radical change, but at limited change through a collective political learning process. On this approach, dissent is at the core of an *ever learning democracy.*[48] It follows,

[42] See eg Müller, 2002, 151–52.
[43] Dreier, 1983b, 587.
[44] Raz, 1979, 268.
[45] See Raz, 1979, 265, 267.
[46] See Habermas, 1984, 99.
[47] See Frankenberg, 1984, 270.
[48] See Rhinow, 1984, 31–32, 38. See also Postema, 1995b, 354. See also Chapter 4 on the importance of disagreement for a healthy and lively rule of law.

therefore, that before disagreement can justify actual disobedience, it must have been given its full chance to influence democratic debates through ordinary channels.

The *ultima ratio* nature of civil disobedience is not entirely uncontroversial, however. As Raz rightly contends, to make the exhaustion of legal and political means an absolute condition of civil disobedience would amount to *normalising* what should, on the contrary, be an *exceptional alarm signal*.[49] Moreover, there are cases in which the matter may be very urgent and in which the lengthiness of legal and political procedures is part of the problem. In such cases, it could even be unjust to wait for the issue of the legal and political process. Furthermore, civil disobedience is often a less damaging means than legal means of protest like strikes in essential sectors such as medical and social care, for instance. Finally, it is very often part of the strategy of civil dissenters to object that they have not been heard or listened to in a sufficient way and thus that the legal and political procedures have been exhausted. Thus, one may argue, with Greenawalt, that, in general, it should suffice that *some* efforts have been made to get ordinary political redress.[50]

vi. The Acceptance of the Consequences of One's Actions and in Particular One's Punishment

The acceptance of the consequences of one's actions, and in particular of one's punishment for having breached the law is regarded by most authors as a constitutive element of civil disobedience. By reference to Gandhi's and Luther King's spirit of non-violent resistance, the readiness to accept one's sanction is regarded as the expression of one's willingness to suffer for moral rightness. According to Rawls, in the democratic constitutional state, this readiness is the logical consequence of one's faith in the system and the rule of law. It corresponds to an acknowledgement of the legitimacy of the political order and majority decisions in general,[51] but also of the legitimacy of the particular decision or law one is breaching despite being prima facie legitimately bound by it.

As Habermas aptly summarises the issue, engaging in civil disobedience is a risk the decision of which each individual should take for himself[52] and that implies accepting in advance all the consequences such an action implies. It is important, however, not to confuse the acceptance of one's punishment with renunciation to any form of defence and judicial means of justification of one's acts. Similarly, the judiciary should not presume the illegality of the act without further examination of the facts merely on grounds of an individual's readiness to accept the consequences of their illegal action. As Dworkin puts it, when an act of civil disobedience can achieve its aim without punishment, then this is in general much better for all participants.

[49] See Raz, 1979, 275.
[50] Greenawalt, 1989, 229.
[51] Rawls, 1971, 366.
[52] Habermas, 1984, 112.

III. THE JUSTIFICATION OF CIVIL DISOBEDIENCE

Acts of norm resistance like civil disobedience are *illegal per se*. A priori it seems therefore that no one may legally act in this way. But does this mean that one may never be justified in disobeying what one regards as an unjust law? It is useful to distinguish between *legal* and *moral* justifications. The question of the moral justification of civil disobedience only arises, indeed, first, when there is both a moral and a legal obligation to obey the law,[53] and secondly, when this obligation is prima facie and may therefore be balanced against reasons to disobey. For instance, although there is a legal obligation to stop at a red light in the middle of an empty plain at 3 am, there is not necessarily a moral obligation to do so in the absence of coordinating or expertise reasons; in such a case, no moral justification is required for disobeying the law, but a legal justification will have to be provided. Finally, the existence of a *right* to civil disobedience also needs to be assessed.

1. Legal Justification

Some authors, especially in the German legal doctrine, contend that there can be a *legal* justification of acts of civil disobedience. Legal justifications can be given a priori and thus amount to a formal legalisation or they can be given a posteriori and thus play a role in the imputation or sanction determination process.

a. A Priori Justification

Three main objections may be brought forward against a priori justifications.

First of all, the *legal theoretical objection*: it follows from the presentation of the different constitutive elements of the concept of civil disobedience that the illegality of the act of disobedience is crucial. It would be contradictory, therefore, to justify such actions a priori and thus render them legal. While some forms of dissent and protest are institutionalised and channelled in a democratic constitutional state, acts of resistance that fall outside these forms of dissent cannot be legalised without undermining the *raison d'être* of the democratic state and legal order.

Secondly, the *legal political objection*: legalising civil disobedience would *normalise an exceptional political action* and undermine its function *qua* alarm signal.[54] If all personal risks in disobeying the law are excluded, then the moral

[53] This actually raises difficulties for those accounts of political and legal authority that rely on a purely substantive test, like Raz's normal justification thesis, rather than a minimal substantive *cum* procedural one like the account proposed in this book. The former's scope for recognising grounds of justification of civil disobedience as well as a right to civil disobedience are indeed bound to be more limited than others, as we will see. By contrast, when legitimacy relies on fair coordination procedures, there is more scope for the recognition of error and hence for the justification of civil disobedience.

[54] Habermas, 1984, 106.

foundation itself of illegal protest becomes questionable.[55] Moreover, its role as an appeal to the majority would also be undermined, since valid law represents the outcome of fair and democratic coordination in the face of disagreement and hence respect for majority rule. In order to be able to fulfil its function in a democracy, civil disobedience should remain 'suspended between legitimacy and legality,' as Habermas elegantly phrases it.[56]

Finally, the *legal conceptual objection*: Dreier, one of the defenders of the legalisation of civil disobedience, argues that legalisation would allow citizens to justify themselves in a much easier way, ie entirely at law through legally applicable formulae.[57] True, many of the legitimating principles that are used in the moral justification of civil disobedience are already part of what we consider as our constitutional law.[58] Fundamental rights and principles that are applied in such cases, however, are moral concepts that are essentially contestable and this whether or not some of their conceptions are entrenched in a constitution or in the law.[59] Were it not so, the absurd consequence would be to submit the justification of disobedience to majority decisions to the very principles and conceptions chosen according to those majority decisions themselves.[60]

Of course, the practice comprises many exceptions to these *desideranda*. For instance, article 2 of the French Declaration of Human Rights mentions a right to resistance[61] and article 20 paragraph 4 of the German Constitution also entails an expressive guarantee of the *right to (system) resistance*. Most authors agree, however, that this legalisation of the right of resistance is merely *symbolic*. A legal system simply cannot, for logical reasons, institutionalise in a way that is internal to the system a form of control that is external to it.[62] Kaufmann says that the impossible has been attempted through this guarantee: a right, that in its nature can only be supra-positive, has been made positive, or, in other words, the illegal has been made legal.[63]

b. A Posteriori Justification

Does the a posteriori justification according to superior law of an a priori illegal breach of inferior law fare any better? It seems to. Indeed, the existence of a *prima facie illegal* breach of a *prima facie valid* law is sufficient to constitute an act of civil

[55] Habermas, 1984, 106.
[56] Habermas, 1984, 106.
[57] Dreier, 1983a, 54 ff; Dreier, 1983b, 593.
[58] See Habermas, 1985, 113.
[59] See Chapters 1, 2 and 3 for a discussion of the role of moral concepts in the law.
[60] See Hassemer, 1985, 340–41.
[61] See Kley, 2001, § 17, 12 ff on the reception of art. 2 in Swiss law.
[62] See eg Kley, 2001, § 17, 27 ff who speaks of the right to resistance as a *pre-constitutional right*, an emergency exit enabling us to escape the constitutional order when it is in danger; according to Kley, however, this door is no real exit, but is an invisible door, a mere thought experiment. See also Müller, 2002, 154.
[63] Kaufmann/Backmann, 1972, x.

disobedience *at the time of the act of disobedience*, even if later on that law is regarded as being a posteriori invalid and/or the disobedient action as being legal and hence legally justified.[64]

Some authors have objected that, in such circumstances, there is retrospectively no breach of a valid law and hence that the person who believed in the success of her legal justification has therefore not intentionally refused to abide by valid law.[65] This approach seems too generous, however. It excludes actions which at the time of the breach of law could be identified as civil disobedience, merely because their justification has been invoked judicially in the meantime; what matters is that the people refusing to abide by the law know that they are disobeying valid law and thus that they are acting illegally even if they claim to have legal or moral justifications for it.[66] True, in the case where a legal justification is accepted, it is also very often admitted that not only the act was not illegal, but that the law itself was not valid. In such a case, no moral justification is obviously needed any longer; there was indeed no moral obligation to act as the law required in the first place since there was no valid law to obey. Even if an a posteriori legal justification is not accepted, the fact that the dissenter thought he was legally justified in acting in this way, calls for an alleviated burden of proof regarding his moral justification, especially when the law was indeterminate.[67]

2. Moral Justification

Civil disobedience should be able to benefit from a certain degree of moral justification in a democratic constitutional state. After a few general considerations on why this is the case, I will turn to more precise grounds for this justification of acts of civil disobedience. Once this has been done, some necessary limitations to justified civil disobedience will be discussed.

a. General

When people disagree morally with the law and hence resort to civil disobedience, they are doing something illegal, but they usually claim to have a moral justification for it. Since most obligations to obey the law are only prima facie, stronger moral reasons not to obey legitimate law may be given and may therefore tilt the balance of legitimacy. However, as one could foresee in circumstances of reasonable disagreement, exactly what these justifying principles may be is a matter of some moral controversy. Thus, a *working theory of civil disobedience*, to borrow Dworkin's terms,[68] cannot make the rightness or

[64] See Remele, 1992, 100; Dreier, 1991, 58.
[65] See Greenawalt, 1989, 229.
[66] On this debate, see Remele, 1992, 97 ff.
[67] See Dworkin, 1977, 206–22 on the indeterminate constitutional status of a statute that is disobeyed.
[68] Dworkin, 1985, 106.

justification[69] of civil disobedience depend on which side is right in the underlying controversy, but should on the contrary focus on what it would seem right for a person to do given her circumstances. The standard cannot therefore avoid being subjective albeit minimally reasonable.[70]

This open attitude towards the moral justifiability of civil disobedience is quite new. For Hobbesian and Schmittian theories of the state, and the maxim of authoritative legalism according to which 'law is law,' civil dissenters violate the principle of legal security and hence the *raison d'être* of the state.[71] On this strict view, political resistance has lost all justification in a democratic constitutional state in which moral dissent with unjust law has been channelled into different institutional or non-institutional means of expression. Under these circumstances, disobedience is equivalent to violence and it cannot therefore be justified under the rule of law. This classical view was also that of Kant and Spinoza.[72] According to them and others, illegal resistance in a legitimate civil state is unjustifiable, except in cases of physical urgency.[73] Of course, Kant, and in this he distances himself from Hobbes,[74] does not deny that we should react to injustice in the law and in fact he contends that this is even a duty of citizens.[75] However, this should be done peacefully and legally thanks to the *freedom of the pen* and the expression of our dissenting opinions.[76] As I explained in my introduction, this concern is not unjustified. On the proposed account of coordination-based political and legal authority, the mere fact of reasonable disagreement cannot justify *both* the need for authority and the need for civil disobedience. A further element of justification is needed that explains how once one has started coordinating and is bound to abide by the outcome of the coordinative scheme on grounds of a mixed semi-voluntary duty to coordinate for reasons of disagreement, one may be justified in claiming a shift in the balance of legitimacy on the very same grounds.

I will discuss what this decisive element in tilting the balance could be in the next subsections, but for the time being it is important to understand how modern democratic legal systems and societies differ from those in which those accounts of civil disobedience were developed. If one observes, first of all, the *historical context* in which those claims were made, their strong opposition to the justifiability of civil disobedience becomes more understandable and in a sense less pertinent in contemporary pluralistic democracies. Moreover, despite

[69] I am not using 'justification' in a strict and absolute sense of moral rightness here. Contra: RAZ, 1979. See Chapters 4, 7 and 13.

[70] See Chapter 4.

[71] HOBBES, 1999, ch 5, 32–33.

[72] See SPINOZA,1951.

[73] See HOBBES, 1999, ch 21, 153. See KANT, *Streit der Fakultäten,* 1991, VI, 287. See also KANT, *Rechtslehre,* 1991, IV, 440.

[74] See on this distinction, WALDRON, 2002C.

[75] See on the distinction between *public* disobedience and *private* (secret) disobedience: KRAUT, 1984, 115 ff on the question of Socrates' disobedience to the law in the *Crito*. It seems that Socrates would have regarded private disobedience as unjust for it could 'destroy the city,' but public disobedience as a common risk in politics.

[76] See KANT, *Gemeinspruch,* 1991, VI, 161.

the institutionalised opportunities to express dissent in contemporary democracies, *the causes for moral mistakes or misjudgements*, or more generally the scope for divergent conceptions are more important in contemporary pluralistic and complex societies than in more homogeneous societies.[77] Finally, recent historical experience teaches that marginal but responsible civil disobedience has played a *crucial role qua democracy-immanent form of resistance* in the struggle against violations of the public interest and human rights.

b. Civil Disobedience Qua Democratic Test of Legitimacy

One of the major arguments for the justification of civil disobedience that has been made in modern democratic theory is its role as a *litmus test for the moral legitimacy of democratically adopted laws.*[78]

Democratic procedures and institutions cannot always provide, in view of the complexity of contemporary political debates and the need for closure, all the means for the contestation of existing laws and the incorporation of new principles.[79] It has long been recognised, therefore, that there is a danger of injustice in democracy and this risk is enhanced in current circumstances of pervasive and persistent reasonable pluralism.[80] In those conditions, civil disobedience provides the ideal test of the balance of legitimacy of democratic decisions and a check on majority rule; what it does is *prod the majority into reconsidering a decision it has taken*. Habermas speaks, therefore, of this test as being an *essential part of the political culture of a mature democratic polity*[81] and as the *guardian of legitimacy* in a democratic constitutional state.[82] In a similar way, Rawls regards civil disobedience as one of the *stabilising devices of a constitutional system*.[83]

This justification of civil disobedience echoes the idea of a *living rule of law* developed earlier in the book, that constantly scrutinises and realises itself further through the perpetuation of disagreement within and about the law, rather than being static and measured only according to its translation in positive law.[84] This revised ideal of the rule of law is based on a *dynamic understanding* of the law and the constitution as incomplete projects that can get things wrong and need therefore to be revised constantly according to changing circumstances.[85] The ambiguous relationship of mutual reinforcement and limitation between the rule of law and disobedience hence reflects the *paradox of disagreement* as being both a force of convergence and a force of divergence; the rule of law can be seen

[77] See Chapter 5.
[78] Habermas, 1984, 101. See also Rawls, 1971, 372 ff.
[79] Singer, 1972, 84.
[80] See Bohman, 2003 on this 'new pluralism.' Thus, contrary to what Raz, 1979, 274, note 7 seems to believe, encouraging pluralism in society is desirable.
[81] Habermas, 1985, 112. See also Müller, 2002, 154.
[82] Habermas, 1984, 105.
[83] Rawls, 1971, 383.
[84] See Chapter 4. See also Kutz, 1994, 1020.
[85] Habermas, 1998a, 462.

as a response to disagreement, but disagreement in turn can be disruptive of the rule of law's coordinative functions, thus enhancing the need for law while providing legal and illegal means to constantly question and revise it. According to Rawls, 'along with such things as free and regular elections . . . , civil disobedience used with due restraint and sound judgement helps to maintain and strengthen just institutions.'[86]

This idea of legal change triggered through disobedience parallels the *dynamic approach to coordination problems and conventions* I developed earlier in the book.[87] There, I argued that the proposed coordination-based account of political and legal authority should be understood as a complex and iterated one which encompasses more than one coordination problem at a time and seeks a *dynamic equilibrium* rather than a static solution to each problem.[88] In these conditions, it should be clear that the legitimacy of a coordination-based decision or law should be open to constant re-examination and why a shift in the balance of legitimacy should never be excluded even by those who take part in the coordination scheme and are bound by its temporarily salient outcome. The *paradox* that lies in the *illegal* nature of this test of *legal* legitimacy is only apparent. If one is to question the foundations of the democratic constitutional state, only a marginal and exceptional method that lies outside the boundaries of the legal can constitute the necessary boost for a *learning democracy*. According to Habermas, the justification of civil disobedience flows therefore from the fact that it makes clear that there is a *tension* between the guarantee of legal security, on the one hand, and the claims to legitimacy of the democratic legal order, on the other.[89] Civil disobedience must, in order to retain its crucial function, preserve this very *gap between legality and legitimacy.*[90]

c. A Few Limitations to the Justification of Civil Disobedience

The justifiability of civil disobedience in determinate circumstances does not exempt us from having to remain cautious. It certainly does not turn civil disobedience into a morally recommendable or even a morally binding breach of law. After all, civil disobedience goes beyond legal means of questioning and resistance.[91]

[86] Rawls, 1971, 383.
[87] See Chapters 6 and 13. See also Gaus, 2002 for the critique of Waldron, 1999a.
[88] See on iterated coordination problems, Taylor, 1987; Hardin, 1982.
[89] See Habermas, 1985, 106.
[90] Habermas, 1985, 113.
[91] This raises the famous ethical objection of *generalisation* (see Chapter 6). This argument need not worry us when applied to civil disobedience, however. First of all, it is a mistake to believe that because it is not morally right that all citizens do something *collectively*, no one of them has the right *individually* to do it (Dworkin, 1978, 206). Secondly, this argument is based on an *empirical proposition* that cannot necessarily be discussed philosophically. As a matter of fact, if one refers to the empirical evidence we have on civil disobedience, one has to acknowledge that only a minority of the population has ever resorted to it and, even then, only for limited periods. Finally, since, as I argued before, the coordination-based obligation to obey the law is a *special* one rather than a general one, the lack of global coverage of the duty to obey should make people less fearful of the occurrence of punctual acts of civil disobedience to existing obligations.

More importantly, although their intentions are good, even those who invoke diverging reasonable moral insights can err. It is also true, however, that a working theory of civil disobedience in conditions of reasonable pluralism cannot make the rightness of any decision about civil disobedience depend on which side is objectively right in the underlying controversy.[92]

Given this book's account of law's legitimacy, that is founded on the law's ability to coordinate our actions on contested issues of common concern, the law cannot avoid making claims that will be at odds with the sense of justice some of us have. Thus, if law's main authority is based on the need to coordinate our actions in the face of disagreement about justice, then not only can the objective standard of justice not be used as a threshold for justified resistance, but, moreover, the fact of moral disagreement itself and individual claims to detain the objective right answer can hardly constitute a general justification for disobeying the law without further qualifications either; law cannot be said to be in crisis and its authority limited simply because it conflicts with the firm and conscientious moral convictions of the individual citizen in conditions where people with diverging opinions have started to fairly coordinate their actions. Traditional accounts seem therefore to be facing a *quandary*; neither objectivist accounts, such as Raz's, nor pluralist justifications of civil disobedience, such as Dworkin's, are able to provide value-neutral limits to the justifiability of acts of civil disobedience that are compatible with legal pluralism.

There is, in other words, a *shift in the object of disagreement* from the moment of ordinary dissent to that of civil disobedience. Disagreement about justice need not yet imply disobedience, and it can actually only be turned into disobedience if its object is transposed from justice onto democratic decision-making and its results.[93] If disagreement about justice calls for coordination about justice and the authority of a single legal rule that settles the conflict, and if one decides to get over that disagreement by taking part in the legal coordination scheme in which one has a strong moral interest, for instance by accepting its benefits, our diverging conceptions of justice *alone* can no longer justify disobedience; we need something more that can trigger the moral justification of disobedience to a coordination-based and hence a disagreement-based authority and this might have to do, for instance, with the limitations of the democratic amendment procedures or of the channels of judicial review, etc. There is a sense, therefore, in which civil disobedience constitutes the culmination point of reasonable disagreement in extreme circumstances only, once coordinating legal means of resistance and means of provoking a shift in legitimacy have failed. As a result, reasonable disagreement about justice *qua* cause of a coordination-based obligation to obey the law may well constitute the *value-neutral limitation to justified civil disobedience* that was missing for a plausible theory of civil disobedience.

[92] Dworkin, 1985, ch 4.
[93] See Singer, 1972, 104 ff.

In a nutshell, it is the disagreement-conscious and disagreement-based understanding of legal authority proposed in this book that paradoxically provides the theory of civil disobedience with the key to the apparent lack of moral limitation to the justification of civil disobedience in conditions of reasonable pluralism. Indeed, those who think that they must *disobey* the law in order to *disagree* with it are mistaken. What they are in fact disagreeing with is the outcome of a fair and democratic procedure they supported and took part in, in order to deal with disagreement[94] and this change in the object of their disagreement calls for *self-restraint*. The lack of determinacy and unity of justice should encourage people in a democracy to express and fight for their conceptions, while at the same time showing self-restraint about going too far in doing so.[95] If indeterminacy and disagreement should incite people to express their views against the majority for reconsideration purposes, it should also remind them of the coordinating and conflict-settling role of democratic procedures and hence of the coordination-based moral authority majority decisions have in the first place. As Rawls states, '*up to a certain point* it is better that the law and its interpretation be settled than that it be settled rightly.'[96] The key element, however, is to determine where exactly this point lies without falling into the very disagreement disobedience impersonates. There are three such value-neutral limitations to civil disobedience one should mention.

First of all, the justification of civil disobedience is only prima facie and it can therefore be set aside when the coordination-based reasons to obey the law are stronger or other stronger rights are at stake. It follows that it must be possible to distinguish, among rights or principles, those in respect of which the reasons given by democratic and fairly coordinative decisions have less weight. For instance, as Singer rightly contends, reasons to abide by the law on rights that are not immediately necessary for the preservation of a democratic government, like freedom of religion, are stronger than reasons to abide by the law on rights that are necessary for it, like freedom of speech.[97] Indeed, if democratic procedures are to perform their conflict-solving function, the individual must recognise that there are strong reasons for allowing a fair decision-procedure to determine which of these alleged rights are really to be treated as rights. This reasoning cannot, however, apply, for obvious reasons, to the rights that render those very decision-procedures fair in the first place.

Secondly, civil disobedience is oriented at the majority to whom it expresses discontent and a plea for reconsideration. As such, it can be regarded as a more or less direct *effort of persuasion* of the majority. It follows, then, as Singer suggests, that 'once it becomes apparent that the majority are *not willing to reconsider* their decision, disobedience must be abandoned.'[98] An illustration might be useful

[94] Singer, 1972, 104.
[95] See Habermas, 1984, 105.
[96] Rawls, 1971, 389 (emphasis added).
[97] Singer, 1972, 65 ff.
[98] Singer, 1972, 84 (emphasis added).

here. Take the case, for instance, of the outcome of a popular vote which some regard as profoundly unjust, and even as contrary to fundamental constitutional rights. In such a case, those in the minority may use all the legal channels of resistance, including parliamentary lobbying and judicial review. Once all those have been exhausted, however, it is clear that the majority will feel supported and is not likely to be willing to change its mind. Of course, those in the minority may also claim that they would rather not use those legal channels because they are biased or, they may claim, if they used them, that there are other illegal means one may use to convince the majority. The important element here is that if it becomes apparent at some stage that despite all the minority's efforts, the majority will not be convinced, then civil disobedience should be halted.

Finally, even when it is justified, civil disobedience may only be tolerated in the way we tolerate and abstain from interfering with those views we do not regard as right in everyday life.[99] The *toleration* of political diversity and hence of civil disobedience cannot be unbounded. Its limits can be deduced from the nature of politics and the rule of law. Tolerating the politically intolerant or extremist political movements, conflicts with our obligation as citizens to safeguard the vitally important realm of free debate and action. The political condition of plurality and dissenting expression depends upon a commitment by all those concerned to maintain the common political world that guarantees rights as citizens and hence the right to disagree to all of them.[100]

3. The Right to Civil Disobedience

Once we concede that civil disobedience may be justified within certain limitations, the next question that arises is whether there can be a *moral right* to civil disobedience.[101] One could think at first sight that to accept the existence of a right to civil disobedience would be a contradiction in itself given the necessary pre-existence of an *obligation* to obey. This paradox can easily be solved, however. Since the obligation is only a prima facie one, not only may civil disobedience be justified but it could even become a prima facie right in certain circumstances. In fact, in the absence of a general or piecemeal obligation to obey, the question of a right to resist or even of a justification of such resistance would not even arise. In this respect, it is important to understand that it is not because there is no obligation to obey or only a piecemeal obligation to obey that there is necessarily a right to disobey.

[99] See Chapter 7 on toleration and mutual accommodation.

[100] See ARENDT, 1965, 255.

[101] I am using the term 'right' in a moral sense and not in a strictly legal sense; its legal transposition will be submitted to the same difficulties as the a priori legal guarantee of civil disobedience *tout court*. Contra: RAZ, 1979, 262 who seems to hold that if there were a moral right to civil disobedience, there would be a presumption for giving it legal recognition.

Many authors, especially in the German tradition, do not distinguish between the *justification* of civil disobedience and the existence of an actual *right* to disobey the law. In fact, most of the literature on the issue speaks indifferently of a *right* to resistance ('*Widerstandsrecht*') to refer to the justification of civil disobedience.[102] The distinction is crucial, however. To have a right means that one may use it in an objectively right or a wrong way, in the sense that one may use one's right to disobey for reasons that may not be regarded as right or even as reasonable by others, or worse for reasons that are objectively wrong.[103] To be justified to resort to civil disobedience, on the contrary, means that one's grounds for doing so are considered by most others as being right or at least a reasonable thing to do for a person in those circumstances.[104]

Some authors, like Raz in particular, contend that there should be no right to civil disobedience in liberal states and this for two reasons. First of all, in countries where the right to political participation is institutionalised and respected, a right to civil disobedience would be *contradictory*. It would generate the risk of turning an exceptional political action into a banal and usual form of political action.[105] Secondly, a right would *tolerate errors*, whereas such errors on the part of people who want to change the rules of our polity are not acceptable. Civil disobedience may only be justified, when its aim is really the right one.[106] Other authors, like Dworkin, recommend the recognition of a right to civil disobedience and for good reasons, it seems. As Dworkin puts it, since reasonable people disagree about the right, 'a theory of disobedience is useless if it declares only that people are right to disobey laws or decisions that are wicked or stupid, that the rightness of the disobedience flows directly from the wrongness of the law. Almost everyone will agree that *if* a particular decision is very wicked, people should disobey it. But this agreement will be worthless in particular, concrete cases, because people will then disagree whether the law *is* that wicked, or wicked at all.'[107]

Of course, this does not mean that the right should be legalised and made positive[108] or that it should be absolute and cannot be infringed by stronger reasons or other people's rights.[109] On the contrary, in circumstances of reasonable disagreement, dissenters do not claim authority instead of a coordinative and fair majority decision,[110] but solely the equal plausibility of an alternative way. Civil

[102] See eg DREIER, 1983A.
[103] See WALDRON, 1993A.
[104] See DWORKIN, 1978, 188 ff; RAZ, 1979, 273.
[105] RAZ, 1979, 275.
[106] RAZ, 1979, 273. If Raz argues the way he does, it is because on his account of legitimate authority and the normal justification thesis, the law only has authority when it is morally right. This in turn implies that although one may justify someone's reasonable disagreement and even their disobedience on grounds of individual autonomy, a right to disobey would condone the political promotion of objectively wrong conceptions of justice.
[107] DWORKIN, 1985, ch 4.
[108] See eg DWORKIN, 1985, ch 4. Contra: RAZ, 1979, 262.
[109] Contra: RAWLS, 1971, 374–75.
[110] This is what RAZ, 1979, 270 seems to believe defenders of a right to civil disobedience should hold.

disobedience remains illegal and an *ultima ratio* means. Through its quality as a right, however, it gains a place in the larger democratic order. In fact, it is Habermas who seems to see clearly through this issue. He contends, indeed, that 'the "right" to civil disobedience remains *suspended between legitimacy and legality* for good reasons.'[111] Civil disobedience should not be encouraged blindly *qua* absolute right; it must remain a risk that each individual has to be taking for himself when he believes sincerely in the injustice of the law he objects to.

CONCLUSION

This chapter started by establishing how the *democratic* nature of law-making procedures enhances the law's authority. My argument was that the coordinative nature of a decision-making procedure, like deliberative majority voting in which equal participation is guaranteed, implies a fairness-based obligation to abide by its outcome for all its voluntary participants on the basis of the coordination-based account of authority developed in the prior chapter; the general fairness of democratic procedures matches the individual fairness requirement of coordination-based obligations and explains the specific legitimacy of democratic laws. This fairness-based account of the authority of democratic law ties up nicely with the account of democratic legitimacy I propounded in the first section of the third part of the book where I argued for the minimal substantive *cum* procedural legitimation of procedural legitimacy and linked the legitimacy of majority decisions to the respect of political equality and minimal democratic rights.

In the second part of the chapter, I developed an argument for the *moral justification and limits of morally motivated public disobedience to the law* in a democratic constitutional state. More precisely, I argued for the justification of civil disobedience, and even a right to civil disobedience in conditions of reasonable disagreement, that takes the coordination-based and hence the disagreement-based origins of the prima facie obligation to obey democratic law into account. Reasonable disagreement calls indeed for a re-examination of the definition, justification and limits of civil disobedience in a democratic state. Given the suggested account of the emergence of the rule of law and legal coordination in the face of disagreement, the law cannot avoid making authoritative claims that will be at odds with the sense of justice some of us have, thus limiting the grounds on which and the manner in which civil disobedience can be justified. Mere reasonable disagreement no longer suffices to justify disobedience to a law we have established to coordinate on matters we disagree about. Something more is needed to justify how civil disobedience may still be regarded as an extension of our reasonable disagreements outside the realm of legality. In short, those who think that they must *disobey* the law simply in order to *disagree* with it are mistaken. What they are in fact disagreeing with is the democratic procedure to

[111] Habermas, 1984, 112 (emphasis added).

deal with disagreement and this change in the nature of disagreement calls for self-restraint. Civil disobedience should therefore be understood as a self-restrained and self-limited check on democratic procedures of law-making and on the rule of law.

I started by arguing, following Dworkin, that a *working theory of civil disobedience* cannot make the rightness or justification of civil disobedience depend on which side is right in the underlying controversy, but should on the contrary focus on what it would seem right for a person to do given her circumstances. It follows from this chapter's considerations about the justification of the right to resist unjust law *qua* central element of the *democratic test of the legitimacy of law* that it is in the interest of all democratic states to take civil disobedience seriously and engage with it, without of course necessarily encouraging it and accepting it blindly. When limited, civil disobedience, far from being incompatible with a genuinely democratic form of government, can have an important part to play as a justifiable form of protest. The ambivalent destiny of the modern constitutional state lies, therefore, in *living with this tension between stability and legality, on the one hand, and renewal and legitimacy, on the other, and in making it bear fruit*.

I then argued, however, that we need to go further than this justification and explore the limitations we may legitimately impose on civil disobedience in the conditions where disagreement also justifies authority and the respect for the rule of law. In fact, I argued, reasonable disagreement about justice *qua* origin of a coordination-based obligation to obey the law constitutes the *value-neutral limitation to justified civil disobedience* that was missing in past theories of civil disobedience and that could not be derived from either pluralistic nor objectivist models of justification of civil disobedience. On the proposed account, disagreement both *justifies* civil disobedience for the sake of law's legitimacy and *limits* it for the sake of law's certainty: reasonable disagreement in a democratic constitutional state justifies self-restrained disobedience at the most. I assessed various value-neutral criteria for the limitation of the justification of disagreement-based disobedience to disagreement-justified laws. First of all, the justification of civil disobedience can only be prima facie and it can therefore be set aside when the coordination-based reasons to obey the law are stronger or other stronger rights are at stake. Secondly, civil disobedience is a plea for reconsideration and a more or less direct effort of persuasion of the majority. As such, once it becomes apparent that the majority are *not willing to reconsider* their decision, disobedience must be abandoned. Finally, civil disobedience may be compared to an exercise in *tolerating the tolerant* and as such it finds its limits in the protection of the public sphere and the conditions of democratic deliberation, on the one hand, and the rule of law, on the other.

Conclusions

LONG BOOKS CANNOT afford long and elaborate conclusions. What they should provide is a *synthetical overview* of the main features of a book-long argument. This is precisely what the present conclusion aims at doing by going through the main theses of the book, but in rearranging them in a different and more synthetical order. This overview presupposes some familiarity with the text and is intended neither as a stand-alone nor as an exhaustive summary; the individual chapters and their conclusions will serve better in that role.

Reasonable disagreement about justice calls for a new way to understand the law. Any satisfactory political and legal theory should therefore provide a way of dealing with and accommodating moral disagreement and the fundamental problem of finding a legitimate and justifiable way of making collective binding decisions in the face of continuing moral conflict. The main take of the book has therefore been to make proposals of institutional and procedural design that can contribute to taking better account of the democratic circumstances of lawmaking. It replaced political conflict at the core of contemporary jurisprudence, just as it was in early modern philosophy of law, rather than associate jurisprudence with grand theorising about justice and abstract principles.

I. TAKING REASONABLE DISAGREEMENT SERIOUSLY

1. From Disagreement to Law and Back Again

The book started with a discussion in its first and second parts of the *nature, extent and significance of disagreement*. The point was to provide the analysis of the relationship between law and disagreement with a complete account of the latter's origins and types, as well as of its persistence and pervasiveness, before moving on to assess the positive and negative elements of its significance.

In short, the book argued that the kind of normative political-moral disagreement that pervades legal reasoning, and that translates into theoretical legal disagreement, is *deep* disagreement that can go to the core of conceptual meaning, *persistent* disagreement that cannot be reasonably settled and *pervasive* disagreement that extends to many key areas of human social and political organisation and distribution. The significance of this kind of reasonable disagreement about justice is complex and I presented arguments both in favour of its fostering and of its channelling. The complex nature of disagreement was already discussed by Hume and Freud and I developed their arguments in both directions. With respect to the *positive aspects* of disagreement, I argued, following Arendt's path, that disagreement is a necessary element of lively politics

and hence of human life. As Arendt argues, however, disagreement also presents dangers which should be curbed and I then turned to a discussion of disagreement's *negative aspects* and the resolution of coordination problems. There I argued that the law constitutes one of the most flexible and extensive means of coordination, thus making coordination in the face of reasonable disagreement one of the law's main functions—at least in the broad and adverbial sense of coordination.

My main contention in the first and second parts of the book was that the law's relationship to disagreement is Janus-like. Not only is the law *the main response* to moral disagreement, but it is itself affected by moral disagreement about its *raison d'être*, procedures and modes of justification, and its negative and positive consequences. All this implies that the discussion of the relationship between law and disagreement cannot be reduced to a presentation of the nature, extent and significance of disagreement, on the one hand, and of the emergence of the rule of law as a perfect response to the latter, on the other. It calls for a detailed discussion of conceptual, institutional, procedural and functional elements of the law under the new light of the pervasiveness and persistence of reasonable moral disagreement in the law. This is what I tried to provide in the third part of the book dedicated to the response to disagreement. The ambivalence of disagreement is best captured through the idea of the *relationship of mutual reinforcement and limitation between disagreement and the rule of law*.

2. The Rule of Law as Response to Disagreement

My primary argument was that the *rule of law* should be understood as both a way to channel disagreement through coordination and a way to coordinate it in a manner that takes the persistence of disagreement in the law seriously. The centrality of disagreement in the rule of law translates into procedural, institutional, content-related and normative accommodations.

Law-making *procedures* are needed that can provide decisions with the legitimacy they need in conditions of reasonable disagreement. The book started by arguing that toleration and mutual accommodation quickly encounter limitations in conditions of reasonable disagreement where reasonable deliberation cannot ensure convergence and where closure is required. In response, the book provided a long-needed justification of majority voting that reconciles political legitimacy with the reality of reasonable disagreement, while also tying the legitimacy of majority decisions to the respect of democratic deliberation and of basic democratic rights and principles. Majority voting is justified in virtue of the maximal decisiveness compatible with political equality and the fairness it guarantees in conditions of reasonable disagreement. It is in fact the fairest compromise *qua* process one may think of in those conditions; although I argued that compromise *qua* outcome is a potential, albeit ambiguous, response to disagreement in virtue of reasons of practicability, justice, concept determination and coherence, I also

explained how compromise *qua* process and democracy in particular need not give rise to further compromises *qua* outcome.

In terms of law-making *institutions*, taking reasonable disagreement seriously implies making sure it is those institutions which are most representative of our disagreements and democratically most legitimate which have the last word on reasonably contested issues. This implies, for instance, that constitutional assemblies should not be able to bind legislative assemblies too rigidly, except on minimal democratic rights. Similarly, no rights-instrumental justification of restrictions on participatory rights, such as ultimate powers of judicial review for instance, can succeed in conditions of reasonable disagreement about rights, thus confirming the intrinsic justification of basic equal participatory rights. Finally, democratic representatives should be in constant dialogue with those they represent thanks to the minimally descriptive representation of disagreement and the enhancement of the public sphere that derives from this representation of disagreement and from the increase in deliberation that follows at all levels of the representation relationship. In fact, as a result, disagreement should be kept alive within particular institutions, but it should also be able to trigger a form of dialogue and cooperation among these institutions.

In terms of the law's *content*, taking reasonable disagreement seriously implies, for instance, methods of legal interpretation that do not presume more than could be expressed by the law's wording in conditions of reasonable disagreement; law-making in circumstances of reasonable disagreement pre-empts disagreement by the collective recognition of a canonical text whose interpretation cannot therefore rely on retrieving prior disagreements, and in particular conflicting intentions. In a similar vein, law-making should aim at respecting others' reasonable albeit diverging views and as such it should ensure both synchronic and diachronic coherence; in conditions of reasonable disagreement, officials, but also institutions more generally, should not place their own conceptions of the right before those of others and should try to integrate them, whether the latter have been expressed in past laws and decisions or in current deliberations. Finally, in prevision of conflicts of constitutional rights, legal systems often establish formal or material hierarchies, as well as rules of conflict that help resolve those conflicts, albeit not in all cases, thus giving rise to complex conciliation issues.

Finally, the law's *authority* itself should be understood in terms that take into account the pervasiveness and persistence of reasonable disagreement in the law. As such, the law's authority can be justified, I argued, on grounds of coordination in circumstances of reasonable disagreement. More particularly, the duties to abide by particular coordinating laws should be understood as semi-voluntary duties of fairness in conditions of reasonable disagreement about justice where we disagree about the content of our duties of justice and accept to coordinate our actions according to a fair democratic procedure. As a consequence, the reasons for justifying acts of *civil disobedience* in circumstances of reasonable disagreement, where authority is justified on grounds of coordination, cannot extend to

all cases of reasonable disagreement. On the contrary, they are limited to those cases where the majority can still realistically be persuaded to change its decision, which will otherwise bind all those who had an equal chance to deliberate and vote in a fair democratic process.

3. Disagreement as Response to the Rule of Law

Not only did the book argue that the law would gain from understanding how it should be seen as one of the main responses to moral disagreement, but it also claimed that disagreement should not always be suppressed by law in the name of the latter's unity and coherence. This is what I referred to as the *paradox of reasonable disagreement*. The law has a role to play in solving disagreement, but disagreement also has its own place within the law as a creative and jurisgenerative force. Understood within the relationship of mutual reinforcement and limitation between disagreement and law, the *rule of law* paradoxically benefits from disagreement which is both its *raison d'être* and its creative resource. Not only does the rule of law constitute a response to disagreement in ensuring convergence on common rules, but disagreement is in return an essential feature of a healthy rule of law. The rule of law ideal is not an ideal whose implementation can ever be perfect and in fact it should not; it is only by being constantly questioned that it can be strengthened in its minimal but essential achievements.

Substantive conflict is not, therefore, a defect in a legal system, but a sign of its *continuity with the plurality of public values the legal system embodies and mediates*. This is actually one of Arendt's most important contributions to political theory. As she argues, 'the public realm in a republic is constituted by an exchange of opinion between equals and this realm would simply disappear the very moment an exchange becomes superfluous because all equals happened to be of the same opinion.'[1] Disagreement's different political and legal advantages have been discussed at length in the book, and especially in its third part. The legal and political benefits of disagreement are, among others, plurality of opinions, tolerance, enhanced deliberation, epistemological benefits, mutual learning from trial and error, etc.

First of all, I argued that we should choose *procedures* which not only establish means to settle our disagreement, but also allow it to flourish in that framework. The liberal principle of *toleration* of reasonable pluralism, when conceived positively and actively, encourages debates over controversial issues of justice and protects the right of all reasonable positions to be expressed and discussed publicly. Further, I argued for *deliberative voting ethics* that allow disagreement and deliberation to spread without the pressure for agreement generated by other alternative modes of closure such as mutual accommodation or com-

[1] Arendt, 1970, 93; Arendt, 1968a, 241. See also Canovan, 1988, 178. See Arendt, 1970, 76, 225; Arendt, 1998, 57–58.

promise, for example. The deliberation-oriented justification of majority voting implies the respect of political equality and of basic democratic rights, thus tying the legitimacy of majority decisions to the full and equal expression of disagreements and the equal protection of minority opinions.

With respect to *institutions*, secondly, further democratic disagreements are fostered by the *dialogue and cooperation among institutions* and more particularly between constitutional and legislative assemblies, between legislative assemblies and courts and between representative officials and represented citizens in the public sphere. Institutional cooperation is the outcome of the productive tension and conflict that characterise the separation of powers *qua* combination of a division of labour and of checks and balances. This is the kind of cooperation among authorities and officials which the principle of *legal integrity* or coherence aims at generating in the face of reasonable disagreement. The same may be said of the *minimal descriptive representation model* I propounded to represent diversity and disagreement efficiently, while also enabling them to carry on within the representation relationship. This approach to representation redeems the latter through the enhancement of political equality and hence of deliberation among those represented, among representatives and those represented, and among representatives and thus reinforces democratic participation and the public sphere better than participatory democracy alone.

My third group of arguments was that the *content of law* should remain open to disagreement. This is the case, for instance, in the constitutional context where I argued against the idea of an absolute *democratic precommitment* and rigid constitutional entrenchment in all areas but minimal constitutive democratic rights, in order to provide space for further disagreement and change in this heavily controversial area of law. In-built correctives can ensure the development of further disagreements about entrenched constitutional rights; it is the case, for instance, of the use of essentially contestable concepts whose function is to stir disagreement, flexible forms of entrenchment or flexible forms of constitutional interpretation. This encourages rather than freezes further disagreement and a *hermeneutic narrative* or *democratic iteration* whose only constraint is the authority of the legal text. In any case, however we protect and entrench constitutional rights, I argued that we cannot prevent all their further conflicts legally and these *conflicts of rights* should be regarded as an advantage rather than as a deficit in their constitutional protection.

Finally, with respect to issues pertaining to the law's authority, *civil disobedience* should be understood, I argued, as a prolongation of our disagreements in the sphere of illegal action. Thus, it potentially triggers further legal disagreements and hence promotes democratic deliberation and reinforces the public sphere, in the new limits set by the proposed coordination-based or fairness-based account of legal duties to abide by democratic decisions in conditions of reasonable disagreement about justice.

4. Means to Keep a Balance

Last but not least, while disagreement should be encouraged along the lines just sketched, it is important to reflect on the means of preventing the encouragement of reasonable disagreement from getting entirely out of hand and of *keeping it in check*. While it is crucial to realise the pervasiveness and persistence of disagreement within the law itself and hence to adapt legal procedures and institutions to this reality, both by curbing it and by encouraging it, reasonable disagreement may prove resilient and the means to deal with it may prove beneficial to some and not to others. As Dworkin argues, it is a matter of finding the right balance: too little disagreement and law stagnates; too much and law founders.[2]

There should be means, therefore, of ensuring the respect of all opinions that resist reasonable disagreement and hence of preventing everything from being 'up for grabs.' Arendt, like Hume and Freud before her, was aware of both the dangers and the benefits of disagreement and hence of its double nature. She was one of the first political theorists to attempt to reconcile these two dimensions of disagreement by making both institutional and procedural proposals to keep disagreement in check but without suppressing it and counterproductively separating individuals. There are many ways of channelling disagreement without undermining it and even by fostering it. Arendt talks of the importance of setting limits that *separate* as well as *relate* individuals to each other[3]; hence the role of constitutional and positive law in establishing artificial channels of deliberation and decision which are more rigid and durable than the actions they accommodate or the conflicts they stage. This idea of a just distance between individuals reveals the importance of having rules of adjudication to separate parties to a conflict, but also to bring closer people separated by hatred: on the one hand, putting an end to uncertainty and, on the other, showing the people that they are part of the same community.[4] As a consequence, my arguments for the *limitations to the limitations* of disagreement were the following.

Primarily, it is important to emphasise that there is nothing to fear from fostering reasonable pluralism and disagreement; it perpetuates the idea of respect for and accommodation of others' reasonable albeit conflicting opinions and thus reinforces a *culture of active toleration and deliberation*. Besides, *civic education* and other constitutive elements of *political ideology* can be developed to keep disagreement in check and make sure it is only encouraged in its positive aspects.[5] Finally, as 'state of nature' theorists argue, people who coordinate to curb disagreement are also ready to coordinate in order to keep disagreement in a productive check later on through such means. Once people have coordinated out of the state of nature and of pure disagreement, it is difficult to see how they

[2] Dworkin, 1986, 88–89, 236–39.
[3] See Arendt, 1968a, 465–67.
[4] See Ricoeur, 1995, 192 who applies Arendt's idea in his philosophy of law.
[5] On civic education in conditions of reasonable pluralism, see Gutmann, 1987; Gutmann/Thompson, 1996; Waldron, 1998c; Macedo, 2000; Waldron, 2002c; Wingo, 2003, 106 ff.

would not coordinate to prevent such a state from arising again. The paradox of the *basic convergence on the need to converge* and of the so-called *link of division* was emphasised at length in the book.

Secondly, *concrete legal institutions and procedures* can be developed to make the most of the possibilities of disagreement while curbing its dangers. For instance, the account of democratic legitimacy propounded in this book links the legitimacy of deliberative *cum* majority decisions to the constitutional protection of minimal minority rights and hence makes the authority of these decisions depend on the respect of fairness and political equality. This *minimal substantive legitimation of procedural legitimacy* is the only plausible account of political legitimacy in conditions of reasonable disagreement; it reconciles the coordination-oriented and contingent nature of procedural legitimacy with the most minimal substantive elements required of any account of political legitimacy that are compatible with the fact of reasonable disagreement. The protection of minority rights is more concretely guaranteed by the *constitutional entrenchment of minimal democratic rights* and their judicial control, thus preventing the democratic process from jeopardising its own constitutive elements and foundations and hence protecting the cornerstone of political equality. These protection mechanisms are in turn enhanced by the *dialogue and partnership among institutions* that prevent disagreement from getting out of hand with a system of checks and balances whose role is to keep the tension generated by the separation of powers productive. Finally, the model of *partial descriptive representation of disagreement* defended in the book ensures the minimal descriptive presence of all political groups within representation and thus the reinforcement of democratic control through the public sphere and thanks to heightened disagreement among those represented, among those represented and representatives, and among representatives.

Thirdly, the *content* of law can be organised in such a way that it maintains a certain stability and continuity, while also allowing for change and renewal. This is the idea underlying the distinction between *moral and legal indeterminacy*, and the law's ability to stage moral conflict in such a way that moral incoherences and incommensurabilities are legally stabilised and can only give rise to legally channelled conflicts. The same may be said of *essentially contestable concepts* whose function in the law is to encourage disagreement, while also ensuring a minimal level of conceptual continuity and the perpetuation of the constitutional narrative, for instance. Moreover, the proposed principle of *legal integrity* should enhance dialogue and cooperation among different institutions, but also among officials within those institutions, thus privileging respect and coherence over dogmatism and entrenchment in case of conflict, both at any given time and over time.

Finally, this is confirmed by the proposed account of *political and legal authority* that is based on the fairness of the procedure of coordination and more particularly on the democratic nature of law in conditions of reasonable disagreement. In case these conditions are respected, but the minority fears the conflicting position

of the majority, *civil disobedience* may be justified in order to rechannel disagreement and redress its imbalances, within the limits of respect for the majority's refusal to reconsider, of course.

II. TOWARDS GLOBAL LEGAL PLURALISM

1. The Idea

The contemporary national state, as the main source of legality, is now placed in the delicate situation of being called upon to act not only as a whole, but also as a part. It will indeed be no less difficult in future to reconcile indivisible popular sovereignty with the proliferation of a multitude of incompatible sources of legality within the state than to reconcile the very same sovereignty with the new post-national and supra-national institutions and their own pluralistic sources of legality.[6] In a nutshell, the limits set by pluralism on legal orders no longer come only from below, but are also applied from above or even from aside. In fact, both phenomena are now irremediably linked and enhance each other; on the one hand, infra-national moral and social pluralism have increased thanks to the globalisation of our perspectives and, on the other, relations of interdependency driven by global markets and the plurality of moral sources overwhelm the nation state as a location for democratic regulation, thus calling for more global forms of governance and adjudication.

The problem is that, to date, neither issues of infra-national legal pluralism nor issues of supra-national or post-national legal pluralism have been sufficiently explored in legal philosophy. The present book should have redressed and remedied the first omission in taking reasonable disagreement's implications for law seriously and reconstructing the concept of law around disagreement. What remains to be done, therefore, is to take the issue of *reasonable legal pluralism beyond the state level* and develop a complete theory of global legal pluralism. Conflicts in the relationship among integrated but independent legal orders, ie legal orders implicated in polycentred and heterarchical legal entities where sovereignty is not clearly and completely deferred to any legal order in particular, raise important difficulties. This is particularly relevant in the context of the relations among national legal orders, on the one hand, and among national and European authorities in the European Union, on the other. These conflicts need to be taken more seriously and constitute the basis for a global conception of post-national law understood both as a way of settling international and supra-national legal conflicts and as a way of making the most out of them *qua* creative source of legality.[7]

It is time to go beyond 'dispute-settlement'-type conceptions of the relations among independent albeit integrated legal orders and realise the integrating

[6] See Ricoeur, 1994, 272.
[7] See Lord/Magnette, 2004 in the context of legitimacy in the EU.

and community-shaping capacity of conflict. In fact, I would argue that *disagreement will increase with complex legal integration* and the addition of further degrees of legality. Hence the importance of acknowledging the phenomenon and of turning it into a creative resource. The reinforcing circle first stated by Hume between disagreement and the need for convergence has indeed been confirmed lately by the increase of disagreement due in part to the increasing social pluralism that characterises interconnected contemporary Western societies; the more global sociability becomes, the more disagreement there is and in return the more global convergence and sociability is needed, thus increasing the extent of disagreement, etc.

2. Three Illustrations

Developing a complete theory of global legal pluralism of the kind suggested here can have important implications in very sensitive areas of current global governance, such as post-national democratic institutions or the legitimacy of post-national constitutionalism. I will only explore three issues here: sovereignty, coherence and citizenship.

First of all, a revised conception of *cooperative sovereignty* could arise from a more elaborate approach to global legal pluralism.[8] This in turn would solve many of the difficulties encountered by traditional conceptions of sovereignty in the face of well-known changes in the international and supra-national reality. Instead of understanding sovereignty as being absolute or as being shared in conditions of pluralism, ie in ways which either cannot account for the new post-national reality or undermine the concept of sovereignty entirely, or, worse, instead of invoking a new era of post-sovereignty, a pluralism-based reconstruction of the relations among sovereign states and entities could give rise to a cooperative conception of sovereignty. Sovereignty should be conceived as a reflexive concept whose correct use is to reflect on and disagree over the values protected by sovereignty, ie mainly democracy and fundamental rights. Conflicts among different sovereign authorities or entities about different conceptions of the same fundamental concepts, such as fundamental human rights or democratic values, call for means both of settlement and enhancement of these conflicts. The protection of the values underlying those contestable concepts would therefore benefit more from cooperation between the different competent authorities and entities on how best to protect their common values and hence on when to give up their sovereignty to others, than from the mere declaration of primacy of one sovereign over the other. As it is at once open and closed, cooperative sovereignty could both frame and stimulate the debates that go deep into the heart of what should be the best allocation of power and this not only in Europe, but also on a more global scale.

[8] See Besson, 2003b; Besson, 2003c; Besson, 2004b.

Secondly, cooperative sovereignty could give rise to a *principle of global coherence* in conditions of reasonable post- and supra-national pluralism.[9] When conflicting sovereign positions are understood as being in a cooperative relationship rather than an adversarial one, it is easy to see how a principle of respect for others' reasonable albeit different positions should be developed on the model of the principle of legal coherence at the infra-state level. This is crucial if all the different sources of legality that apply to citizens of these polycentered and integrated states and entities are to speak to them with one coherent voice, since this is the key to the law's legitimacy and authority. None of the conflicting sources of legality should be primarily subordinated to others and local governance should be able to coexist and flourish alongside global governance, provided conflict becomes a source of mutual learning and principled consistency in the cooperative venture of providing the common subjects to these different legal orders with the values and certainty which the rule of law aims at securing for them. This principle of post-national legal coherence could have an important role to play in the European context, where more constitutional conflicts are bound to arise now that even more competences and rights are being constitutionalised at the European level, and this without clarifying the relationship between the primacy clause that has been explicitly stated in article 10 of the Treaty establishing a Constitution for Europe and the principle of diversity of article 5 of the same constitutional Treaty.[10] A principle of European coherence of the kind I have argued for could, in other words, help deal with the growing pressure for common European solutions under conditions of increasing diversity. It could put conflict at the centre of the European Union, as both an incentive and a means of integration in way of comparison and self-reflexivity.

Finally, a more conflict-sensitive and creative conception of *European and global citizenship* could be developed on the basis of a pluralism-based approach to post-national law and the relations between the different legal orders constituting that multilevel body of law. European citizenship and other forms of global citizenship have developed that do not depend on a European or global form of national belonging or identity and that are already or might be gradually based on residence rather than nationality. Although these new forms of citizenship do not aim at suppressing national citizenships, conflicting loyalties are bound to arise. Besides, with so many diverse ways of being a European citizen, European citizenship will become the trigger of a conflictual identity. Instead of suppressing diversity and the occurrence of these conflicts, it is important to make the most out of them by emphasising the creative nature of conflicts. European and global citizenships should be understood as an experience in mirroring and mutual learning from others' differences and the realisation of one's imperfections, rather than as a unifying and coherent identity-forging process. Instead of imposing a European unified model of citizenship and democracy, one should hope that

[9] See in the European context, Besson, 2004a.
[10] See Besson, 2005c.

these will gradually emerge from cooperation on common concerns of the different actors in place and from the emulation that could result from the competition among democratic forums. What matters for now, therefore, is to understand the development of European citizenship and democracy as a mixed approach in both fostering national differences in democratic processes and constituting a framework of European-mindedness and respect for others' diversity when deciding common issues.

Of course, one may object that the further people are from each other, the less informed they are of each other's concerns and the less likely they are to disagree or at least to disagree on the same issues and in a fully informed way. Like maintaining the balance between the advantages and disadvantages of infra-national pluralism, furthering post-national disagreement therefore has a cost. At the European level, the increasingly integrated structures of law-making and the different procedures of institutional cooperation can already be said to increase mutual awareness. At the moral global level, however, more educational and institutional work remains to be done to ensure fully informed and productive disagreement.

I hope that this brief synthetical review of the features that characterise the position defended in this book will help to bear out the case for thinking about disagreement in the law comprehensively, and no longer in the compartmentalised way in which it was conceptualised until recently. Like Waldron who started the discussion before me, I would like these considerations about the nature, significance and response to disagreement in the law to leave a small mark in what should become a central subject in legal philosophy. After all, it was the case for classical authors such as Hobbes, Kant or Hume and it is worth wondering why it no longer is. I would be very happy, however, if all the book had achieved was to persuade those, who disparage the importance of disagreement for the law or limit its importance to the discussion of some restricted issues of legal philosophy, that disagreement ought to be taken more seriously in our effort to construct a complete account of law-making in democratic societies.

To borrow the metaphor I quoted at the opening of the book, legal philosophy would gain from being understood not only as a theory of peace, but also as a theory of war. Agreement and disagreement do not stand in opposite and unrelated positions to each other, but are, on the contrary, *two sides of the same coin*. The law can no longer concern itself only with agreement and it is high time lawyers realised that there is another side to the rule of law than convergence and determinacy. As Aristotle once explained, 'it is obvious that a *polis* which goes on and on and becomes more and more of a unit, will eventually cease to be a *polis* at all.'[11]

[11] Aristotle, 1988, II, 2 (emphasis added).

BIBLIOGRAPHY

AARNIO, A (1987), *The Rational as Reasonable* (Dordrecht, Kluwer).

ABEL, O (1996), *Paul Ricoeur, La Promesse et la Règle* (Paris, Michalon).

ABRAMSON, K (1999), 'Hume on Cultural Conflicts of Values' 93 *Philosophical Studies* (USA) 173.

ACKERMAN, B (1980), *Social Justice in the Liberal State* (New Haven, Yale University Press).

ACKERMAN, B (1984), 'The Storrs Lectures: Discovering the Constitution' 93 *Yale Law Review* 1013.

ACKERMAN, B (1988), 'Neo-federalism?' in ELSTER/SLAGSTAD (eds), *Constitutionalism and Democracy* (Cambridge, Cambridge University Press), 153.

ACKERMAN, B (1989), 'Why Dialogue?' 86 *Journal of Philosophy* 5.

ACKERMAN, B (1991), *We, The People: Foundations* (Cambridge Mass, Belknap).

ACKERMAN, B (2000), 'The New Separation of Powers' 113 *Harvard Law Review* 668.

ACKERMAN/FISHKIN (2000), 'Deliberation Day,' Conference on Deliberating about Deliberative Democracy, University of Texas, Austin, 4–6 February 2000, www.la.utexas.edu/conf2000/papers/DeliberationDay.pdf.

ACKERMAN/FISHKIN (2004), *Deliberation Day* (New Haven, Yale University Press).

ADAMS, J (1951), 'Letter to John Penn' in *Works of John Adams* (Princeton, Princeton University Press), vol 4.

ADORNO, TH W (1947), *Dialektik der Aufklärung* (Frankfurt, S Fischer).

ADORNO, TH W (1966), *Negative Dialektik* (Frankfurt, Suhrkamp).

ADORNO, TH W (1997), *Dialectic of Enlightenment* (London, Verso).

AINSLIE, G (1984), 'Behavioral Economics 11: Motivated Involuntary Behaviour' 23 *Social Science Information* 247.

ALCHOURRON/BULYGIN (1991A), 'The Expressive Conception of Norms' in HILPINEN, R (ed), *New Studies in Deontic Logic* (Dordrecht, D Reidel), 95.

ALCHOURRON/BULYGIN (1991B), 'Los limites de la logica y el razonamiento juridico' in ALCHOURRON/BULYGIN (eds), *Analisis Logico y Derecho* (Madrid, Centro des Estudios Constitucionales), 303.

ALEINIKOFF, A (1986), 'Constitutional Law in the Age of Balancing' 96 *Yale Law Journal* 943.

ALEXANDER, L (1989), 'Constrained by Precedent' 63 *Southern California Law Review* 1.

ALEXANDER, L (1996), 'Precedent' in PATTERSON, D (ed), *A Companion to the Philosophy of Law and Legal Theory* (Oxford, Blackwell).

ALEXANDER, L (1997), 'All or Nothing at All? The Intentions of Authorities and the Authority of Intentions' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon).

ALEXANDER, L (2000), 'Rules, Rights, Options and Time' 6 *Legal Theory* 391.

ALEXANDER, L (2003), 'Is Judicial Review Democratic? A Comment on Harel' 22 *Law and Philosophy* 277.

ALEXANDER/KRESS (1997), 'Against Legal Principles' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon), 279.

ALEXY, R (1979), 'Zum Begriff des Rechtsprinzips' 1 *Rechtstheorie* 59.

ALEXY, R (1985A), *Theorie der Grundrechte* (Frankfurt, Suhrkamp).

ALEXY, R (1985B), 'Rechtsregeln und Rechtsprinzipien' 25 *Archiv für Rechts- und Sozialphilosophie* 13.

ALEXY, R (1989), *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford, Clarendon).

ALEXY, R (1992), 'Rights, Legal Reasoning and Rational Discourse' 5 *Ratio Juris* 143.
ALEXY, R (1996A), 'Habermas on Law and Democracy: Critical Exchanges. Law's Reconstruction, Justification and Application: Jürgen Habermas's Theory of Legal Discourse' 17 *Cardozo Law Review* 1027.
ALEXY, R (1996B), *Theorie der Grundrechte* (3rd edn) (Frankfurt, Suhrkamp).
ALEXY, R (1996C), *Theorie der juristischen Argumentation: die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (3rd edn) (Frankfurt, Suhrkamp).
ALEXY, R (1998), 'Law and Correctness' in FREEMAN, M D A (ed), *Legal Theory at the End of the Millenium* (Oxford University Press), 205.
ALEXY, R (2000), 'On the Structure of Legal Principles' 13 *Ratio Juris* 294.
ALEXY, R (2002), *A Theory of Constitutional Rights* (Oxford University Press).
ALEXY, R (2003A), 'Constitutional Rights, Balancing and Rationality' 16:2 *Ratio Juris* 131.
ALEXY, R (2003B), 'The Nature of Legal Philosophy' 7:1 *Associations* 63.
ALEXY, R (2003C), 'The Nature of Arguments about the Nature of Law' in MEYER/PAULSON/POGGE (eds), *Rights, Culture and the Law. Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press), 3.
ALEXY, R (2003D), *An Argument from Injustice* (Oxford University Press).
ALEXY, R (2004), 'The Nature of Legal Philosophy' 17:2 *Ratio Juris* 156.
ALEXY/PECZENIK (1990), 'The Concept of Coherence and its Significance for Discursive Rationality' 3:1 *Ratio Juris* 130.
ALLEN, F (1964), 'Comments' 58 *Northwestern University Law Review* 798.
ALLEN, R (1980), *Socrates and Legal Obligation* (Minneapolis, University of Minnesota Press).
ALLEN/REGAN (eds) (1999), *Debating Democracy's Discontents* (Oxford University Press).
ALTHUSSER, L (2003), *Montesquieu, la politique et l'histoire* (4th edn) (Paris, PUF).
ALTMAN, A (1986), 'Legal Realism, Critical Legal Studies and Dworkin' 15 *Philosophy and Public Affairs* 202.
ALTMAN, A (1990), *Critical Legal Studies. A Liberal Critique* (Princeton University Press).
ALVAREZ, S (2003), 'Gli argomenti della rappresentanza: giustizia, uguaglianza, democrazia' 21 *Ragion Pratica* 525.
ANKERSMIT, F A (1996), *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford University Press).
ANKERSMIT, F A (2002), *Political Representation* (Stanford University Press).
ANSCOMBE, E (1967), 'Who is Wronged?' 5 *Oxford Review* 16.
APEL, K-O (1988), *Diskurs und Verantwortung* (Frankfurt, Suhrkamp).
ARENDT, H (1965), *Eichmann in Jerusalem* (New York, Viking).
ARENDT, H (1968A), *Between Past and Future: Six Exercises in Political Thought* (2nd edn) (New York, Viking).
ARENDT, H (1968B), *Men in Dark Times* (London, Cape).
ARENDT, H (1970), *On Violence* (London, Allen Lane).
ARENDT, H (1973), *On Revolution* (Harmondsworth, Penguin).
ARENDT, H (1982), in BEINER, R (ed), *Lectures on Kant's Political Philosophy* (Brighton, Harvester).
ARENDT, H (1998), *The Human Condition* (2nd edn) (University of Chicago Press).
ARENDT, H (2001), 'The Crisis in Culture: Its Social and Its Political Significance' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
ARISTOTLE (1988), *The Politics* (Cambridge University Press).
ARISTOTLE (2004), *The Nicomachean Ethics* (London, Penguin).

ARNESON, R J (1982), 'The Principle of Fairness and Free-Rider Problems' 92 *Ethics* 624.
ARNESON, R J (1995), 'Democratic Rights at National and Workplace Levels' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 118.
ARROW, K (1951), *Social Choice and Individual Values* (New York, Wiley).
ATIYAH/SUMMERS (1987), *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (Oxford, Clarendon).
AUDARD, C (1994), 'Consensus and Democracy. An Anglo-French Conference on John Rawls' 7 *Ratio Juris* 267.
AUDARD, C (1995), 'The Idea of Free Public Reason' 8:1 *Ratio Juris* 15.
BAERT, P (1998), *Social Theory in the Twentieth Century* (Cambridge, Polity Press).
BAGHRAMIAN/INGRAM (2000), 'Introduction' in BAGHRAMIAN/INGRAM (eds), *Pluralism, The Philosophy and Politics of Diversity* (London, Routledge).
BAIER, A (1988), 'Hume's Account of Social Artifice: Its Origins and Originality' 98 *Ethics* 757.
BAKER, G (1981), 'Following Wittgenstein: Some Signposts for *Philosophical Investigations* §§ 143–242' in LEICH/HOLTZMAN (eds), *Wittgenstein: to Follow a Rule* (London, Routledge).
BANG/DYRBERG (2000), 'Governance, Self-representation and Democratic Imagination' in SAWARD, M (ed), *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge), 146.
BANKOWSKI/CHRISTODOULIDIS (2000), 'The European Union as an Essentially Contested Project' in BANKOWSKI/SCOTT (eds), *The European Union and its Legal Order* (Oxford, Blackwell), 17.
BARBER, B (1984), *Strong Democracy: Participatory Politics for a New Age* (Berkeley, University of California Press).
BARBER, N (2001), 'Prelude to the Separation of Powers' 60:1 *Cambridge Law Journal* 59.
BARBER, N (2003), 'The *Rechtsstaat* and the Rule of Law' 53 *University of Toronto Law Journal* 443.
BARENDT, E (1995), 'Separation of Powers and Constitutional Government' *Public Law* 599.
BARNES, A (1988), *On Interpretation* (Oxford, Blackwell).
BARRON, A (1992), 'Ronald Dworkin and the Challenge of PostModernism' in HUNT, A (ed), *Reading Dworkin Critically* (New York, Berg).
BARRY, B (1964), 'The Public Interest' 38 *Proceedings of the Aristotelian Society* 1.
BARRY, B (1965), *Political Argument* (London, Routledge).
BARRY, B (1990), *Political Argument: A Reissue with a New Introduction* (New York, Harvester).
BARRY, B (1991), 'Is Democracy Special?' in *Democracy and Power, Essays in Political Theory 1* (Oxford, Clarendon), 24.
BARRY, N (1995), 'Hume, Smith and Rousseau on Freedom' in WOKLER, R (ed), *Rousseau and Liberty* (Manchester University Press).
BAUM LEVENBOOK, B (1984), 'The Role of Coherence in Legal Reasoning' 3 *Law and Philosophy* 355.
BAUM LEVENBOOK, B (1986), 'Is There a Problem of Justification? A Reply to Fishkin' in PENNOCK/CHAPMAN (eds), *Justification, Nomos XXVII* (New York University Press).
BAYNES, K (1992), *The Normative Grounds of Social Criticism, Kant, Rawls and Habermas* (Albany, State University of New York Press).
BAYON, J C (1998), 'Diritti, Democrazia, Costituzione' 10 *Ragion Pratica* 41.
BECKER/NEDELMANN (1983), 'Von der Anwendbarkeit psychoanalytischer Kategorien auf die Politik' in BECKER/NEDELMANN (eds), *Psychoanalyse und Politik* (Frankfurt, Suhrkamp).

Bedau, H (1991), *Civil Disobedience in Focus* (London, Routledge).
Beiner, R (1983), *Political Judgement* (London, Bethuen).
Beiner, R (2001), 'Rereading Hannah Arendt's Kant Lectures' in Beiner/Nedelsky (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
Beiner/Nedelsky (2001), 'Introduction' in Beiner/Nedelsky (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
Beitz, C (1983), 'Procedural Equality in Democratic Theory: A Preliminary Examination' in Chapman/Pennock (eds), *Liberal Democracy*, *Nomos XXV* (New York University Press), 71.
Beitz, C (1989), *Political Equality* (Princeton University Press).
Bellamy, R (1998), 'Negotiating Values: From Consensus to Compromise' in *Liberalism and Pluralism: Towards a Politics of Compromise* (London, Routledge), ch 4.
Bengoetxea/MacCormick/Moral Soriano (2001), 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in De Burca/Weiler (eds), *The European Court of Justice* (Oxford University Press), 43.
Benhabib, S (1990), 'Communicative Ethics and Contemporary Controversies in Practical Philosophy' in Benhabib/Dallmayr (eds), *The Communicative Ethics Controversy* (Cambridge Mass, MIT Press).
Benhabib, S (1994a), 'Deliberative Rationality and Models of Democratic Legitimacy' 1 *Constellations* 26.
Benhabib, S (1994b), 'Democracy and Difference: Reflections on the Meta-Politics of Lyotard and Derrida' 1 *Journal of Political Philosophy* 1.
Benhabib, S (1996a), 'Toward a Deliberative Model of Democratic Legitimacy' in Benhabib, S (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press), 67.
Benhabib, S (1996b), *The Reluctant Modernism of Hannah Arendt* (London, Sage).
Benhabib, S (2001), 'Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought' in Beiner/Nedelsky (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
Benhabib, S (2002), *The Claims of Culture* (Princeton University Press).
Benhabib, S (2004), *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press).
Benjamin, M (1990), *Splitting the Difference*, *Compromise and Integrity in Ethics and Politics* (Lawrence, University Press of Kansas).
Benn, S (1950), 'Interests in Politics' 60 *Proceedings of the Aristotelian Society* 123.
Benn, S (1978), 'The Problematic Rationality of Political Participation' in Benn, S *et al* (eds), *Political Participation* (Canberra, Australian National University Press).
Benn, S (1984), 'Persons and Values: Reasons in Conflict and Moral Disagreement' 95 *Ethics* 20.
Benn, S (1988), *A Theory of Freedom* (Cambridge University Press).
Bentham, J (1962), A*n Introduction to the Principles of Morals and Legislation* (New York, The Free Press).
Bentham, J (1977), *A Comment on the Commentaries and a Fragment on Government* (London, Athlone Press).
Berlin, I (1969a), *Four Essays on Liberty* (Oxford University Press).
Berlin, I (1969b), 'Does Political Theory Still Exist?' in Laslett/Runciman (eds), *Philosophy, Politics and Society* (2nd series) (Oxford University Press).

BERLIN, I (1998), 'The Pursuit of the Ideal' in HARDY/HAUSHEER (eds), *The Proper Study of Mankind: An Anthology of Essays* (London, Pimlico).
BERLIN, I (1999), *The Hedgehog and the Fox* (London, Phoenix).
BERLIN/WILLIAMS (1994), 'Pluralism and Liberalism: A Reply' 42 *Political Studies* 306.
BERNSTEIN, R (1986), *Philosophical Profiles* (Cambridge, Polity).
BERNSTEIN, R (1996), 'Habermas on Law and Democracy: Critical Exchanges: Laws, Morals and Ethics: The Retrieval of the Democratic Ethos' 17 *Cardozo Law Review* 1127.
BERNSTEIN, R (2000), 'Arendt on Thinking' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).
BESSETTE, J (1994), *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago University Press).
BESSON, S (1999), 'Mesures positives: le nouvel équilibre asymétrique. Perspectives pour le droit suisse' 4 *Pratique Juridique Actuelle* 390.
BESSON, S (2001), 'Paritary Rights for Women in Switzerland: What Can One Learn from a Negative Popular Verdict?' 7:1 *Jus Gentium* 55.
BESSON, S (2002), 'Plus d'égalité pour les femmes dans les faits – quel rôle pour la nouvelle Constitution cantonale?' (special volume) *Revue Fribourgeoise de Jurisprudence* 3.
BESSON, S (2003A), 'Four Arguments against Compromising Justice Internally' 23:2 *Oxford Journal of Legal Studies* 211.
BESSON, S (2003B), 'Post-souveraineté ou simple changement de paradigmes? Variations sur un concept essentiellement contestable' in BALMELLI/BORGHI/HILDBRAND (eds), *La souveraineté au XXIème siècle* (Fribourg, Editions Interuniversitaires), 7.
BESSON, S (2003C), 'La souveraineté coopérative en Europe' in BALMELLI, T (ed), *La Suisse saisie par l'Europe* (Fribourg, Editions Interuniversitaires), 5.
BESSON, S (2003D), 'Les obligations positives de protection des droits fondamentaux. Un essai en dogmatique comparative' 1 *Revue de droit suisse* 49.
BESSON, S (2003E), 'Human Rights, Institutional Duties and Cosmopolitan Responsibilities' 23:3 *Oxford Journal of Legal Studies* 507.
BESSON, S (2003F), 'Democracy and Disagreement: From Deliberation to Vote and Back Again. The Move Towards Deliberative Voting Ethics' in IGLESIAS/FERRER (eds), *Globalization, Democracy and Citizenship* (Berlin, Duncker & Humblot), 101.
BESSON, S (2004A), 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' 10:3 *European Law Journal* 257.
BESSON, S (2004B), 'Sovereignty in Conflict' 8:15 *European Integration Online Papers*, http://eiop.or.at/eiop/texte/2004-015a.htm
BESSON, S (2005A), 'Law, Authority and Democracy, Review of Lukas Meyer, Stanley Paulson and Thomas Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*' 2:1 *Journal of Moral Philosophy* 91.
BESSON, S (2005B), 'The Paradox of Democratic Representation' in WINTGENS, L (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot, Ashgate).
BESSON, S (2005C), 'The Many European Constitutions and the Future of European Constitutional Theory' *Archiv für Rechts- und Sozialphilosophie Beiheft* forthcoming.
BESSON, S (2005D), 'La Constitution de la société civile' (special volume) *Revue Fribourgeoise de Jurisprudence* 323.
BICKEL, A (1986), *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Yale University Press).
BICKFORD, S (1993), *The Dissonance of Democracy* (Ithaca, Cornell University Press).
BIX, B (1993), *Law, Language and Legal Determinacy* (Oxford, Clarendon).

BLACKBURN, S (1981), 'Rule-following and Moral Realism' in HOLTZMAN/LEICH (eds), *Wittgenstein: To Follow a Rule* (London, Routledge).

BLACKBURN, S (1985), 'Errors and the Phenomenology of Values' in HONDERICH, T (ed), *Morality and Objectivity* (London, Routledge).

BLACKBURN, S (1998), *Ruling Passions* (Oxford, Clarendon).

BLACKBURN, S (2001), 'Group Minds and Expressive Harm' 60 *Maryland Law Review* 467.

BOBBIO, N (1987), *The Future of Democracy, A Defence of the Rules of the Game* (Cambridge, Polity).

BOBBIO, N (1998), 'Des critères pour résoudre les antinomies' in *Essais de théorie du droit* (Brussels and Paris, Bruylant and LGDJ), 91.

BÖCKENFÖRDE, E W (1991), 'Grundrechte als Grundsatznormen' in *Recht, Staat, Freiheit, Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt, Suhrkamp).

BODIN, J (1962), *Six Books of a Commonwealth* (Cambridge Mass, Harvard University Press).

BOGHOSSIAN, P A (1989), 'The Rule-Following Considerations' 98 *Mind* 507.

BOHMAN, J (1994), 'Complexity, Pluralism and the Constitutional State: On Habermas' *Faktizität und Geltung*' 28 *Law and Society Review* 897.

BOHMAN, J (1995), 'Public Reason and Cultural Pluralism, Political Liberalism and the Problem of Moral Conflict' 23 *Political Theory* 253.

BOHMAN, J (1996), *Public Deliberation: Pluralism, Complexity and Democracy* (Cambridge Mass, MIT Press).

BOHMAN, J (1998), 'Survey Article: The Coming of Age of Deliberative Democracy' 6 *Journal of Political Philosophy* 400.

BOHMAN, J (1999), 'Citizenship and Norms of Publicity, Wide Public Reason in Cosmopolitan Societies' 27 *Political Theory* 176.

BOHMAN, J (2003), 'Deliberative Toleration' 31:6 *Political Theory* 757.

BOHMAN/REHG (eds) (1997), D*eliberative Democracy: Essays on Reason and Politics* (Cambridge Mass, MIT Press).

BOLTANSKI/THÉVENOT (1991), *De la Justification, Les économies de la grandeur* (Paris, Gallimard).

BORK, R (1990), *The Tempting of America: The Political Seduction of the Law* (London, Sinclair Stevenson).

BOUDON, R (1994), *The Art of Self-Persuasion* (Cambridge, Polity).

BOUDON, R (1996), 'The Cognitivist Model. A Generalized Rational Choice Model' 8:2 *Rationality and Society* 123.

BOURDIEU, P (1977), *Outline of a Theory of Practice* (Cambridge University Press).

BOURDIEU, P (1987), 'The Force of Law: Toward a Sociology of the Juridical Field' 38 *Hastings Law Journal* 814.

BOURDIEU, P (1994), *Raisons pratiques, Sur la théorie de l'Action* (Paris, Seuil).

BOURDIEU, P (2000), *Propos sur le Champ Politique* (Lyon, Presses Universitaires de Lyon).

BOVENS/RABINOWICZ (2003A), 'Complex Collective Decisions. An Epistemic Perspective' 7:1 *Associations* 37.

BOVENS/RABINOWICZ (2003B), 'Democracy and Argument: Tracking Truth in Complex Social Decisions' in VAN AAKEN/LIST/LÜTGE (eds), *Deliberation and Decision: A Dialogue Between Economics, Constitutional Theory and Deliberative Democracy* (Aldershot, Ashgate).

BOYER, A (1995), 'Democracy and Disagreement' 8 *Ratio Juris* 1.

BRATMAN, M (1992), 'Shared Cooperative Activity' 101 *Philosophical Review* 327.
BRATMAN, M (1993), 'Shared Intention' 104 *Ethics* 97.
BRATMAN, M (1999A), *Faces of Intention* (Cambridge University Press).
BRATMAN, M (1999B), *Intention, Plans and Practical Reason* (Cambridge Mass, Harvard University Press).
BRATMAN, M (2002), 'Shapiro on Legal Positivism and Jointly Intentional Activity' 8 *Legal Theory* 511.
BRENNAN, G (1999), 'Collective Irrationality and Belief,' Working Paper, Canberra, Research School of Social Sciences, Australian National University.
BRENNAN, G (2001), 'Collective Coherence?' 21 *International Review of Law and Economics* 197.
BRENNAN/PETTIT (1992), 'Unveiling the Vote' 20 *British Journal of Political Science* 311.
BRENNAN/LOMASKY (1993), *Democracy and Decision* (Cambridge University Press).
BRENNAN, W (1986), 'In Defence of Dissents' 37 *Hastings Law Journal* 427.
BRENNAN, W (1989), 'Why Have a Bill of Rights?' 9 *Oxford Journal of Legal Studies* 425.
BREST, P (1980), 'The Misconceived Quest for the Original Understanding' 60 *Boston University Law Review* 204.
BREST, P (1981), 'The Fundamental Rights Controversy' 90 *Yale Law Journal* 1063.
BRINK, D (1989), 'Moral Disagreement' in *Moral Realism and the Foundation of Ethics* (Cambridge University Press).
BRINK, D (2001), 'Legal Interpretation, Objectivity and Morality' in LEITER, B (ed), *Objectivity in Law and Morals* (Cambridge University Press).
BROOME, J (2000), 'Incommensurable Values' in CRISP/HOOKER (eds), *Well-Being and Morality, Essays in Honour of James Griffin* (Oxford University Press), 21.
BROWER, B (1994), 'The Limits of Public Reason' 91 *Journal of Philosophy* 5.
BRUNKHORST, H (2000), 'Equality and Elitism in Arendt' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).
BRUTUS (1981), 'Letter to the New York Journal' in STORING, H (ed), *The Anti-Federalist* (University of Chicago Press).
BRYCE, J (1980), 'Flexible and Rigid Constitutions' in *Constitutions* (Aalen, Scientia Verlag), 3.
BUCHANAN, A (2002), 'Political Legitimacy and Democracy' 112 *Ethics* 691.
BÜCHLER-TSCHÜDIN, V (1980), *Demokratie und Kompromiss* (Basel, Helbing & Lichtenhahn).
BURGE, T (1986), 'Intellectual Norms and Foundations of Mind' 83 *Journal of Philosophy* 697.
BURGE, T (1989), 'Wherein is Language Social?' in GEORGE, A (ed), *Reflections on Chomsky* (Oxford, Blackwell).
BURKE, E (1925), 'Speech to the Electors at Bristol' in BROUGHTON, L N (ed), *Selections* (Princeton University Press), 125.
BURKE, E (1960), *Selected Writings* (New York, Modern Library).
BURTNESS, J (1999), *Consequences: Morality, Ethics and the Future* (Minneapolis, Fortress Press).
CALABRESI/RHODES (1992), 'The Structural Constitution: Unitary Executive, Plural Judiciary' 105 *Harvard Law Review* 1153.
CALHOUN, C (1995), 'Standing for Something' 92 *Journal of Philosophy* 235.
CAMPBELL, T D (1988), 'Ethical Positivism' in PANOU, S (ed), *Theory and Systems of Philosophy* (Stuttgart, Franz Steiner).
CAMPBELL, T D (1996), *The Legal Theory of Ethical Positivism* (Aldershot, Dartmouth).
CAMPBELL, T D (1999), 'Human Rights: A Culture of Controversy' 26 *Journal of Law and Society* 14.

Caney, S (1996), 'Impartiality and Liberal Neutrality' 8 *Utilitas* 286.
Canovan, M (1988), 'Friendship, Truth and Politics: Hannah Arendt and Toleration' in Mendus, S (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge University Press).
Carens, J (1979), 'Compromises in Politics' in Pennock/Chapman (eds), *Compromise in Ethics, Law and Politics*, *Nomos XXXI* (New York University Press).
Cavell, S (1979), *The Claim of Reason* (Oxford, Clarendon).
Chambers, S (1995), 'Discourse and Democratic Practices' in White, S (ed), *The Cambridge Companion to Habermas* (Cambridge University Press).
Chambers, S (1996), *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, Cornell University Press).
Chambers, S (2002), 'Can Procedural Democracy be Radical?' in Ingram, D (ed), *The Political: Readings in Continental Philosophy* (Oxford, Blackwell).
Chang, R (2004), 'Putting Together Morality and Well-Being' in Baumann/Betzler (eds), *Practical Conflicts, New Philosophical Essays* (Cambridge University Press), 118.
Chapman, B (1998a), 'More Easily Done than Said: Rules, Reasons and Rational Social Choice' 18 *Oxford Journal of Legal Studies* 293.
Chapman, B (1998b), 'Law, Incommensurability and Conceptually Sequenced Argument' 146 *University of Pennsylvania Law Review* 1487.
Christiano, T (1995), 'Social Choice and Democracy' in Copp/Hampton/Roemer (eds), *The Idea of Democracy* (Cambridge University Press), 270.
Christiano, T (1996), *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, Westview Press).
Christiano, T (1999a), 'Justice and Disagreement at the Foundations of Political Authority' 110 *Ethics* 165.
Christiano, T (1999b), 'Commentary' 7 *Cardozo Journal of International and Comparative Law* 473.
Christiano, T (2000), 'Waldron on Law and Disagreement' 19 *Law and Philosophy* 513.
Christiano, T (2004), 'The Authority of Democracy' 12:3 *Journal of Political Philosophy* 266.
Christodoulidis, E A (1994), 'The Suspect Intimacy Between Law and Political Community' 80 *Archiv für Rechts- und Sozialphilosophie* 1.
Clarke, S (1999), 'Contractarianism, Liberal Neutrality and Epistemology' 47 *Political Studies* 627.
Cohen, C (1971), *Democracy* (New York, Free Press).
Cohen, G A (1995), 'Incentives, Inequality and Community' in Darwall, S (ed), *Equal Freedom, Selected Tanner Lectures on Human Values* (Ann Arbor, University of Michigan Press), 261.
Cohen, J (1968), 'Commentary: Representation and the Problem of Identity' in Pennock/Chapman (eds), *Representation*, *Nomos X* (New York University Press).
Cohen, J (1986a), 'An Epistemic Conception of Democracy' 97 *Ethics* 26.
Cohen, J (1986b), 'Reflections on Rousseau: Autonomy and Democracy' 15:3 *Philosophy and Public Affairs* 275.
Cohen, J (1989), 'Deliberation and Democratic Legitimacy' in Hamlin/Pettit (eds), *The Good Polity* (Oxford, Blackwell).
Cohen, J (1995), 'Moral Pluralism and Political Consensus' in Copp/Hampton/Roemer (eds), *The Idea of Democracy* (Cambridge University Press), 270.
Cohen, J (1996), 'Procedure and Substance in Deliberative Democracy' in Benhabib, S (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press), 95.

COHEN, J (1999), 'Reflections on Habermas and Democracy' 12 *Ratio Juris* 385.
COHEN, J (2001), 'Taking People as They Are?' 30:4 *Philosophy and Public Affairs* 385.
COHEN/ROGERS (1983), *On Democracy* (New York, Penguin Books).
COHEN/ROGERS (1993), 'Associations and Democracy' 10 *Social Philosophy and Policy* 282.
COHEN/SABEL (1997), 'Directly-Deliberative Polyarchy' 3:4 *European Law Journal* 313.
COHEN/SABEL (2003), 'Sovereignty and Solidarity: EU and US' in ZEITLIN/TRUBEK (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford University Press), ch 13.
COHEN, J L (1998), 'Trust, Voluntary Association and Workable Democracy: the Contemporary American Discourse of Civil Society' in WARREN, M E (ed), *Democracy and Trust* (Cambridge University Press).
COHEN/ARATO (1989), 'Politics and the Reconstruction of the Concept of Civil Society' in HONNETH/MCCARTHY/OFFE/WELLMER (eds), *Zwischenbetrachtung im Prozess der Aufklärung* (Frankfurt, Suhrkamp).
COHEN/ARATO (1992), *Civil Society and Political Theory* (Cambridge Mass, MIT Press).
COLEMAN, J (1982), 'Negative and Positive Positivism' 11 *Journal of Legal Studies* 139.
COLEMAN, J (1988), 'Negative and Positive Positivism' in *Markets, Morals and the Law* (Cambridge University Press).
COLEMAN, J (1991), 'Rules and Social Facts' 14 *Harvard Journal of Law and Public Policy* 721.
COLEMAN, J (1995), 'Truth and Objectivity in Law' 1 *Legal Theory* 33.
COLEMAN, J (1998), 'Incorporationism, Conventionality and the Practical Difference Thesis' 4 *Legal Theory* 381.
COLEMAN, J (2001), *The Practice of Principle* (Oxford University Press).
COLEMAN/FEREJOHN (1986), 'Democracy and Social Choice' 97 *Ethics* 6.
COLEMAN/LEITER (1996), 'Legal Positivism' in PATTERSON, D (ed), *A Companion to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 241.
COLEMAN/LEITER (1997), 'Determinacy, Objectivity and Authority' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon).
CONDORCET, J A DE (1785), *Essai sur l'application de l'analyse de la probabilité des décisions rendues à la pluralité des voix* (Paris).
CONNOLLY, W (1972), 'On Interests in Politics' 2 *Politics and Society* 459.
CONNOLLY, W (1983), *The Terms of Political Discourse* (2nd edn) (Oxford, Robertson).
COONS, J E (1964), 'Approaches to Court-imposed Compromises: the Uses of Doubt and Reason' 58 *Northwestern University Law Review* 750.
COPP, D (1995), 'Could Political Truth be a Hazard for Democracy?' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 101.
COPP, D (1996), 'Pluralism and Stability in Liberal Theory' 4 *Journal of Political Philosophy* 198.
COPP/HAMPTON/ROEMER (eds) (1995), *The Idea of Democracy* (Cambridge University Press).
COTTERELL, R (1995), *Law's Community: Legal Theory in Sociological Perspective* (Oxford, Clarendon).
COULTRAP, J (1999), 'From Parliamentarism to Pluralism: Models of Democracy and the European Union's Democratic Deficit' 11 *Journal of Theoretical Politics* 107.
COVER, R M (1983), '*Nomos* and Narrative' 97:1 *Harvard Law Review* 4.
COVER, R M (1984), 'The Supreme Court 1982, Foreword: Nomos and Narrative' 97 *Harvard Law Review* 4.
COWEN, T (1991), 'Self-Constraint versus Self-Liberation' 101 *Ethics* 360.
CRANSTON, M (1967), 'Human Rights, Real and Supposed' in RAPHAEL, D (ed), *Political Theory and the Rights of Man* (London, MacMillan).

CRANSTON, M (1987), 'John Locke and the Case for Toleration' in MENDUS/EDWARDS (eds), *On Toleration* (Oxford, Clarendon).

D'AGOSTINO, F (1992), 'The Idea and Ideal of Public Justification' 19 *Social Theory and Practice* 143.

D'AGOSTINO, F (1995), 'Value Pluralism, Public Justification and Post-modernism: the Conventional Status of Political Critique' 29 *Journal of Value Inquiry* 351.

D'AGOSTINO/GAUS (eds) (1998), *Public Reason* (Aldershot, Ashgate).

DAHL, R (1957), 'Decision-making in a Democracy: The Supreme Court as a National Policy Maker' 6 *Journal of Public Law* 279.

DAHL, R (1971), *Polyarchy: Participation and Opposition* (New Haven, Yale University Press).

DAHL, R (1989), *Democracy and its Critics* (New Haven, Yale University Press).

DAHL, R (1998), O*n Democracy* (New Haven, Yale University Press).

DAN-COHEN, M (1997), 'Interpreting Official Speech' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon), 433.

DANIELS, N (1989), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (2nd edn) (Stanford University Press).

DARWALL, S L (1977), 'Two Kinds of Respect' 88 *Ethics* 38.

DAVIDSON, D (1982), 'Paradoxes of Irrationality' in WOLLHEIM/HOPKINS (eds), *Philosophical Essays* (Cambridge University Press).

DAVIDSON, D (1984), 'On the Very Idea of a Conceptual Scheme' in *Inquiries into Truth and Interpretation* (Oxford, Clarendon).

DEGGAU, H G (1983), *Die Aporien der Rechtslehre Kants* (Stuttgart and Bad Cannstatt, Frommann-Holzboog).

DERATHÉ, R (1970), *Jean-Jacques Rousseau et la science politique de son temps* (2nd edn) (Paris, J Vrin).

DERRIDA, J (1988), 'Signature, Event, Context' in *Limited Inc.* (Evanston, Northwestern University Press), 90.

DERRIDA, J (1990), 'Force de loi: le fondement mystique de l'autorité' 11 *Cardozo Law Review* 919.

DERRIDA, J (1992), *L'autre Cap: la démocratie contractuelle* (Paris, Editions de Minuit).

DEWEY, J (1927), *The Public and its Problems* (London, Allen & Unwin).

DICKSON, J (2001A), *Evaluation and Legal Theory* (Oxford, Hart Publishing).

DICKSON, J (2001B), 'Interpretation and Coherence in Legal Reasoning' in ZALTA, E N (ed), *Stanford Encyclopedia of Philosophy* (Summer 2001 edn), http://plato.stanford.edu/archives/sum2001/entries/legal-reas-interpret/.

DOBEL, J P (1990), *Compromise and Political Action* (Savage, Rowman & Littlefield).

DOLAN, F (2000), 'Arendt on Philosophy and Politics' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).

DORF/SABEL (1998), 'A Constitution of Democratic Experimentalism' 98 *Columbia Law Review* 267.

DOWNS, A (1957), *An Economic Theory of Democracy* (New York, Harper & Row).

DREIER, R (1983A), 'Widerstand und ziviler Ungehorsam im Rechtsstaat' in GLOTZ, R (ed), *Ziviler Ungehorsam im Rechtsstaat* (Frankfurt, Suhrkamp), 54.

DREIER, R (1983B), 'Widerstandsrecht im Rechtsstaat, Bemerkungen zum zivilen Ungehorsam' in ACHTERBERG/KRAWIETZ *et al* (eds), *Recht und Staat im sozialen Wandel, Festschrift Scupin* (Berlin, Duncker & Humblot), 573.

DREIER, R (1985), 'Rechtsgehorsam und Widerstandsrecht' in BRODA, C *et al* (ed), *Festschrift für R. Wassermann* (Neuwied, Luchterhand), 299.

DREIER, R (1991), 'Widerstandsrecht im Rechtsstaat' in *Recht-Staat-Vernunft, Studien zur Rechtstheorie* (Frankfurt, Suhrkamp), 30.
DREIER, R (1997), 'Gustav Radbruch und die Mauerschützen' 1 *Juristen Zeitung* 421.
DREIER, H (1996 or 1998), in DREIER, H (ed), *Grundgesetz, Kommentar* (Tübingen, JCB Mohr), vol I and II.
DRYZEK, J S (1990), *Discursive Democracy* (Cambridge University Press).
DRYZEK, J S (2000), *Deliberative Democracy and Beyond* (Oxford University Press).
DRYZEK, J S (2001), 'Legitimacy and Economy in Deliberative Democracy' 29:5 *Political Theory* 651.
DRYZEK/LIST (2002), 'Social Choice Theory and Deliberative Democracy: A Reconciliation' 33 *British Journal of Political Science* 1.
DUBIEL, H (1991), 'Konsens oder Konflikt,' unpublished manuscript.
DUNN, J (1969), *The Political Thought of John Locke: A Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge University Press).
DUNN, J (1993), *Western Political Theory in the Face of the Future* (Cambridge University Press).
DUNN, J (1999A), *Interpreting Political Responsibility* (Cambridge, Polity).
DUNN, J (1999B), 'Situating Democratic Political Accountability' in PRZEWORSKI/STOKES/MANIN (eds), *Democracy, Accountability and Representation* (Cambridge University Press), 329.
DUNN, J (2000), *The Cunning of Unreason: Making Sense of Politics* (London, Harper Collins).
DURKHEIM, E (1960), *Leçons de Sociologie* (Paris, PUF).
DURKHEIM, E (1991), *Physik der Sitten und des Rechts* (Frankfurt, Suhrkamp).
DWORKIN, R (1975), 'The Original Position' in DANIELS, N (ed), *Reading Rawls* (Stanford University Press).
DWORKIN, R (1978), *Taking Rights Seriously* (London, Duckworth).
DWORKIN, R (1984A), 'Rights as Trumps' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press), 153.
DWORKIN, R (1984B), 'A Reply to Soper' in COHEN, M (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London, Duckworth), 250.
DWORKIN, R (1985), *A Matter of Principle* (Cambridge Mass, Harvard University Press).
DWORKIN, R (1986), *Law's Empire* (London, Fontana).
DWORKIN, R (1987), 'What is Equality? Part 4: Political Equality' 22 *University of San Francisco Law Review* 4.
DWORKIN, R (1989), 'Political Judges and the Rule of Law' in SINGH, M (ed), *Comparative Constitutional Law*, *Festschrift P.K. Tripathi* (Lucknow, Eastern Book Company), 3.
DWORKIN, R (1990), *A Bill of Rights for Britain* (London, Chatto & Windus).
DWORKIN, R (1994A), 'A Reply to Ricoeur' 7 *Ratio Juris* 287.
DWORKIN, R (1994B), 'Hart's Posthumous Reply,' unpublished manuscript.
DWORKIN, R (1994C), *Life's Dominion* (New York, Vintage).
DWORKIN, R (1995A), 'The Foundations of Liberal Equality, A Tanner Lecture' in DARWALL, S (ed), *Equal Freedom* (Ann Arbor, University of Michigan Press).
DWORKIN, R (1995B), *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge Mass, Harvard University Press).
DWORKIN, R (1996A), 'Indeterminacy in Law' in GUEST, S (ed), *Positivism Today* (Aldershot, Dartmouth), 1.
DWORKIN, R (1996B), 'Objectivity and Truth, You'd Better Believe It' 25 *Philosophy and Public Affairs* 3.

DWORKIN, R (1997A), 'In Praise of Theory' 29 *Arizona State Law Journal* 407.
DWORKIN, R (1997B), 'Comment on Scalia' in SCALIA, A (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press).
DWORKIN, R (1997C), 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' 65 *Fordham Law Review* 1249.
DWORKIN, R (1998), 'The Partnership Conception of Democracy' 86 *California Law Review* 453.
DWORKIN, R (2000A), 'Must Our Judges Be Philosophers? *Can* They Be Philosophers?,' New York Council for the Humanities Scholar of the Year Lecture, www.culturefront.org/culturefront/dworkin.html.
DWORKIN, R (2000B), *Sovereign Virtue, The Theory and Practice of Equality* (Cambridge Mass, Harvard University Press).
DWORKIN, R (2001A), 'Do Liberal Values Conflict?' in LILLA/DWORKIN/SILVERS (eds), *The Legacy of Isaiah Berlin* (New York, New York Review Books), 73.
DWORKIN, R (2001B), 'Political and Legal Archimedeans,' unpublished manuscript.
DWORKIN, R (2001C), 'Justice for Hedgehogs,' unpublished manuscript.
DWORKIN, R (2002), 'Thirty Years On' 115 *Harvard Law Review* 1655.
DWORKIN, R (2003A), 'Interpretation, Morality and Truth,' unpublished manuscript.
DWORKIN, R (2003B), 'Response to Overseas Commentators' 1:4 *International Journal of Constitutional Law* 651.
DWORKIN, R (2003C), 'The Judge's New Role: Should Personal Convictions Count?' 1:1 *Journal of International Criminal Justice* 4.
DWORKIN, R (2004A), 'Hart's Postscript and the Character of Political Philosophy' 24:1 *Oxford Journal of Legal Studies* 1.
DWORKIN, R (2004B), 'Ronald Dworkin Replies' in BURLEY, J (ed), *Dworkin and his Critics* (Oxford, Blackwell), 339.
EASTERBROOK, F (1983), 'Statutes' Domains' 50 *University of Chicago Law Review* 533.
ECKERSLEY, R (2000), 'Deliberative Democracy, Ecological Risk and "Communities of Fate"' in SAWARD, M (ed), *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge), 117.
EDER, K (1986), 'Der permanente Gesellschaftsvertrag - zur kollektiven Konstruktion einer sozialen Ordnung' in KERN/MÜLLER (eds), *Gerechtigkeit, Diskurs oder Markt?* (Opladen, Westdeutscher Verlag).
EEKELAAR, J (2002), 'Judges and Citizens: Two Conceptions of Law' 22: 3 *Oxford Journal of Legal Studies* 497.
EHRENZWEIG, A (1973), *Psychoanalytische Rechtswissenschaft* (Berlin, Duncker & Humblot).
EISENBERG, M (1988), *The Nature of the Common Law* (Cambridge Mass, Harvard University Press).
EISGRUBER, C L (1990), 'Disagreeable People' 43 *Stanford Law Review* 275.
EISGRUBER, C L (2001), *Constitutional Self-Government* (Cambridge Mass, Harvard University Press).
EISGRUBER, C L (2002A), 'Democracy and Disagreement: A Comment on Jeremy Waldron's *Law and Disagreement*' 6:5 *Legislation and Public Policy* 35.
EISGRUBER, C L (2002B), 'Constitutional Self-Government and Judicial Review: Reply to Five Critics' (37) *University of San Francisco Law Review* 115.
EISGRUBER, C L (2005), 'Should Constitutional Judges be Philosophers?' in HERSHOWITZ, S (ed), *Exploring Law's Empire* (Oxford University Press).
ELSTER, J (1983), *Sour Grapes, Studies in the Subversion of Rationality* (Cambridge University Press).

ELSTER, J (1984), *Ulysses and the Sirens, Studies in Rationality and Irrationality* (Cambridge University Press).

ELSTER, J (1986A), 'The Market and the Forum: Three Varieties of Political Theory' in ELSTER/HYLLAND (eds), *Foundations of Social Choice Theory* (Cambridge University Press), 103.

ELSTER, J (ed) (1986B), *The Multiple Self* (Cambridge University Press).

ELSTER, J (1988), 'Introduction' in ELSTER/SLAGSTAD (eds), *Constitutionalism and Democracy* (Cambridge University Press).

ELSTER, J (1989), *Solomonic Judgements, Studies in the Limitations of Rationality* (Cambridge University Press).

ELSTER, J (1991A), 'The Possibility of Rational Politics' in HELD, D (ed), *Political Theory Today* (Cambridge, Polity), 115.

ELSTER, J (1991B), 'Constitutionalism in Eastern Europe: An Introduction' 58 *University of Chicago Law Review* 447.

ELSTER, J (1993), 'Rebuilding the Boat in the Open Sea: Constitution-making in Eastern Europe' 71 *Public Administration* 169.

ELSTER, J (1995A), 'Limiting Majority Rule: Alternatives to Judicial Review in the Revolutionary Epoch' in SMITH, E (ed), *Constitutional Justice under old Constitutions* (The Hague, Kluwer).

ELSTER, J (1995B), 'Forces and Mechanisms in the Constitution-making Process' 45 *Duke Law Review* 364.

ELSTER, J (1998A), 'Introduction' in ELSTER, J (ed), *Deliberative Democracy* (Cambridge University Press), 1.

ELSTER, J (1998B), 'Deliberation and Constitution Making' in ELSTER, J (ed), *Deliberative Democracy* (Cambridge University Press), 97.

ELSTER, J (2000), *Ulysses Unbound* (Cambridge University Press).

ELY, J H (1980), *Democracy and Distrust* (Cambridge Mass, Harvard University Press).

ELY, J H (1983), 'Professor Dworkin's External/Personal Preferences Distinction' 33 *Duke Law Journal* 985.

ENDICOTT, T A (1996), 'Linguistic Indeterminacy' 16 *Oxford Journal of Legal Studies* 667.

ENDICOTT, T A (1997), 'Vagueness and Legal Theory' 3 *Legal Theory* 37.

ENDICOTT, T A (1998), 'Herbert Hart and the Semantic Sting' 4 *Legal Theory* 283.

ENDICOTT, T A (1999), 'The Impossibility of the Rule of Law' 19 *Oxford Journal of Legal Studies* 1.

ENDICOTT, T A (2000), *Vagueness in the Law* (Oxford University Press).

ENDICOTT, T A (2001), 'Are there any Rules?' 5 *Journal of Ethics* 199.

ENDICOTT, T A (2002A), 'How to Speak the Truth' 46 *American Journal of Jurisprudence* 229.

ENDICOTT, T A (2002B), 'Law and Language' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).

ENDICOTT, T A (2003A), 'Raz on Gaps: The Surprising Part' in MEYER/PAULSON/POGGE (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press), 99.

ENDICOTT, T A (2003B), 'The Reason of the Law' 48 *American Journal of Jurisprudence* 83.

ENDICOTT, T A (2005), '"Our Critic not our Mirror": Why Justice is not an Interpretive Concept,' unpublished manuscript.

ESKRIDGE, W N (1994), *Dynamic Statutory Interpretation* (Cambridge Mass, Harvard University Press).

ESKRIDGE, W N (2000), 'The Circumstances of Politics and the Application of Statutes' 100 *Columbia Law Review* 558.

ESSER, J (1972), *Vorverständnis und Methodenwahl in der Rechtsfindung, Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Frankfurt, S Fischer).

ESSER, J (1974), *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (3rd edn) (Tübingen, JCB Mohr).

ESTLUND, D (1993), 'Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence' 71 *Texas Law Review* 1437.

ESTLUND, D (1994), 'Opinion Leaders, Independence and Condorcet's Jury Theorem' 36 *Theory and Decision* 131.

ESTLUND, D (1995), 'Making Truth Safe for Democracy' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 71.

ESTLUND, D (1997), 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority' in BOHMAN/REHG (eds), *Deliberative Democracy* (Cambridge Mass, MIT Press), 173.

ESTLUND, D (2000A), 'Democratic Authority: Toward a Philosophical Framework,' Conference on Deliberating about Deliberative Democracy, University of Texas, Austin, 4–6 February 2000, www.la.texas.edu/conf2000/index.html.

ESTLUND, D (2000B), 'Jeremy Waldron on *Law and Disagreement*' 99 *Philosophical Studies* 111.

ESTLUND, D (2000C), 'Political Quality' 17 *Social Philosophy and Policy* 144.

ESTLUND/WALDRON/GROFMAN/FELD (1989), 'Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited' 83:4 *American Political Science Review* 1317.

EWING, K D (1999), 'The Human Rights Act and Parliamentary Sovereignty' 62 *Modern Law Review* 79.

FABRE, C (1998), 'Constitutionalising Rights' 6 *Journal of Political Philosophy* 263.

FABRE, C (2000A), 'The Dignity of Rights' 20 *Oxford Journal of Legal Studies* 271.

FABRE, C (2000B), 'A Philosophical Argument for a Bill of Rights' 30 *British Journal of Political Science* 93.

FALLON, R (1997), '"The Rule of Law" as a Concept in Constitutional Discourse' 97 *Columbia Law Review* 1.

FARBER/FRICKEY (1991), *Law and Public Choice: A Critical Introduction* (Chicago University Press).

FARR, J (1989), 'Understanding Conceptual Change Politically' in BALL/FARR/HANSON (eds), *Political Innovation and Conceptual Change* (Cambridge University Press), 24.

FATE-NORTON, D (1993A), 'An Introduction to Hume's Thought' in FATE-NORTON, D (ed), *The Cambridge Companion to Hume* (Cambridge University Press).

FATE-NORTON, D (1993B), 'Hume, Human Nature and the Foundations of Morality' in FATE-NORTON, D (ed), *The Cambridge Companion to Hume* (Cambridge University Press).

FEINBERG, J (ed) (1969), *Moral Concepts* (Oxford University Press).

FEINBERG, J (1970), 'The Nature and Value of Rights' 4 *Journal of Value Inquiry* 263.

FEINBERG, J (1973), *Social Philosophy* (Englewood Cliffs, Prentice Hall).

FEINBERG, J (1978), 'Voluntary Euthanasia and the Inalienable Right to Life' 7 *Philosophy and Public Affairs* 102.

FEINBERG, J (1979), 'The Nature and Value of Rights' in LYONS, D (ed), *Rights* (Belmont, Wadsworth), 78.

FEINBERG, J (1980), 'Noncomparative Justice' in *Rights, Justice and the Bounds of Liberty, Essays in Social Philosophy* (Princeton University Press), 265.

FEINBERG, J (1984), *Harm to Others* (Oxford University Press).

FEINBERG, J (1992A), 'In Defense of Moral Rights: Their Bare Existence' in *Freedom and Fulfillment*: *Philosophical Essays* (Princeton University Press), 197.

FEINBERG, J (1992B), 'In Defense of Moral Rights: Their Social Importance' in *Freedom and Fulfillment*: *Philosophical Essays* (Princeton University Press), 220.

FEINBERG, J (1992C), 'Civil Disobedience in the Modern World' in *Freedom and Fulfillment*: *Philosophical Essays* (Princeton University Press), 152.

FEREJOHN, J (1995), 'Must Preferences be Respected in a Democracy?' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 270.

FEREJOHN, J (1999), 'Accountability and Authority: Toward a Theory of Political Accountability' in PRZEWORSKI/STOKES/MANIN (eds), *Democracy, Accountability and Representation* (Cambridge University Press), 131.

FEREJOHN, J (2001), 'Statutes, Plans, Intentions: A Planning Theory of Legislation,' www.law.nyu.edu/clppt/program2001/readings/ferejohn/statutes_as_partial_plans_nov231.pdf.

FERRAJOLI, L (2001), 'Fundamental Rights' 14 *International Journal for the Semiotics of Law* 1.

FERRARA, A (2001), 'Of Boats and Principle, Reflections on Habermas' "Constitutional Democracy"' 6 *Political Theory* 782.

FERRERES-COMELLA, V (2000), 'A Defense of Constitutional Rigidity' 1 *Analisi e diritto* 45.

FETSCHER, I (1968), *Rousseaus Politische Philosophie* (2nd edn) (Neuwied, Luchterhand).

FINKELSTEIN, C (2001A), 'Introduction to the Symposium on Conflicts of Rights' 7 *Legal Theory* 235.

FINKELSTEIN, C (2001B), 'Two Men and a Plank' 7 *Legal Theory* 279.

FINNIS, J (1973), 'Revolutions and the Continuity of Law' in SIMPSON, A W B (ed), *Oxford Essays in Jurisprudence* (2nd series) (Oxford University Press).

FINNIS, J (1980), *Natural Law and Natural Rights* (Oxford, Clarendon).

FINNIS, J (1984), 'The Authority of Law in the Predicament of Contemporary Social Theory' 1 *Journal of Law, Ethics and Public Policy* 115.

FINNIS, J (1985), 'On "The Critical Legal Studies Movement"' 30 *American Journal of Jurisprudence* 21.

FINNIS, J (1987A), 'Reason and Authority in *Law's Empire*' 6 *Law and Philosophy* 357.

FINNIS, J (1987B), 'On "The Critical Legal Studies Movement"' in *Oxford Essays in Jurisprudence* (3rd series) (Oxford University Press), 145.

FINNIS, J (1989), 'Law as Coordination' 2 *Ratio Juris* 97.

FINNIS, J (1990), 'Natural Law and Legal Reasoning' 38 *Cleveland State Law Review* 1.

FINNIS, J (1992), 'Natural Law and Legal Reasoning' in GEORGE, R (ed), *Natural Law Theory* (Oxford University Press).

FINNIS, J (1996), 'Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections' 71 *Notre Dame Law Review* 596.

FINNIS, J (1998), 'Public Reason, Abortion and Cloning' 32 *Valparaiso University Law Review* 361.

FINNIS, J (2000A), 'Abortion, Natural Law, and Public Reason' in GEORGE/WOLFE (eds), *Natural Law and Public Reason* (Washington, Georgetown University Press).

FINNIS, J (2000B), 'On the Incoherence of Legal Positivism' 75:5 *Notre Dame Law Review* 1597.

FINNIS, J (2001), 'Natural Law: The Classical Theory' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).

FINNIS, J (2003), 'Law and What I Truly Should Decide' 48 *American Journal of Jurisprudence* 107.

FISH, S (1989), *Doing What Comes Naturally* (Durham, Duke University Press).
FISH, S (1991A), 'Play of Surfaces: Theory and the Law' in LEYH, G (ed), *Legal Hermeneutics, History, Theory and Practice* (Berkeley, University of California Press).
FISH, S (1991B), 'The Law Wishes to Have a Formal Existence' in SARAT/KEARNS (eds), *The Fate of Law* (Ann Arbor, University of Michigan Press).
FISH, S (1999), 'Mutual Respect as a Device of Exclusion' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 88.
FISHKIN, J (1981), 'Introduction to Symposium on Representation' 91 *Ethics* 353.
FISHKIN, J (1986), 'Liberal Theory and the Problem of Justification' in PENNOCK/CHAPMAN (eds), *Justification, Nomos XXVII* (New York University Press).
FISHKIN, J (1991), *Democracy and Deliberation* (New Haven, Yale University Press).
FISHKIN, J (1997), *The Voice of the People* (New Haven, Yale University Press).
FITZPATRICK, P (2001), 'Consolations of the Law: Jurisprudence and the Constitution of Deliberative Politics' 14 *Ratio Juris* 281.
FLATHMAN, R (1993), *Thomas Hobbes: Skepticism, Individuality and Chastened Politics* (London, Sage).
FLETCHER, G (1987A), 'Why Kant' 87 *Columbia Law Review* 421.
FLETCHER, G (1987B), 'Law and Morality: A Kantian Perspective' 87 *Columbia Law Review* 533.
FODOR, J (1998), 'Review of Christopher Peacocke's *A Study of Concepts*' in *In Critical Condition* (Cambridge Mass, MIT Press), 27.
FOGELIN, R (1994), *Pyrrhonian Reflections on Knowledge and Justification* (New York, Oxford University Press).
FOLLET, M (1940), 'Constructive Conflict' in METCALF/URWICH (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follet* (London, Pitman).
FOOT, P (1978), 'Moral Arguments' in *Virtues and Vices and Other Essays* (Oxford, Blackwell).
FOUCAULT, M (1980), *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Brighton, Harvester Press).
FORBES, D (1975), *Hume's Philosophical Politics* (Cambridge University Press).
FORST, R (2000), 'Toleranz, Gerechtigkeit und Vernunft' in *Toleranz* (Frankfurt, Campus), 118.
FRÄNKEL, E (1991A), 'Die repräsentative und plebiszitäre Komponente im demokratischen Verfassungsstaat' in *Deutschland und die westlichen Demokratien* (Frankfurt, Suhrkamp), 153.
FRÄNKEL, E (1991B), 'Parlament und öffentliche Meinung' in *Deutschland und die westlichen Demokratien* (Frankfurt, Suhrkamp), 209.
FRANK, J (1949), *Law and the Modern Mind* (London, Stevens).
FRANKENA, W K (1955), 'Natural and Inalienable Rights' 64 *Philosophical Review* 212.
FRANKENA, W (1968), 'Two Notes on Representation' in PENNOCK/CHAPMAN (eds), *Representation, Nomos X* (New York University Press), 49.
FRANKENBERG, G (1984), 'Ziviler Ungehorsam und rechtsstaatliche Demokratie' 1 *Juristen Zeitung* 270.
FRASER, N (1997), 'Communication, Transformation and Consciousness-Raising' in CALHOUN/MCGOWAN (eds), *Hannah Arendt and the Meaning of Politics* (Minneapolis, University of Minnesota Press).
FREDMAN, S (2000), 'Judging Democracy: The Role of the Judiciary in the UK Human Rights Act 1998' 53 *Current Legal Problems* 99.
FREEDEN, M (2003), *Ideology, A Very Short Introduction* (Oxford University Press).

FREEMAN, S (1990A), 'Reason and Agreement in Social Contract Views' 19 *Philosophy and Public Affairs* 122.
FREEMAN, S (1990B), 'Constitutional Democracy and the Legitimacy of Judicial Review' 9 *Law and Philosophy* 327.
FREEMAN, S (2000), 'Deliberative Democracy: A Sympathetic Comment' 29 *Philosophy and Public Affairs* 371.
FREEMAN, S (ed) (2003), *The Cambridge Companion to Rawls* (Cambridge University Press).
FREUD, S (1940A), 'Totem und Tabu' in *Gesammelte Werke* (London, Imago Publ Co), IX.
FREUD, S (1940B), 'Massenpsychologie und Ich-Analyse' in *Gesammelte Werke* (London, Imago Publ Co), XIII.
FREUD, S (1940C), 'Das Ich und das Es' in *Gesammelte Werke* (London, Imago Publ Co), XIII.
FREUD, S (1995A), *Le malaise dans la culture* (Paris, PUF).
FREUD, S (1995B), *L'avenir d'une illusion* (Paris, PUF).
FRIEDMAN, B (1998), 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' 73:2 *New York University Law Review* 333.
FROHOCK, F (1994), 'Explaining Political Disagreement. Review' 88 *American Political Science Review* 979.
FULLER, L (1964), *The Morality of Law* (New Haven, Yale University Press).
FULLER, L (1969A), 'Human Interaction and the Law' 14 *American Journal of Jurisprudence* 1.
FULLER, L (1969B), *The Morality of Law* (revised edn) (New Haven, Yale University Press).
FUMERTON, R (1994), 'The Incoherence of Coherence Theories' 19 *Journal of Philosophical Research* 89.
GADAMER, H-G (1975), *Wahrheit und Methode, Grundzüge einer philosophischen Hermeneutik* (4th edn) (Tübingen, JCB Mohr).
GALLIE, W B (1956), 'Essentially Contested Concepts' 56 *Proceedings of the Aristotelian Society* 167.
GALSTON, W (1991), *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (Cambridge University Press).
GALSTON, W (1999A), 'Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory' 40 *William and Mary Law Review* 869.
GALSTON, W (1999B), 'Diversity, Toleration and Deliberative Democracy: Religious Minorities and Public Schooling' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 39.
GALSTON, W (2000), 'Democracy and Value Pluralism' 17:1 *Social Philosophy and Policy* 255.
GANS, C (1981), 'The Normativity of Law and its Coordinative Function' 16 *Israel Law Review* 333.
GANS, C (1992), *Philosophical Anarchism and Political Disobedience* (Cambridge University Press).
GARDNER, J (1996), 'Shut Up and Vote: a Critique of Deliberative Democracy and the Life of Talk' 63 *Tennessee Law Review* 421.
GARDNER, J (2000A), 'Law as a Leap of Faith' in OLIVER/DOUGLAS SCOTT/TADROS (eds), *Faith in Law, Essays in Legal Theory* (Oxford, Hart Publishing), 19.
GARDNER, J (2000B), 'The Virtue of Justice and the Character of Law' 53 *Current Legal Problems* 1.
GARDNER, J (2000C), 'The Virtue of Charity and its Foils' in MOODY/MITCHELL (eds), *The Foundations of Charity* (Oxford, Hart Publishing).

GARDNER, J (2001A), 'The Mysterious Case of the Reasonable Person' 51 *Toronto Law Review* 273.

GARDNER, J (2001B), 'Legal Positivism: 5½ Myths' 46 *American Journal of Jurisprudence* 199.

GARDNER, J (2002), 'Reasons for Teamwork' 8 *Legal Theory* 495.

GARDNER, J (2004), 'The Legality of Law' 17:2 *Ratio Juris* 168.

GARDNER/MACKLEM (2002), 'Reasons' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).

GARGARELLA, R (1995), *Nos los representantes* (Buenos Aires, Mito & Devila).

GARGARELLA, R (1998A), 'Full Representation, Deliberation and Impartiality' in ELSTER, J (ed), *Deliberative Democracy* (Cambridge University Press), 260.

GARGARELLA, R (1998B), 'Il ruolo dei giudici di fronte al terreno proibito' 10 *Ragion Pratica* 65.

GARZON VALDES, E (1993), 'Representacion y democracia' in GARZON VALDEZ, E (ed), *Derecho, Etica y Politica* (Madrid, Centro de Estudios Constitucionales).

GAUS, G (1986), 'Subjective Value and Justificatory Political Theory' in PENNOCK/CHAPMAN (eds), *Justification, Nomos XXVII* (New York University Press).

GAUS, G (1995), 'The Rational, the Reasonable and Justification' 3 *Journal of Political Philosophy* 234.

GAUS, G (1996), *Justificatory Liberalism: An Essay in Epistemology and Political Theory* (Oxford University Press).

GAUS, G (1997), 'Reason, Justification and Consensus: Why Democracy Can't Have it All' in BOHMAN/REHG (eds), *Deliberative Democracy, Essays on Reason and Politics* (Cambridge Mass, MIT Press), 205.

GAUS, G (2002), 'Waldron and the Legal Coordination Game,' www.utdt.edu/congresos/pdf-sri/der-173.pdf.

GAUS, G (2003), *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London, Sage).

GAUTHIER, D (1969), *The Logic of Leviathan* (Oxford, Clarendon).

GAUTHIER, D (1979), 'David Hume, Contractarian' 1 *Philosophical Review* 3.

GAUTHIER, D (1982), 'Three Against Justice: The Foole, the Sensible Knave and the Lydian Shepherd' in FRENCH/ÜHLING/WETTSTEIN (eds), *Midwest Studies in Philosophy VII: Social and Political Philosophy* (Minneapolis, University of Minnesota Press), 11.

GAUTHIER, D (1986), *Morals by Agreement* (Oxford, Clarendon).

GAUTHIER, D (1995A), 'Constituting Democracy' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 314.

GAUTHIER, D (1995B), 'Public Reason' 12 *Social Philosophy and Policy* 19.

GEORGE, R (1996), 'A Defense of the New Natural Law Theory' 41 *American Journal of Jurisprudence* 47.

GEORGE, R (1997), 'Book Review: Law, Democracy and Moral Disagreement' 110 *Harvard Law Review* 1388.

GEORGE, R (1999A), 'Law, Democracy and Moral Disagreement: Reciprocity, Slavery and Abortion' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 184.

GEORGE, R (1999B), 'Reason, Freedom and the Rule of Law: Their Significance in the Natural Law Tradition' 46 *American Journal of Jurisprudence* 249.

GERMANN, R (1977), 'Konkordanz- und Konkurrenzdemokratie' 96 *Zeitschrift für Schweizerisches Recht* 173.

GERT, B (1996), 'Hobbes's Psychology' in SORELL, T (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press).

GEUSS, R (1981), *The Idea of Critical Theory* (Cambridge University Press).
GEWIRTH, A (1981), 'The Basis and Content of Human Rights' in PENNOCK/CHAPMAN (eds), *Human Rights, Nomos XXIII* (New York University Press).
GEWIRTH, A (1982A), *Human Rights* (University of Chicago Press).
GEWIRTH, A (1982B), 'Can Utilitarianism Justify any Moral Rights?' in PENNOCK/CHAPMAN (eds), *Ethics, Economics and the Law, Nomos XXIV* (New York University Press), 158.
GEWIRTH, A (1984), 'Are there any Absolute Rights?' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press), 91.
GEWIRTH, A (1994), 'Is Cultural Pluralism Relevant to Moral Knowledge?' 11 *Social Philosophy and Policy* 1.
GEWIRTH, A (1996), *The Community of Rights* (Chicago University Press).
GIDDENS, A (1990), 'Jürgen Habermas' in SKINNER, Q (ed), *The Return of Grand Theory in the Human Sciences* (Cambridge University Press).
GIDDENS, A (1991), 'Reason Without Revolution' in BERNSTEIN, R (ed), *Habermas and Modernity* (Cambridge Mass, MIT Press).
GILBERT, M (1981), 'Game Theory and Convention' 46 *Synthese* 41.
GILBERT, M (1989), O*n Social Facts* (Princeton University Press).
GILBERT, M (1990), 'Walking Together: A Paradigmatic Social Phenomenon' 15:1 *Midwest Studies in Philosophy* 1.
GILBERT, M (1993), 'Group Membership and Political Obligation' 76 *Monist* 119.
GLENDON, M A (1991), *Rights Talk: the Impoverishment of Political Discourse* (New York, Free Press).
GOLDING, M (1979), 'The Concept of Compromise: A Preliminary Inquiry' in CHAPMAN/PENNOCK (eds), *Compromise in Ethics, Law and Politics, Nomos XXXI* (New York University Press).
GOLDSMITH, M (1996), 'Hobbes on Law' in SORELL, T (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press).
GOLDSWORTHY, G (1997), 'Originalism in Constitutional Interpretation' 25 *Federal Law Review* 1.
GOLDSWORTHY, G (2000), 'Dworkin as an Originalist' 17 *Constitutional Commentary* 49.
GOLDSWORTHY, G (2001), 'Legislation, Interpretation and Judicial Review' 52 *University of Toronto Law Journal* 75.
GOODIN, R E (2000), 'Democratic Deliberation Within' 29 *Philosophy and Public Affairs* 81.
GOODIN, R E (2001), 'Consensus Interruptus' 5 *Journal of Ethics* 121.
GOODIN, R E (2003A), 'Representing Diversity,' paper presented to the ECPR Joint Sessions 2003, www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws14/Goodin.pdf.
GOODIN, R E (2003B), *Reflexive Democracy* (Oxford University Press).
GOODRICH, P (1984A), 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language' 4 *Oxford Journal of Legal Studies* 88.
GOODRICH, P (1984B), 'The Role of Linguistics in Legal Analysis' 47 *Modern Law Review* 523.
GOODRICH, P (1995), *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley, University of California Press).
GORDON, R (1990), 'New Developments in Legal Theory' in KAIRYS, D (ed), *The Politics of Law: A Progressive Critique* (New York, Pantheon Books).
GORDON, R (1997), 'The Dangers of Deliberation' 106 *Yale Law Journal* 1313.
GOULD, C (1996), 'Diversity and Democracy: Representing Differences' in BENHABIB, S (ed), *Democracy and Difference* (Princeton University Press).

GOUREVITCH, V (ed) (1997), *Rousseau: The Social Contract and other Political Writings* (Cambridge University Press).

GOWANS, C (ed) (2000), 'Introduction' in *Moral Disagreements: Classic and Contemporary Readings* (London, Routledge).

GRAY, J (1977), 'On the Contestability of Social and Political Concepts' 5 *Political Theory* 331.

GRAY, J (1978), 'On Liberty, Liberalism and Essential Contestability' 8 *British Journal of Political Science* 385.

GRAY, J (1983), 'Political Power, Social Theory and Essential Contestability' in MILLER/SIEDENTOP (eds), *The Nature of Political Theory* (Oxford, Clarendon).

GRAY, J (1996), *Isaiah Berlin* (London, Harper Collins).

GRAY, J (2000), 'Where Pluralists and Liberals Part Company' in BAGHRAMIAN/INGRAM (eds), *Pluralism, The Philosophy and Politics of Diversity* (London, Routledge).

GREEN, L (1983), 'Law, Coordination and the Common Good' 3 *Oxford Journal of Legal Studies* 299.

GREEN, L (1988), *The Authority of the State* (Oxford, Clarendon).

GREEN, L (1989A), 'Associative Obligations and the State' in GREEN/HUTCHINSON (eds), *Law and the Community: The End of Individualism* (Toronto, Carswell), 93.

GREEN, L (1989B), 'Law, Legitimacy and Consent' 62 *Southern California Law Review* 795.

GREEN, L (1996), 'The Concept of Law Revisited' 94 *Michigan Law Review* 1687.

GREEN, L (1999), 'Positivism and Conventionalism' 12 *Canadian Journal of Law and Jurisprudence* 35.

GREEN, L (2001), 'Pluralism, Social Conflict and Tolerance' in SOETEMAN, A (ed), *Pluralism and Law* (Stuttgart, Kluwer).

GREEN, L (2004), 'Associative Obligations and the State' in BURLEY, J (ed), *Dworkin and his Critics* (Oxford, Blackwell), 267.

GREENAWALT, K (1982), 'Utilitarian Justifications for Observance of Legal Rights' in PENNOCK/CHAPMAN (eds), *Ethics, Economics and the Law, Nomos XXIV* (New York University Press).

GREENAWALT, K (1989), *Conflicts of Law and Morality* (New York, Oxford University Press).

GREENAWALT, K (1992), *Law and Objectivity* (Oxford University Press).

GREENAWALT, K (1997A), 'Propter Honoris Respectum: The Nature of Rules and the Meaning of Meaning' 72 *Notre Dame Law Review* 1449.

GREENAWALT, K (1997B), 'From the Bottom Up' 82 *Cornell Law Review* 994.

GREENAWALT, K (1999), *Statutory Interpretation: 20 Questions* (New York, Columbia University Press).

GREENAWALT, K (2000), 'Are Mental States Relevant for Statutory and Constitutional Interpretation?' 85 *Cornell Law Review* 1609.

GREENBERG/LITMAN (1998), 'The Meaning of Original Meaning' 86 *Georgetown Law Journal* 569.

GRICE, P (1989), *Studies in the Way of Words* (Cambridge Mass, Harvard University Press).

GRIFFITHS, A P (1960), 'How Can One Person Represent Another?' 34 *Proceedings of the Aristotelian Society* 186.

GRIFFITHS, J (1986), 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism* 1.

GRIMM, D (2001), 'Bedingungen demokratischer Rechtssetzung' in WINGERT/GÜNTHER (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit* (Frankfurt, Suhrkamp), 489.

GROFMAN/FELD (1988), 'Rousseau's General Will: A Condorcetian Perspective' 82:2 *American Political Science Review* 567.

GUASTINI, R (1993), *Le fonti del diritto e l'interpretazione* (Milan, Giuffrè).

GUASTINI, R (1998A), 'Principi di diritto e discrezionalità giudiziale' 3 *Diritto Publico* 651.
GUASTINI, R (1998B), *Teoria e dogmatica delle fonti* (Milan, Giuffrè).
GUASTINI, R (1999), *Distinguiendo. Estudios de Teorìa y Metateorìa del Derecho* (trans FERRER, J) (Barcelona, Gedisa).
GUINIER, L (1995), *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York, Free Press).
GÜNTHER, K (1988), *Der Sinn für Angemessenheit* (Frankfurt, Suhrkamp).
GÜNTHER, K (1995), 'Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas' 3 *European Journal of Philosophy* 36.
GUTMANN, A (1987), *Democratic Education* (Princeton University Press).
GUTMANN, A (1993), 'The Disharmony of Democracy' in CHAPMAN/SHAPIRO (eds), *Democratic Community, Nomos XXXV* (New York University Press), 126.
GUTMANN, A (1996), 'Democracy and its Discontents' in SARAT/VILLA (eds), *Liberal Modernism and Democratic Individuality* (Princeton University Press).
GUTMANN, A (1997), 'Preface' in SCALIA, A, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press).
GUTMANN, A (1999), 'Deliberative Democracy and Majority Rule' in KOH/SLYE (eds), *Deliberative Democracy and Human Rights* (New Haven, Yale University Press), 227.
GUTMANN, A (2003), *Identity in Democracy* (Princeton University Press).
GUTMANN/THOMPSON (1990), 'Moral Conflict and Political Consensus' 101 *Ethics* 64.
GUTMANN/THOMPSON (1996), *Democracy and Disagreement* (Cambridge Mass, Belknap).
GUTMANN/THOMPSON (1997), 'Disagreeing about Deliberative Democracy' 7:3 *Pegs: The Good Society* 11.
GUTMANN/THOMPSON (1999), 'Democratic Disagreement' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 243.
GUTMANN/THOMPSON (2000A), 'Why Deliberative Democracy is Different' 17 *Social Philosophy and Policy* 161.
GUTMANN/THOMPSON (2000B), 'Deliberative Democracy Beyond Process', Conference on Deliberating about Deliberative Democracy, University of Texas, Austin, 4–6 February 2000, www.la.texas.edu/conf2000/index.html.
HAACK, S (1998), *Manifesto of a Passionate Moderate* (University of Chicago Press).
HAAKONSSEN, K (1993), 'The Structure of Hume's Political Theory' in FATE-NORTON, D (ed), *The Cambridge Companion to Hume* (Cambridge University Press).
HABERMAS, J (1971), *Theorie und Praxis* (Frankfurt, Suhrkamp).
HABERMAS, J (1975), *Legitimation Crisis* (London, Heinemann).
HABERMAS, J (1981A), *Theorie des kommunikativen Handelns* (2nd edn) (Frankfurt, Suhrkamp).
HABERMAS, J (1981B), *Philosophisch-politische Profile* (Frankfurt, Suhrkamp).
HABERMAS, J (1983), *Moralbewusstsein und kommunikatives Handeln* (Frankfurt, Suhrkamp).
HABERMAS, J (1984), *The Theory of Communicative Action* (Cambridge, Polity).
HABERMAS, J (1985), *Die neue Unübersichtlichkeit* (Frankfurt, Suhrkamp).
HABERMAS, J (1986), *Autonomy and Solidarity: Interviews* (London, Verso).
HABERMAS, J (1988), 'Die neue Intimität zwischen Politik und Kultur' in RÜSEN/LÄMMERT/GLOTZ (eds), *Die Zukunft der Aufklärung* (Frankfurt, Suhrkamp).
HABERMAS, J (1990A), *Strukturwandel der Öffentlichkeit* (Frankfurt, Suhrkamp).
HABERMAS, J (1990B), *Moral Consciousness and Communicative Action* (Cambridge, Polity).
HABERMAS, J (1991), *Erläuterungen zur Diskursethik* (Frankfurt, Suhrkamp).

HABERMAS, J (1993), *Justification and Application: Remarks on Discourse Ethics* (Cambridge, Polity).
HABERMAS, J (1994A), 'Struggles for Recognition in the Democratic Constitutional State' in TAYLOR, C *et al* (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press), 107.
HABERMAS, J (1994B), 'Three Normative Models of Democracy' 1 *Constellations* 1.
HABERMAS, J (1995A), 'Replik' 49 *Revue Internationale de Philosophie* 551.
HABERMAS, J (1995B), 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' 92 *Journal of Philosophy* 109.
HABERMAS, J (1996A), 'Replik auf Beiträge zu einem Symposium der Benjamin N. Cardozo School of Law' 17 *Cardozo Law Review* 1559.
HABERMAS, J (1996B), *Between Facts and Norms* (Cambridge, Polity).
HABERMAS, J (1998A), *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt, Suhrkamp).
HABERMAS (1998B), J, *The Inclusion of the Other: Studies in Political Theory* (Cambridge Mass, MIT Press).
HABERMAS, J (1998C), *Die Postnationale Konstellation* (Frankfurt, Suhrkamp).
HABERMAS, J (1999A), 'From Kant to Hegel and Back Again: The Move Towards Detranscendentalization' 7 *European Journal of Philosophy* 129.
HABERMAS, J (1999B), *Wahrheit und Rechtfertigung, Philosophische Aufsätze* (Frankfurt, Suhrkamp).
HABERMAS, J (2001A), 'Constitutional Democracy, A Paradoxical Union of Contradictory Principles?' 6 *Political Theory* 766.
HABERMAS, J (2001B), *The Postnational Constellation: Political Essays* (Cambridge, Polity), 58.
HABERMAS, J (2003), 'On Law and Disagreement. Some Comments on "Interpretive Pluralism"' 16:2 *Ratio Juris* 187.
HABERMAS/LUHMANN (1971), *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet Sozialforschung* (Frankfurt, Suhrkamp).
HALOWELL, J (1944), 'Compromise as a Political Ideal' 54 *Ethics* 173.
HALPIN, A (2001), *Reasoning with Law* (Oxford, Hart Publishing).
HAMILTON/JAY/MADISON (1961), in COOKE, J (ed), *The Federalist* (Middletown Conn, Wesleyan University Press).
HAMPSHIRE, S (1959), *Thought and Action* (London, Chatto & Windus).
HAMPSHIRE, S (1983), *Morality and Conflict* (Oxford, Blackwell).
HAMPSHIRE, S (1999), *Justice is Conflict* (London, Duckworth).
HAMPTON, J (1986), *Hobbes and the Social Contract Tradition* (Cambridge University Press).
HAMPTON, J (1994), 'Democracy and the Rule of Law' in SHAPIRO, I (ed), *The Rule of Law, Nomos XXXVI* (New York University Press).
HAMPTON, J (1995), 'The Moral Commitments of Liberalism' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 292.
HAMPTON, J (1997), *Political Philosophy* (Boulder, Westview Press).
HARDIN, R (1982), *Collective Action* (Baltimore, Johns Hopkins University Press).
HARDIN, R (1995), 'Public Choice versus Democracy' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press).
HARDIN, R (1999A), 'Deliberation: Method, Not Theory' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 103.
HARDIN, R (1999B), *Liberalism, Constitutionalism and Democracy* (Oxford University Press).
HARE, R M (1952), *The Language of Morals* (Oxford, Clarendon).

HAREL, A (1997), 'What Demands are Rights? An Investigation into the Relation between Rights and Reasons' 17 *Oxford Journal of Legal Studies* 101.
HAREL, A (2003), 'Rights-based Judicial Review: A Democratic Justification' 22 *Law and Philosophy* 247.
HAREL, A (2004), 'Theories of Rights' in GOLDING/EDMUNDSON (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 191.
HARLOW, C (1985), 'Power from the People? Representation and Constitutional Theory' in MCAUSLAN/MCELDOWNEY (eds), *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution* (London, Sweet & Maxwell), ch 3.
HARRISON, J (1981), *Hume's Theory of Justice* (Oxford, Clarendon).
HARRISON, R (1993), *Democracy* (London, Routledge).
HART, H L A (1954), 'Definition and Theory in Jurisprudence' 70 *Law Quarterly Review* 49.
HART, H L A (1955), 'Are There Any Natural Rights?' 64 *Philosophical Review* 175.
HART, H L A (1961), *The Concept of Law* (Oxford, Clarendon).
HART, H L A (1962), *Law, Liberty and Morality* (Oxford University Press).
HART, H L A (1973), 'Bentham on Legal Rights' in *Oxford Essays on Jurisprudence* (2nd series) (Oxford University Press), 170.
HART, H L A (1975), 'Rawls on Liberty and its Priority' in DANIELS, N (ed), *Reading Rawls* (Stanford University Press), 230.
HART, H L A (1979), 'Between Utility and Rights' 79 *Columbia Law Review* 828.
HART, H L A (1982), 'Legal Rights' in *Essays on Bentham* (Oxford, Clarendon).
HART, H L A (1983), *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon).
HART, H L A (1984), 'Are There Any Natural Rights?' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press), 77.
HART, H L A (1988), 'Moral Populism and Democracy' in *Law, Liberty and Morality* (Oxford University Press).
HART, H L A (1994), *The Concept of Law* (2nd edn) (Oxford, Clarendon).
HARVEY, C (2001), 'Contested Constitutionalism: Human Rights and Deliberative Democracy in Northern Ireland' in CAMPBELL/EWING/TOMKINS (eds), *Sceptical Essays on Human Rights* (Oxford University Press), 163.
HASSEMER, W (1985), 'Ziviler Ungehorsam - ein Rechtfertigungsgrund?' in BRODA, C *et al* (ed), *Festschrift für R. Wassermann* (Neuwied, Luchterhand), 325.
HAVERKATE, G (1992), *Verfassungslehre. Verfassung als Gegenseitigkeitsordnung* (Munich, Beck).
HEGEL, F (1966), *Politische Schriften* (Frankfurt, Suhrkamp).
HEGEL, F (1996), *The Philosophy of Right* (Oxford University Press).
HELD, D (1980), *Introduction to Critical Theory: Horkheimer to Habermas* (London, Hutchinson).
HELD, D (1995), *Democracy and the Global Order: From the Nation State to Cosmopolitan Governance* (Cambridge, Polity).
HELD, D (2004), *Models of Democracy* (3rd edn) (Cambridge, Polity).
HERSHOWITZ, S (2003), 'Legitimacy, Democracy and Razian Authority' 9 *Legal Theory* 201.
HERSHOWITZ, S (2005), 'Acting with Integrity: The Justification. Horizontal Stare Decisis' in HERSHOWITZ, S (ed), *Exploring Law's Empire* (Oxford University Press).
HESSE, K (1995), *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn) (Heidelberg, CF Müller).
HESSE, M (1982), 'Science and Objectivity' in THOMPSON/HELD (eds), *Habermas: Critical Debates* (London, MacMillan).

HEYD, D (ed) (1996), *Toleration: An Elusive Virtue* (Princeton University Press).
HILPINEN, R (1985), 'Normative Conflicts and Legal Reasoning' in BULYGIN/GARDIES/NIINILUOTO (eds), *Man, Law and Modern Forms of Life* (Dordrecht, D Reidel), 193.
HIMMA, K (2001), 'Inclusive Legal Positivism' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).
HIRSCHMAN, A O (1994), 'Social Conflicts as Pillars of Democratic Market Societies' 22 *Political Theory* 203.
HIRST, P (1990), *Representative Democracy and its Limits* (Cambridge, Polity).
HÖFFE, O (1987), *Politische Gerechtigkeit. Grundlegung einer kritischen Philosophie von Recht und Staat* (Frankfurt, Suhrkamp).
HOBBES, T (1971), in CROPSEY, J (ed), *Dialogue Between a Philosopher and a Student of the Common Law* (University of Chicago Press).
HOBBES, T (1983), in WARRENDER, H (ed), *De Cive* (Oxford, Clarendon).
HOBBES, T (1999), in TUCK, R (ed), *Leviathan* (2nd edn) (Cambridge University Press).
HOEKSTRA, K (1997), 'Hobbes and the Fool' 25 *Political Theory* 620.
HOHFELD, W N (1978), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Westport, Greenwood).
HOLMES, O W (1963), *The Common Law* (Boston University Press).
HOLMES, S (1988A), 'Precommitment and the Paradox of Democracy' in ELSTER/SLAGSTAD (eds), *Constitutionalism and Democracy* (Cambridge University Press).
HOLMES, S (1988B), 'Gag Rules or the Politics of Omission' in ELSTER/SLAGSTAD (eds), *Constitutionalism and Democracy* (Cambridge University Press), 19.
HOLMES, S (1993), *The Anatomy of Antiliberalism* (Cambridge Mass, Harvard University Press).
HOLMES, S (1995), *Passions and Constraints: On the Theory of Liberal Democracy* (University of Chicago Press).
HOLMES/SUNSTEIN (1997), 'The Politics of Constitutional Revision in Eastern Europe' in LEVINSON, S (ed), *Responding to Imperfection* (Princeton University Press).
HOLMES/SUNSTEIN (1999), *The Cost of Rights: Why Liberty Depends on Taxes* (New York, W W Norton).
HONIG, B (1991), 'Declarations of Independence: Arendt and Derrida on the Problem of Founding the Republic' 85:1 *American Political Science Review* 97.
HONIG, B (1997), *Excitable Speech: Politics of the Performative* (London, Routledge).
HORKHEIMER, M (1947), *The Eclipse of Reason* (New York, Oxford University Press).
HORWITZ, M (1993), 'Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism' 107 *Harvard Law Review* 32.
HUBIN, D C (1986), 'Of Bindings and By-Products: Elster on Rationality' 15 *Philosophy and Public Affairs* 82.
HUME, D (1975), in NIDDITCH, P H (ed), *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (3rd edn) (Oxford, Clarendon).
HUME, D (1978), in NIDDITCH, P H (ed), *A Treatise of Human Nature* (2nd edn) (Oxford, Clarendon).
HUME, D (2002), 'A Dialogue' in *Essays and Treatises on Several Subjects* (Bristol, Thoemmes), vol II.
HUNT, A (1992), 'Law's Empire or Legal Imperialism?' in HUNT, A (ed), *Reading Dworkin Critically* (New York, Berg).
HUNYADI, M (1995), *La vertu du conflit* (Paris, Cerf).
HURD, H (1997), 'Interpreting Authorities' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon).

HURD, H (2000), 'Moral Rights and Legal Rules: A Natural Law Theory' 6 *Legal Theory* 423.
HURLEY, S (1985), 'Objectivity and Disagreement' in HONDERICH, T (ed), *Morality and Objectivity* (London, Routledge).
HURLEY, S (1989), *Natural Reasons* (New York, Oxford University Press).
HURLEY, S (1990), 'Coherence, Hypothetical Cases, and Precedent' 10 *Oxford Journal of Legal Studies* 221.
HURLEY, S (1999), 'Rationality, Democracy and Leaky Boundaries' 7 *Journal of Political Philosophy* 126.
HURLEY, S (2000), 'Cognitivism in Political Theory' in CRISP/HOOKER (eds), *Well-Being and Morality, Essays in Honour of James Griffin* (Oxford University Press), 177.
INOUE, T (2003), 'Two Models of Democracy: How to Make Demos and Hercules Collaborate in Public Deliberation,' 2003 IVR World Congress Plenary Session Paper, www.ivr2003.net/Abstracts/inoue.pdf.
ISSACHAROFF/KARLAN/PILDES (2002), *The Law of Democracy: Legal Structure of the Political Process* (2nd edn) (New York, Foundation Press).
JACOBS/SHAPIRO (2000), *Politicians Don't Pander* (University of Chicago Press).
JACKSON, F (1995), *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford, Clarendon).
JACKSON, B (1988), *Law, Fact and Narrative Coherence* (Roby, Deborah Charles).
JACKSON, B (2001), 'A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems' in SOETEMAN, A (ed), *Pluralism and Law* (Stuttgart, Kluwer).
JASPERS, K (1958), *Die Atombombe und die Zukunft des Menschen* (2nd edn) (Munich, R Piper).
JEFFERSON, T (1984), 'Letters to James Madison, 6 Sept. 1789' in PETERSON, M (ed), *Thomas Jefferson: Writings* (New York, Viking).
JOAS, H (2000), *The Genesis of Values* (Cambridge, Polity).
JOHNSON, J (1998), 'Arguing for Deliberation: Some Skeptical Considerations' in ELSTER, J (ed), *Deliberative Democracy* (Cambridge University Press), 161.
JONES, P (1994), *Rights* (Basingstoke, MacMillan).
JONES, P (1995), 'Review Article: Two Conceptions of Liberalism and Two Conceptions of Justice' 25 *British Journal of Political Science* 515.
KÄLIN, W (1988), 'Ziviler Ungehorsam und Grundrechte' in SALADIN/SITTER (eds), *Widerstand im Rechtsstaat* (Fribourg, Editions universitaires).
KAMM, F (1990), 'The Philosopher as Insider and Outsider' 15 *Journal of Philosophy and Medicine* 361.
KAMM, F (2001), 'Conflicts of Rights. Typology, Methodology and Nonconsequentialism' 7 *Legal Theory* 239.
KAMM, F (2002), 'Rights' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).
KANT, I (1965), *The Critique of Pure Reason* (New York, St Martin's Press).
KANT, I (1991), in REISS, H (ed), *Political Writings* (Cambridge University Press).
KANT, I (1996), in GREGOR, M (ed), *The Metaphysics of Morals* (Cambridge University Press).
KANT, I (2001), *Kritik der Urteilskraft* (Hamburg, Meiner).
KATEB, G (1961), 'Aspects of Rousseau's Political Thought' 76 *Political Science Quarterly* 519.
KATEB, G (1981), 'The Moral Distinctiveness of Representative Democracy' 91 *Ethics* 357.
KATEB, G (1992), *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, Cornell University Press).

KATEB, G (2000), 'Political Action: its Nature and Advantages' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).

KATEB, G (2001), 'The Judgment of Arendt' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).

KAUFMANN, A (1990), *Das Gewissen und das Problem der Rechtsgeltung* (Heidelberg, CF Müller).

KAUFMANN, A (1991), *Vom Ungehorsam gegen die Obrigkeit bis zum zivilen Ungehorsam im modernen Rechtsstaat* (Heidelberg, Decker & Müller).

KAUFMANN, A (1997), *Rechtsphilosophie* (2nd edn) (Munich, CH Beck).

KAUFMANN/BACKMANN (eds) (1972), *Widerstandsrecht* (Darmstadt, Wissenschaftliche Buchgesellschaft).

KAVANAGH, A (2002), 'Original Intention, Enacted Text and Constitutional Interpretation' 47 *American Journal of Jurisprudence* 255.

KAVANAGH, A (2003A), 'Participation and Judicial Review: A Reply to Jeremy Waldron' 22 *Law and Philosophy* 451.

KAVANAGH, A (2003B), 'The Idea of a Living Constitution' 16:1 *Canadian Journal of Law and Jurisprudence* 55.

KAVANAGH, A (2004), 'On the Elusive Distinction between Interpretation and Legislation in the 1998 Human Rights Act' 24:2 *Oxford Journal of Legal Studies* 259.

KAVKA, G (1986), *Hobbesian Moral and Political Theory* (Princeton University Press).

KEKES, J (1993), *The Morality of Pluralism* (Princeton University Press).

KELSEN, H (1955), 'Foundations of Democracy' 66 *Ethics* 1.

KELSEN, H (1961), *General Theory of Law and State* (New York, Russell & Russell).

KELSEN, H (1979), *Allgemeine Theorie der Normen* (Vienna, Manz).

KELSEN, H (1985), *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzig, F Deuticke).

KELSEN, H (1990), 'On the Theory of Interpretation' (1934), translated *in* 10 *Legal Studies* 127.

KEMP SMITH, N (1941), *The Philosophy of David Hume* (London, MacMillan).

KENNEDY, D (1998), *A Critique of Adjudication* (Cambridge Mass, Harvard University Press).

KERSTING, W (1984), *Wohlgeordnete Freiheit, Quellen zur Studie der Rechtsphilosophie* (Berlin, W de Gruyter), vol 20.

KERSTING, W (1992), 'Politics, Freedom and Order: Kant's Political Philosophy' in GUYER, P (ed), *Cambridge Companion to Kant* (Cambridge University Press), 342.

KERSTING, W (1993), *Wohlgeordnete Freiheit, Quellen zur Studie der Rechtsphilosophie* (2nd edn) (Frankfurt, Suhrkamp), vol 20.

KERSTING W (1994), *Die politische Philosophie des Gesellschaftsvertrags* (Darmstadt, Primus).

KEYT, D (1991), 'Aristotle's Theory of Distributive Justice' in KEYT/MILLER (eds), *A Companion to Aristotle's Politics* (Oxford, Blackwell).

KIS, J (2002), 'When We are Morally Required to Cooperate,' paper presented to the NYU Colloquium in Moral and Political Philosophy, 23 September 2002, www.law.nyu.edu/clppt/program2002/readings/kis/kispaper.pdf.

KLEY, A (2001), 'Rechtsstaat und Widerstand' in THÜRER/AUBERT/MÜLLER (eds), *Verfassungsrecht der Schweiz* (Zürich, Schulthess), ch 17.

KLOSKO, G (1990), 'The Obligation to Contribute to Discretionary Public Goods' 37 *Political Studies* 196.

KLOSKO, G (1992), *The Principle of Fairness and Political Obligation* (Lanham, Rowman & Littlefield).

KLOSKO, G (2000), *Democratic Procedures and Liberal Consensus* (Oxford University Press).
KNAPP/MICHAELS (1991), 'Intention, Identity and the Constitution: A Response to David Hey' in LEYH, G (ed), *Legal Hermeneutics, History, Theory and Practice* (Berkeley, University of California Press).
KNIGHT, J (1992), *Institutions and Social Conflict* (Cambridge University Press).
KNIGHT, J (1999), 'Constitutionalism and Deliberative Democracy' in MACEDO, S (ed), *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press), 159.
KNIGHT/JOHNSON (1994), 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' 22:2 *Political Theory* 277.
KNIGHT/JOHNSON (1997), 'What Sort of Equality does Deliberative Democracy Require?' in BOHMAN/REHG (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge Mass, MIT Press), 279.
KÖNIG, H (1988), 'Einleitung' in KÖNIG, H (ed), *Politische Psychologie Heute*, Leviathan: Sonderheft 9 (Opladen, Westdeutscher Verlag).
KOH/SLYE (eds) (1999), 'An Introduction' in *Deliberative Democracy and Human Rights* (New Haven, Yale University Press), 3.
KOMESAR, N (1984), 'Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis' 51 *University of Chicago Law Review* 366.
KOMESAR, N (1994), *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press).
KORNHAUSER, L (2003), 'Preference, Well-Being and Morality in Social Decisions' 32 *Journal of Legal Studies* 303.
KORNHAUSER/SAGER (1993), 'The One and the Many: Adjudication in Collegial Courts' 81 *California Law Review* 1.
KORNHAUSER/SAGER (2004), 'The Many as One: Integrity and Group Choice in Paradoxical Cases' 32:3 *Philosophy and Public Affairs* 249.
KORSGAARD, C (1993), 'The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent-Neutral Values' 10 *Social Philosophy and Policy* 24.
KORSGAARD, C (2003), 'The Dependence of Value on Humanity' in WALLACE, R J (ed), *The Practice of Value* (Oxford University Press), 63.
KRAMER, M (1998), 'Rights Without Trimmings' in KRAMER/SIMMONDS/STEINER (eds), *A Debate over Rights* (Oxford, Clarendon), 7.
KRAUT, R (1984), *Socrates and the State* (Princeton University Press).
KRESS, K (1984), 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions' 72 *California Law Review* 369.
KRESS, K (1987), 'The Interpretive Turn' 97 *Ethics* 834.
KRESS, K (1989), 'Legal Indeterminacy' 77 *California Law Review* 283.
KRESS, K (1990), 'Legal Theory: A Preface to Epistemological Indeterminacy' 85 *Northwestern University Law Review* 134.
KRESS, K (1991), 'Legal Indeterminacy' in LEYH, G (ed), *Legal Hermeneutics, History, Theory and Practice* (Berkeley, University of California Press).
KRESS, K (1993), 'Coherence and Formalism' 16:3 *Harvard Journal of Law and Public Policy* 639.
KRESS, K (1996), 'Coherence' in PATTERSON, D (ed), *A Companion to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 533.
KRESS, K (1999), 'Why no Judge Should be a Dworkinian Coherentist' 6 *Texas Law Review* 1375.
KRESS/LEITER (1997), 'Against Legal Principles' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon), 279.

KRIPKE, S (1980), *Naming and Necessity* (Oxford, Blackwell).
KRIPKE, S (1982), *Wittgenstein on Rules and Private Language* (Oxford, Blackwell).
KRONMAN, A T (1990), 'Precedent and Tradition' 99 *Yale Law Journal* 1029.
KUFLIK, A (1977), 'Majority Rule Procedure' in PENNOCK/CHAPMAN (eds), *Due Process, Nomos XVIII* (New York University Press), 296.
KUFLIK, A (1979), 'Morality and Compromise' in PENNOCK/CHAPMAN (eds), *Compromise in Ethics, Law and Politics, Nomos XXXI* (New York University Press).
KUHN, T (1977), 'Objectivity, Value Judgement and Theory Choice' in *The Essential Tension* (University of Chicago Press).
KUPER, A (2004), *Democracy Beyond Border: Justice and Representation in Global Institutions* (Oxford University Press).
KURAN, T (1998), 'Insincere Deliberation and Democratic Failure' 12 *Critical Review* 529.
KUTZ, C (1994), 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' 103 *Yale Law Journal* 997.
KUTZ, C (2000A), 'Self-Defense and Political Justification' 88 *California Law Review* 751.
KUTZ, C (2000B), 'Acting Together' 61 *Philosophy and Phenomenological Research* 1.
KUTZ, C (2001A), *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press).
KUTZ, C (2001B), 'The Judicial Community' 11 *Philosophical Issues* 442.
KUTZ, C (2002A), 'The Collective Work of Citizenship' 8 *Legal Theory* 471.
KUTZ, C (2002B), 'Parliamentary Self-Government' in VILLANUEVA, E (ed), *Legal and Political Philosophy*, 5 *Rodopi Philosophical Studies* vol 1.
KYMLICKA, W (1990), *Contemporary Political Philosophy* (Oxford, Clarendon).
KYMLICKA, W (1995), *Multicultural Citizenship* (Oxford, Clarendon).
LACLAU/MOUFFE (1985), *Hegemony and Socialist Strategy* (London, Verso).
LAFONT, C (1998), 'Pluralism and Universalism in Discourse Ethics' in NASCIMENTO, A (ed), *A Matter of Discourse: Community and Communication in Contemporary Philosophies* (Aldershot, Ashgate), 55.
LAFONT, C (1999), *The Linguistic Turn in Hermeneutic Philosophy* (Cambridge Mass, MIT Press).
LAFONT, C (2002), 'Realismus und Konstruktivismus in der kantianischen Moralphilosophie – Das Beispiel der Diskursethik' 50:1 *Deutsche Zeitschrift für Philosophie* 39.
LAFONT, C (2003), 'Procedural Justice? Implications of the Habermas-Rawls Debate for Discourse Ethics' 29:2 *Philosophy and Social Criticism* 167.
LAFONT, C (2004), 'Moral Objectivity and Reasonable Agreement: Can Realism be Reconciled with Kantian Constructivism?' 17:1 *Ratio Juris* 27.
LAFONT, C (2005), 'Justice and Legitimacy: the Intricate Relation of Morality to Politics,' unpublished manuscript.
LAGERSPETZ, E (1995), *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* (Dordrecht, Kluwer).
LAGERSPETZ, E (2003), 'Institutions and Collective Actions. Remarks on Hegel, Hobbes and Democracy' 7:1 *Associations* 51.
LARMORE, C (1987), *Patterns of Moral Complexity* (Cambridge University Press).
LARMORE, C (1990), 'Political Liberalism' 18 *Political Theory* 339.
LARMORE, C (1994), 'Pluralism and Reasonable Disagreement' 11:1 *Social Philosophy and Policy* 61.
LARMORE, C (1996), *The Morals of Modernity* (Cambridge University Press).
LARMORE, C (1999), 'The Moral Basis of Political Liberalism' 12 *Journal of Philosophy* 599.
LARMORE, C (2001), 'Moral Judgment' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).

LEFORT, C (1986), *The Political Forms of Modern Society* (Cambridge, Polity).
LEHRER, K (2001), 'The Rationality of Dissensus: A Reply to Goodin' 5 *Journal of Ethics* 105.
LEICH/HOLTZMAN (1981), 'Introductory Essay: Communal Agreement and Objectivity' in LEICH/HOLTZMAN (eds), *Wittgenstein: To Follow a Rule* (London, Routledge).
LEITER, B (1995), 'Legal Indeterminacy' 1 *Legal Theory* 481.
LEITER, B (1998), 'Realism, Hard Positivism and Conceptual Analysis' 4 *Legal Theory* 533.
LEITER, B (2001), 'Objectivity, Morality and Adjudication' in LEITER, B (ed), *Objectivity in Law and Morals* (Cambridge University Press).
LEITER, B (2002), 'Law and Objectivity' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).
LENDI, M (1981), 'Konsens – Fähigkeit zum Dissens' in *Recht als Prozess und Gefüge, Festschrift Hans Huber* (Bern, Stämpfli), 487.
LEVY/SPILLER (eds) (1996), *Regulations, Institutions and Commitment* (Cambridge University Press).
LEWIS, D (1969), *Convention* (Oxford, Blackwell).
LEYH, G (ed) (1992), *Legal Hermeneutics: History, Theory and Practice* (Berkeley, University of California Press).
LIJPHART, A (1984), *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, Yale University Press).
LINDAHL, H (1998), 'The Purposiveness of Law: Two Concepts of Representation in the European Union' 17 *Law and Philosophy* 481.
LIST/GOODIN (2001), 'Epistemic Democracy: Generalizing the Condorcet Jury Theorem' 9 *Journal of Political Philosophy* 277.
LIST/PETTIT (2002), 'Aggregating Sets of Judgments: An Impossibility Result' 18 *Economics and Philosophy* 89.
LIST/PETTIT (2004), 'Aggregating Sets of Judgments: Two Impossibility Results Compared' 140 *Synthese* 391.
LITTLE, R (1999), 'Reading Justice Brennan: Is There a Right to Dissent?' 50 *Hastings Law Journal* 683.
LOCKE, J (1999), in LASLETT, P (ed), *Two Treatises of Government* (Cambridge University Press).
LOHMANN, H-M (1988), 'Die Stimme des Intellekts ist leise . . . Freuds Kulturtheorie als Politische Psychologie' in KÖNIG, H (ed), *Politische Psychologie Heute*, Leviathan: Sonderheft 9 (Opladen, Westdeutscher Verlag).
LONG, A A (1983), 'Greek Ethics after McIntyre and the Stoic Community of Reason' 3 *Ancient Philosophy* 184.
LORAUX, N (1997), *La cité divisée* (Lausanne, Payot).
LORD/MAGNETTE (2004), 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU' 42:1 *Journal of Common Market Studies* 183.
LORENZER, A (1988), 'Die Geschichtlichkeit menschlicher Lebensentwürfe' in KÖNIG, H (ed), *Politische Psychologie Heute*, Leviathan: Sonderheft 9 (Opladen, Westdeutscher Verlag).
LOUGHLIN, M (2003A), 'Representation and Constitutional Theory' in CRAIG/RAWLINGS (eds), *Law and Administration in Europe* (Oxford University Press).
LOUGHLIN, M (2003B), 'Constitutional Law: The Third Order of the Political' in BAMFORTH/LEYLAND (eds), *Public Law in a Multi-layered Constitution* (Oxford, Hart Publishing), ch 2.
LUBAN, D (1985), 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice' 14 *Philosophy and Public Affairs* 397.

LUCE/RAIFFA (1957), *Games and Decisions* (New York, Wiley).
LUCY, W (1999), *Understanding and Explaining Adjudication* (Oxford University Press).
LUCY, W (2000A), 'What is Wrong with Ideology?' 20:2 *Oxford Journal of Legal Studies* 283.
LUCY, W (2000B), 'Review of *Law and Disagreement*' 63 *Modern Law Review* 936.
LUCY, W (2002), 'Adjudication' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press), 206.
LUHMANN, N (1968), *Vertrauen. Ein Mechanismus zur Reduktion sozialer Komplexität* (2nd edn) (Stuttgard, F Enke).
LUHMANN, N (1985), *A Sociological Theory of Law* (London, Routledge).
LUHMANN, N (1988), 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' 15 *Journal of Law and Society* 153.
LUHMANN, N (1989), 'Law as a Social System' 83 *Northwestern University Law Review* 136.
LUHMANN, N (1995), 'Legal Argumentation: An Analysis of its Form' 58 *Modern Law Review* 285.
LUKES, S (1982), 'Of Gods and Demons: Habermas and Practical Reason' in THOMPSON/HELD (eds), *Habermas: Critical Debates* (London, MacMillan).
LUKES, S (1991), *Moral Conflict and Politics* (Oxford, Clarendon).
LYONS, D (1970), 'The Correlativity of Rights and Duties' 4 *Nous* 45.
LYONS, D (1979), 'Human Rights and the General Welfare' in LYONS, D (ed), *Rights* (Belmont, Wadsworth), 174.
LYONS, D (1984), 'Utility and Rights' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press), 110.
LYONS, D (1993), *Moral Aspects of Legal Theory* (Cambridge University Press).
LYONS, D (1999), 'Original Intent and Legal Interpretation' 24 *Australian Journal of Legal Philosophy* 1.
LYOTARD, J-F (1983), *Le différend* (Paris, Editions de Minuit).
LYOTARD/THEBAUD (1983), *Just Gaming* (Minneapolis, University of Minnesota Press).
MACCORMICK, N (1977), 'Rights in Legislation' in RAZ/HACKER (eds), *Law, Morality and Society* (Oxford, Clarendon), 189.
MACCORMICK, N (1978), *Legal Reasoning and Legal Theory* (Oxford, Clarendon).
MACCORMICK, N (1981), *H.L.A. Hart* (London, Edward Arnold).
MACCORMICK, N (1982), 'Legal Reasoning and Practical Reason' in FRENCH/ÜHLING/WETTSTEIN (eds), *Midwest Philosophical Studies VII: Social and Political Philosophy* (Minneapolis, University of Minnesota Press), 271.
MACCORMICK, N (1984), 'Coherence in Legal Justification' in PECZENIK, A *et al* (eds), *Theory of Legal Science* (Dordrecht, D Reidel), 235.
MACCORMICK, N (1985), 'A Moralistic Case for A-Moralistic Law?' 20 *Valparaiso University Law Review* 1.
MACCORMICK, N (1990), 'Reconstruction after Deconstruction: A Response to CLS' 10 *Oxford Journal of Legal Studies* 539.
MACCORMICK, N (1992), 'Why Laws have Rationes and What These Are' in GOLDSTEIN, L (ed), *Precedent in Law* (Oxford, Clarendon).
MACCORMICK, N (1993A), 'Beyond the Sovereign State' 56 *Modern Law Review* 1.
MACCORMICK, N (1993B), 'Constitutionalism and Democracy' in BELLAMY, R (ed), *Theories and Concepts of Politics: An Introduction* (Manchester University Press).
MACCORMICK, N (1994), 'Sovereignty, Democracy, Subsidiarity' 25 *Rechtstheorie* 281.
MACCORMICK, N (1995A), 'The *Maastricht-Urteil:* Sovereignty now' 1 *European Law Journal* 259.

MacCormick, N (1995b), 'The Relative Heteronomy of Law' 3 *European Journal of Philosophy* 69.
MacCormick, N (1995c), 'Time, Narratives and Law' in Bjarup/Blegvad (eds), *Time, Law and Society*, 64 *Beiheft des Archivs für Rechts- und Sozialphilosophie* 111.
MacCormick, N (1996a), 'Liberalism, Nationalism and the Post-Sovereign State' in Bellamy/Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford, Blackwell), 141.
MacCormick, N (1996b), 'Natural Law and the Separation of Law and Morals' in George, R (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press), 105.
MacCormick, N (ed) (1997a), *Constructing Legal Systems, European Union in Legal Theory* (Dordrecht, Kluwer).
MacCormick, N (1997b), 'Democracy, Subsidiarity and Citizenship in the European Commonwealth' 16:4 *Law and Philosophy* 331.
MacCormick, N (1998), 'Risking Constitutional Collision in Europe?' 18 *Oxford Journal of Legal Studies* 517.
MacCormick, N (1999a), *Questioning Sovereignty* (Oxford University Press).
MacCormick, N (1999b), 'Reasonableness and Objectivity' 74:5 *Notre Dame Law Review* 1575.
Macedo, S (1990), 'The Politics of Justification' 18 *Political Theory* 280.
Macedo, S (1991), *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford, Clarendon).
Macedo, S (ed) (1999), 'Introduction' in *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press).
Macedo, S (2000), *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge Mass, Harvard University Press).
MacIntyre, A (1973), 'The Essential Contestability of Some Social Concepts' 84 *Ethics* 1.
MacIntyre, A (1981), *After Virtue: A Study in Moral Theory* (Notre Dame University Press).
MacIntyre, A (1988), 'The Rationality of Traditions' in *Whose Justice? Which Rationality?* (London, Duckworth).
Mackie, J L (1977), *Ethics: Inventing Right and Wrong* (Harmondsworth, Penguin).
Mackie, J L (1984), 'Can There be a Right-Based Moral Theory?' in Waldron, J (ed), *Theories of Rights* (Oxford University Press), 168.
Madison, J (1961), 'Federalist Number Ten' in *The Federalist Papers* (Cambridge Mass, Belknap).
Manin, B (1987), 'On Legitimacy and Political Deliberation' 15 *Political Theory* 338.
Manin, B (1997), *The Principles of Representative Democracy* (Cambridge University Press).
Manin/Przeworski/Stokes (1999a), 'Elections and Representation' in Przeworski/Stokes/Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press), 27.
Manin/Przeworski/Stokes (1999b), 'Introduction' in Przeworski/Stokes/Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press), 1.
Manning, J F (1997), 'Textualism as a Nondelegation Doctrine' 97 *Columbia Law Review* 673.
Mansbridge, J (1980), *Beyond Adversary Democracy* (New York, Basic Books).
Mansbridge, J (1981), 'Living with Conflict: Representation in Adversary Democracy' 91 *Ethics* 466.
Mansbridge, J (1999), 'Everyday Talk in the Deliberative System' in Macedo, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 211.
Mansbridge, J (2000), 'What Does a Representative Do? Descriptive Representation in Communicative Settings of Distrust, Uncrystallized Interests, and Historically

Denigrated Status' in NORMAN/KYMLICKA (eds), *Citizenship in Diverse Societies* (Oxford University Press), 99.
MARIN, L (2001), *On Representation* (Stanford University Press).
MARKS, S (2003), *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford, Oxford University Press).
MARMOR, A (1992), *Interpretation and Legal Theory* (Oxford, Clarendon).
MARMOR, A (1995), 'Authorities and Persons: A Reply to Jeremy Waldron' 1 *Legal Theory* 337.
MARMOR, A (1996), 'On Convention' 107 *Synthese* 349.
MARMOR, A (1997), 'On the Limits of Rights' 16 *Law and Philosophy* 1.
MARMOR, A (1998), 'Legal Conventionalism' 4 *Legal Theory* 509.
MARMOR, A (2001), *Positive Law and Objective Values* (Oxford University Press).
MARMOR, A (2004), 'The Rule of Law and its Limits' 23:1 *Law and Philosophy* 9.
MARTI, H (1958), *Urbild und Verfassung, Eine Studie zum hintergründigen Gehalt einer Verfassung* (Bern, H Huber).
MARTI MARMOL, J L (2001), 'Democracia y Deliberacion. Una reconstruccion del modelo de Jon Elster' 113 *Revista des Estudios Politicos* 161.
MARTI MARMOL, J L (2005), 'The Sources of Legitimacy of Political Decisions: Between Procedure and Substance' in WINTGENS, L (ed), *The Theory and Practice of Legislation, Essays in Jurisprudence* (Aldershot, Ashgate).
MARTIN, R (1993), *A System of Rights* (Oxford, Clarendon).
MARX, K (1978), in TUCKER, R (ed), *The Marx-Engels Reader* (2nd edn) (New York, Norton).
MARX/ENGELS (1971), *Writings on the Paris Commune* (New York, Monthly Review Press).
MASON, A (1993), *Explaining Political Disagreement* (Cambridge University Press).
MASON, H E (ed) (1996), *Moral Dilemmas and Moral Theory* (New York, Oxford University Press).
MCCARTHY, T (1984), *The Critical Theory of Jürgen Habermas* (Cambridge, Polity).
MCCARTHY, T (1991A), 'Complexity and Democracy: The Seducements of Systems Theory' in *Ideals and Illusions* (Cambridge Mass, MIT Press), 181.
MCCARTHY, T (1991B), 'Practical Discourse: On the Relation of Morality to Politics' in *Ideals and Illusions* (Cambridge Mass, MIT Press).
MCCARTHY, T (1994), 'Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue' 105 *Ethics* 44.
MCCARTHY, T (1995), 'Practical Discourse and the Relation between Morality and Politics' 40 *Revue Internationale de Philosophie* 461.
MCCARTHY, T (1996), 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions' 17 *Cardozo Law Review* 1083.
MCCARTHY, T (1998), 'Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions' in ROSENFELD/ARATO (eds), *Habermas on Law and Democracy: Critical Exchanges* (Berkeley, University of California Press).
MCCLOSKEY, H J (1985), 'Respect for Human Moral Rights Versus Maximizing Good' in FREY, R G (ed), *Utility and Rights* (Oxford, Blackwell), 121.
MCDOWELL, J (1981), 'Non-Cognitivism and Rule-Following' in LEICH/HOLTZMAN (eds), *Wittgenstein: To Follow a Rule* (London, Routledge).
MCMAHON, C (2000), 'Discourse and Morality' 110 *Ethics* 514.
MENDUS, S (ed) (1988), 'Introduction' in *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge University Press).
MENDUS, S (1989), *Toleration and the Limits of Liberalism* (Basingstoke, MacMillan).

MENTZOS, S (1976), *Interpersonale und institutionalisierte Abwehr* (Frankfurt, Suhrkamp).
MICHELMAN, F J (1986A), 'The Supreme Court 1985, Foreword' 100 *Harvard Law Review* 4.
MICHELMAN, F J (1986B), 'Justification (and Justifiability) of Law in a Contradictory World' in PENNOCK/CHAPMAN (eds), *Justification: Nomos XXVII* (New York University Press).
MICHELMAN, F J (1988), 'Law's Republic' 97 *Yale Law Journal* 1493.
MICHELMAN, F J (1989), 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' 41 *Florida Law Review* 443.
MICHELMAN, F J (1997), 'How Can People Ever Make the Laws? A Critique of Deliberative Democracy' in BOHMAN/REHG (eds), *Deliberative Democracy* (Cambridge Mass, MIT Press).
MICHELMAN, F J (1998A), 'Brennan and Democracy' 86 *California Law Review* 399.
MICHELMAN, F J (1998B), 'Constitutional Authorship' in ALEXANDER, L (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press).
MICHELMAN, F J (1999), *Brennan and Democracy* (Princeton University Press).
MICHELMAN, F J (2000A), 'Human Rights and the Limits of Constitutional Theory' 13 *Ratio Juris* 63.
MICHELMAN, F J (2000B), 'Constitutionalism, Privatization and Globalization: Whither the Constitution?' 21 *Cardozo Law Review* 1063.
MICHELMAN, F J (2001), 'Morality, Identity and "Constitutional Patriotism"' 14:3 *Ratio Juris* 253.
MICHELMAN, F J (2002A), 'Relative Constraint and Public Reason: What is "The Work We Expect of Law"?' 67 *Brooklyn Law Review* 963.
MICHELMAN, F J (2002B), 'Postmodernism, Proceduralism and Constitutional Choice: A Comment on Van der Walt and Botha' 9 *Constellations* 246.
MICHELMAN, F J (2002C), 'The Problem of Constitutional Interpretive Disagreement: Can Discourses of Application Help?' in ABOULAFIA/BOOKMAN/KEMP (eds), *Habermas and Pragmatism* (London, Routledge).
MICHELMAN, F J (2003A), 'The Constitution, Social Rights and Liberal Political Justification' 1:1 *International Journal of Constitutional Law* 13.
MICHELMAN, F J (2003B), 'Constitutional Legitimation for Political Acts' 66:1 *Modern Law Review* 15.
MICHELMAN, F J (2003C), 'Is the Constitution a Contract for Legitimacy?' 8 *Review of Constitutional Studies* 101.
MILL, J S (1962), *On Liberty and Utilitarianism* (New York, Meridian).
MILL, J S (1975), *Three Essays* (New York, Oxford University Press).
MILL, J S (1977), *Considerations on Representative Government,* in *Collected Works* (University of Toronto Press), 19.
MILL, J S (1991A), *Considerations on Representative Government* (Amherst, Prometheus Books).
MILL, J S (1991B), in GRAY, J (ed), *On Liberty* (London, Routledge).
MILLER, D (1976), *Social Justice* (Oxford, Clarendon).
MILLER, D (1981), *Philosophy and Ideology in Hume's Political Thought* (Oxford, Clarendon).
MILLER, D (1983), 'Linguistic Philosophy and Political Theory' in MILLER/SIEDENTOP (eds), *The Nature of Political Theory* (Oxford, Clarendon).
MILLER, D (1993), 'Deliberative Democracy and Social Choice' in HELD, D (ed), *Prospects for Democracy, North, South, East, West* (Cambridge, Polity), 74.
MILLER, J (1984), *Rousseau, Dreamer of Democracy* (New Haven, Yale University Press).
MILLER, S (2001), *Social Action: A Teleological Account* (Cambridge University Press).

Mirabeau, H G (1834), *Œuvres* (Paris).
Montague, P (2001), 'When Rights Conflict' 7 *Legal Theory* 257.
Montaigne, M (1958), 'Apology for Raymond Sebond' in Frame, D (ed), *The Complete Essays of Montaigne* (Stanford University Press).
Montesquieu, C-L (1989), *The Spirit of Laws* (trans Cohler, A, Miller, B and Stone, H) (Cambridge University Press).
Montesquieu, C-L (1997), *Les Lettres Persanes* (Paris, Poche).
Moon, J D (1991), 'Constrained Discourse and Public Life' 19 *Political Theory* 202.
Moon, J D (1993), *Constructing Community* (Princeton University Press).
Moon, J D (1995), 'Practical Discourse and Communicative Ethics' in White, S (ed), *The Cambridge Companion to Habermas* (Cambridge University Press).
Moore, M (1981), 'The Semantics of Judging' 54 *South Californian Law Review* 151.
Moore, M (1982), 'Moral Reality' 1 *Wisconsin Law Review* 1061.
Moore, M (1985), 'A Natural Law Theory of Interpretation' 58 *Southern California Law Review* 277.
Moore, M (1989), 'Authority, Law and Razian Reasons' 62 *Southern California Law Review* 827.
Moore, M (1992), 'Precedent, Induction and Ethical Generalization' in Goldstein, R (ed), *Precedent in Law* (Oxford, Clarendon).
Moore, M (1996), 'Law as a Functional Kind' in George, R (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press).
Moore, M (1997), 'Interpreting Interpretation' in Marmor, A (ed), *Law and Interpretation* (Oxford, Clarendon).
Moore, M (1998), 'Hart's Concluding Scientific Postscript' 4 *Legal Theory* 301.
Moore, M (2002), 'Legal Reality: A Naturalist Approach to Legal Ontology' 21 *Law and Philosophy* 619.
Moore, M (2003), 'Excerpts from Legal Reality: A Naturalist Approach to Legal Ontology' 7:1 *Associations* 145.
Moravcsik, A (2002), 'Reassessing Legitimacy in the European Union' 40:4 *Journal of Common Market Studies* 603.
Morawetz, T (1992), 'Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and Judging' 141 *University of Pennsylvania Law Review* 371.
Moreso, J J (1998a), 'Sulla portata del vincolo preventivo' 10 *Ragion Pratica* 75.
Moreso, J J (1998b), 'Diritti e giustizia procedurale imperfetta' 10 *Ragion Pratica* 13.
Moreso, J J (2001), 'In Defense of Inclusive Legal Positivism' in Chiassoni, P (ed), *Legal Ought* (Turin, Giapichelli), 37.
Moreso, J J (2003a), 'Conflictos entre Principios Constitucionales' in Carbonell, M (ed), *Neoconstitucionalismo(s)* (Madrid, Trotta).
Moreso, J J (2003b), 'El reino de los derechos y la objetividad de la moral' in Diciotti, E (ed), *Diritti umani ed oggetività della morale* (Turin, Giapichelli), 9.
Morgan, B (2002), 'What is Right with Ideology?' 22 *Oxford Journal of Legal Studies* 517.
Mouffe, C (2000), *The Democratic Paradox* (New York, Verso).
Mouffe, C (2002), 'For an Agonistic Public Sphere' in Enzewor, A *et al* (eds), *Democracy Unrealized* (Ostfeldern Ruit, Hatje Cantz), 87.
Müller, J P (1992), *Demokratische Gerechtigkeit* (Munich, DTV).
Müller, J P (1993), 'Funktion der Garantie eines Kerngehalts der Grundrechte in der Verfassung'11 *Recht* 33.

MÜLLER, J P (1998), 'Das Weltbürgerrecht (§ 62) und Beschluss' in HÖFFE, O (ed), *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre* (Berlin, Akademie Verlag), 257.
MÜLLER, J P (1999), *Politischer Mensch, Menschliche Politik* (Basel, Helbing & Lichtenhahn).
MÜLLER, J P (2001), 'Ist die Gewissensfreiheit noch aktuell?' in AUER, A (ed), *Aux Confins du Droit, Essais en l'honneur du Professeur Charles-Albert Morand* (Basel, Helbing & Lichtenhahn), 293.
MÜLLER, J P (2002), *Die demokratische Verfassung* (Zürich, NZZ Verlag).
MÜLLER, J P (2003), 'Kunst des juristischen Urteils: Impulse von Kant und Savigny' 21:4 *Recht* 125.
MÜLLER, J P (2005), 'Vom Geist der Gesetze im Jahre 2004' in MADER/KARPEN (eds), *The Participation of Civil Society in the Legislative Process* (Baden-Baden, Nomos).
MULHALL, S (1995), 'Reply to Alain Boyer on "Democracy and Disagreement"' 8 *Ratio Juris* 9.
MULHALL/SWIFT (1996), *Liberals and Communitarians* (2nd edn) (Oxford, Blackwell).
MURPHY, A (1970), *Kant: The Philosophy of Right* (London, MacMillan).
MURPHY, L (1999), 'Institutions and the Demands of Justice' 27:4 *Philosophy and Public Affairs* 251.
MURPHY, L (2001), 'The Political Question of the Concept of Law' in COLEMAN, J (ed), *Hart's Postscript* (Oxford University Press).
NAGEL, T (1979), *Mortal Questions* (Cambridge University Press).
NAGEL, T (1986), *The View from Nowhere* (New York, Oxford University Press).
NAGEL, T (1987), 'Moral Conflict and Political Legitimacy' 16 *Philosophy and Public Affairs* 215.
NAGEL, T (1991), *Equality and Partiality* (New York, Oxford University Press).
NAGEL, T (1994), 'La valeur de l'inviolabilité de la personne' 2 *Revue de métaphysique et de morale* 149.
NAGEL, T (1995), 'Personal Rights and Public Space' 24 *Philosophy and Public Affairs* 83.
NAGEL, T (1997), *The Last Word* (New York, Oxford University Press).
NAGEL, T (2001), 'Pluralism and Coherence' in LILLA/DWORKIN/SILVERS (eds), *The Legacy of Isaiah Berlin* (New York, New York Review Books), 105.
NEDELSKY, J (2001A), 'Judgment, Diversity and Relational Autonomy' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
NEDELSKY, J (2001B), 'Embodied Diversity and the Challenges to Law' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
NEVES, M (2000), *Zwischen Themis und Leviathan: eine schwierige Beziehung* (Baden-Baden, Nomos).
NINO, C S (1992), R*ights* (Aldershot, Dartmouth).
NINO, C S (1993), *The Ethics of Human Rights* (Oxford, Clarendon).
NINO, C S (1996), *The Constitution of Deliberative Democracy* (New Haven, Yale University Press).
NOZICK, R (1968), 'Moral Complications and Moral Structures' 13 *Natural Law Forum* 1.
NOZICK, R (1974), *Anarchy, State and Utopia* (New York, Basic Books).
NOZICK, R (1989), *The Examined Life* (New York, Simon and Schuster).
OAKESHOTT, M (1975), *Hobbes on Civil Association* (Oxford, Blackwell).
OAKESHOTT, M (1991), *Rationalism in Politics and Other Essays* (Indianapolis, Liberty Press).
OBER, J (1998), *Political Dissent in Democratic Athens, Intellectual Critics of Popular Rule* (Princeton University Press).

Offe, C (1989), 'Bindungen, Fessel und Bremse. Moralische und institutionelle Aspekte intelligenter Selbstbeschränkung' in Honneth/McCarthy/Offe/Wellmer (eds), *Zwischenbetrachtung im Prozess der Aufklärung* (Frankfurt, Suhrkamp).

Offe, C (1998a), 'How Can We Trust Our Fellow Citizens?' in Warren, M E (ed), *Democracy and Trust* (Cambridge University Press).

Offe, C (1998b), 'Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights' 6 *Journal of Political Philosophy* 113.

Offe/Preuss (1991), 'Democratic Institutions and Moral Resources' in Held, D (ed), *Political Theory Today* (Cambridge, Polity), 143.

O'Neill, O (1986), 'The Public Use of Reason' 14 *Political Theory* 523.

O'Neill, O (1989), *Constructions of Reason* (Cambridge University Press).

O'Neill, O (1990), 'Practices of Toleration' in Lichtenberg, J (ed), *Democracy and the Mass Media* (Cambridge University Press).

Otsuka, M (2003), 'The Problem of Intergenerational Sovereignty: On Jefferson's Argument that All Laws Must be Re-enacted Every 19 Years' in *Libertarianism without Inequality* (Oxford University Press), ch 7.

Otsuka, M (2004), 'Skepticism about Saving the Greater Number' 32 *Philosophy and Public Affairs* 413.

Paine, T (1958), *The Rights of Man* (London, Dent).

Parkinson, J (2003a), 'Legitimacy Problems in Deliberative Democracy' 51 *Political Studies* 180.

Parkinson, J (2003b), 'Hearing Voices: Negotiating Representation Claims in Public Deliberation,' paper presented to the ECPR Joint Sessions 2003, www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws14/Parkinson.pdf.

Pascal, B (1966), *Pensées* (trans Krailshammer, A J) (London, Penguin).

Passerin D'entreves, M (2000), 'Arendt's Theory of Judgement' in Villa, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).

Pateman, C (1970), *Participation and Democratic Theory* (Cambridge University Press).

Pateman, C (1995), *The Politics of Presence* (Oxford, Clarendon).

Peacocke, C (1981), 'Reply: Rule-following: The Nature of Wittgenstein's Arguments' in Leich/Holtzman (eds), *Wittgenstein: To Follow a Rule* (London, Routledge).

Peacocke, C (1992), *A Study of Concepts* (Cambridge Mass, MIT Press).

Peczenik, A (1983), *The Basis of Legal Justification* (Lund, A Peczenik).

Peczenik, A (1989), 'Weighing Rights' in MacCormick/Bankowski (eds), *Enlightenment, Rights and Revolution* (Aberdeen University Press), 189.

Peczenik, A (1994), 'Law, Morality, Coherence and Truth' 7 *Ratio Juris* 146.

Penelhum, T (1993), 'Hume's Moral Psychology' in Fate-Norton, D (ed), *The Cambridge Companion to Hume* (Cambridge University Press).

Penner, J (2003), 'Legal Reasoning and Legal Authority' in Meyer/Paulson/Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press), 71.

Pennock, J R (1968), 'Political Representation: An Overview' in Pennock/Chapman (eds), *Representation, Nomos X* (New York University Press).

Pennock, J R (1979), *Democratic Political Theory* (Princeton University Press).

Pennock, J R (1986), 'Justification in Politics' in Pennock/Chapman (eds), *Justification, Nomos XXVII* (New York University Press).

Perelman, C (1972), *Justice et Raison* (Brussels, Presses Universitaires de Bruxelles).

PERELMAN, C (1977), *L'empire rhétorique: Rhétorique et Argumentation* (University of Notre Dame Press).
PERRY, M J (1988), *Morality, Politics and Law* (New York, Oxford University Press).
PERRY, S (1987), 'Judicial Obligation, Precedent and the Common Law' 7 *Oxford Journal of Legal Studies* 215.
PERRY, S (1999), 'Interpretation and Methodology in Legal Theory' in Marmor, A (ed.), *Law and Interpretation Essays in Legal Philosophy* (Oxford, Clarendon Press).
PERRY, S (2001), 'Hart's Methodological Positivism' in COLEMAN, J (ed), *Hart's Postscript* (Oxford University Press), 311.
PERRY, S (2002), 'Method and Principle in Legal Theory' 111:7 *Yale Law Journal* 1757.
PERRY, S (2005), 'Associative Obligations and the Obligation to Obey the Law' in HERSHOWITZ, S (ed), *Exploring Law's Empire* (Oxford University Press).
PETTIT, P (1996), *The Common Mind: An Essay on Psychology, Society and Politics* (New York, Oxford University Press).
PETTIT, P (1997), *Republicanism: A Theory of Freedom and Government* (Oxford, Clarendon).
PETTIT, P (2000), 'Democracy, Electoral and Contestatory' 42 *Nomos* 105.
PETTIT, P (2001A), *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge, Polity).
PETTIT, P (2001B), 'Deliberative Democracy and the Discursive Dilemma' 11 *Philosophical Issues* 268.
PETTIT, P (2001C), 'Two Sources of Morality' 18:2 *Social Philosophy and Policy* 102.
PETTIT, P (2002A), 'Collective Persons and Powers' 8 *Legal Theory* 443.
PETTIT, P (2002B), 'Groups with Minds of their Own' in SCHMITT, F (ed), *Socializing Metaphysics* (Lanham, Rowman & Littlefield).
PETTIT, P (2002C), *Rules, Reasons and Norms: Selected Essays* (Oxford, Clarendon).
PETTIT, P (2003A), 'Depoliticizing Democracy' 7:1 *Associations* 23.
PETTIT, P (2003B), 'Deliberative Democracy, the Discursive Dilemma and Republican Theory' in FISHKIN/LASLETT (eds), *Philosophy, Politics and Society, vol 7, Debating Deliberative Democracy* (Malden, Blackwell), 138.
PETTIT, P (2003C), 'Akrasia, Collective and Individual,' www.law.nyu.edu/clppt/program2003/readings/Pettit.pdf.
PETTIT, P (2004), 'Depoliticizing Democracy' 17:1 *Ratio Juris* 52.
PETTIT/RABINOWICZ (2001), 'The Jury Theorem and the Discursive Dilemma' 11 *Philosophical Issues* 268.
PFERSMANN, O (2000), 'Esquisse d'une théorie des droits fondamentaux' in FAVOREU/GAÏA/GHEVONTIAN/MELIN-SOUCRAMANIEN/PFERSMANN/PINI/ROUX/SCOFFONI/TREMEAU, *Droit des libertés fondamentales* (Paris, Dalloz).
PHARO, P (1998), 'Les limites de l'accord social, A propos du débat Habermas-Rawls sur la justice politique' 39:3 *Revue francaise de sociologie* 591.
PHILLIPS, A (1991), *Engendering Democracy* (Cambridge, Polity).
PHILLIPS, A (1995), *The Politics of Presence* (Oxford, Clarendon).
PINKARD, T (1998), 'Kant, Citizenship and Freedom' in HÖFFE, O (ed), *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre* (Berlin, Akademie Verlag), 155.
PIPPIN, R (2003), 'The Conditions of Value' in WALLACE, R J (ed), *The Practice of Value* (Oxford University Press), 86.
PITKIN, H (1965), 'Obligation and Consent' 59 *American Political Science Review* 996.

Pitkin, H (1972), *The Concept of Representation* (Berkeley, University of California Press).
Pitkin, H (1989), 'Representation' in Ball/Farr/Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press), 132.
Pitkin/Shiner (1982), 'On Participation' 2:4 *Democracy* 43.
Plato (1990), *Gorgias* (Oxford University Press).
Platts, M (1988), 'Moral Reality' in Sayre-McCord, G (ed), *Essays on Moral Realism* (Ithaca, Cornell University Press).
Plotke, D (1997), 'Representation is Democracy' 4:1 *Constellations* 19.
Pogge, T (1988), 'Kant's Theory of Justice' 79 *Kant Studies* 407.
Pogge, T (1989), R*ealizing Rawls* (Ithaca, Cornell University Press).
Pogge, T (1992), 'Cosmopolitanism and Sovereignty' 103 *Ethics* 48.
Pogge, T (2002), *World Poverty and Human Rights* (Cambridge, Polity Press).
Popkin, R (1955), 'The Skeptical Precursors of David Hume' 16 *Philosophy and Phenomenological Research* 61.
Popper, K (1972), *Objective Knowledge* (Oxford, Clarendon).
Popper, K (1987), 'Toleration and Intellectual Responsibility' in Mendus/Edwards (eds), *On Toleration* (Oxford, Clarendon).
Posner, R (1998), 'The Problematics of Moral and Legal Theory' 111 *Harvard Law Review* 1637.
Posner, R (2000), 'Review of Jeremy Waldron, Law and Disagreement' 100 *Columbia Law Review* 582.
Post, R (1995), *Constitutional Domains: Democracy, Community and Management* (Cambridge Mass, Harvard University Press).
Post, R (1998), 'Democracy, Popular Sovereignty, and Judicial Review' 86 *California Law Review* 429.
Postema, G (1982), 'Coordination and Convention at the Foundations of Law' 11 *Journal of Legal Studies* 165.
Postema, G (1986), *Bentham and the Common Law Tradition* (Oxford, Clarendon).
Postema, G (1987), 'Protestant Interpretation and Social Practices' 6 *Law and Philosophy* 283.
Postema, G (1989), 'Bentham and the Public Character of Law' 1 *Utilitas* 47.
Postema, G (1995a), 'Public Practical Reason: An Archaeology' *Social Philosophy and Policy Foundation* 43.
Postema, G (1995b), 'Public Practical Reason: Political Practice' in Shapiro/Decew (eds), *Theory and Practice, Nomos XXXVII* (New York University Press), 345.
Postema, G (1995c), 'Morality in the First Person Plural' 14 *Law and Philosophy* 1.
Postema, G (1996), 'Law's Autonomy and Public Practical Reason' in George, R (ed), *The Autonomy of Law* (Oxford, Clarendon), 79.
Postema, G (1997), 'Integrity: Justice in Workclothes' 82 *Iowa Law Review* 821.
Postema, G (2003), 'Law's Melody: Time and the Normativity of Law' 7:1 *Associations* 227.
Postema, G (2004), 'Law's Melody: Time and the Normativity of Law' 17:2 *Ratio Juris* 203.
Prendergast, C (2000), *The Triangle of Representation* (New York, Columbia University Press).
Preuss, U (1984), *Politische Verantwortung und Bürgerloyalität: von den Grenzen der Verfassung und des Gehorsams in der Demokratie* (Frankfurt, S Fischer).
Preuss, U (1999), 'The Constitution of a European Democracy and the Role of the Nation State' 12 *Ratio Juris* 417.
Przeworski, A (1991), *Democracy and the Market* (Cambridge University Press).

PRZEWORSKI, A (1998), 'Deliberation and Ideological Domination' in ELSTER, J (ed), *Deliberative Democracy* (Cambridge University Press), 140.
PRZEWORSKI/ALVAREZ/CHEIBUB/LIMONGI (1996), 'What Makes Democracy Endure?' 7 *Journal of Democracy* 39.
PRZEWORSKI/STOKES/MANIN (1999), *Democracy, Accountability and Representation* (Cambridge University Press).
PUFFENDORF, S (1964), *De Jure Naturae et Gentium* (Oxford University Press).
PUTNAM, H (1995), 'Are Moral and Legal Values Made or Discovered?' 1 *Legal Theory* 5.
RADBRUCH, G (1946), 'Gesetzliches Unrecht und übergesetzliches Recht' 1 *Schweizerische Juristen Zeitung* 105.
RADIN, M (1930), 'Statutory Interpretation' 43 *Harvard Law Review* 863.
RANCIÈRE, J (1995), *La Mésentente* (Paris, Galilée).
RAPHAEL, D (1988), 'The Intolerable' in MENDUS, S (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge University Press).
RAWLS, J (1958), 'Justice as Fairness' 67 *Philosophical Review* 164.
RAWLS, J (1971), *A Theory of Justice* (Cambridge Mass, Harvard University Press).
RAWLS, J (1993), *Political Liberalism* (New York, Columbia University Press).
RAWLS, J (1995A), 'The Domain of the Political and Overlapping Consensus' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 245.
RAWLS, J (1995B), 'Reply to Habermas' 93 *Journal of Philosophy* 132.
RAWLS, J (1999A), *The Law of Peoples, with the Idea of Public Reason Revisited* (Cambridge Mass, Harvard University Press).
RAWLS, J (1999B), 'Justice as Fairness' in FREEMAN, S (ed), *John Rawls: Collected Papers* (Cambridge Mass, Harvard University Press).
RAWLS, J (1999C), 'Legal Obligation and the Duty of Fair Play' in FREEMAN, S (ed), *John Rawls: Collected Papers* (Cambridge Mass, Harvard University Press).
RAWLS, J (1999D), 'The Idea of Public Reason Revisited' in FREEMAN, S (ed), *John Rawls: Collected Papers* (Cambridge Mass, Harvard University Press).
RAWLS, J (1999E), 'The Idea of an Overlapping Consensus' in FREEMAN, S (ed), *John Rawls: Collected Papers* (Cambridge Mass, Harvard University Press).
RAWLS, J (1999F), *A Theory of Justice* (revised edn) (Oxford University Press).
RAWLS, J (2000), *Lectures on the History of Moral Philosophy* (Cambridge Mass, Harvard University Press).
RAWLS, J (2001), *Justice as Fairness: A Restatement* (Cambridge Mass, Harvard University Press).
RAZ, J (1972), 'Legal Principles and the Limits of Law' 81 *Yale Law Journal* 823.
RAZ, J (1976), 'Professor Dworkin's Theory of Rights' 26 *Political Studies* 123.
RAZ, J (1979), T*he Authority of Law* (Oxford, Clarendon).
RAZ, J (1980), *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford, Clarendon).
RAZ, J (1981), 'Authority and Consent' 67 *Virginia Law Review* 103.
RAZ, J (1983), 'The Problem about the Nature of Law' 21 *Ontario Law Review* 203.
RAZ, J (1984A), 'Legal Rights' 4 *Oxford Journal of Legal Studies* 1.
RAZ, J (1984B), 'Hart on Moral Rights and Legal Duties' 4 *Oxford Journal of Legal Studies* 123.
RAZ, J (1984C), 'Rights-based Moralities' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press).
RAZ, J (1984D), 'On the Nature of Rights' 93 *Mind* 194.

RAZ, J (1986A), *The Morality of Freedom* (Oxford, Clarendon).
RAZ, J (1986B), 'Dworkin: A New Link in the Chain' 74 *California Law Review* 1103.
RAZ, J (1987A), 'Autonomy, Toleration and the Harm Principle' in GAVISON, R (ed), *Issues in Contemporary Legal Philosophy* (Oxford, Clarendon), 313.
RAZ, J (1987B), 'Government by Consent' in PENNOCK/CHAPMAN (eds), *Authority Revisited, Nomos XXIX* (New York University Press), 76.
RAZ, J (1989), 'Facing Up' 62 *Southern California Law Review* 1153.
RAZ, J (ed) (1990), 'Introduction' in *Authority* (Oxford, Blackwell).
RAZ, J (1992), 'Rights and Individual Well-being' 5 *Ratio Juris* 127.
RAZ, J (1994), 'Moral Change and Social Relativism' 11 *Social Philosophy and Policy* 139.
RAZ, J (1995A), *Ethics in the Public Domain* (Oxford University Press).
RAZ, J (1995B), 'Rights and Politics' 71 *Indiana Law Journal* 27.
RAZ, J (1996A), 'Intention in Interpretation' in GEORGE, R (ed), *The Autonomy of Law* (Oxford University Press), 249.
RAZ, J (1996B), 'On the Nature of Law' 86 *Archiv für Rechts- und Sozialphilosophie* 1.
RAZ, J (1997A), 'Interpretation Without Retrieval' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon).
RAZ, J (1997B), 'Rights in Politics' in TASIOULAS, J (ed), *Law, Values and Social Practices* (Aldershot, Dartmouth).
RAZ, J (1998A), 'Disagreement in Politics' 43 *American Journal of Jurisprudence* 25.
RAZ, J (1998B), 'Two Views of the Nature of the Theory of Law: A Partial Comparison' 4 *Legal Theory* 249.
RAZ, J (1998C), 'On the Authority and Interpretation of Constitutions' in ALEXANDER, L (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press).
RAZ, J (1998D), 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' 4 *Legal Theory* 1.
RAZ, J (1998E), 'Incommensurability and Agency' in CHANG, R (ed), *Incommensurability, Incomparability and Practical Reason* (Cambridge Mass, Harvard University Press), 110.
RAZ, J (1999A), 'Explaining Normativity: On Rationality and the Justification of Reason' 12 *Ratio* 354.
RAZ, J (1999B), *Practical Reason and Norms* (2nd edn) (Oxford University Press).
RAZ, J (2000), 'The Central Conflict: Morality and Self-Interest' in CRISP/HOOKER (eds), *Well-Being and Morality: Essays in Honour of James Griffin* (Oxford University Press), 209.
RAZ, J (2001A), *Engaging Reason, On the Theory of Value and Action* (Oxford University Press).
RAZ, J (2001B), *Value, Respect and Attachment* (Cambridge University Press).
RAZ, J (2001C), 'Reasoning with Rules' 54 *Current Legal Problems* 1.
RAZ, J (2001D), 'Notes on Value and Objectivity' in LEITER, B, *Objectivity in Law and Morals* (Cambridge University Press).
RAZ, J (2003A), 'Numbers, With or Without Contractualism' 16:4 *Ratio* 346.
RAZ, J (2003B), 'Comments and Responses' in MEYER/PAULSON/POGGE (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press), 253.
RAZ, J (2003C), 'The Practice of Value' in WALLACE, R J (ed), *The Practice of Value* (Oxford University Press), 15.
RAZ, J (2003D), 'More on Explaining Value: Replies and Comparison' in WALLACE, R J (ed), *The Practice of Value* (Oxford University Press), 121.
RAZ, J (2003E), 'About Morality and the Nature of Law' 48 *American Journal of Jurisprudence* 1.

RAZ, J (2004A), 'Personal Practical Conflicts' in BAUMANN/BETZLER (eds), *Practical Conflicts, New Philosophical Essays* (Cambridge University Press), 172.

RAZ, J (2004B), 'Can There be a Theory of Law?' in GOLDING/EDMUNDSON (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 324.

RAZ, J (2004C), 'Incorporation by Law' 10 *Legal Theory* 1.

RAZ, J (2004D), 'Speaking with One Voice: On Dworkinian Integrity and Coherence' in BURLEY, J (ed), *Dworkin and his Critics* (Oxford, Blackwell), 285.

RÉAUME, D (1989), 'Is Integrity a Virtue? Dworkin's Theory of Legal Obligation' 39 *University of Toronto Law Journal* 380.

REDONDO, C (2004), 'Legal Reasons,' www.ivr2003.net/Abstracts/documents/redondo.pdf.

REGAN, D (1989), 'Authority and Value' 62 *Southern California Law Review* 995.

REHG/BOHMAN (eds) (2001), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory*, *Essays in Honour of Thomas MacCarthy* (Cambridge Mass, MIT Press).

REMELE, K (1992), *Ziviler Ungehorsam* (Münster, Aschendorff).

REY, G (1998), 'A Priori Conceptions' in VILLANUEVA, S (ed), *Concepts*, 9 *Philosophical Issues* 92.

RHINOW, R (1984), *Widerstandrecht im Rechtsstaat?* (Bern, P Haupt).

RICCIARDI, M (2001), 'Essential Contestability and the Claims of Analysis' in CARTER/RICCIARDI (eds), *Freedom, Power and Political Morality, Essays in Honour of Felix Oppenheim* (London, Palgrave).

RICHARDSON, H S (1997), 'Democratic Intentions' in BOHMAN/REHG (eds), *Deliberative Democracy* (Cambridge Mass, MIT Press).

RICOEUR, P (1990), *Soi-même comme un autre* (Paris, Seuil).

RICOEUR, P (1994), 'The Plurality of Sources of Law' 7 *Ratio Juris* 272.

RICOEUR, P (1995), *Le Juste* (Paris, Editions Esprit).

RIEFF, P (1961), *Freud: The Mind of the Moralist* (London, Victor Gollancz).

RIKER, W H (1982), *Liberalism Against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco, Freeman).

RILEY, P (1982), *Will and Political Legitimacy* (Cambridge Mass, Harvard University Press).

RILEY, P (1995), 'Rousseau's General Will: Freedom of a Particular Kind' in WOKLER, R (ed), *Rousseau and Liberty* (Manchester University Press).

RODERICK, R (1986), *Habermas and the Foundations of Critical Theory* (Basingstoke, MacMillan).

ROGOWSKI, R (1981), 'Representation in Political Theory and Law' 91 *Ethics* 395.

RORTY, R (1988), 'The Priority of Democracy to Philosophy' in *Objectivity, Relativism and Truth: Philosophical Papers* (Cambridge University Press), vol I.

RORTY, R (1989), *Contingency, Irony and Solidarity* (Cambridge University Press).

RORTY, R (1995), 'Freud und die moralische Reflexion' in *Solidarität oder Objektivität?, Drei philosophische Essays* (Frankfurt, Suhrkamp).

RORTY, R (1997), 'Justice as Larger Loyalty' in BONTEKOE/STEPANIANTS (eds), *Justice and Democracy: Cross-cultural Perspectives* (Honolulu, University of Hawaii Press).

ROSENBLUM, N (1994), 'Democratic Character and Community: The Logic of Congruence?' 2 *Journal of Political Philosophy* 67.

ROSENFELD, M (1995), 'Law as Discourse: Bridging the Gap between Democracy and Rights' 108 *Harvard Law Review* 1163.

ROSENFELD, M (2000), 'Rule of Law Versus Rechtsstaat' in MÜLLER/HÄBERLE (eds), *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt, Wissenschaftliche*

Begegnung einiger Freunde von Thomas Fleiner zu Ehren seines 60. Geburtstages (Basel, Helbing & Lichtenhahn).

Ross, A (1958), *On Law and Justice* (London, Steven and Sons).

Ross, W D (1930), *The Right and the Good* (Oxford, Clarendon).

Ross, W D (1938), *The Foundations of Ethics* (Oxford, Clarendon).

Rousseau, J-J (1963), *Le contrat social* (Paris, Edition 10/18).

Rousseau, J-J (1997), in Gourevitch, V (ed), *The Social Contract and Other Later Political Writings* (Cambridge University Press).

Rüfner, W (1976), 'Grundrechtskonflikte' in Stark, C (ed), *Bundesverfassungsgericht und Grundgesetz* (Tübingen, JCB Mohr), vol I, 453.

Ryan, A (1996), 'Hobbes's Political Philosophy' in Sorell, T (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press).

Sabel/Simon (2004), 'Destabilizing Rights. How Public Law Litigation Succeeds' 117:4 *Harvard Law Review* 1015.

Sager, L (1990), 'The Incorrigible Constitution' 65 *New York University Law Review* 893.

Sandel, M (1982), *Liberalism and the Limits of Justice* (Cambridge University Press).

Sandel, M (1994), 'Political Liberalism' 107 *Harvard Law Review* 1765.

Sandel, M (1997), *Democracy's Discontent, America in Search of a Public Philosophy* (Cambridge Mass, Belknap).

Sanders, L (1997), 'Against Deliberation' 25 *Political Theory* 347.

Sarat/Kearns (eds) (1996), L*egal Rights: Historical and Philosophical Perspectives* (Ann Arbor, University of Michigan Press).

Sartori, G (1987), *The Theory of Democracy Revisited* (Chatham, Chatham House).

Saward, M (1998), *The Terms of Democracy* (Cambridge, Polity).

Saward, M (ed) (2000a), 'Introduction' in *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge).

Saward, M (2000b), 'Less than Meets the Eye: Democratic Legitimacy and Deliberative Theory' in *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge), 66.

Saward, M (2000c), 'Variation, Innovation and Democratic Renewal' in *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge), 213.

Saward, M (2003a), 'The Representative Claim,' paper presented to the ECPR Joint Sessions 2003, www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws14/Saward.pdf.

Saward, M (2003b), *Democracy* (Cambridge, Polity).

Sayre-McCord, G (1985), 'Coherence and Models for Moral Theorizing' 66 *Pacific Philosophical Quarterly* 170.

Scalia, A (1989a), 'The Rule of Law as a Law of Rules' 56 *University of Chicago Law Review* 1175.

Scalia, A (1989b), 'Originalism: The Lesser Evil' 57 *Cincinnati Law Review* 849.

Scalia, A (1997), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press).

Scanlon, T M (1977), 'Due Process' in Pennock/Chapman (eds), *Due Process*, *Nomos XVIII* (New York University Press).

Scanlon, T M (1982), 'Contractualism and Utilitarianism' in Sen/Williams (eds), *Utilitarianism and Beyond* (Cambridge University Press).

Scanlon, T M (1984), 'Rights, Goals and Fairness' in Waldron, J (ed), *Theories of Rights* (Oxford University Press), 137.

SCANLON, T M (1996), 'The Difficulty of Toleration' in HEYD, D (ed), *Toleration: An Elusive Virtue* (Princeton University Press).
SCANLON, T M (1998), *What We Owe to Each Other* (Cambridge Mass, Harvard University Press).
SCHAUER, F (1982), *Free Speech: A Philosophical Enquiry* (Cambridge University Press).
SCHAUER, F (1987), 'Precedent' 39 *Stanford Law Review* 571.
SCHAUER, F (1994), 'Precedent and the Necessary Externality of Constitutional Norms' 17 *Harvard Journal of Law and Public Policy* 45.
SCHAUER, F (1997), 'Discourse and its Discontents' 72 *Notre Dame Law Review* 1309.
SCHAUER, F (1999), 'Talking as a Decision Procedure' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 17.
SCHEFFLER, S (1982), *The Rejection of Consequentialism* (Oxford, Clarendon).
SCHELLING, T (1963), *The Strategy of Conflict* (New York, Oxford University Press).
SCHELLING, T (1984), *Choice and Consequences* (Cambridge Mass, Harvard University Press).
SCHEUNER, U (1976), 'Konsens und Pluralismus als verfassungsrechtliches Problem' in JAKOBS, G (ed), *Rechtsgeltung und Konsens, Schriften zur Rechtstheorie* (Berlin, Duncker & Humblot), Heft 49.
SCHEUNER, U (1979), 'Der Mehrheitsentscheid im Rahmen der demokratischen Grundordnung' in HÄFELIN/HALLER/SCHINDLER (eds), *Menschenrechte, Föderalismus, Demokratie, Festschrift für Werner Kägi* (Zurich, Schulthess).
SCHMILL, U (2002), 'Comment on Large Legislatures by Waldron' in VILLANUEVA, E (ed), *Legal and Political Philosophy*, 5 *Rodopi Philosophical Studies*, vol 1.
SCHMITT/THOMASSEN (eds) (1999), *Political Representation and Legitimacy in the European Union* (Oxford University Press).
SCHUMPETER, J A (1946), *Kapitalismus, Sozialismus und Demokratie* (Bern, A Francke).
SCHUMPETER, J A (1947), *Capitalism, Socialism and Democracy* (2nd edn) (London, Allen & Unwin).
SEARLE, J (1978), '*Prima Facie* Obligations' in RAZ, J (ed), *Practical Reasoning* (Oxford University Press), 81.
SEARLE, J (1990), 'Collective Intentions and Actions' in COHEN/MORGAN/POLLACK (eds), *Intentions in Communication* (Cambridge Mass, MIT Press).
SEARLE, J (1995), *The Construction of Social Reality* (London, Allen Lane).
SEITZ, B (1995), *The Trace of Political Representation* (Albany, State University of New York Press).
SELZNICK, P (1987), 'The Idea of a Communitarian Morality' 75 *California Law Review* 445.
SEN, A (1985), 'Well-Being, Agency and Freedom' 82 *Journal of Philosophy* 169.
SEN, A (1988), 'Rights and Agency' in SCHEFFLER, S (ed), *Consequentialism and its Critics* (Oxford University Press), 187.
SEN, A (1990), 'Individual Freedom as Social Commitment' (June 14) *New York Review of Books* 49.
SETALA, M (1996), *Referendums and Democratic Government* (Basingstoke, MacMillan).
SHAFER-LANDAU, R (1994), 'Ethical Disagreement, Ethical Objectivism and Moral Indeterminacy' 54 *Philosophy and Phenomenological Research* 331.
SHAFER-LANDAU, R (1997), 'Moral Rules' 107:4 *Ethics* 584.
SHAFER-LANDAU, R (2003), *Whatever Happened to Good and Evil* (Oxford University Press).
SHAPIRO, I (1994), 'Three Ways to be a Democrat' 22 *Political Theory* 124.
SHAPIRO, I (1996), *Democracy's Place* (Ithaca, Cornell University Press).
SHAPIRO, I (1999A), *Democratic Justice* (New Haven, Yale University Press).

SHAPIRO, I (1999B), 'Enough Deliberation: Politics is about Interests and Power' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 28.
SHAPIRO, M (1979), 'Compromise and Litigation' in PENNOCK/CHAPMAN (eds), *Compromise in Ethics, Law and Politics*, *Nomos XXXI* (New York University Press).
SHAPIRO, M (1996), *Freedom of Speech: The Supreme Court and Judicial Review* (Englewood Cliffs, Prentice-Hall).
SHAPIRO, S (1998), 'On Hart's Way Out' 4 *Legal Theory* 454.
SHAPIRO, S (2000), 'Law, Morality and the Guidance of Conduct' 6 *Legal Theory* 127.
SHAPIRO, S (2002), 'Law, Plans and Practical Reason' 8 *Legal Theory* 387.
SHER, G (1981), 'Subsidized Abortion: Moral Rights and Moral Compromise' 10 *Philosophy and Public Affairs* 361.
SHER, G (1984), 'Right Violations and Injustices: Can We Always Avoid Trade-offs?' 94 *Ethics* 212.
SHIFFRIN, S (2000), 'Paternalism, Unconscionability Doctrine and Accommodation' 29:3 *Philosophy and Public Affairs* 205.
SHKLAR, J (1985), *Men and Citizens: A Study in Rousseau's Social Theory* (2nd edn) (Cambridge University Press).
SHKLAR, J (1964), *Legalism: Law, Morals and Political Trials* (Cambridge Mass, Harvard University Press).
SHUE, H (1980), *Basic Rights* (Princeton University Press).
SIECKMANN, J (1990), *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden, Nomos).
SIECKMANN, J (1994), 'Zur Abwägungsfähigkeit von Prinzipien' 53 *Archiv für Rechts-und Sozialphilosophie, Supplement* 205.
SIECKMANN, J (1995), 'Zur Begründung von Abwägungsurteilen' 26 *Rechtstheorie* 45.
SIEYÈS, A (1963), *What is the Third Estate* (London, Pall Mall Press).
SIMMEL, G (1955), *Conflict and the Web of Group Affiliations* (New York, Free Press).
SIMMONDS, N (1995), 'The Analytical Foundations of Justice' 54 *Cambridge Law Journal* 306.
SIMMONDS, N (1998), 'Rights at the Cutting Edge' in KRAMER/SIMMONDS/STEINER, *A Debate over Rights* (Oxford, Clarendon), 113.
SIMMONS, A J (1979), *Moral Principles and Political Obligations* (Princeton University Press).
SIMMONS, A J (1999), 'Justification and Legitimacy' 109 *Ethics* 739.
SIMMONS, A J (2001), *Justification and Legitimacy, Essays on Rights and Obligations* (Cambridge University Press).
SINGER, J (1984), 'The Player and the Cards: Nihilism and Legal Theory' 94:1 *Yale Law Journal* 1.
SINGER, P (1972), *Democracy and Disobedience* (Oxford, Clarendon).
SKINNER, Q (1989), 'Language and Political Change' in BALL/FARR/HANSON (eds), *Political Innovation and Conceptual Change* (Cambridge University Press), 6.
SMITH, D (2005), 'The Many Faces of Political Integrity' in HERSHOWITZ, S (ed), *Exploring Law's Empire* (Oxford University Press).
SMITH, M B E (1973), 'Is there a Prima Facie Obligation to Obey the Law?' 82 *Yale Law Journal* 950.
SMITH, T V (1942), 'Compromise: Its Context and Limits' 53 *Ethics* 1.
SOLUM, L B (1993), 'Constructing an Ideal of Public Reason' 30 *San Diego Law Review* 729.
SOLUM, L B (1994), 'Inclusive Public Reason' 75 *Pacific Philosophical Quarterly* 217.

SOLUM, L B (1996), 'Indeterminacy' in PATTERSON, D (ed), *A Companion to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 488.
SOLUM, L B (2000), 'The Value of Dissent' 85 *Cornell Law Review* 859.
SOMEK, A (1996), 'German Legal Philosophy and Theory in the Nineteenth and Twentieth Centuries' in PATTERSON, D (ed), *A Companion to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 343.
SOPER, P (1984), *A Theory of Law* (Cambridge Mass, Harvard University Press).
SORELL, T (1986), *Hobbes* (London, Routledge).
SOSA, D (2002), 'Size Matters' in VILLANUEVA, E (ed), *Legal and Political Philosophy*, 5 *Rodopi Philosophical Studies* vol 1.
SPINOZA, B (1951), *A Political Treatise* (New York, Dover Publications).
SQUIRES, J (2000), 'Group Representation, Deliberation and the Displacement of Dichotomies' in SAWARD, M (ed), *Democratic Innovation: Deliberation, Association and Representation* (London, Routledge), 93.
STAVROPOULOS, N (1996), *Objectivity in Law* (Oxford University Press).
STAVROPOULOS, N (2001), 'Hart's Semantics' in COLEMAN, J (ed), *Hart's Postscript* (Oxford University Press).
STAVROPOULOS, N (2003), 'Interpretivist Theories of Law' in ZALTA, E (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2003 edn), http://plato.stanford.edu/archives/fall1999/entries/law-interpretivist/.
STAVROPOULOS, N (2004), 'Objectivity' in GOLDING/EDMUNDSON (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford, Blackwell), 315.
STAVROPOULOS, N (2005), 'Criteria and Disagreement,' unpublished manuscript.
STEINER, H (1977), 'The Structure of a Set of Compossible Rights' 74 *Journal of Philosophy* 767.
STEINER, H (1994), *An Essay on Rights* (Oxford, Blackwell).
STEINER, H (1998), 'Working Rights' in KRAMER/SIMMONDS/STEINER, *A Debate over Rights* (Oxford, Clarendon), 233.
STOCKER, M (1990), *Plural and Conflicting Values* (Oxford, Clarendon).
STOLZENBERG, N M (1993), 'He Drew a Circle that Shut Me Out: Assimilation, Indoctrination, and the Paradox of Liberal Education' 105 *Harvard Law Review* 581.
STROUD, B (1983), *Hume* (London, Routledge).
STURGEON, N L (1994), 'Moral Disagreement and Moral Relativism' 11 *Social Philosophy and Policy* 80.
SUGDEN, R (1993), 'Thinking as a Team: Towards an Explanation of Non-Selfish Behaviour' in PAUL/PAUL/MILLER (eds), *Altruism* (Cambridge University Press).
SUGDEN, R (1995), 'Justified to Whom?' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 149.
SULLIVAN, K M (1998), 'Epistemic Democracy and Minority Rights' 86 *California Law Review* 445.
SUNSTEIN, C R (1988), 'Beyond the Republican Revival' 97 *Yale Law Journal* 1539.
SUNSTEIN, C R (1990), *After the Rights Revolution* (Cambridge Mass, Harvard University Press).
SUNSTEIN, C R (1991), 'Preferences and Politics' 20:1 *Philosophy and Public Affairs* 3.
SUNSTEIN, C R (1993A), *Democracy and the Problem of Free Speech* (New York, Free Press).
SUNSTEIN, C R (1993B), *The Partial Constitution* (Cambridge Mass, Harvard University Press).
SUNSTEIN, C R (1994), 'Incommensurability and Valuation in Law' 92 *Michigan Law Review* 779.

SUNSTEIN, C R (1995), 'Democracy and Shifting Preferences' in COPP/HAMPTON/ROEMER (eds), *The Idea of Democracy* (Cambridge University Press), 196.
SUNSTEIN, C R (1996A), *Legal Reasoning and Political Conflict* (New York, Oxford University Press).
SUNSTEIN, C R (1996B), 'Foreword: Leaving Things Undecided' 110 *Harvard Law Review* 6.
SUNSTEIN, C R (1997), 'Deliberation, Democracy, Disagreement' in BONTEKOE/STEPANIANTS (eds), *Justice and Democracy: Cross-cultural Perspectives* (Honolulu, University of Hawai Press).
SUNSTEIN, C R (1999), 'Agreement Without Theory' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 123.
SUNSTEIN, C R (2001A), *Republic.com* (Princeton University Press).
SUNSTEIN, C R (2001B), D*esigning Democracy. What Constitutions Do* (Oxford University Press).
SUNSTEIN, C R (2002A), 'The Law of Group Polarization' 10:2 *Journal of Political Philosophy* 175.
SUNSTEIN, C R (2002B), 'The Equal Chance to Have One's Vote Count' 21 *Law and Philosophy* 122.
SYPNOWICH, C (1999), 'Utopia and the Rule of Law' in DYZENHAUS, D (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing), 179.
SYPNOWICH, C (2001), 'Law and Ideology' in ZALTA, E (ed), *Stanford Encyclopedia of Philosophy* (Winter 2001 edn), http://plato.stanford.edu/entries/law-ideology/.
TATSUO, I (2005), 'Two Models of Democracy: How to Make Demos and Hercules Collaborate in Public Discussion' in WINTGENS, L (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot, Ashgate).
TAUREK, J (1977), 'Should the Numbers Count?' 6 *Philosophy and Public Affairs* 293.
TAYLOR, C (1985), 'Atomism' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press), 187.
TAYLOR, M (1987), *The Possibility of Cooperation* (Cambridge University Press).
THOMSON, J J (1986A), 'Self-Defense and Rights' in *Rights, Restitution and Risk* (Cambridge Mass, Harvard University Press), 33.
THOMSON, J J (1986B), 'Some Ruminations on Rights' in *Rights, Restitution and Risk* (Cambridge Mass, Harvard University Press), 49.
THOMSON, J J (1990), *The Realm of Rights* (Cambridge Mass, Harvard University Press).
THOREAU, H (1960), *On the Duty of Civil Disobedience* (New York, New American Library).
TIMSIT, G (1993), *Les Figures du Jugement* (Paris, PUF).
TIMSIT, G (1995), *Gouverner ou Juger, Les blasons de la légalité* (Paris, PUF).
TOCQUEVILLE, A (1990), *Democracy in America* (New York, Vintage).
TODOROV, T (1985), *Frêle Bonheur, Essai sur Rousseau* (Paris, Hachette).
TRACHTENBERG, Z (1993), *Making Citizens: Rousseau's Political Theory of Culture* (London, Routledge).
TRIBE, L (1978), *American Constitutional Law* (New York, Foundation Press).
TRIBE, L (1980), 'The Puzzling Persistence of Process-Based Constitutional Theories' 89 *Yale Law Journal* 1063.
TRIBE, L (1995), 'Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation' 108 *Harvard Law Review* 1221.
TUCK, R (1988), 'Scepticism and Toleration in the Seventeenth Century' in MENDUS, S (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge University Press).
TUCK, R (1989), *Hobbes* (Oxford University Press).

TUCK, R (1996), 'Hobbes's Moral Philosophy' in SORELL, T (ed), *The Cambridge Companion to Hobbes* (Cambridge University Press).
TUCK, R (1999), 'Introduction' in *Hobbes, Leviathan* (2nd edn) (Cambridge University Press).
TULLY, J (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press).
TULLY, J (1999), 'The Agonic Freedom of Citizens' 28 *Economy and Society* 161.
TULLY, J (2002), 'The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy' 65 *Modern Law Review* 204.
TULLY, J (2003), 'Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection' in HAYES, C (ed), *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca, Cornell University Press), 17.
TUOMELA, R (1995), *The Importance of Us* (Stanford University Press).
TUSHNET, M (1998), 'Defending the Indeterminacy Thesis' in BIX, B (ed), *Analyzing Law* (Oxford, Clarendon), 232.
TUSHNET, M (1999), *Taking the Constitution Away from the Court* (Princeton University Press).
TWINING, W (2000), *Globalisation and Legal Theory* (London, Butterworths).
ULLMANN-MARGALIT, E (1977), *The Emergence of Norms* (Oxford, Clarendon).
ULLMANN-MARGALIT, E (1982), 'Is Law a Coordinative Authority?' 16 *Israel Law Review* 350.
UNGER, R (1996), *What Should Legal Analysis Become?* (London, Verso).
URBINATI, N (2000), 'Representation as Advocacy' 28:6 *Political Theory* 758.
URBINATI, N (2002), *Mill on Democracy: From the Athenian Polis to Democratic Representation* (University of Chicago Press).
VAN DER WELDEN, P (1992), 'Coherence in Law: A Deductive and a Semantic Explication of Coherence' in BROUWER, B *et al* (eds), *Coherence and Conflict in Law* (Deventer, Kluwer), 257.
VAN MILL, D (1996), 'The Possibility of Rational Outcomes from Democratic Discourse and Procedures' 58 *Journal of Politics* 734.
VAN PARIJS, P (1998), 'Should the European Union Become More Democratic?' in FOLLESDAL/KOSLOWSKI (eds), *Democracy and the European Union* (Berlin, Springer), 287.
VEITCH, S (1999), *Moral Conflict and Legal Reasoning* (Oxford, Hart Publishing).
VELLEMAN, J D (2000), 'How to Share an Intention' in *The Possibility of Practical Reason* (Oxford, Clarendon), 200.
VILLA, D (2000), 'Introduction: the Development of Arendt's Political Thought' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).
VILLA, D (2001), 'Hannah Arendt: Modernity, Alienation and Critique' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
VIROLI, M (1988), *La théorie de la société bien ordonnée chez Jean-Jacques Rousseau* (Berlin, W de Gruyter).
VLASTOS, G (1984), 'Justice and Equality' in WALDRON, J (ed), *Theories of Rights* (Oxford University Press), 41.
VON WRIGHT, G E (1983), 'The Foundations of Norms and Normative Statements' in VON WRIGHT, G E (ed), *Practical Reason. Philosophical Papers I* (Oxford, Blackwell), 67.
WALDRON, J (ed) (1984), 'Introduction' in *Theories of Rights* (Oxford University Press).
WALDRON, J (ed) (1987A), 'Nonsense upon Stilts? A Reply' in *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London, Methuen), 183.

WALDRON, J (1987B), 'Theoretical Foundations of Liberalism' 37 *Philosophical Quarterly* 135.
WALDRON, J (1989A), 'Autonomy and Perfectionism in Raz's Morality of Freedom' 62 *Southern California Law Review* 1097.
WALDRON, J (1989B), 'Legislation and Moral Neutrality' in GOODIN/REEVE (eds), *Liberal Neutrality* (London, Routledge).
WALDRON, J (1989C), 'The Rule of Law in Contemporary Liberal Theory' 2 *Ratio Juris* 79.
WALDRON, J (1990A), 'Rights and Majorities: Rousseau Revisited' in CHAPMAN/WERTHEIMER (eds), *Majorities and Minorities*, *Nomos XXXII* (New York University Press), 44.
WALDRON, J (1990B), *The Law* (London, Routledge).
WALDRON, J (1993A), 'Liberal Rights: Two Sides of the Coin' in *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press).
WALDRON, J (1993B), 'Assurances of Objectivity' 5 *Yale Journal of Law and Humanities* 553.
WALDRON, J (1993C), 'Religious Contributions to Political Deliberation' 30 *San Diego Law Review* 817.
WALDRON, J (1993D), 'Justice Revisited' (14 June) 18 *Times Literary Supplement* 5.
WALDRON, J (1993E), 'Special Ties and Natural Duties' 22 *Philosophy and Public Affairs* 3.
WALDRON, J (1993F), 'A Right-Based Critique of Constitutional Rights' 13 *Oxford Journal of Legal Studies* 45.
WALDRON, J (1994A), 'Vagueness in Law and Language, Some Philosophical Issues' 82 *California Law Review* 509.
WALDRON, J (1994B), 'Freeman's Defense of Judicial Review' 13 *Law and Philosophy* 27.
WALDRON, J (1995A), 'Rights and Needs: The Myth of Disjunction' in SARAT/KEARNS (eds), *Legal Rights: Historical and Philosophical Perspectives* (Ann Arbor, University of Michigan Press).
WALDRON, J (1995B), 'What Plato would Allow' in SHAPIRO/DECEW (eds), *Theory and Practice, Nomos XXXVII* (New York University Press).
WALDRON, J (1996), 'Kant's Legal Positivism' 109 *Harvard Law Review* 1535.
WALDRON, J (1997A), 'Legislative Intention and Unintentional Legislation' in MARMOR, A (ed), *Law and Interpretation* (Oxford, Clarendon).
WALDRON, J (1997B), 'Supply Without Burthen Revisited' 82 *Iowa Law Review* 1467.
WALDRON, J (1998A), 'Moral Truth and Judicial Review' 43 *American Journal of Jurisprudence* 75.
WALDRON, J (1998B), 'Dirty Little Secret' 98 *Columbia Law Review* 510.
WALDRON, J (1998C), 'Hobbes on Truth and Civil Doctrine' in RORTY, A (ed), *Philosophers on Education* (London, Routledge).
WALDRON, J (1999A), *Law and Disagreement* (Oxford University Press).
WALDRON, J (1999B), 'Virtue *en masse*' in ALLEN/REGAN (eds), *Debating Democracy's Discontents* (Oxford University Press).
WALDRON, J (1999C), *The Dignity of Legislation* (Cambridge University Press).
WALDRON, J (1999D), 'All We Like Sheep' 12 *Canadian Journal of Law and Jurisprudence* 169.
WALDRON, J (1999E), 'Deliberation, Disagreement and Voting' in KOH/SLYE (eds), *Deliberative Democracy and Human Rights* (New Haven, Yale University Press), 210.
WALDRON, J (2000A), 'Lex Satis Justa' 75 *Notre Dame Law Review* 1829.
WALDRON, J (2000B), '"Transcendental Nonsense" and System in the Law' 100 *Columbia Law Review* 16.
WALDRON, J (2000C), 'Arendt's Constitutional Politics' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).

WALDRON, J (2000D), 'Legislation by Assembly' 46/3 *Loyola Law Review* 507.
WALDRON, J (2000E), 'Cultural Identity and Civil Responsibility' in NORMAN/KYMLICKA (eds), *Citizenship in Diverse Societies* (Oxford University Press), 155.
WALDRON, J (2001A), 'Normative (Ethical) Legal Positivism' in COLEMAN/SHAPIRO (eds), *Hart's Postscript* (Oxford University Press).
WALDRON, J (2001B), 'The Relation between Legal and Political Philosophy' in COLEMAN/SHAPIRO (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press).
WALDRON, J (2001C), 'A Question of Judgment' (28 September) *Times Literary Supplement* 7.
WALDRON, J (2001D), 'Does Law Promise Justice?' 17 *Georgia State University Law Review* 759.
WALDRON, J (2002A), 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' 21 *Law and Philosophy* 137.
WALDRON, J (2002B), 'Introduction: Disagreement on Justice and Rights' 6:5 *Legislation and Public Policy* 5.
WALDRON, J (2002C), 'Hobbes and the Principles of Publicity' in HONIG/MAPEL (eds), *Skepticism, Individuality and Freedom: The Reluctant Liberalism of Richard Flathman* (Minneapolis, University of Minnesota Press).
WALDRON, J (2002D), 'Large Legislatures' in VILLANUEVA, E (ed), *Legal and Political Philosophy*, 5 *Rodopi Philosophical Studies* vol 1.
WALDRON, J (2002E), 'Response to Professors Kutz, Schmill and Sosa' in VILLANUEVA, E (ed), *Legal and Political Philosophy*, 5 *Rodopi Philosophical Studies* vol 1.
WALDRON, J (2002F), 'Judicial Power and Popular Sovereignty' in GRABER/PERHAC (eds), *Marbury Versus Madison: Documents and Commentary* (Washington, CQ Press), 181.
WALDRON, J (2003A), 'Authority for Officials' in MEYER/PAULSON/POGGE (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press), 45.
WALDRON, J (2003B), 'Security and Liberty: The Image of Balance' 11:2 *Journal of Political Philosophy* 191.
WALDRON, J (2003C), 'Legislating with Integrity' 72 *Fordham Law Review* 373.
WALDRON, J (2004A), 'The Rule of Law as a Theatre of Debate' in BURLEY, J (ed), *Dworkin and his Critics* (Oxford, Blackwell), 319.
WALDRON, J (2004B), 'Can there be a Democratic Jurisprudence?,' paper presented to the 2004 Analytical Legal Philosophy Conference, NYU, 16–17 April 2004.
WALDRON, J (2005), 'Did Dworkin ever Answer the Crits' in HERSHOWITZ, S (ed), *Exploring Law's Empire* (Oxford University Press).
WALKER, N (2001), 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism' in CAMPBELL/EWING/TOMKINS (eds), *Sceptical Essays on Human Rights* (Oxford University Press), 119.
WALKER, N (2003), 'Late Sovereignty in the European Union' in WALKER, N (ed), *Sovereignty in Transition* (Oxford, Hart Publishing).
WALLACE, R J (2003), 'Introduction' in WALLACE, R J (ed), *Joseph Raz: The Practice of Value* (Oxford University Press), 1.
WALUCHOW, W (1989), 'The Weak Social Thesis' 9 *Oxford Journal of Legal Studies* 23.
WALZER, M (1970), 'The Obligation to Disobey' in *Obligations* (Cambridge Mass, Harvard University Press).
WALZER, M (1973), 'Political Action: The Problem of Dirty Hands' 2 *Philosophy and Public Affairs* 160.

WALZER, M (1983), *Spheres of Justice* (New York, Basic Books).
WALZER, M (1989), 'A Critique of Philosophical Conversation' 21:1 *Philosophical Forum* 182.
WALZER, M (1994), *Thick and Thin, Moral Argument at Home and Abroad* (University of Notre Dame Press).
WALZER, M (1997), *On Toleration* (New Haven, Yale University Press).
WARNKE, G (2001), 'Taking Ethical Debate Seriously' in REHG/BOHMAN (eds), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory*, *Essays in Honor of Thomas MacCarthy* (Cambridge Mass, MIT Press).
WARRENDER, H (1957), *Political Philosophy of Hobbes: His Theory of Obligation* (Oxford, Clarendon).
WATKINS, J (1957), 'Epistemology and Politics' 31 *Proceedings of the Aristotelian Society* 80.
WEALE, A (1998), 'Between Representation and Constitutionalism in the European Union' in WEALE/NENTWICH (eds), *Political Theory and the European Union* (London, Routledge), 49.
WEBER, M (1949), *The Methodology of the Social Sciences* (New York, Free Press).
WEBER, M (1991), 'Politics as Vocation' in GERTH/WRIGHT MILLS (eds), *From Max Weber: Essays in Sociology* (London, Routledge), 77.
WEILER, J H H (1995), 'European Democracy and Its Critics: Five Uneasy Pieces' in COTTIER/KADDOUS (eds), *Democracy and Federalism in European Integration* (Bern, Stämpfli), 5.
WEILER, J H H (1999), 'To be a European Citizen: Eros and Civilization' in WEILER J H H (ed), *The Constitution of Europe* (Cambridge University Press), 324.
WEINSTOCK, D M (1994), 'The Justification of Political Liberalism' 75 *Pacific Philosophical Quarterly* 165.
WELLMAN, C (1975), 'Ethical Disagreement and Objective Truth' 12 *American Philosophical Quarterly* 12.
WELLMAN, C (1997), A*n Approach to Rights* (Dordrecht, Kluwer).
WELLMAN, CH (1995), 'On Conflicts between Rights' 14 *Law and Philosophy* 271.
WELLMER, A (1996), *Endgames: The Irreconcilable Nature of Modernity* (Cambridge Mass, MIT Press).
WELLMER, A (2000), 'Arendt on Revolution' in VILLA, D (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press).
WELLMER, A (2001), 'Hannah Arendt on Judgment: The Unwritten Doctrine of Reason' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).
WENAR, L (1995), 'Political Liberalism: An Internal Critique' 106 *Ethics* 41.
WERTHEIMER, A (1999), 'Internal Disagreements: Deliberation and Abortion' in MACEDO, S (ed), *Deliberative Politics, Essays on Democracy and Disagreement* (Oxford University Press), 170.
WHELAN, F G (1983), 'Prologue: Democratic Theory and the Boundary Problem' in PENNOCK/CHAPMAN (eds), *Liberal Democracy, Nomos XXV* (New York University Press).
WILLIAMS, B (1972), *Morality: An Introduction to Ethics* (Harmondsworth, Penguin).
WILLIAMS, B (1973), *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press).
WILLIAMS, B (1979), 'Conflicts of Value' in RYAN, A (ed), *The Idea of Freedom, Essays in Honour of Isaiah Berlin* (Oxford University Press), 227.
WILLIAMS, B (1981), 'Conflicts of Values' in *Moral Luck* (Cambridge University Press).

WILLIAMS, B (1991), 'Subjectivism and Toleration' in GRIFFITHS, P (ed), *A.J. Ayer: Memorial Essays* (Cambridge University Press).
WILLIAMS, B (1993), 'Knowledge, Science, Convergence' in *Ethics and the Limits of Philosophy* (3rd edn) (London, Fontana).
WILLIAMS, B (1996), 'Toleration: An Impossible Virtue?' in HEYD, D (ed), *Toleration: An Elusive Virtue* (Princeton University Press).
WILLIAMS, B (2001), 'Liberalism and Loss' in LILLA/DWORKIN/SILVERS (eds), *The Legacy of Isaiah Berlin* (New York, New York Review Books), 91.
WILLIAMS, B (2003), 'Relativism, History and the Existence of Values' in WALLACE, R J (ed), *The Practice of Value* (Oxford University Press), 106.
WILLIAMS, H (1983), *Kant's Political Philosophy* (Oxford, Blackwell).
WILLIAMS, M (1998), *Voice, Trust and Memory* (Princeton University Press).
WILLIAMS, M (2000), 'The Uneasy Alliance of Group Representation and Deliberative Democracy' in NORMAN/KYMLICKA (eds), *Citizenship in Diverse Societies* (Oxford University Press), 124.
WINGO, A (2003), *Veil Politics in Liberal Democratic States* (Oxford University Press).
WINTGENS, L (2001), 'Sovereignty and Representation' 14 *Ratio Juris* 272.
WINTGENS, L (ed) (2002), *Legisprudence: A New Approach to Legal Theory* (Oxford, Hart Publishing).
WINTGENS, L (ed) (2005), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot, Ashgate).
WITTGENSTEIN, L (1967), *Remarks on the Foundations of Mathematics* (2nd edn) (Oxford, Blackwell).
WITTGENSTEIN, L (1969), *On Certainty* (Oxford, Blackwell).
WITTGENSTEIN, L (1991), *Philosophical Investigations* (3rd edn) (Oxford University Press).
WOKLER, R (ed) (1995), *Rousseau and Liberty* (Manchester University Press).
WOLFF, A (1990), 'The Conflict between Authority and Autonomy' in RAZ, J (ed), *Authority* (Oxford, Blackwell).
WOLFF, J (1995), 'Political Obligation, Fairness and Independence' 8 *Ratio* 96.
WOLLHEIM, R (1960), 'How Can One Person Represent Another?' 34 *Proceedings of the Aristotelian Society* 209.
WOLLHEIM, R (1969), 'A Paradox in the Theory of Democracy' in LASLETT/RUNCIMAN (eds), *Philosophy, Politics and Society* (Oxford University Press).
WONG, D (1984), *Moral Relativity* (Berkeley, University of California Press).
WONG, D (1992), 'Coping with Moral Conflict and Ambiguity' 102 *Ethics* 777.
WRIGHT, C (1981), 'Rule-following, Objectivity and the Theory of Meaning' in HOLTZMAN/LEICH (eds), *Wittgenstein: To Follow a Rule* (London, Routledge).
WROBLEWSKI, J (1990), 'Principles, Values and Rules in Legal Decision-Making and the Dimensions of Legal Rationality' 3 *Ratio Juris* 100.
YABLO, S (2000), 'Red, Bitter, Best. Critical Notice of Frank Jackson's Book: *From Metaphysics to Ethics: A Defence of Conceptual Analysis*' 41:1 *Philosophical Books* 13.
YOUNG, I M (1986), 'The Ideal of Community and the Politics of Difference' 12 *Social Theory and Practice* 1.
YOUNG, I M (1990), *Justice and the Politics of Difference* (Princeton University Press).
YOUNG, I M (1995), 'Together in Difference: Transforming the Logic of Group Political Conflict' in KYMLICKA, W (ed), *The Rights of Minority Cultures* (Oxford University Press), 155.

YOUNG, I M (1996), 'Communication and the Other: Beyond Deliberative Democracy' in BENHABIB, S (ed), *Democracy and Difference* (Princeton University Press), 120.

YOUNG, I M (1997A), 'Deferring Group Representation' in SHAPIRO/KYMLICKA (eds), *Ethnicity and Group Rights, Nomos XXXIX* (New York University Press).

YOUNG, I M (1997B), 'Difference as a Resource for Democratic Communication' in BOHMAN/REHG (eds), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge Mass, MIT Press).

YOUNG, I M (1999A), 'Justice, Inclusion and Deliberative Democracy' in MACEDO, S (ed), *Deliberative Politics, Essays on* Democracy and Disagreement (Oxford University Press), 151.

YOUNG, I M (1999B), 'State, Civil Society and Social Justice' in SHAPIRO/HACKER-CORDON (eds), *Democracy's Value* (Cambridge University Press), 141.

YOUNG, I M (2000), *Inclusion and Democracy* (Oxford University Press).

YOUNG, I M (2001A), 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' in BEINER/NEDELSKY (eds), *Judgment, Imagination and Politics, Themes from Kant and Arendt* (Lanham, Rowman & Littlefield).

YOUNG, I M (2001B), 'Activist Challenges to Deliberative Democracy' 29:5 *Political Theory* 670.

YOUNG, O (1994), *International Governance: Protecting the Environment in a Stateless Society* (Ithaca, Cornell University Press).

Index

abstractness, *see under* legal indeterminacy
accommodation, *see* mutual accommodation
adjudication, *see* judicial review
agreement
  consensus and, 19–20, 238
    see also consensus
  to disagree, 4, 156, 168, 333
  incompletely theorised, 157, 331, 409
    see also Sunstein
  in judgement, 82–84, 331
  intermediate level of, 333
  in understanding, 81–84
  lack of, 48
  pluralistic, 238
    see also Bohman; mutual accommodation
  pressure for, 207, 239, 282, 530
  reasoned, 283
    see also Bohman; mutual accommodation
  reflexive, 168, 328
  see also disagreement
akrasia:
  disagreement and, 295
  precommitment and, *see* constitutional precommitment
Alexy, R., 448–453
ambiguity, *see under* legal indeterminacy
Aquinas, 162
Arendt, A., 8, 42, 53, 118, 143, 188, 193, 225–226, 228, 242, 249, 253, 320, 332, 341, 351, 366, 370, 399–401, 475, 527–528, 530, 532
Aristotle, 537
Arrow, K., 243–244
assemblies:
  constituent, *see under* constitution
  legislative, *see* legislature
authority:
  circumstances of, 179, 490
  concept of, 461–462
  coordination and, *see* coordination-based duties
  of democratic law, 460–461, 505–506
  dependence thesis, 411–412, 495–496
  disagreement and, 161–164, 459–461
    see also coordination-based duties
  knowability of, 176, 181, 495, 497
  majority decision and, 499, 505–506
  normal justification thesis, 411–412, 496–499
  for officials v citizens, 412–414, 462–463
  pre-emption thesis, 411–412, 493–495
  see also Raz; coordination-based duties; obligation to obey the law; civil disobedience

Bayon, J.C., 322, 324
Beitz, C., 224–225, 250, 252
Benhabib, S., 211, 235–236, 242, 327, 331
Bentham, J., 162
Berlin, I., 55, 123
bill of rights, *see* constitution
Bodin, J., 288, 300
Bohman, J., 210–211, 238, 308, 311, 322
Boltanski and Thévenot, 168
Bourdieu, P., 4, 168n
Bratman, M., 194n
burdens:
  of judgement, 26–29, 37, 39, 67, 101–102, 111–112, 127, 266, 271, 387
  of reason, *see* reason
Burge, T., 78n

checkerboard statutes, 257, 278, 375, 393–395, 414
  see also compromise; integrity
Cicero, 375
circumstances:
  of authority, *see under* authority
  of compromise *see under* compromise
  of disagreement, *see under* disagreement
  of integrity, *see under* integrity
  of justice, *see under* justice
  of politics, *see under* politics

citizenship:
disagreement and, 532
global, 536–537
officials and, 182, 396, 463
civil disobedience:
acceptance of one's punishment and, 513
active v passive, 510
conscientious objection and, 507, 510–511
democracy and, 518–519, 521–522
as democratic test of legitimacy, 518–519
direct v indirect, 510
disagreement and, 504, 519–522
error and, 516–518, 523
illegality of, 509
intolerance and, 522
legal justification of, 514–516
limitations of, 519–522
majority and, 521–522
moral justification of, 516–518
non-violence and, 512
persuasive v confrontational, 510
political and moral motivation of, 510–511
publicity of, 510
see also public sphere
revolution and, 506–507
right to, 522–524
as *ultima ratio*, 512
see also authority; obligation to obey the law; coordination-based duties
Cohen, J., 211, 228–229
coherence, *see* integrity
Coleman, J., 194
collective action, *see* coordination
compromise:
circumstances of, 266
concept of, 259–263
concept attribution and, 275–277
democracy and, *see* democracy; majority rule
distributive v integrative, 261
error and, 274
external v internal, 260–262
inefficiency and, 272
injustice and, 272–275
integrity and, 268, 277–279, 385–386
of interests, 264–265
justification of, 263–271
limits of, 271–279
multiprinciple, 269–270
of principles, 265–271
qua outcome v *qua* process, 260
single-principle, 270–271
concept:
attribution, 275–277
conception and, 49, 72
conciliatory, 276
criterial, 70–71, 78–79
descriptive v normative, 70–71, 79, 81, 85
essentially contestable, *see* essentially contestable concept
gerrymandered, 275–277, 412
interpretive, 70–71
see also Dworkin
principle and, 260
thick v thin, 71
umbrella, 276
concerted action, *see* coordination
Condorcet *Jury Theorem*, 218–219, 244
conflict:
virtue of, 234
see also disagreement
conflict of rights:
agglomeration of duties and, 429
causes of, 425–427, 430–431
compossible rights and, 428
conciliation v prioritisation and, 442–443, 449–451
conflict of duties and, 426
conflict of interests and, 426
criteria of conciliation and, 451–453
importance of number of rights, 441–442
legal hierarchy and, 444–445
prima facie duties and, 428
proportionality, 452–453
qualitative priority of rights and, 437–439
quantitative weighing of rights, 439–443
resolution of, 436–453
rights as side-constraints and, 429
see also Nozick
legal rules of conflict and, 445–448
specificationism and, 427–428, 431
typology of, 431–435, 435–436
weighing and balancing, 423, 438–439, 448, 455

Connolly, W., 73
consensus:
agreement and, *see* agreement
compromise and, 260
see also compromise
modus vivendi and, 26, 31, 107, 119, 260
on the importance of consensus, 2–3
overlapping, 3, 24–27, 35–37, 92, 102–103, 106
see also Rawls; Habermas
see also convergence; mutual accommodation
consistency:
logical, 105, 379
principled, 379, 394, 536
see also integrity
constitution:
constituent assemblies, 289, 296, 298, 300, 310, 312, 317, 334, 337
constitutionalism, 292
democracy and, 288–289, 316–323
democratisation of constitutionalism, 289, 316–317, 328, 338
entrenchment, 205, 285, 287–292, 324–328
see also constitutional precommitment
interpretation, 314, 327, 333–336, 531
iteration, 332, 531
narrative, 332, 533
notion of, 291–292
precommitment and, *see* constitutional precommitment
rights and, *see* rights
weak constitutionalism, 290, 324, 337
constitutional precommitment:
akrasia and, 295, 303–310
amendability of, 329–330
analogy to individual precommitment, 293–298
constitutive predecision and, 319–322
coordination and, 313, 320–322, 327, 331
co-originality and, 318–319
correctives to, 328–336
democracy-constitutive, 289, 317–319
democracy-disabling, 289
democracy-enabling, 289, 317–319
disagreement and, 305–309
entrenchment levels, 324–328
essentially contestable concepts and, 330–333
implementation of, 310–313
intergenerational, 301–302
limitations of, 298–315
notion of, 292–293
object, 302–303
operation of, 313–315
paradox of, 305–306, 309–310, 322
procedural v substantive, 297–298
subject of, 299–302
target of, 303–310
convergence on the need to converge, 167–168
see also Grundkonvergenz
cooperation, *see* coordination
coordination:
adverbial, 200–201, 465, 486, 528
as law's main function, 197–203
see also coordination-based duties; Raz
authority and, *see* coordination-based duties
conscious, 179–181
convention, 183–184, 187
determinatio, 93, 176–178, 186
see also legal positivism
disagreement and, 161–162
duties, *see* coordination-based duties
first-level, 186–195
formal and informal, 185–186
framework of bargaining, 194–195
global, 200–201
knowable, 176, 181, 495, 497
law and, 181–197
natural and collective, 182–184
need for, 164–167
pivotal disagreement and, 192–195
possibility of, 167–168
problem, *see* coordination problem
pyramid, 163
see also Hume
rule of recognition and, 188–195, 204, 465
see also Hart; legal positivism
sanctions and, 185, 197
second-level, 195
third-level, 195–197
coordination problem:
need for resolution of, 176–178
notion of, 168–176

Prisoner's dilemma, 171–172
partial and unreasonable coordination conflict problem, 180–181
partial conflict coordination problem, 173–176
pure coordination problem, 172–173
reasons to solve, 178–179
resolution of, 176–181
coordination-based duties:
acquired, 473–475
auxiliary, 465, 472–473
consent-based, 473–474
dependence thesis and, 495–496
fair play, 477–489, 499, 505
generalisation argument and, 480–481
law and, 481–483
legal reasons and, 492–493
mixed, 475–477
natural, 466–473
normal justification thesis and, 496–499
piecemeal v general, 463–464
pre-emption thesis and, 493–495
Razian authority and, 490–499
root, 465, 466–471
semi-voluntarily acquired, 474–475
voluntary, *see* acquired
see also authority; obligation to obey the law; civil disobedience
crazy claims, *see under* essentially contestable concept
criteria:
concepts and, *see under* concept
paradigms and, *see under* paradigms

Darwin, 166
deconstruction, 5–6, 58
reconstruction and, 5–6, 12–13, 380, 389, 534
deliberation, *see* democratic deliberation
democracy:
authority, *see* authority; coordination-based duties
compromise and, 280–282
conditions of legitimacy, 211, 212–223, 224–226
deliberative, *see* democratic deliberation
equality and, *see under* voting; majority rule; democratic representation; democratic participation
paradox of, 302
participation, *see* democratic participation
partnership conception of, 252
see also Dworkin
representation, *see* democratic representation
democratic deliberation:
agreement as logic of, 232–233
agreement as regulative ideal of, 228–229
authority, *see* authority; coordination-based duties
democratic representation and, *see* democratic representation
disagreement and, 229–231
discursive dilemma, 409–410
justification of, 226–228
voting and, 240–254
democratic participation:
democratic representation and, *see* democratic representation
equality and, 224–226
justification of, 224–226
right of rights, 219, 225
democratic representation:
challenge of disagreement, 343, 353–360, 363–364
as delegation v as trusteeship, 352–353, 367–368
deliberation and, 368–369
democratic participation and, 370, 372
descriptive v substantive, 347–348, 365–367
descriptive group disagreement representation, 356–360
diverse representation, 367
diversity and, 361–362
election, 348–349
equality and, 369–370
of fact v particulars of disagreement, 355–356, 359–360, 366
horizontal disagreement among representatives, 353–354, 357
inclusion and, 340–341
individual v group, 346–347
of individual v group disagreement, 356
of interests v perspectives, 350–352
legitimacy of, 368–370
microcosmic, 347
notion of, 343–353

paradox of, 9, 14, 205, 285, 343, 360–361, 363–364
public sphere and, *see* public sphere
as process, 345–346
as relationship, 345
vertical disagreement between representatives and their constituency, 354–355, 358
determinatio, *see under* legal positivism; coordination
disagreement:
authority and, *see* authority
benefits of, 116–118
borderline, 50–51, 75–78
circumstances of, 13–14, 163, 167, 177, 192, 211, 246
conceptual, 48–52, 75–80
coordination and, *see* coordination
criterial, 51–52, 67, 70, 77–80, 82, 86–87, 89
dangers of, *see* coordination; coordination problem
economy of, 238, 328, 337
empirical, 23, 159
epistemic, 53–54, 60, 67, 130, 217, 273
ethical-political, 39, 103
see also Habermas
expressed v tacit, 21
fact of, 39–45, 155–156, 355–356, 372
fallibility and, 43–45
fulcrum of, 81, 84
indeterminacy and, *see* legal indeterminacy
interpretive v principled, 56
intrasubjective v intersubjective, 20
jurisgenerative v jurispathic, 5, 113, 116–117, 530
legal, 23
see also legal disagreement
limits of, 158
metaphysical, 54–57, 64, 67, 270
moral, 1, 19–21, 22, 24–25, 41
multiple-principled v single-principled, 56–57
normative, 52–57, 80–81
notion of, 19–21
objectivity and, 39–45
of opinions v interests, 20–21, 34
paradox of, 5, 518
persistent, 19–119
pervasive, 123–204
pivotal, 51–52, 78–80
political, 2, 22–23
political-moral, 17, 22–23, 24–39, 46–47, 56–57, 66, 155, 527
see also Rawls; Habermas
publicity and, 7
reasonable, 91–119
scepticism and, 39–45, 113–115
semantic, 48, 75
see also verbal
sources of, 47–57
substantive, 52–57
see also normative
truth of, 155–156
types of, 22–39
verbal, 48, 75
see also semantic
disobedience, *see* civil disobedience
dispute, *see* disagreement
dissensus, *see* disagreement
dissent, *see* disagreement
Dryzek, J., 210, 236–239, 242
duties, *see* obligations; rights
Dworkin, R., 23, 45, 49, 52, 58, 63, 67, 69–71, 76, 79, 81–82, 84, 88, 192, 225, 243, 252, 257, 272, 274, 278–279, 281, 332, 376–379, 381, 384, 386, 388–390, 394–397, 399–407, 409–411, 416, 437, 449–450, 468, 510, 513, 516, 520, 523, 525, 532

Eckersley, R., 367
Elster, J., 227, 241, 251, 287, 293–297, 300–314, 317, 320–321, 328, 335, 338
Endicott, T., 69n, 79
enlarged mentality, 143, 228, 366, 401
see also democratic representation; integrity; Arendt; Kant
equality:
democracy and, *see under* democratic representation; democratic participation
majority rule and, *see under* majority rule; voting
error, *see under* legal indeterminacy; civil disobedience; compromise
essentially contestable concept:
borderline disagreement and, 75–78
concept of, 72–74
crazy claims and, 76–77, 79–80, 89
criterial disagreement and, 78–80

conceptual disagreement and, 75–80
constitutional precommitment and, 330–333
interpretive concept and, 70–71
normative disagreement and, 80–81
paradigms and, 81–88
see also paradigms
pivotal disagreement and, 78–80
sources of, 74–81
vagueness and, 76–78
verbal disagreement and, 75
ethics, *see* morality

fairness:
coordination-based duties to obey the law and, 479–480, 531, 533
see also coordination-based duties; authority; civil disobedience
democracy and, 505–506, 524, 528–529
see also justice; integrity; compromise; majority rule
Finnis, J., 94, 102, 172–173, 176
Freeman, S., 287
Freud, 20n, 111n, 166, 527, 532

Gallie, W.B., 72–74, 83
game theory, 168–171, 187
Gardner, J., 93n, 98n, 465n
Garzon Valdes, E., 288
Gaus, G., 197n, 229, 268
good:
common, 35, 38, 53, 130, 151, 165, 252, 333, 342, 350, 368, 423–426, 429
see also Rousseau
right and, *see* right
Goodin, R., 367
Green, L., 476
Greenawalt, K., 513
Grundkonvergenz, 168n, 204
Gutmann and Thompson, 101, 104, 225, 229, 238, 242, 247, 251, 253, 265–268

Habermas, J., 3, 25, 31–39, 95–96, 101, 103–104, 110, 211, 215, 229–230, 232–233, 235, 241, 318–319, 325, 332–333, 512–513, 515, 518–519, 524
Hamilton, A., 304, 362
Hampton, J., 102, 187, 199
Hare, R.M., 71
Hart, H.L.A., 188–189, 449, 478–479, 483
Hayek, F., 293
Hegel, G.W.F., 6
Hershowitz, S., 499
Hobbes, T., 95, 106, 121, 125, 126–128, 129, 131–132, 134–135, 137–138, 141, 146, 147–149, 150–151, 156, 159–160, 162, 169, 178, 187, 247, 334, 361, 517, 537
Holmes, S., 287, 293, 295, 297, 300, 305, 308, 311, 317, 318–320, 324, 330
human rights, *see under* rights
Hume, D., 6, 124–125, 126, 133–137, 145–147, 152–154, 155, 158–159, 161–164, 166–168, 180, 183–184, 187, 191, 266, 386, 475, 480, 484, 527, 532, 535, 537

incommensurability, *see under* value
indeterminacy:
legal, *see* legal indeterminacy
moral, 58, 62–64, 67
objectivity and, 59–62
realism and, 40–41
uncertainty and, 59–62
underdeterminacy and, 64–65
institutional:
conflict, 334
design, 5, 14, 211, 233, 236, 285, 527
cooperation, 334, 416, 531, 537
integrity:
actors of, 382
argument v postulation for, 278, 377–379, 394, 396, 411
authority and, 410–415
circumstances of, 268, 278, 378, 386–392
coherence and, 378–379
communal responsibility and, 404–410
compromise and, *see* compromise
concept of, 378–381
Critical Legal Studies, 387–391
see also under legal indeterminacy
degree of, 383
diachronic v synchronic, 384–385
fairness and, 377, 392, 394
global coherence and, 536
as heuristic, 389–390, 406, 416
independent virtue of, 377, 393–396
justice and, 393–396, 401–403
justificatory, 381

legal, 380
levels of, 384–385
local v general, 383–384
moral, 380
moral pluralism and, 380
normative, 379
necessity of, 386–387
object of, 382–383
as optimisation principle, 382, 390, 392, 416
partial reform dilemma, 279, 384
see also Raz
personal duty of, 404–405
plausibility of, 387–391
practicability of, 391–392
precedents and, 383
as principled consistency, 379
public morality and, 396–403
relationship between moral and legal, 380–381
service conception of, 396
value of, 393–415
interest:
common, 13, 128, 134, 161–162, 167, 172–174, 176, 185, 195, 199, 204, 493
see also democratic representation; coordination
objective, 350–351
see also democratic representation
subjective, 350
see also under rights
interpretation:
constitutional, *see under* constitution
legal, 14, 205, 326, 373, 529

Johnson, J., 210
judicial review, 289, 333–336, 520–522, 529
jurisprudence:
analytic v continental, 11
democracy and, 8–9
see also legisprudence
general v special, 11
peace and, 3, 6, 537
see also Ricoeur
political philosophy and, 8–9
war and, 3, 6, 537
see also Ricoeur; Hegel
justice:
circumstances of, 113, 145, 177
disagreement and, 7, 24–25
distributive, 158, 273
fairness and, 279, 377
integrity and, 377, 393–396, 401–403
see also integrity; Dworkin
see also right
justification:
actual assent thesis, 109
alternative modes of political, 115–116
individual, 108
mutual, 107–110
see also under liberalism
public, 108–110
reasonable view thesis, 109–110
see also legitimacy; liberalism

Kamm, F., 422, 433, 439–440
Kant, I., 23, 34, 46, 93, 95, 103, 107, 109–110, 121, 125–126, 129–130, 131–133, 135, 139, 141–145, 146, 150, 151–152, 154, 156, 159, 166, 177, 228, 366, 399, 407, 427, 466, 468–469, 475, 517, 537
Kateb, G., 369
Kelsen, H., 251, 253, 280, 434
Kress, K., 59
Kutz, C., 461n

Larmore, C., 109
legal disagreement:
normative, 23
theoretical, 23
legal indeterminacy:
abstractness, 51
ambiguity, 50
Critical Legal Studies and, 57–58
see also under integrity
disagreement and, 65–66
error and, 62
essentially contestable concept, *see* essentially contestable concept
first-order v second-order, 63–64
law's symbolic force and, 4
local v systematic, 64
moral indeterminacy and, 58, 62–64
see also Dworkin
radical or global v moderate or local, 57–58
moral realism and, 40–41, 58, 62–64
vagueness, 50–51, 76–78
legal pluralism, *see* pluralism
legal philosophy, *see* jurisprudence
legal positivism:

determinatio and, 177–178, 186
see also coordination
normative v descriptive, 177–178
legal reasoning, 116–118, 119
legal theory, *see* jurisprudence
legislation:
fundamental rights and, 292n
legislature:
constitutional assemblies and, 14, 330, 338, 370, 529, 531
judiciary and, 333–336, 446–448
representation and, *see* democratic representation
legisprudence, 8–9
legitimacy:
alternatives modes of political, 115–116, 253–254
co-originality, 33, 214–215, 318–319
see also Habermas
epistemic populism, 216–220
issue of, 212–213
justification and, 212–213
multipersonal, 116
personal v impersonal, 116, 253–254
of procedural legitimacy, 212–223
procedural v substantive, 213–216
pure decisionism, 220–221
soft proceduralism, 220–223, 323
soft substantivism, 216–220, 323
substantively legitimate proceduralism, 221–223, 499
liberalism, 27, 96, 100
disagreement and, 2–3
mutual justification and, *see under* justification
principle of avoidance, 25–27, 106
see also Rawls
principle of non-imposition, 109, 115
link of division, 4n, 533
see also Loraux
Locke, J., 125–126, 150, 162, 249, 475
Loraux, N., 2n-4n
Luhmann, N., 6n
Lyotard, J.F., 5n

MacCormick, N., 176–178, 318
Mackie, J.L., 41, 43
majority rule:
equality and, 250–251, 369–370
as fairest compromise, 250–251, 280–282
fairness and, 528–529
see also under fairness
legitimacy of, 248–254
maximal decisiveness, 250–254, 528
minority rule and, 249
as technical device, 249–250
tyranny of, 251–252, 256, 311, 358
unanimity and, 248–249
Manin, B., 227
Mansbridge, J., 342
Marti Marmol, J.L., 212–223
Marx, K., 289
meaning:
descriptive v evaluative, 83
see also Williams; essentially contestable concept
Michelman, F., 323
Mill, J.S., 356n
minority rule, *see* majority rule; voting
Montesquieu, C.L., 334
see also separation of powers
Moore, M., 41
morality:
comprehensive, 24–31, 31–39
of conflict, 1, 193
ethics and, 24–39, 32n
objectivity, 39–45
public, 142, 396–403, 406–407
realism, 40–41, 127
scepticism, 39–45, 113–115
science and, 42, 44–45
see also Williams
Mouffe, C., 331
Méller, J.P., 168n
mutual accommodation:
compromise and, 238, 257–258, 267–268
see also compromise
limits of, 238–240
notion of, 116, 238

Nagel, T., 109, 113n, 396, 401
Nino, C.S., 235, 241, 247, 320, 322
Nozick, R., 429, 437, 479, 484–486

Objectivity, *see under* morality
obligation:
duties and, *see* rights
to obey the law, *see* obligation to obey the law; authority; civil disobedience

obligation to obey the law:
acquired, 473–475
authority and, 462
civil disobedience and, *see* civil disobedience
coordination-based, *see* coordination-based duties
natural, 466–473
voluntary, *see* acquired
semi-voluntary, 474–475
see also authority; coordination-based duties; civil disobedience
Offe, C., 318
original position, 28–30, 110
see also Rawls
overlapping consensus, *see under* consensus

paradigms:
criteria and, 72, 86, 89
disputable v indisputable, 77–78, 84–86
notion of, 84
truth and, 86–88
see also under essentially contestable concept
parliament, *see* legislature
participation, *see* democratic participation
perspectives, 351–352
see also under democratic representation
Pettit, P., 361n, 404, 406, 408–410
Pitkin, H., 346, 348
Plotke, D., 370, 372
pluralism:
cultural, *see* social
global legal, 534–537
legal, 534
moral, 1, 43, 53, 54–55
see also value pluralism
social, 1, 35, 53
see also disagreement; morality
political judgement, 42, 92–93, 143, 399–401
see also Arendt; Kant; integrity
political participation, *see* democratic participation
politics:
circumstances of, 4n, 19, 162, 203, 235
law as offspring of, 3–4, 8–9
politique politisante v *politisée*, 297, 300, 312
see also Elster
positivism, *see* legal positivism
Postema, G., 182, 196, 229, 390, 395, 399, 402, 414
pouvoir constituant v *constitué*, 312
precommitment, *see* constitutional precommitment
principles:
rights and, 450–451
see also rights
rules and, 449–450
Prisoner's dilemma, *see under* coordination problem
public choice, 244
see also Arrow
public reason, *see* reason
public sphere, 28, 95–96
civil disobedience and, 510, 529, 531
see also under civil disobedience
modes of closure and, 236–237
representation and, 340, 345, 368–369, 372
publicity, *see under* disagreement; civil disobedience
Puffendorf, 162

rational, 112, 125
coordination and, 175, 185, 293–294, 304–305
ethical rationalism, 98
irrational and, 21, 110–111
see also Freud; Wingo
reasonable and, *see* reasonable
see also akrasia; constitutional precommitment
Rawls, J., 3, 24, 25–31, 32, 35–38, 92–96, 101–103, 104, 106, 109–110, 112–113, 211, 230, 249, 258, 274, 386, 437, 469, 477–479, 481, 483, 508, 510–511, 513, 518–519, 521
Raz, J., 43, 51–52, 56–57, 78–80, 96–97, 115, 156, 159, 198–202, 273, 279, 376, 378, 384, 388–392, 410–415, 424. 457, 460–461, 464, 479, 482, 487, 490–499, 501, 510, 512–513, 520, 523
realism:
legal, *see under* legal indeterminacy
moral, *see under* indeterminacy; morality
reason:
burdens of, 37, 42, 96, 99, 102–103, 111–113, 114, 119, 123, 160, 350
community of, 2

public, 25–31, 95–96
see also liberalism; Rawls; Habermas
see also reasonable
reasonable:
actualist v probabilistic, 99–101
disagreement, *see* disagreement
liberalism and, 3
see also liberalism
limits of, 110–111
see also Freud; Wingo
notion of, 91–105
person-based v content-based, 96–99
public v private, 25–31, 95–96
rational and, 1, 93–95
significance of, 105–111
value of, 105–110
Réaume, D., 393
reflective equilibrium, 35
see also Rawls; integrity
representation, *see* democratic representation
republicanism, 211n, 408n
respect:
for others, 267–269, 282–283, 307, 316, 325, 337, 397–398, 400–401, 406–408, 416, 466–467, 515, 528, 531, 533–534
self-respect, 267
Ricoeur, P., 1, 3, 6
right:
good and, 24–39
see also under morality; ethics
rights:
civil, 324–326
conflict of, *see* conflict of rights
constitutional, 291–292, 425
duties and, 423–424
dynamic nature of, 424
entrenchment, *see under* constitutional precommitment
fundamental, 291–292, 425
see also constitutional rights
human, *see* constitutional rights; fundamental rights
instrumentalism, 335n
interest theory of, 422
interests and, 423
as intermediaries between interests and duties, 424
legal, 290–291, 424–425
moral, 421–424
moral and legal, 421
political, 325–328
precommitment, *see* constitutional precommitment
principles and, *see* principles
procedural, 326–328, 337
revised interest theory of, 422–423
right of rights, *see under* democratic participation
status theory of, 422
utility and, 419, 429–430
will theory of, 422
Riker, W.H., 244
Rousseau, J.J., 121, 125, 128–130, 131, 133, 139–141, 149–151, 159, 216–220, 252, 341
rule of law:
civil disobedience and, 507, 519, 522, 524–525
see also civil disobedience
coordination and, 177–178, 186, 486
disagreement and, 5, 8, 14, 113, 119, 528–531
integrity and, 407–408
legal indeterminacy and, 66–67
see also legal indeterminacy
living, 116–119, 518
paradox of, 117
rule of recognition, *see under* coordination; legal positivism

saward, M., 235
Scanlon, T., 109
scepticism, *see under* morality
Schelling, T., 287, 309, 312
separation of powers, 292, 334, 531, 533
see also judicial review; legislature
Sher, G., 266
Shklar, J., 3n, 5n, 8n
Simmons, A.J., 459, 479, 481, 486
Singer, P., 251, 280, 511, 521
social contract theories, 10, 12, 123–160, 187–189, 473, 485
see also state of nature
sorites paradox, 50, 77–78
see also under legal indeterminacy; essentially contestable concept
sovereignty:
cooperative, 535
moral, 107
popular, 33, 215–216, 312, 318, 534
Spinoza, B., 288, 300, 517
state of nature:

fiction, 13, 123–125, 155
natural right and, 127–128, 130, 139
see also social contract theories
Stavropoulos, N., 60–61, 63, 275–277
Sunstein, C., 157, 287, 300, 320, 330, 331, 367

tolerance, *see* toleration
toleration, 2–3, 27, 38, 96, 106, 116, 207, 233–234, 237, 266, 400, 522, 528, 530, 532
Tribe, L., 289

unanimity, *see under* voting
Urbinati, N., 368

vagueness, *see under* legal indeterminacy
value:
coherentism, 377–378, 380–381
conflict, 54–55, 64
incommensurability, 54–55, 78, 269–270, 380, 384, 387, 440, 533
monism, 43, 379–380, 468
pluralism, 43, 53, 54–56, 64, 67, 384, 425, 431
reason for action and, 412n
Veitch, S., 6n, 117
voting:
aggregation of preferences and, 243–245
ambiguity, 243
see also Arrow
deliberative justification of, 240–243
equality and, 246–254
ethics, 245–254
instability, 244
see also Arrow
majority rule and, *see* majority rule
maximal decisiveness, 248–254
minimal decisiveness, 246–248
minority rule, 249
need for closure and, 233–235
unanimity, 248–249
see also democracy; democratic deliberation; majority rule

Waldron, J., 9–10, 19, 22, 24, 30–31, 73, 108, 161–162, 173–175, 201, 222, 242, 245, 247, 268–269, 290, 303, 305, 307–308, 311, 314–316, 321, 325, 330, 333, 378, 386, 395, 397–398, 402–403, 413, 416, 438, 460, 466–471, 472, 477, 493, 496–497, 537
Walzer, M., 69
Weber, M., 402–403, 410
Wertheimer, A., 240, 253
Williams, B., 13, 42, 71, 155, 159, 428–429
Williams, M., 364
Wingo, 110–111
Wittgenstein, L., 51–52, 86n, 190–191

Young, I., 345, 359