

The Place of Religious Belief in Public Reason Liberalism*

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1 THE PROBLEM:

THE STATUS OF RELIGIOUS BELIEF IN PUBLIC REASON LIBERALISM

In the last couple of decades a new conception of liberalism has arisen—the “public reason view” — which developed out of contractualist approaches to justifying liberalism. The social contract theories of Hobbes, Locke and Rousseau all stressed that the justification of the state depended on showing that everyone would, in some way, consent to it. By relying on consent, social contract theory seemed to suppose a voluntarist conception of political justice: what is just depends on what people choose to agree to — what they will. As Hume famously pointed out, such accounts seem to imply that ultimately political justice derives from promissory obligations, which the social contract theory leaves unexplained.¹ Only in Kant, I think, does it become clear that consent is not fundamental to a social contract view: we have a duty to agree to act according to the idea of the “original contract.”² Rawls’s revival of social contract theory in *A Theory of Justice* also made no important appeal to consent, though the apparatus of an “original agreement” of sorts persisted. The aim of the original position, Rawls announced, is to settle “the question of justification...by working out a problem of deliberation.”³ As the question of public justification takes center stage (we might say as contractualist liberalism becomes justificatory liberalism), it becomes clear that posing the problem of justification in terms of a deliberative or a bargaining problem is simply a heuristic: the real issue is “the problem of justification”⁴ — what principles can be justified to all reasonable persons.

In his *Political Liberalism* Rawls is clear that the argument from the original position is just one stage of the justificatory enterprise.⁵ In Rawls’ later work the idea of public reason becomes increasingly important: the aim is to work out a theory of *public reasons* — reasons that can be used as a basis of justification that is acceptable to all reasonable citizens. Now although the idea of public reason was

* I have greatly benefited from a series of exchanges with Christopher Eberle on these matters. My thanks also to Leif Wenar for his insightful queries.

¹ See David Hume, “Of the Original Contract” in his *Essays Moral, Political, and Literary* (Oxford: Oxford University Press, 1963), pp. 452-473.

² See Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, trans. (Indiana: Bobbs-Merrill, 1965), p. 71.

³ John Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), p. 16 (p.17 of the original edition).

⁴ Ibid.

⁵ John Rawls, *Political Liberalism*, paperback edn. (New York: Columbia University Press, 1996), pp. 385ff.

implicit in contractual theory all along,⁶ sustained focus on it has had a surprising result. Whereas many citizens with deep religious convictions enthusiastically affirmed traditional liberal freedoms of religious belief and expression, explicit public reason views have been widely criticized by those friendly to religion. Once the explicit problem becomes one of public justification and what constitutes acceptable public reasons, it has seemed clear to many that religious-based considerations fail to qualify as such reasons. But if so, public reason liberalism is *exclusionary*: reasons that deeply religious citizens see as fundamental to political justice are ruled out of bounds as acceptable public reasons.⁷ In particular, in the eyes of many of its proponents public reason liberalism is committed to “a duty of civility according to which citizens owe each others reasons that they can share....”⁸ This seems to lead to what Christopher J. Eberle calls “the principle of restraint” — “a citizen should not support any coercive law for which he lacks a public justification.”⁹ To some religiously-inclined philosophers, requiring such restraint shows a basic inequity¹⁰ at the heart of public reason liberalism: those with strong religious-based views about how society is to be ordered are excluded or marginalized in liberal politics. Steve Macedo, an advocate of public reason liberalism, responds: “If some people...feel ‘silenced’ or ‘marginalized’ by the fact that some of us believe that it is wrong to seek to shape basic liberties on the basis of religious or metaphysical claims, I can only say ‘grow up!’”¹¹

This is more than a philosophical impasse: for the liberal it must be truly worrying that those with strong religious commitments have become strident critics of public reason liberalism. A foundational liberal principle has been religious freedom; liberalism has taken religious commitment seriously, and has insisted on the importance of people being able to live according to their avowed religious doctrines. But today those with religious commitments are apt to see themselves as critics of liberalism.

I think both public reason liberals and friends of religion are responsible for their current mutual hostility. Liberals have tended to be much too quick to link

⁶ See Lawrence B. Solum’s very nice appendix on “Historical Formulations of Public Reason” to his “Constructing an Ideal of Public Reason,” *San Diego Law Review*, vol. 30 (Fall 1993): 729-762, at pp. 754ff.

⁷ See Michael J. Perry, “Religious Morality and Political Choice: Further Thoughts — and Second Thoughts — on *Love and Power*,” *San Diego Law Review*, vol. 30 (Fall 1993): 703-727, pp. 712ff.

⁸ Stephen Macedo, “In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?” in *Natural Law and Public Reason*, Robert P. George and Christopher Wolfe, eds. (Washington, DC: Georgetown University Press, 2000), pp. 11-49, p. 35. See also Rawls, *Political Liberalism*, p. 217.

⁹ *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), p. 68.

¹⁰ See Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 120

¹¹ Macedo, “In Defense of Liberal Public Reason,” p. 35.

public reason to secularism, and so have needlessly alienated those who take their religious views seriously. I shall try to show in this paper that the status of religious-based reasoning in public reason liberalism is much more complex than most participants in this debate have assumed.¹² Liberals have also, in my view wrongly, insisted that the principle that coercive laws be publicly justified grounds a strong duty of civility or principle of restraint on citizens: if justified laws require reasons of a particular sort, then it is thought that citizens engaging in politics somehow have a duty only to offer only these reasons. I shall argue that it is very difficult to show that any “duty of civility” follows from a commitment to the public justification of coercion. However, liberals are not the only parties at fault. Some religiously-inclined philosophers have advanced extreme claims that they cannot be true to their convictions unless they have a moral liberty to impose (via majority rule) coercive restraints on their fellow citizens that have no justification except through appeal to their faith. Such laws, I argue, would constitute wrongful coercion, failing the test of public justification.

2 THE FUNDAMENTAL ELEMENTS OF PUBLIC REASON LIBERALISM

2.1 *The (Generic) Public Justification Principle*

I take as my starting point Eberle’s observation that “*Respect for others requires public justification of coercion*: that is the clarion call of justificatory liberalism.”¹³ Public reason liberalism ties respecting persons to justifying coercion *to* those being coerced: in some way, to respect others requires that one refrains from coercing *them* unless one can provide reasons that, in some way, are accessible *to them*. Of course, public reason liberals differ among themselves as to how we should understand this general requirement. They disagree, for example, about whether the set of persons to whom justification is owed is restricted (say, to the “reasonable” or to those who possess moral personality), and whether the requirement that reasons be “accessible” means that justification must restrict itself to those reasons which actual people can appreciate, or whether the reasons must be accessible only to idealized persons of some sort (say, those who are fully rational). Public reason liberals also have to specify the conditions under which a reason is accessible — when one thinks about it very hard? After a conversion experience? These debates are funda-

¹² Care must be exercised here. Some disposed to criticize public reasons views such as Kent Greenawalt display great sensitivity to the complexity of the problem (especially in his *Private Consciences and Public Reasons*); and Rawls’s own views on this issue are subtle. For an excellent explication of Rawls’s complex doctrine of public reason, see Samuel Freeman, “Public Reasons and Political Justifications,” *Fordham Law Review*, vol. 72 (April 2004): 2021-2072. For a critical reconstruction of Rawls’s case for observing public reason, with special attention to religious beliefs, see Paul J. Weithman, “Citizenship and Public Reason” in *Natural Law and Public Reason*, pp. 125-170.

¹³ *Religious Conviction in Liberal Politics*, p. 54; emphasis in original.

mental to the details of a public reason liberal theory, but at present our concern is to identify a widely shared generic version, so let us abstract as far as possible from these disagreements.

I propose the following general principle as a point of departure for our discussion:

The Public Justification Principle: A coercive law L is wrong unless each and every member of the public P deliberating under conditions C would, given their reason (s) R , endorse L .

I leave open just how to specify P (whether the members must all be reasonable, fully rational, etc.). The Public Justification Principle supposes that there is some specification (and almost certainly some idealization) of the public such that if each member so described deliberated under some conditions (C), each would, with reason, endorse L . The Public Justification Principle does not suppose that each person must actually endorse L ; if P and C are idealized conditions that may not be actualized, then we should not expect a requirement of actual endorsement. The question is not what people do endorse, but what they would with reason endorse.

Although the Public Justification Principle casts its net pretty widely, some public reason accounts might not accept it. Rawlsian accounts seem to restrict the requirement of public justification to just some acts of coercion (say, concerning matters of basic justice or constitutional essentials): if that is the correct interpretation, Rawlsians restrict the range of L to a subset of laws. Since my aim here is to show that even our fairly strong Public Justification Principle has extremely modest implications for the status of religious reasons in politics, we need not worry if some public reason views adopt a more restricted principle.

2.2 Pluralism of reasons (by P under C)

As stated, almost any political theory would endorse the Public Justification Principle: if the deliberations of the parties are so specified that they all accept, say, a certain substantive moral theory, then coercive acts justified by that moral theory would also be justified by the Public Justification Principle. If each member of the public accepted the same moral theory M , then of course each member of the public correctly deliberating about M , would endorse those acts of coercion mandated by M . The Public Justification Principle would do little or no work. Again, the principle could justify a specific theological view if, say, the condition C was specified as having grace, or having the proper conversion experience. The principle becomes interesting, and not reducible to any specific moral theory or religious view, when the public and its deliberative conditions are so specified that what is a reason to one member of P under C may not be a reason to others. Under conditions of reasonable pluralism, we cannot suppose that the reasoning of one member of the public is a proxy for everyone else's reasoning. Consequently, the requirement that every member of P (under C) endorses L is not implied by one member doing so.

If the "clarion call" of public reason liberalism is that coercion must be publicly justified, the problem that motivates the public reason project is the conviction that

rational disagreement is the “normal result of the exercise of human reason.”¹⁴ Some philosophers are apt to reject this because they see it as denying the objectivity of reasons: rational persons, they claim, are necessarily tracking the same objective reasons. My aim here is not to answer these objections, but we should remember that the disagreement about reasons takes place among a suitably described public deliberating under some specified conditions: whether or not this implies a metaphysics of reasons depends on how the public and its deliberative conditions are specified. If they are said to be perfectly rational, with perfect information, and having no time constraints on deliberations, then perhaps rational pluralism plausibly entails a metaphysical doctrine about the plurality of reasons, but that is by no means implied the generic formulation of the view.

I assume here that included in this reasonable pluralism are religious beliefs: some of the public (*P*) under *C* have religious beliefs while others do not. Some secular liberals argue that fully rational individuals would not have any religious beliefs, while some religiously-inclined philosophers insist that all fully rational individuals would accept at least some religious beliefs. We can set aside this debate: at best it only concerns extreme characterizations of the relevant public (the perfectly rational) and its deliberative conditions (full information). Some, of course, go further, and argue that all religious beliefs commit one to clear mistakes, and so on almost any plausible specification of *P* (the public), members would not reason on the basis of religious considerations. Now to be sure, if one holds a religious belief in a way that that is incompatible with one’s rationally fundamental beliefs about the way to understand the world, and if this is pointed out, and one still maintains the religious beliefs, then any view (such as public reason liberalism) that appeals to good reasons or rational deliberators will question the rationality of such religious beliefs. But even one as skeptical about religious faith as Hobbes, who insisted that sensible faith may not go against reason (it may not, say, require belief in contradictions), also allowed that faith may go beyond reason — i.e., license convictions not warranted by reason.¹⁵ In any event, I suppose that many, but not all, members of *P* under *C* deliberate on the basis of religious or faith-based considerations. For present purposes, we need not characterize precisely the nature of religious or faith-based reasons (as will be seen, the analysis does not depend on any particular characterization, except that they are rational and not universally shared by *P* under *C*.)

¹⁴ Rawls adds: “within the framework of free institutions of a constitutional regime.” *Political Liberalism*, p. xviii. See further my *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London: Sage, 2003), ch. 1.

¹⁵ See Hobbes, *Leviathan*, Edwin Curley, ed. (Indianapolis: Hackett, 1994), pp. 72 (ch. xii, ¶25). Cf. Greenawalt, *Private and Public Reasons*, p. 40; Swaine, *The Liberal Conscience*, p. xvii.

2.3 Laws and coercion

It is assumed here that all laws are coercive and so all fall under the requirements of the Public Justification Principle.¹⁶ This assumption is consistent with Robert Audi's distinction between "primary" and "secondary" coercion:¹⁷ some coercive interventions are more serious than others. However, it is not consistent with the claim that some laws are not coercive at all.¹⁸ However, again this need not detain us: if the strong assumption that all laws are coercive does not lead to significant restraints on religious reasons in politics, views that exempt some laws from the need for public justification will have even less significant implications.

3 PUBLIC JUSTIFICATION, WRONGFUL LEGISLATION, AND CITIZEN RESPONSIBILITY

Let us first consider whether there is any direct inference from the Public Justification Principle — the heart of public reason liberalism — to a principle of restraint. If we accepted only the Public Justification Principle, should we conclude that citizens are to vote and debate about politics only on the basis of "public reasons?" Accepting that it is wrong for the state to legislate on non-public grounds, does this imply that it is wrong for citizens to vote on non-public grounds?

The Public Justification Principle tells us when coercive laws are justified, and so when they dispel the presumptive wrongness of coercion. *Prima facie* if (coercive) law *L* is unjustified, a state official who acts on *L* thereby does wrong. We can only say "prima facie" here, for there may be justifications for certain role responsibilities such that at least sometimes, say, a lower official may justifiably enforce an unjustified law.¹⁹ On the other hand, role permissions have limits, and even those low down the chain of command who enforce unjust laws may be responsible for wrongdoing. Putting aside these complex matters, the Public Justification Principle has its core range of application to state officials, especially those in the judicial and executive branches: it is they who are most directly implicated in state coercion.

As complex as is the problem of moral responsibility of those in the executive and judicial branches for wrongdoing, matters are far more complex and difficult concerning the actions of voters (and even legislators; see below §4.4). Suppose citizen Alf votes for *L* though he believes *L* fails the test of Public Justification. To

¹⁶ See my "Liberal Neutrality: A Radical and Compelling Principle" in *Perfectionism and Neutrality*, George Klosko and Steven Wall, eds. (Lanham, MD: Rowman & Littlefield, 2003): 137-165.

¹⁷ *Religious Commitment and Secular Reason*, pp. 87-89.

¹⁸ *Ibid.*, See also Greenawalt, *Private Consciences and Public Reasons* p.8. John Stuart Mill, *Principles of Political Economy*, seventh edn., Sir William Ashley, ed. (Fairfield, NJ: Augustus M. Kelly, 1976), Bk. V, ch. XI.

¹⁹ I owe this point to Chris Eberle.

make matters simpler, suppose that there really is no good public justification for *L*. Does Alf violate the Principle of Public Justification in voting for *L*?

Suppose first that *L* is defeated in the vote. If so, *L* never was the grounds for a wrongful imposition, and so no wrong was ever done on the basis of *L*. It is hard to see how Alf actually committed a wrong derived from the Public Justification Principle. Certainly, as Kant would say, his ineffective advocacy of a wrongful imposition showed his act to be without moral worth, but, as Kant also stressed, political morality is not concerned with the moral worth of citizens, but only the justice of their actions. “[I]t applies only to the external and — what is more — practical relationship of one person to another in which their actions *can in fact exert an influence on each other*. . . .”²⁰ Alf may not be an admirable person, but he was in no way responsible for any wrongful legislation (the sole concern of the Public Justification Principle) because no wrongful legislation occurred.

But surely, it will be said, if Alf votes for *L* and it passes (and so *L* actually is employed to coerce), and if he advocated the law when he knew it was unjustified, then Alf is indeed guilty of political wrongdoing. In our first case Alf may be saved by a sort of moral luck, akin to a drunk driver who gets home without hurting anyone, but now his luck has run out. Clearly, we may say, Alf is partly responsible for the resulting wrongdoing. Certainly not “clearly.” It is difficult to determine Alf’s moral responsibility for the wrong occasioned by *L*. Most political theorists writing on democracy and public justification ignore that no voter is decisive in producing an outcome.²¹ Apportioning individual responsibility for collective outcomes given the overdetermination involved in just about all elections is an extremely difficult task that I shall not undertake here.²² We tend to think that voters must be in some way be morally responsible for unjust laws they voted for, but the fact that *L* would have been passed whether or not Alf voted for it hugely complicates any judgment that he is responsible for its wrongful impositions, or even has a share of the responsibility. If we try to apportion how much of the wrongdoing Alf is responsible for, we find ourselves in a morass of conflicting intuitions. Consider:

Alf’s Hawaiian Vote: Alf advocates *L*, which is unjustified and which he thinks is unjustified. In a national plebiscite, he votes for *L*, and *L* passes. But when Alf went to the polls in Hawaii the election was already decided and the result announced by every network. Indeed, the total number of Hawaiian voters was less than the margin of *L*’s lead up to this point. Is he in any way responsible for the outcome?

²⁰ Kant, *Metaphysical Elements of Justice*, p. 34 [§B of “Introduction to the Elements of Justice”]. Emphasis added.

²¹ See here Geoffrey Brennan and Loren Lomasky, *Democracy and Decision* (Cambridge: Cambridge University Press, 1993), pp. 55ff.

²² For one attempt to analyze moral responsibility in the context of collective actions, see Seumas Miller, *Social Action* (Cambridge: Cambridge University Press, 2001), ch. 8. See also Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), pp. 67-73, 82-83.

And of course I have assumed that somehow there is a direct link between Alf's vote and *L*. Given that in representative democracies one votes for a candidate or a party, and it is very difficult to know what laws that candidate will help pass, Alf's responsibility for wrongful laws becomes murkier and murkier.

4. THE DUTY OF CIVILITY

4.1 *The Shared Reasons View*

It seems doubtful that the Public Justification Principle itself clearly implies that citizens do wrong when they vote for unjustified laws. Perhaps we need to expand the reach of the ideal of public justification. In addition to a principle that renders legislation based on non-public reasons wrongful, perhaps public reason liberalism, and its commitment to respect for persons, is inevitably led to a broader moral duty that renders political actions of citizens (e.g. casting a vote) wrongful when based on non-public reasons. Rather than thinking of this citizen duty as a direct implication of the Public Justification Principle, we might see it as a companion duty that is part of an ideal of citizenship — a duty for citizens to conform to public justification in their individual actions in the political forum.²³ In this vein Macedo claims that a commitment to public justification entails a “duty of civility according to which citizens owe each other reasons that they can share....”²⁴ On Macedo's view a citizen violates this duty if he offers reasons in favor of a policy that, if accepted, would fail to justify that policy. One way to formulate this duty is:

The Shared Reasons View of the Duty of Civility: Alf violates the duty of civility if he publicly (in a political forum) advocates *L* on the basis of *R*, and Betty, a fellow member of the public (*P*), deliberating under *C*, would not endorse *R* (she would not share it).²⁵

On the face of it, this grounds a pretty robust constraint on appeal to religious beliefs in politics. Given our assumption of reasonable pluralism (§2.2), there is no religious belief that every member of *P* deliberating under *C* shares; consequently appeal to any religious belief when advocating a policy or law in the political forum (I leave aside for now how to characterize this forum) would violate the duty of civility. We thus seem led to Robert Audi's “principle of secular rationale” according to which “one has a *prima facie* obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support (say, one's vote).”²⁶

²³ This seems to be Rawls's view in *Political Liberalism*, p. 217.

²⁴ Macedo, “Are Slavery and Abortion Hard Cases?” p. 35.

²⁵ As stated, this is too simple: Alf may have excellent reasons to *think* Betty (qua a *P* under *C*) would endorse *R*, but he may still be mistaken. As stated, he would still violate the Duty of Civility: this may be too harsh.

²⁶ Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), p. 86.

Recall that the Duty of Civility (in the form of The Shared Reasons View) is acknowledged to go beyond the requirements of the Public Justification Principle: it is supposed to be a broader application of it. The problem, though, is that the Shared Reasons View of the Duty of Civility rules out advocating laws that meet the Principle of Public Justification. It can render wrongful a citizen's advocacy of publicly justified laws, and for that reason must be rejected. And that is because the Principle of Public Justification does not require that all laws be justified by shared reasons among the citizens. If each person's (different) reasons converge on *L*, then coercing on the basis of *L* meets the test of public justification. If, as Eberle claims, justificatory liberalism is based on some notion of respect for others, one who coerces on the basis of an *L* so justified would never treat others without respect: everyone has reasons to endorse *L*, even though we have different reasons. One demands that they conform to *L*, and, at least insofar as they are members of *P* under *C*, they see that they have reason to. That they have different reasons to follow *L* does not somehow show that one is treating them disrespectfully. Each endorses *L* and each has reason to follow it: *L* is publicly justified. So public justifications may be based either on a consensus *or* a convergence of justifying reasons.²⁷ A consensus justification maintains (as in the Shared Reasons View) that a law is justified because everyone has the same grounds to endorse it; a convergence justification maintains that it is justified because we all have our own, different, reasons to endorse it. The Shared Reasons View of the Duty of Civility is plausible only if consensus justifications are uniquely legitimate. But a convergence justification of *L* is perfectly public and impartial: *L* is not partial to anyone's reasons, but, instead, rests on everyone's reasons.

Many political philosophers resist this: they insist that *bona fide* moral justifications must be grounded on common reasons. Often this is because they endorse a doctrine of reasons such that, if *R* is a reason for Alf, it must be a reason for Betty. But we have already seen that this doctrine about reasons may be true, yet reasonable pluralism obtains for *P* under *C* (the relevant public deliberating under the specified conditions). Given this, there is no bar to a religious-based reason entering into a public justification: it could well be a reason that religious citizen Alf can give to fellow religionist Charlie to validate *L*.

Public justification can (and should) take account of the division of epistemic labor. Alf can justify *L* to co-religionist Charlie on the basis of religious considerations; Betty justifies *L* to Doris by appeal to the works of John Stuart Mill, and Eugene justifies it to Frances and Charlie (justification is often overdetermined) on the basis of neo-Aristotelian ethics. At the end of the day, many different reasons from many different perspectives may converge on *L*. This is the insight that makes so attractive Rawls's idea of an overlapping consensus. Given this, I believe that

²⁷ On convergence as a mode of justification, see Fred D'Agostino, *Free Public Reason* (New York: Oxford University Press, 1996), pp. 30-31.

that we should reject Eberle's claim that "The justificatory liberal is unavoidably committed to the claim that a citizen in a liberal democracy ought not to support (or reject) any coercive law for which *she enjoys* only a religious justification."²⁸ A religious citizen may have only a religious reason for the law, yet the law may still be publicly justified because others have their own reasons to endorse it. If we accept Eberle's "unavoidable" constraint, a religious citizen may be prohibited from supporting publicly justified laws.

4.2 *The Wrongful Advocacy View*

Can we formulate a duty of civility that does require consensus justification? Suppose that we reformulate Eberle's claim as: the justificatory liberal is unavoidably committed to the claim that a citizen in a liberal democracy ought not to support (or reject) any coercive law which *she believes* enjoys only a religious justification. The focus now is not on whether the citizen's support rests only on a religious ground, but her belief that there *is* only a religious ground that could support it for any member of *P* under *C*. Again, given our assumption of reasonable pluralism (§2.2), no law could be endorsed (by *P* under *C*) solely on the basis of religious reasons. Religious reasons are by no means unique in this regard. Although I think Rawls's idea of a "comprehensive doctrine" is so ill-formed that we would do best to abandon it,²⁹ whatever value it has is in stressing that some reasonable and rational free and equal moral persons (one conception of *P*) build their lives on normative standards that other members of *P* do not. Given this, a law justified only on these controversial normative standards will not conform to the Principle of Public Justification. Thus if we suppose that there are some laws that clearly have only a religious rationale, a religious citizen who advocates such laws, knowing that they fail the test of public justification, might seem to violate a clear duty of civility.

It appears, then, that the following duty of civility might be a plausible expansion of the Principle of Public Justification:

The Wrongful Advocacy View of the Duty of Civility: If Alf has a well-grounded belief that *L* violates the Principle of Public Justification, Alf violates the duty of civility if he publicly advocates *L* (in a political forum), votes for it, etc.

Alas, even this modest duty of civility can lead to objectionable results: it can prohibit citizens from doing their best to bring about publicly justified laws. It overlooks the important fact that political activity, including speech and voting, can legitimately be strategic: perhaps sometimes it must be. Consider a case:

Alf's Immoderate Proposal. Alf believes that, ideally, a center-left free market oriented government would be publicly justified. However he is convinced that free trade is the most important issue today — though he would certainly en-

²⁸ Eberle, *Religious Convictions in Liberal Politics*, p. 14. Emphasis added.

²⁹ I argue for this claim in "The Diversity of Comprehensive Liberalisms" in *The Handbook of Political Theory*, Gerald F. Gaus and Chandran Kukathas, eds. (London: Sage, 2004), ch. 8.

dorse government programs to give significant aid to displaced workers. But Alf reasonably thinks that in the current shrill political climate, nuanced proposals get lost in the noise; if he advocates government programs to aid displaced workers, his speech will be coded as “anti-trade.” So Alf publicly advocates a radical free market approach, always talking about the benefits of free trade and never its shortcomings, though he sincerely hopes that such an approach is not instituted, nor given the need for political compromise, does he expect it to be. Alf thinks that the most probable result of this advocacy will be a final policy a wee bit closer to what is publicly justified.

Does Alf act in an objectionable way? With a few more details, we can easily see how the Wrongful Advocacy View says he does wrong, but I think, clearly, he does not act uncivilly, and certainly not wrongfully. After all, he is aiming at a policy that satisfies the Principle of Public Justification; politics is complicated, and often the best way to get the best result is to endorse something else.

Still, someone might object that Alf’s Immodest Proposal, though it may be justifiable, is uncivil: he is not treating his fellow citizens as equal partners but as people to be led. Consider another case. In his *Economic Theory of Democracy* Anthony Downs pointed out that in multi-party systems the resulting government depends on which coalition is formed after the election. Under these conditions, Downs held, the voter needs to know the following if he is to vote in a way that, given his ideology, will bring the best result.

1. What coalitions each party is willing to enter under various sets of circumstances.
2. Estimated probabilities which show how likely each party is to enter each coalition open to it...
3. What policy compromises each party is apt to make in each possible coalition. i.e., what policies each coalition would adopt after it was formed. ...³⁰

Suppose we have five parties ranged along a left-right continuum, A,B,C,D,E. It normally takes three parties to form a government, but of course this depends on how well each party does in the election. Now in these circumstances, Alf may think that Party C’s policies are publicly justified: so the best government would be, say, a B,C,D coalition, tending to reflect C policies. But suppose he believes that Party B is weak: if it does not get more support, the likely coalition will be C,D,E (with a government reflecting views to the right of his). In this case the best thing for Alf to do may be to campaign for B, even though he agrees that if B policies were implemented, the policies would fail to be publicly justified. But this would seem to run afoul of the Wrongful Advocacy View of the Duty of Civility. And it is hard to see that Alf is in any way acting uncivilly: he is simply aware of the complex ways that aggregation systems can generate outcomes.

Inspired by deliberative democrats such as Habermas, some friends of democracy insist that such “strategic” behavior is inappropriate in a respectful politics:

³⁰ Anthony Downs, *An Economic Theory of Democracy* New York: Harper and Row, 1957), p. 146

people should express only their sincere views and only vote for the options that express their sincere understanding of the best justified proposals. This is to ignore the ways electoral systems work, and in general to ignore the possible impact of your sincere statements and actions in helping to produce wrongful laws. Politics is complicated: it is, I think, implausible to insist that civility requires us to ignore the complex relations between inputs and outputs, and treat contemporary politics as if was a small group decision in which all put far greater weight on sincere speech than justified outcomes.

4.3 *The Minimal Duty of Civility*

We might reformulate the Wrongful Advocacy View as a more complex principle that takes account of strategic and other considerations. We would then have something along the lines of:

The Minimal Duty of Civility: If Alf thinks that *L* is not publicly justified, Alf violates the duty of civility if he publicly advocates *L* (in a political forum), votes for *L*, etc., unless Alf thinks that advocating *L* (voting for it, etc.) will help bring about a publicly justified outcome.

But even this is too strong. Not all political action is instrumental. Geoffrey Brennan and Loren Lomasky argue that political activity and speech is often expressive.³¹ Because the expected instrumental value of one's vote is typically so low (because one is so unlikely to cast the decisive vote), Brennan and Lomasky argue that voters rationally take up a non-instrumental stance: they may vote, say, to express discontent with the current administration. If we accept that such expressive voting occurs and is rational, then one may vote for a candidate not because one endorses the laws the candidate proposes, but because, in that context, the vote has a certain expressive meaning. The Minimal Duty of Civility seems to imply that one should not take up a purely expressive stance: one must vote for *L* only if one believes that *L* would be publicly justified, or that voting for *L* is instrumentally useful in producing a publicly justified outcome. What is not clear is why an account of public reason as the grounds of justification must instruct voters not to vote expressively. Voters have expressive political concerns, and precluding them from politics needs strong justification: given the indirect links between voting and legislative outcomes, it is not obvious that such a justification is forthcoming.

This argument depends on accepting Brennan and Lomasky's analysis that voting can be purely expressive, and that such expressive actions are rational — a controversial view. However, the crucial point need not draw on the expressive theory of rationality. When voting, or making a political argument, a person is apt to have a set of diverse considerations that impact on her reasons to act. Some of these will concern her reasons to produce certain legislative outcomes, but others will concern, say, her aim to *communicate* to her fellows that she is unhappy with the

³¹ Brennan and Lomasky, *Democracy and Decision*, p. 33.

status quo or that she is worried or troubled by certain events. The political arena, especially as it concerns voters, has far more tasks than simply turning voter's judgments into laws: voters employ their political liberties to convey their concerns and aspirations. In this sense it is an information-collecting system as well as a decision-making system. Given this, insisting that voters act as if their only concern is producing legislation is to truncate the political, conferring sole legitimacy on one of its functions.

4.4 Legislators

I have focused on whether citizens do wrong by advocating laws on religious grounds. Legislators are not in the same situation: they are involved directly and crucially in enacting laws, so it is appropriate to understand their activity as fundamentally a law-making one rather than as an information-collecting one. Legislators are tremendously more decisive in determining political outcomes; they have a stronger duty to consider not only why they and their constituents support a proposal, but whether the proposal is, overall, publicly endorsed. A traditional theme in the theory of representative government is that legislators owe duties both to their constituents and to the wider public. What John Stuart Mill said of members of a jury is more applicable to good legislators: they possess some "unselfish . . . identification with the public."³² Because of this something like the Duty of Minimal Civility seems to apply. This hardly seems an onerous restraint, nor does it seem unfair to religious legislators. It only applies when a legislator believes that, given all the considerations, *L* is not publicly justified. It is difficult to be confident about such judgments. Remember, since public justification may be by convergence as well as by consensus, that they are voting on the basis of a reason not shared by all does not show that the proposal is not publicly justified (§4.1).

Even this may overstate the role of the Minimal Duty of Civility in a well-designed liberal polity. As James Madison stressed, a republic ought not to rely overmuch on the virtue of its citizen. And in any case, even virtuous legislators cannot appreciate all the reasons for and against proposals. If our concern is public justification there is good reason to endorse procedures (e.g., super-majority rules) that are more apt to filter out "sectarian" proposals.³³ Insofar as political procedures can help laws track public justification without supposing that we are all aiming at overall public justification, public reason liberals should focus on the design of law-making institutions and the way they aggregate inputs into outputs rather than focusing on moral restraints on citizen and legislative inputs. Indeed, democratic procedures may work better when legislators do not always seek a synoptic perspective, but focus on presenting a good case based on an admittedly partial

³² J.S. Mill, *Considerations on Representative Government* in *The Collected Works of John Stuart Mill*, J.M. Robson, ed. (Toronto: University of Toronto Press, 1963–1991), vol. 19, p. 412.

³³ See my *Justificatory Liberalism* (New York: Oxford University Press, 1996), pp. 237ff.

perspective. Well-designed voting procedures can act as a reasonably good imperfect procedure for determining laws endorsed by public reason; if so, even legislators would often do well to press the view of their constituents rather than directly consulting their own convictions about what is publicly justified.

5 RELIGIOUS BELIEFS AS DEFEATERS

5.1 *The asymmetrical status of religious belief*

The more we reflect on the Minimal Duty of Civility the more modest its implications. Recall Eberle's core claim: "The justificatory liberal is unavoidably committed to the claim that a citizen in a liberal democracy ought not to support (*or reject*) any coercive law for which she enjoys only a religious justification."³⁴ Note that Eberle holds that justificatory liberalism unavoidably has a symmetric view of the reasons that justify coercive impositions and those that block them. Suppose Alf is a legislator, elected by a constituency with strong religious convictions. I have argued that, in a rationally pluralist society, a religious reason could not be the only justification for a legitimate law. If legislator Alf thinks that the only reasons for *L* are religious, and if he does not think advocating the religious reason will help produce a publicly justified outcome, then he has good reason to refrain from voting for *L* on the basis of the religious reason. But suppose now that secular legislator Betty proposes a law that would impose restraints that Alf's constituents have strong religious reason to oppose. Does public reason liberalism allow him to vote against Betty's proposal simply on religious grounds? The answer must be affirmative. He rightly can claim that as members of *P* under *C* his constituents would not endorse the imposition, and so it is not publicly justified. Whether others share their defeater is quite beside the point: the imposition cannot be validated by the religious citizens, so coercing on the basis of *L* would violate the Principle of Public Justification.

There is nothing in the Principle of Public Justification that would lead us to conclude that members of *P* under *C* may not employ all their reasons when deliberating on *L*. We did not commence with individuals split into public and private selves, and then say that only their public selves could enter into public justification. Rather, we started off by supposing members of the public who seek to coerce each other and employ all their reasons in either endorsing or refusing to endorse these laws. Although some of your reasons will not help in showing another (who does not share the reason) that *your favored L should be endorsed by her* (qua member of *P* under *C*), all of your reasons may be called upon when examining her opposed coercive laws pressed on you.

³⁴ Eberle, *Religious Convictions in Liberal Politics*, p. 14. Emphasis added.

5.2 Nested political disagreement and religious reasons

A natural worry arises at this point: if there is even one member of the public who would not validate L under C , L fails the test of public justification. And so a state official who coerces on the basis of L does wrong. Given that we confront reasonable disagreement on just about every political issue, this may strike one as a recipe for anarchy, not the just state. This is a serious problem for a public reason view, and undermines most versions of deliberative democracy. According to deliberative democrats, politics aims at agreement: “Agreement among members of the community is set as the open-ended task... [of the] exercise of practical reason and judgment.”³⁵ Thus “the aim of the regulative idea is agreement of conviction on the basis of public reasons uttered as assessed in public discourse....”³⁶ But, of course, such agreement is not to be had: actual politics is characterized far more by disagreement than consensus. Thus deliberative democrats are forced to admit that we may have to cut off the discussion by taking a vote, but it is uncertain whether the outcome of such a vote meets the requirements of public justification.³⁷

Politics and the law are indeed about disagreement — but we do not disagree about everything. Liberal political philosophy has long maintained that abstract principles such as freedom of expression, freedom of religion, freedom of the person, security of bodily integrity, some system of property rights, and a principle of public good provision are validated by all free and equal rational moral persons. Critics of public reason are not apt to deny that such abstract principles can be publicly justified; rather, they point to intractable debates about the preferred interpretations. As Greenawalt says, “Agreement on such abstract ideas may exist now in the United States, but this agreement has limited significance when many people have definite ideas on how to fill in the details, and these ideas powerfully conflict with one another.”³⁸ It is here, says Greenawalt, that religious reasons often must be drawn upon.

Assume that we have a public justification of such an abstract political principle Φ , but are confronted with a set of interpretations qua laws $\{L_1...L_n\}$, each preferred by some citizen. Now in public reason liberalism, the job of democratic procedures is to select from this set. Assume that every member of the public endorses every

³⁵ Gerald J. Postema, “Public Practical Reason: Political Practice” in *NOMOS XXXVII: Theory and Practice*, Ian Shapiro and Judith Wagner DeCrew, eds. (New York: New York University Press, 1995), pp. 345-85 at 356.

³⁶ *Ibid.*

³⁷ Habermas’ view is more complex. His “two-track” conception of deliberative politics conceives of an interplay between democratic procedures and deliberative collective will formation: the procedures do not simply follow deliberation (“cut it off”), but also affect the formation of a deliberative rational agreement. Still, Habermas is quite clear that “[p]olitical deliberations...must be concluded by majority decision in view of the pressures to decide.” Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg, trans. (Cambridge, MA: MIT Press, 1996), p. 306.

³⁸ Greenawalt, *Private Consciences and Public Reasons*, p.114.

member of this set as an eligible interpretation of the principle, but they disagree about which is best: the democratic procedure then gives everyone another reason to endorse a specific member of the set, L_i . In relying on this democratically selected interpretation each and every person member of the public (qua P under C) would endorse L_i . No member of the public, when confronted by a demand based on any member of the publicly eligible set would refrain from endorsing it since it was selected from the eligible set by the democratic procedure. Of course we may have intense disagreements about the best interpretation, but any selection satisfies the requirements of public justification: no one is asked to abide by an interpretation that is not endorsed by her own reason (qua a member of P under conditions C). Can religious-based arguments be employed at this point?

Suppose that we are confronted by a set of publicly eligible interpretations $\{L_1 \dots L_n\}$, and there just is no public justifications for *any* choice (before application of the democratic procedure). Even members of P under C would not converge on a common interpretation. Then, essentially, all we, as actual citizens, can do is advance a procedural solution: make a choice according to some justified procedure. If that is the case, there seems no objection to people appealing to religious or any other reasons to try to get others to agree with their interpretation. To be sure, there really are no good substantive public reasons to select any particular option: because we are employing a procedural solution there is no assumption that we are trying to uncover a specific publicly justified choice. So here Greenawalt seems right; if we confront this sort of public indeterminacy people can decide on just about any grounds they wish so long as their option set is restricted to the set of publicly eligible interpretations.

Suppose, though, that the matter is not really indeterminate, but inconclusive.³⁹ A question is merely inconclusive when it is difficult to see which interpretation can be publicly justified, though we have reason to think that there is one. Although we think that members of P under C *would* arrive at a common interpretation, we, as actual citizens who fall short of the capacities of P under C , cannot now see what that might be. In this case we have a belief that there is some L_i that is better than all other eligible interpretations. All P under C would endorse L_i over rival interpretations.⁴⁰ Now suppose we adopt some other eligible interpretation, L_j . Although L_j is still eligible (it is better than having no legal interpretation of the Φ principle at all), living according to it would constitute a sort of collective irrationality: qua P under C , we all would see we all see L_i as a better law. In adopting L_j we are adopting a suboptimal interpretation — one that is strongly dominated by L_i . Insofar as think there is good reason to suppose that we might, if we thought harder and dis-

³⁹ See Micah Schwartzman, "The Completeness of Public Reason," *Politics, Philosophy, & Economics*, vol. 3 (June 2004): 191-220.

⁴⁰ For simplicity's sake, I have stated this in overly strong terms. The analysis only requires that pairwise determinations could be made such that all P in C agree that L_i is better than L_j , though they do not all agree on the best in the set.

cussed it more, uncover the better law, then we all have some reason to continue on with the process of public justification. So then we would have grounds to restrict our reasons for voting to those that would help bring about the better justified law. However, because we have seen that genuine public reasoning does not exclude appeal to religious beliefs, this recommendation does not, I think, make a great deal of difference as to what beliefs may be appealed to in liberal politics.

5.3 Radical disagreement and religious accommodation

A religious reason only makes impossible the public justification of some law-interpretation of Φ if appeal to that religious reason leaves empty the set of publicly eligible law-interpretations of Φ . I have argued that this is unlikely indeed when our concern is basic principles of social cooperation (and, of course, a theory may so characterize P that only those concerned with living together are included). Certainly, though, such blocking could occur in some areas of public policy. However, a coercive law implementing a policy still may be pursued in the face of such blocking insofar as those who cannot endorse the policy may be exempted from its coercion. It is important to keep in mind why we are committed to public justification: respect for others leads us to justify coercive impositions to the persons imposed upon. If we do not coerce, then we have no commitment to publicly justify.

Allowing religious-based exemptions from military or education requirements is, of course, part of the history of American public policy. The United Kingdom also has instituted such exemptions (e.g. Sikhs are exempted by 1998 Motor Cycles [Protective Headgear] Regulations from the legal requirement to wear motorcycle helmets). Of course complex and difficult arise when seeking to craft legislation that allows such exemptions. There are always worries that the possibility of obtaining an exemption may encourage deceit from those who endorse the aims of the legislation but who nevertheless seek the exemption. We confront the endemic worry about free-riding on socially usefully policies. Legislators also must consider whether the exemptions are so instituted as to put heavy legal burdens on those who cannot rationally endorse the policy (e.g. requiring complex opt-out procedures), such that there are strong practical incentives for them to submit to unjustified impositions. In some cases it might be fairer to allow blanket opt-outs of entire ranges of policy to some groups.⁴¹ My point here is not to even point to solutions to these important problems, but to stress that even when a religious citizen employs her reason to block a public policy on religious grounds, it does not follow that others must do without the policy. As with the European Union, the remaining citizens might reconstitute themselves into a different public (a “core group”) on this issue.

⁴¹ See the very thoughtful treatment of these issues by Swaine, *The Liberal Conscience*.

5.4 “Blocking” and third parties

Consider a more worrying case. Religionist Alf has been exempted from coercive law *L*; suppose that in this case the exemption is not onerous and Alf has no complaint regarding *L*'s effects on him. The reconstituted public includes Betty and Charlie, and within this narrower public *L* (we assume) is publicly justified. However, Alf complains that Betty should not be able to coerce Charlie in that way. Two possibilities need to be distinguished.

(i) Alf might be claiming that Betty and Charlie are simply wrong: the law is not justified even in their narrow public. I take it that this is not a real difficulty: although Alf is not complaining on his own behalf, he can complain on the part of others who are subjected to unjustified coercion.

(ii) Alternatively, and far more troubling, Alf may be asserting that *L* really is, all things considered, justified between Betty and Charlie, but that is not enough: *it must be justified to him as well*. His rational approval must be obtained before Betty can coerce Charlie on the basis of *L*: it is a law that he cannot endorse, and so should apply to no one. Public reason liberalism, as I understand it, must reject Alf's claim on the grounds that it is no disrespect to Alf if Betty and Charlie act according to laws (justified in their narrower public) that Alf's reason does not endorse (when those laws do not coerce Alf, nor do they coerce any others outside the narrow public). I do not claim that this is entirely uncontroversial: many claim that their conscience requires them to authorize all the actions of others, even when those actions are rationally endorsed by those others. We are now getting to the bedrock liberal claim, according to which no one has such moral authority over the lives of others. Mill rightly objected that such claims preclude a tolerant society because everyone's life becomes everyone's business.⁴² My aim now, however, is not to justify this basic claim, but to stress that the option of conscientious exemptions depends on it. If everything everyone does requires the approval of all, then there is no possibility of reconstituting the public to avoid radical disagreement.

6 CONCLUSION

Starting off with a fairly robust Principle of Public Justification, we have seen that very little follows in the way of excluding religious-based reasons from politics. To be sure, public reason liberals must argue that a law that is based solely on religious reasons would be unjustified in a polity in which some members of the public do not endorse those reasons. But so would be a law based solely on a secular consideration that is not shared by all members of *P* under *C*.

I have discussed a number of reasons why the debate between public reason liberals and religiously-inclined philosophers has been so intractable and unhelpful.

⁴² See Mill, *On Liberty*, in *On Liberty and Other Essays*, John Gray, ed. (Oxford: Oxford University Press, 1991), pp. 96ff (ch. 4, ¶¶16ff).

The debate has been informed by overly-simple views of public reason, failures to appreciate the complexities of democratic politics, and ignoring the difficulties in assigning moral responsibility to individual citizens for democratic outcomes. Another reason, I would conjecture, is that, oddly enough, the disputants share a common presupposition: viz., it must be fairly easy to justify coercing people. Thus many public reason liberals argue that, so long as one has a good secular reason, the state can go about coercing everyone; public policy should not be blocked just because someone has a religious objection to it. Many philosophers friendly to religion also accept the “coercion is pretty easy principle,” but insist that it is only fair that, if secular citizens can coerce on their secular vision, religious citizens should be able to coerce on their view of the truth.

Public reason liberals have strayed too far from the spirit of Millian liberalism. Liberals have generally forgotten Mill’s insight that coercing others is a remedy of the last resort, a dangerous tool to be used sparingly: it leads to the “degradation of slavery” if the individual’s conscience cannot freely accept the legal restraint.⁴³ Thus, I have argued, there is a fundamental asymmetry between the ways that controversial beliefs function when employed as justifiers of coercion and when advanced as defeaters of coercive proposals: “the onus of making a case always lies on the defenders of legal prohibitions.”⁴⁴

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⁴³ Mill, *Principles of Political Economy*, p. 943 (Bk. V, ch. xi, §2).

⁴⁴ *Ibid.* And, we should add, coercive requirements.