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WHAT DIGNITY DEMANDS: FROM POLITICAL TO POETICAL LIBERALISM

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Richard Mailey, University of Luxembourg, 2017

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Acknowledgements

This project began in Spring, 2013, when I was awarded funding to conduct doctoral research at the University of Luxembourg. Initially, my intent was to pursue a comparatively narrow inquiry in the field of criminal law – an inquiry that began with the question, "what approach to the construction of criminal intent is most worthy of a liberal opposition to the "use" of human life as a means?" In the end, the thesis that follows never gets to the more specific, doctrinal part of that inquiry, i.e. the question of criminal intent, because the basic, philosophical question at stake – "what does it mean to oppose the *use* of human life *at all*" – quickly seemed like a more interesting and worthwhile topic. Maybe someday I'll return to the question of criminal culpability. But for now, this is it…

This leads me to my first thank you: to my supervisor, Professor Johan van der Walt. From my first night in Luxembourg, when Johan *insisted* that I put a jacket on before going out in the snow (regardless of how much time I'd spent in Scotland), Johan has been a constant source of guidance. He's also placed far more trust in me than I deserve, which, undeserved as it may have been, helped me stay calm in the face of what often felt like a very steep and sometimes impossible struggle uphill. Not many PhD students find a calming influence in their supervisor, so I count myself very lucky on that front, and I thank Johan sincerely, as well, for his faith and encouragement over the last four years.

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INTRODUCTION

Liberalism on the Rocks: Human Dignity in the Age of Trump and Brexit

Introductory Quote:

"Male dignity is a big deal for most men. So is breadwinner status: Many still measure masculinity by the size of a paycheck. White working class men's wages hit the skids in the 1970s and took another body blow during the Great Recession. Look, I wish manliness worked differently. But most men, like most women, seek to fulfill the ideals they've grown up with. For many blue-collar men, all they're asking for is basic human dignity (male varietal)… [and] Trump promises that… [while] Hilary Clinton, by contrast, epitomizes the dorky arrogance and smugness of the professional elite. The dorkiness: the pantsuits. The arrogance: the email server. The smugness: the basket of deplorables. Worse, her mere presence rubs it in that *even women* from her class can treat working-class men with disrespect. Look at how she condescends to Trump as unfit to hold the office of the presidency and dismisses his supporters as racist, sexist, homophobic, or xenophobic."

Joan C. Williams, What So Many People Don't Get About the US Working Class (article in the Harvard Business Review)

I. Context: Liberalism on the Rocks

Liberalism is in a bad place.

To be sure, this isn't the first time that liberalism has come under threat, but it's arguably the first time since the end of the Second World War (surely the birthdate of contemporary liberalism) that its been so fiercely and effectively challenged.

Above all else, the impending threat is captured in the fact that Westerners today are embracing populist (and even fascist) demagoguery at an alarming rate, and with equally alarming zeal. As I write, Donald Trump is celebrating his shocking win in the US Presidential election, with a slew of usually career killing scandals (a Federal investigation into the fraudulent practices of the inaptly named "Trump University,"[1] leaked tapes of Trump bragging about "sexual assault,"[2] etc.) and gaffs (dismissing a US Senator for being "captured"[3] during the Vietnam War, claiming during a debate that he was "smart"[4] for dodging his Federal Income Tax, etc.) only serving as minor setbacks along the way. Similarly, in Europe, right-wing populism has risen to levels that would have been unthinkable until fairly recently. In the UK, for example, the rise of the UK Independence Party, which had previously been obscured by the country's unrepresentative electoral system, has been exposed in full by the public discourse surrounding the recent EU referendum, as well as by the result of the referendum itself.

Elsewhere in Europe, the picture is even clearer. In France, Greece, and Austria, *inter alia*, far-right political parties have gained massive amounts of ground, electorally, and in countries like Hungary and Poland, hard-line, right-wing governments have gained international attention for subverting the rule of law (as with the Polish government's plan to "pack"[5] its Constitutional Court with allies), and for treating refugees in ways that likely contravene international human rights law, as in Viktor Orban's Hungary.[6]

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[1] See here: http://www.nytimes.com/2016/06/01/us/politics/donald-trump-university.html?mtrref=query.nytimes.com&gwh=544B4B3ADF0C9C52E971A55CAA050E5B&gwt=pay.
[2] See here: https://www.theguardian.com/us-news/2016/oct/13/list-of-donald-trump-sexual-misconduct-allegations.
[3] See here: https://www.washingtonpost.com/news/post-politics/wp/2015/07/18/trump-slams-mccain-for-being-captured-in-vietnam/?utm_term=.53d442117eda.
[4] See here: https://www.washingtonpost.com/politics/a-lean-toward-clinton-among-one-group-of-undecided-north-carolina-voters/2016/09/27/ff271b2e-8469-11e6-92c2-14b64f3d453f_story.html?utm_term=.936941e75358.
[5] See here: http://verfassungsblog.de/court-packing-in-warsaw-the-plot-thickens/.
[6] See here: https://www.amnesty.org/en/documents/eur27/4864/2016/en/.

More recently, a new symbol of liberalism's erosion has emerged in Western Europe in the attempts made by French coastal communities to ban the "burkini"[7] – a piece of "Islamic" swimwear that enables Muslim women (and indeed, *any* women) to sunbathe without sacrificing a religious or moral commitment to sexual modesty. In the wake of the terror attacks in Paris and Nice, some local communities in France evidently decided that their commitment to religious tolerance – a commitment that John Rawls once described, then plausibly, as a "settled"[8] component of liberal culture – is no longer worth maintaining, and we should pause to consider how remarkable this choice really is. As the French Prime Minister Manuel Valls would boast, the burkini bans are responses to a perceived "provocation of Radical Islam"[9] – not to any perceived national security threat (e.g. potential for concealed weapons), but to the mere presence of Islamic customs in public, i.e. to any representation of Islam "that wants to impose itself on the public space."[10]

Traditionally speaking, Valls's strained defence of the burkini bans rips up the liberal playbook, because, traditionally speaking, an expressive act's tendency to provoke is not a good, liberal reason for banning it. In this regard, it is worth noting the different opinions that the US Supreme Court has issued vis-à-vis the constitutionality of bans on flag burning and cross burning, respectively.[11] In short, only bans on the latter act are constitutionally permissible under US law, with the difference being that cross burning was historically used by the Ku Klux Klan as a way of "intimidating"[12] and threatening non-Klan members (especially African-Americans), whereas flag burning, despite its propensity to cause great offense (and to *provoke*), lacks such nefarious connotations – i.e. such status as a "signal" or warning of violence, as well as a "symbol of hate."[13]

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[7] For information on the origins of the burkini, and the controversy surrounding its use in France, see here: http://www.timesofisrael.com/why-burkini-swimsuits-are-causing-controversy/. See also http://edition.cnn.com/2016/08/25/opinions/france-burkini-controversy-ghitis/.

[8] I will focus closely on Rawls's work throughout this thesis. For the passage referenced above, which describes freedom of religion as a key aspect of liberal culture (on par with freedom from slavery and involuntary servitude), see JOHN RAWLS, POLITICAL LIBERALISM (at 8), and see chapter two of the thesis for a more comprehensive account of Rawls's work.

[9] See here: http://nytlive.nytimes.com/womenintheworld/2016/09/06/french-pm-comes-out-swinging-in-burqini-debate-it-is-a-provocation-of-radical-islam/. For the full text from which this quote is drawn, see http://www.huffingtonpost.com/manuel-valls/in-france-women-are-free_b_11867242.html.

[10] Ibid.

[11] See *Virginia v. Black* 538 US 343 (2003), on cross burning, and see *Texas v. Johnson* 491 US 397 (1989), on flag burning.

[12] This is a reference to the language of *Virginia v. Black*, in which a majority of the Justices held that, because it is so "inextricably" linked to the Klan – and to feelings of fear and intimidation – cross burning can be banned without violating the First Amendment's guarantee of free speech, provided that the mere fact that someone engages in cross burning isn't taken as "prima facie" evidence of "intent to intimidate," i.e. provided that cross burning that isn't linked to the practice's history of intimidation is still protected as "speech."

[13] Again, see *Virginia v. Black* (Justice O'Connor's opinion).

Inasmuch as it lacks a direct, "signalling" link to violence and intimidation, wearing a burkini is obviously far closer to flag burning than cross burning. However, it is also significantly and practically different from even flag burning, because unlike flag burning, wearing a burkini is not a political statement, except in the way that *all* public acts are understandable as political statements. On the contrary, wearing a burkini, as noted already, is an inward-looking, insular commitment to one's religiosity, and, as such, it would normally be regarded as precisely the kind of innocuous and deeply personal choice that the liberal state is supposed to protect (perhaps even as its primary function). Indeed, the "highest administrative court"[14] in France had no difficulty in accepting that the burkini bans are an affront to the basic, liberal values of the French state, but its ruling has been ignored by mayoral offices on the coasts of France, leaving us to ask: what will remain of liberalism in Europe if citizens not only disavow religious tolerance, *but also the rule of law*, that fundamental, liberal principle according to which, whatever personal issues we have with the law, we commit to accept and respect it as binding until we can *legally* change it, whether through an exercise of our right to protest, or through more direct engagements with legislative and/or judicial processes?

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There is surely nothing so controversial about the suggestion, above, that liberalism is now on the back foot, but controversy quickly emerges when one asks why this is so. For some, the only question at stake here is whether we blame the seducers or the seduced – i.e. those populist firebrands who have propagated an "irrational"[15] and anti-liberal politics of fear (aka the seducers), or those Western citizens who have lazily consumed and believed the "fake news" and scare tactics of powerful populists (aka the seduced). And for supporters of liberalism, this is certainly an attractive dilemma, because it begins with the assumption that the declining popularity of modern liberalism is nothing to do with them (liberals), but is rather something that has befallen them from without – a natural disaster, of sorts, that accordingly poses no challenge to the ultimate *rightness* of their politics.

[14] See here: https://www.washingtonpost.com/news/worldviews/wp/2016/08/26/frances-top-administrative-court-overturns-burkini-ban/.

[15] I borrow this phrase from David Dyzenhaus's account of the Schmitt-Kelsen debate in his book, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR. Disturbingly, there are many parallels between the situation in Weimar Germany, as Dyzenhaus describes it, and the situation in many Western democracies today.

By contrast, this thesis will begin by assuming that, regardless of the blame that can be levied on both the seducers and the seduced, the declining popularity of liberal politics demands some serious soul searching on the part of liberals too. And why shouldn't it? After all, is it not the case that the legitimacy of modern, democratic governance always depends – in large part, at least – on its capacity to appeal to real people, presumably by addressing their more persistent and deeply felt concerns? If this is true, then the fact that liberal politicians are now increasingly on the losing end of democratic votes can hardly be dismissed too quickly as a matter of changing social attitudes, or as a consequence of the malignant and manipulative forces of "charismatic"[16] leaders (Donald Trump or Marine Le Pen, for example). On the contrary, from a democratic perspective, if liberal parties and politicians are losing support, today, *then their fitness to govern is now also questionable*, even if one believes quite reasonably that liberal politics are markedly less destructive than the increasingly popular, anti-liberal politics that are challenging them.

And so I say it again: the declining popularity of liberal politics demands some serious soul searching from liberals – not just accusations of "irrationality" and manipulation. At its simplest, this thesis is an attempt to engage in such soul searching, an attempt to revisit questions that are frequently ignored by more "dogmatic"[17] liberals content to identify their own, particular policy preferences with "justice." To be more precise, the aim is not to ask the sociological or strategic question of what liberalism should become in order to reclaim the support of currently unconvinced, Western citizens (although that would surely be an important line of inquiry, too), but rather, to ask a somewhat deeper, conceptual question: namely, the question of what liberalism must be if it is to remain *itself*, i.e. to remain worthy of its name, and worthy of its own, fundamental promise, a promise that I will identify in chapter one with the ideal of *human dignity* that is at the heart of so much international and national-constitutional law, today. Of course, the answer that I give to this conceptual question may imply an answer to the aforementioned, sociological one, as well, but I do not wish to stretch my analysis that far. Rather, my line of argument is simply 1) that liberalism is now in a difficult position, politically, and 2) that a conceptual critique of liberalism, of the type just described, is therefore an especially timely, important undertaking.

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[16] Ibid. Note also that Dyzenhaus's use of this term with respect to the Weimar situation derives from Max Weber's differentiation between legal, charismatic and traditional forms of authority. See MAX WEBER, ECONOMY AND SOCIETY (chapter on "The Three Types of Legitimate Rule").

[17] For a fuller explanation of how I use this term here, see my discussion of Duncan Kennedy in chapter four. For now, suffice it to say that "dogmatic" liberals are those, as noted above, who accept liberal party lines as "just," regardless of whether they do so critically or unthinkingly.

Research Methodology: An *Immanent* Critique of Modern Liberalism

This leads me immediately to a clarification, though. Because although the description above is consistent with an "internal" critique of liberalism (a critique that presumes the validity of liberalism's normative bases), my intent is actually to offer something more like an "immanent"[18] critique of modern liberalism. To explain, then: an immanent critique is essentially one that proceeds by inspecting a political system (or simply *a* system) for its basic points of appeal – i.e. its basic promises – and by then asking how these points of appeal *themselves* produce contradictions (and in particular, experiences of disingenuity or frustration) in the lived reality of the same system. Although this approach is most closely associated with the "dialectical"[19] philosophies of Hegel (Dialectical Idealism) and Marx (Dialectical Materialism), its influence on this thesis stems more specifically from a paper by Emilios Christodoulidis on "strategies of rupture"[20] in law. As Christodoulidis frames it, the essence of immanent critique lies first of all in an attempt to "hold up the system to its own claims,"[21] forcing it "to face up to its stated principles."[22] More precisely (and again, as explained by Christodoulidis):

> "Immanent critique is tied to the logic of contradiction where contradiction, as "practical" rather than logical, informs a crisis that is experienced by social agents in the materiality of their life. Social reality is experienced by actors in terms of normative expectations that are constitutive (rather than "epiphenomena") of that reality. Normative expectations are part of institutional frameworks that inform actors' perception of social reality. Immanent critique aims to generate within these institutional frameworks contradictions that are inevitable (they can neither be displaced nor ignored), compelling (they necessitate action) and transformative in that (unlike internal critique) the overcoming of the contradiction does not restore, but transcends, the "disturbed" framework within which it arose."[23]

[18] For an introduction, see, for example, Robert J. Antonio, *Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought*.
[19] For the classic examples of dialectical theory, see GFW HEGEL, THE PHILOSOPHY OF SPIRIT, and KARL MARX, CAPITAL (especially the "Preface").
[20] Emilios Christodoulidis, *Strategies of Rupture*.
[21] Ibid at 5.
[22] Ibid.
[23] Ibid at 6.

To explain this formulation: in its basic gesture, immanent critique is very similar to "internal critique," since it aims to expose not the injustice of the system, per se (as with an *external* critique), but, more specifically, the injustice of the system from the perspective of the system's own conception or ideal of justice, vis-à-vis the system's own normative promise. Why, then, does Christodoulidis distinguish between immanent and internal critique? The key, I think, lies in Christodoulidis's claim, a few lines on in the same article, that the "object" of immanent critique "will never be the same again"[24] – specifically inasmuch as the "ruptures" that immanent critiques identify "will not, *cannot*, be sealed over."[25] In other words: unlike an internal critique, immanent critique does not allow for modifications to intra-system practice that restore the system's "order," but rather, places the very *possibility* of order within the system in question, given the system's promise.

To clarify this rather dense elaboration, let me already offer an example of immanent critique in action, specifically by considering the Joan C. Williams quote with which this introduction began. To offer some context, then, Williams's article appeared in the *Harvard Business Review* shortly after Trump's election, and it starts out with an expression of exasperation not at Trump or his supporters, but at Williams's own, "liberal" friends. How could they have so badly underestimated Trump's popularity, Williams asks? And she quickly answers: they underestimated Trump's popularity because they failed to understand 1) the deep-set mentality of an ultimately decisive voting block – "white, working class men" – and 2) the disjoint that exists for members of this voting block between liberalism's promise of "human dignity" and an everyday experience of betrayal, i.e. *of indignity*. To quote:

> "Male dignity is a big deal for most men. So is breadwinner status: Many still measure masculinity by the size of a paycheck. White working class men's wages hit the skids in the 1970s and took another body blow during the Great Recession. Look, I wish manliness worked differently. But most men, like most women, seek to fulfill the ideals they've grown up with. For many blue-collar men, all they're asking for is basic human dignity (male varietal)… [and] Trump promises that."[26]

[24] Ibid at 7.
[25] Ibid.
[26] Joan C. Williams, *What So Many People Don't Get About the US Working Class* – available here: https://hbr.org/2016/11/what-so-many-people-dont-get-about-the-u-s-working-class.

Surely this is wrong, one may think, by which I mean: surely, if liberalism turns on a promise of human dignity, then the felt indignity of white, working class men, whether we affirm it morally or not, is a liberal failure – a failure that a liberal government must at least *strive* to rectify if it is to remain worthy of its status as a "liberal government." However, this is not what Williams says, and to understand why this is not what she says (as well as why her article can be presented as an example of immanent as opposed to merely internal critique), two points are worth flagging. The first is that the situation of white, working class men today, as Williams points out, is a product of significant gains in rights and status that have been made by other social groups. For example, insofar as white, male dignity is often tied to "breadwinner status,"[27] the ability of women to work – and in particular, to earn more than their male partners – becomes a source of indignity, which is to say that the only way to fulfil this aspect of male dignity would be to take a sharp step against female dignity. Similarly, Williams notes that calls for racial sensitivity (or "political correctness"[28]) are often experienced by white, working class men as overly constrictive, and as personally demeaning, despite the fact that such calls are directed, precisely, against forms of speech that have a demeaning message vis-à-vis specific, racial minorities.

This is the first point, then: that the dignity of white, working class men is attainable only via the displacement of their felt indignity onto other social groups (e.g. women, or racial minorities). The second point, by contrast, concerns the way that liberals then typically respond to this conflict – i.e. between the dignity of white, working class men and the dignity of other social groups – by picking a side and, in effect, "naturalizing"[29] their selection. For example, during her oftentimes ill-advised presidential campaign, Hilary Clinton was recorded suggesting that about half of Trump supporters (read as: white, working class men) were a "basket of deplorables" – "racist, sexist, homophobic, xenophobic, Islamophobic… you name it."[30] The message here, in essence, is that Clinton and other liberals of her ilk do not (and indeed, *need not*) regard Trump supporters (or many of them, at least) as part of *their* community, even as they speak in a liberal language of universal inclusion, respect and tolerance, a language of "equal concern and respect"[31] *for all*.

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[27] Ibid.
[28] Ibid.
[29] By "naturalizing," I do not mean that such liberals literally present their political preferences as a matter of "natural justice," but that they do something tantamount to this (e.g. explaining them as "necessary," or as optimally "rational").
[30] See here, for example: http://time.com/4486437/hillary-clinton-donald-trump-basket-of-deplorables/.
[31] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY – for example, at 7 (and frequently elsewhere).

As I understand it, the aim of an immanent critique is to take the first of the two points above seriously, and, in so doing, to *transform* the impulsive politics of dismissal and denigration described by the second point, i.e. to throw such politics into question. Of course, some liberals will surely respond: asking us to avoid such a gesture of dismissal means asking us to abandon our core, liberal oppositions to racism, sexism, etc. And I would reply: it would, but that's not what I'm asking. To explain: my point, throughout this study, will not be that liberalism can avoid such moments of dismissal, but rather and only that liberalism turns on a fundamental opposition to such moments that, even if it is impossible to sustain, is betrayed when such moments are buried, or ignored. Of course, this recognition may bring us to consider the abandonment of liberalism, but the aim of this thesis (and of immanent critique) is not to pave the way for such an abandonment, but to ask, simply, how one can maintain fidelity to liberalism's normative promise, given the tension that it *inevitably* provokes between "normative expectations" and lived experiences.

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The point, then, is that liberalism – in many but of course not all of its contemporary guises – contradicts itself "performatively" insofar as it 1) presents itself as a non-exclusive or non-excluding philosophy of human dignity, on the one hand, and 2) is experienced by many citizens as exclusive and excluding, on the other, thereby leaving a disjoint between liberalism's language (of dignity, tolerance, and inclusion), and the particular forms of liberalism (or the particular, liberal realities) that are defended as plainly "in keeping with" such language. To give another example of this move, consider the later work of John Rawls (discussed in chapter two), which dismisses opposition to first-trimester abortion as *unreasonable*, and as unworthy of political consideration. To be sure, I share fully in Rawls's belief that denials of first-trimester abortion represent a serious wrong, and a serious harm to the dignity of individual women, but it's hard not to resent the way that Rawls presents his dismissal of pro-life politics as a *non-event*, i.e. as a matter of being *reasonable*. Indeed, for anyone who has spoken to sincere and considered opponents of abortion, it should be very clear that 1) they are not *unreasonable*, colloquially speaking, and 2) they often view their position on abortion as fundamental to their way of life (sometimes to the point where abortion is viewed as *the* evil of their generation, an evil that is especially grave in that it is exacted upon a *literally* voiceless minority, i.e. unborn children).

This disjoint here is that while Rawls's liberalism turns on an ethic of radical inclusion – and indeed, on a steadfast commitment to freedom of religion as a basic, posited truth of liberalism's "public culture"[32] – it nonetheless sees fit to exclude the sincere, well-intentioned arguments of a religious minority (e.g. Catholics and other Christian groups) from political consideration, even going so far as to mark them as "unreasonable,"[33] and out of step with "the essentials of a democratic regime."[34] Even if one leaves aside the moral dimensions of this exclusion, i.e. the extent to which it feels out of step with liberal philosophy and rhetoric, can one not note the sociological consequences that such exclusions will likely have? In Rawls's home country, for example, the US Supreme Court's declaration of a constitutional right to first trimester abortion in *Roe v. Wade* has not only failed to settle the abortion debate, but has on some accounts[35] emboldened the pro-life lobby, and pro-life pockets of the citizenry. I wonder, could this be because *Roe* has been experienced by some as a *repression* of their belief-system, and a *devaluation* of their political equality?

With this question hanging, my own, key question is how liberalism can recognize the experience of repression and wrong that pro-lifers often feel while *at the same time* acknowledging that refusing such repression – i.e. letting pro-life politics prevail – would constitute a grave, illiberal wrong, and a grave assault on the human dignity of pregnant women. Put differently, the question is how or perhaps simply whether liberal politics can be "transformed"[36] in response to the above tension, and the answer that this thesis gives – as implied already by its title – is that liberalism must be reconceived as a "poetical" rather than a "political" (as per Rawls) mode of political practice: a mode of political practice that straddles the divide between what Johan van der Walt has described as "legal" and "poetic"[37] responses to the world, where law represents a means of at least provisionally stabilizing reality, i.e. making sense of it, and poetry represents a converse disruption of such stabilization in the name of a certain "excess" that stabilization obscures.

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[32] See JOHN RAWLS, POLITICAL LIBERALISM – for example, at 8 (on the "public culture" of a society as a shared fund of implicit beliefs).
[33] Ibid – especially at 48-54 (section on the idea of the reasonable and rational, the two moral powers at the core of Rawls's liberalism).
[34] Ibid at xvi – in the original "Introduction" to Rawls's book. Although I imply here that Rawls accuses pro-lifers of being both unreasonable *and* undemocratic, these two accusations are really one and the same, which is to say that unreasonable persons are for Rawls those who betray "the essentials of a democratic regime."
[35] See Wiliam Eskridge Jr, *Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics*. To quote: "Not only did Roe energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists" (Eskridge at 1312).
[36] Again, see Emilios Christodoulidis, *Strategies of Rupture* – at 6.
[37] See, for example, Johan van der Walt, *Agaat's Law: Reflections on Law and Literature with Reference to Marlene van Niekerk's Novel, Agaat.*

Chapter Plan: From Political Theory to Constitutional Law

With my context and methodology established, then, the thesis will proceed as follows. In the first chapter, I will defend my claim, made very briefly above, that modern, Western liberalism can be taken to rest on a fundamental commitment to human dignity. Put simply, my basic argument is that human dignity is shared by Western citizens not as a fundamental moral value (it arguably now isn't), but as a purely legal one, which, in an age of serious pluralism, functions as a way of unifying liberal citizens (practically speaking, at least) despite their deep disagreements over the source and content of "right" morality. Having made this argument, I then proceed to identify the various "appearances"[38] of human dignity in Western law, including in international treaties like the UDHR, and in influential constitutions (e.g. the German and South African Constitutions) and bodies of constitutional law (e.g. Canadian or US jurisprudence). The final section then offers a brief exploration of how different, influential jurisdictions – namely, Canada, Germany, and South Africa – have to some extent converged in understanding human dignity as a principle that opposes the "use" or "objectification" of the individual, i.e. the failure to view and treat the individual as an autonomous legal subject capable of freely developing his/her own "personality."[39]

In my second chapter, I then move on to a critique of John Rawls's book, *Political Liberalism*, which offers a reconstruction of modern liberalism very much in keeping with the legal culture described in my first chapter. To already put it quite specifically, the critical aspect of my reading of Rawls will be that his work exhibits a clear tension between two seemingly co-original aims: 1) the aim of moving against a politics of zeal (one that seeks to impose a comprehensive moral truth on a morally diverse group of persons), and 2) the aim of moving against a politics of abandonment (one that is incapable of responding to severe indignity, frustration and pain). As noted above, though, Rawls does not accept the co-originality of this tension, but instead dresses up moments of zeal – like his dismissal of pro-life politics as "unreasonable" – as the unfolding of a liberal morality with which all individuals should agree, and which can accordingly be imposed on persons in liberal-democracies without counting as zeal, or as meaningfully illiberal *coercion*.

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[38] In chapter one, I explain what I mean by the term "appearances" in this context. For now, suffice it to say that I draw loosely and briefly on the work of Hannah Arendt, who adopts a Heideggerian approach to political theory inasmuch as she links the appearance of "political phenomena" to public discourse.

[39] See the German Constitution (or *Grundgesetz*), Article 2.1 (on the right of everyone to the free development of his/her personality), available at: https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.

In chapter three, I then try to render this critique a little more clear and "sophisticated" by filtering it through the work of Carl Schmitt, whose critique of liberalism in Weimar-era Germany can be applied very effectively, I think, to Rawlsian liberalism. In this regard, Schmitt's key complaint is that liberalism conceals moments of unavoidable, groundless violence – moments of sovereignty that determine the moral limits of a community both when they appear, and when their absence marks a tacit, sovereign approval of social conditions as "normal."[40] To be clear, Schmitt is not a critic of such violence (quite the opposite), but rather criticizes liberalism for staging itself as a way of transcending such violence, when, as a matter of fact (says Schmitt), even a pacifistic abdication of state sovereignty, on the part of a liberal Parliament or President, will constitute an approval of social conditions as they are, e.g. of the patterns of private (and especially economic) domination that flourish under conditions of extreme, liberal/libertarian deregulation.

In the second half of chapter three, I then ask for the first time whether an acceptance of political violence as inevitable can give rise to a liberal theory of law. Responding to this question, I turn to the constitutional theory of Bruce Ackerman, an American scholar who suggests *with* Schmitt 1) that liberal morality and constitutional laws are rightfully subordinate to the authority of "The People,"[41] and 2) that institutions are entitled to break with established law (at certain times) so as to redeem the will of "The People." Where Ackerman and Schmitt differ markedly, though, is in Ackerman's refusal to find full legitimacy in acts of institutional, populist heroism. On the contrary, for Ackerman, populist heroism can only become legitimate, over time, where the hero's (or heroic institution's) values are endorsed across a "generation."[42] The consequence of this twist is that, although institutional heroism is accepted and encouraged by Ackerman's theory, its initial manifestation is acknowledged as a form of *violence*, one that must find redemption, over time, by surviving a sustained period of public and inter-institutional debate.

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[40] The key reference on this point is surely to CARL SCHMITT, POLITICAL THEOLOGY, in which Schmitt defines the sovereign as "he who decides on the exception" (at 5).

[41] See Andrew Arato, *Carl Schmitt and the Revival of the Doctrine of Constituent Power in the United States*. It is important to note, though, that although there are striking similarities between Schmitt and Ackerman, the latter is unlikely to ever acknowledge this (and he certainly never cites Schmitt with any level of approval).

[42] To quote Ackerman: "For most judges, the basic unit of the Constitution is The Clause… [but for] me, the basic unit is *The Generation*... [my emphasis]. Constitutional meaning is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental political understandings. This struggle is not fuelled by the intellectual curiosity of a juristic elite, but by crucial historical events which provoke popular efforts to modify, sometimes radically, pre-existing starting points." See Ackerman, *A Generation of Betrayal* – at 1519. And for a more recent (and particularly clear) elaboration of Ackerman's theory in relation to the American civil rights movement, see his book, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION.

In the end, I find Ackerman's theory promising as a "third way"[43] between Schmittian populism and Rawls's moralistic liberalism, but certain aspects of Ackerman's work leave one with a sense of untapped potential. In particular, Ackerman never explains why "The People" won't come, over time, to embrace forms of governance that are intolerable from a liberal perspective, and the only compensation that we get for this omission is a tacit assumption that "the arc of history bends toward justice"[44] (*liberal* justice). On account of this flat-spot in Ackerman's work, *inter alia*, I turn in chapter four to a pair of critical theorists – Duncan Kennedy and Jacques Derrida – who are, let's say, a little less optimistic. To explain: for Kennedy and Derrida, liberal ideals ("the goal of individual freedom"[45] in Kennedy's work, and "hospitality"[46] in Derrida's), are both practically and conceptually contradictory. However, unlike Schmitt, whose work harbours a strange, "metaphysical"[47] thirst for consistency and unity, despite its nihilism, Kennedy and Derrida see the contradictoriness of liberalism as a challenge – a challenge to which their work responds by considering, exhaustively, what it means to honor an impossible ideal (and more specifically, their versions of the impossible ideal on which liberal politics turn).

Ultimately, it is from a careful consideration of Kennedy and Derrida that I take my cue in claiming that liberalism must mutate from a "political" doctrine (e.g. as in Rawls's work) to a "poetical" one. However, this does not mean, as I will clarify, that liberalism should (or indeed, *can*) dispense with practices of the type proposed by Rawls (e.g. those practices that flow from Rawls's principle of public reason), but only that liberalism mustn't identify such practices (as Rawls does) with "justice." Indeed, the key aspect of poetical liberalism, as I define it, is its demand that "political" liberal practices remain open to pursuits of "justice" with which they themselves cannot plausibly be squared ("poetic" pursuits of justice, perhaps): hence why my version of liberalism is "poetical" and not "poetic," i.e. because the minor, linguistic shift from a "political" to a "poetical" liberalism represents a similarly minor, theoretical shift from one concept to the other.

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[43] I borrow this phrase, as applied to Ackerman, from Sujit Choudry, *Ackerman's Higher Law-making in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures* – at 203 (Choudry is referencing Ackerman here, specifically a passage from his book, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS – at 33).

[44] I paraphrase Martin Luther King (or more recently, Barak Obama) here.

[45] See Duncan Kennedy, *The Structure of Blackstone's Commentaries* – at 211.

[46] See JACQUES DERRIDA, OF HOSPITALITY, as well as Jacques Derrida, *The Principle of Hospitality*.

[47] Most obviously, one can see a certain "metaphysical" moment – in the Derridean sense of that term – in Schmitt's definition of the constitution as a matter of an "existential unity" that exceeds the bounds of constitutional law, and on which constitutional law ultimately depends for its legitimacy. See CARL SCHMITT, CONSTITUTIONAL THEORY – for example, at 59.

At this point, though, I anticipate an objection. In a nutshell, the objection is that my "poetical" brand of liberalism is purely deconstructive, and, as such, offers no *constructive* advice for either 1) liberal institutions (and citizens) on how to exercise their public power, or 2) liberal constitution-makers trying to decide how to structure a country's division of institutional powers. With this objection in mind, the fifth and final chapter of the thesis will engage with contemporary constitutional jurisprudence in three jurisdictions (specifically Canada, South Africa, and the United States), with the aim of showing that a "poetical" liberalism does not judge all legal and/or political decisions to be equal, i.e. equally implicated in illiberal violence. On the contrary, as I will try to show, constitutional review in Canada, structured as it is around a central norm of inter-institutional dialogue, tends to reflect a poetical liberal mentality better than either the strong-form model of the US or the weaker form models that one finds not only in Westminster-style legal systems (e.g. in the UK or New Zealand, where judicial invalidations of Acts of Parliament are not possible), but also in the specific contours of the South African Constitutional Court's early jurisprudence enforcing social and economic rights.

Of course, as a familiar reader will surely see, my invocation of Derrida and Kennedy in chapter four prevents me from saying, definitively, that Canada's preference for "dialogic"[48] constitutionalism is "more just"[49] than other forms of constitutionalism, but my aim is simply to show that a "dialogic" approach to constitutionalism represents a better "baseline"[50] – from the perspective of a poetical liberalism – than systems that lean closer to either judicial or legislative supremacy. In the end, despite its resonance with Canadian constitutionalism, poetical liberalism demands that institutional actors are prepared to exceptionally set aside fidelity to even optimal baselines in the name of a concern for "the other" (and the dignity of the other) that such baselines can only partially reflect. This is the point of poetical liberalism, at root: to keep institutional actors asking, in the name of their system's basic promise of human dignity, whether the violence of conventional baselines and practices remains worth it, i.e. remains the "lesser violence"[51] on the table.

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[48] On the general structure of "dialogic" models of constitutional review, see Mark Tushnet, *Dialogic Judicial Review*, or Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*. For an account of the Canadian model, more specifically, see Peter Hogg and Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights isn't Such a Bad Thing After All).*

[49] My use of this phrase will become clear in the wake of my analysis of Derrida in chapter five. See Jacques Derrida, *Force of Law: The Mystical Foundation of Authority* – at 691-693.

[50] I take this phrase from Cass Sunstein's paper, *Lochner's Legacy* (again, see chapter five of this thesis).

[51] See, for example, William Sokoloff, *Between Justice and Legality: Derrida on Decision* – at 346.

Conclusion: The "Basket of Deplorables"

Now admittedly, it is an ex post facto rationalization that has led me to connect the analyses just described – i.e. the analyses that will be presented over the five chapters of this thesis – with liberalism's recent decline, but one can hardly miss the common theme that links these analyses with many of the academic and journalistic "diagnoses"[52] that appeared, for example, in the wake of Trump's election, or after the Brexit vote in the UK. To somewhat oversimplify, the common theme at issue here is the idea that liberalism turns on an ambitiously steep promise, and then dismisses too many voices so as to present that promise as having been fulfilled (or at the very least, as a promise that *can* be fulfilled). As noted already, John Rawls (and others working under his influence) does this by retreating to hypothetical or imaginary ground (appealing for legitimacy to ideal rather than real persons) when more cherished, liberal policy preferences are challenged, thereby allowing Rawls to explain, very calmly, 1) that his opponents are "irrational"[53] and perhaps even "mad"[54] (he *really* says that, in *Political Liberalism*), and 2) that they can accordingly be "contained"[55] without any implication of their having been illiberally coerced. Is this not also precisely what Hilary Clinton sought to do – or what she was doing, in effect – with her "basket of deplorables" comment, albeit in a less sophisticated way?

I think so. Of course, this doesn't mean that Clinton is wrong. Perhaps many Trump voters are, quite simply, "deplorable" – racist, sexist, etc. But one may still ask: is there not a tension between the language that liberals like Clinton and Rawls use – i.e. the inclusive language of human dignity, and tolerance – at the same time that they disparage particular groups of voters as "deplorable," "irrational," or "mad?" This thesis claims that there is indeed such a tension, and it accordingly asks: what does it mean to remain faithful to the promise of liberal language when it seems to require the denunciation of "deplorable" views – i.e. intolerance – on the one hand, and a posture of discursive tolerance, on the other, a posture that prohibits the dismissal of opinions that are sincere and considered, even if they challenge liberal orthodoxy by prioritizing some claims over others (e.g. by prioritizing demands for freedom of speech over demands for "political correctness").

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[52] Aside from the Joan C. Williams piece already mentioned, see Nick Cohen's response to Trump's rise, in *The Guardian*: https://www.theguardian.com/commentisfree/2016/sep/24/only-liberalism-can-thwart-demagogues.
[53] See JOHN RAWLS, POLITICAL LIBERALISM – at 126 and 144, respectively.
[54] Ibid.
[55] See the original "Introduction" to Rawls's POLITICAL LIBERALISM – at xvii ("the problem is to *contain*… [*unreasonable* moral impulses]… so that they do not undermine the unity and justice of society").

Like I said, maybe the answer to this question is that liberalism promises too much, or makes the wrong promise. Indeed, perhaps we would be better off if we abandoned liberalism (as I present it), and embrace a more comprehensive, controversial theory of justice – one that, for example, would be capable of denouncing Trump voters as "deplorables" without inconsistency. This thesis accepts that such a move *may* be necessary, but it does not consider *whether* it is necessary, because it prefers to ask the immanently critical question of what liberalism must become (or of how liberal practice must transform itself) if it is to rise to the challenge posed by its alleged inconsistency. In the end, my answer to this question may be politically unattractive, but the point, as I noted earlier, is not to answer the sociological question of what liberalism must become to win votes, and to change its dwindling, political fortunes. No: my question, and my only question, is what liberalism must be to remain worthy of its own promise, and in the first chapter of the thesis – to which we can proceed now – I will defend an answer to the question of how that promise should be framed.

CHAPTER ONE

The Promise of Liberalism: Human Dignity as a Legal/Public Value

Introductory Quote:

"Europe no longer see its legal foundation in a collectivist macro-subject, which started its life as a mythical monster called Leviathan. [On the contrary]… in Europe that monster has been tamed, for the time being, and duly pushed off its throne and replaced by the idea of human dignity as the foundation of law. Human dignity is no less mysterious as the foundation of law than sovereignty, probably more so. But whatever is required to understand that mystery, it does not require idolatrous submission to a Leviathan that conceives of itself as an earthly god, an earthly god that not only claims to provide the ultimate horizon of meaning and defines for its citizens the limits of who they are… [but]… also claims to have the coercive power to draft into service its citizens to kill the enemies that it defines and… to sacrifice their lives."

Mattias Kumm, Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review

Introduction

As I have suggested already, the aim of this thesis is to offer an immanent critique of modern liberalism, by which I mean a critique that 1) accepts the normative foundations or promises of modern liberalism as it finds them, and 2) seeks out any gaps or disconnects between liberalism's systematization – whether as theory or practice – and its foundations. To this end, my first task will be to construct an outline of liberalism's orienting promise, and I will attempt to do this now, over the course of the present chapter, by arguing that the fundamental promise in which modern, liberal states (and theories) are anchored is the basically Kantian promise that state power will not be deployed (or withheld, although I say this tentatively, since it prematurely opens up a whole other kettle of fish) in ways that are offensive to *human dignity*, i.e. in ways that "use" individuals to further ends contrary to their own.

From the outset, one may object strongly to this statement. For example, one may ask: why, given that many people in liberal societies favor commitments to national security or increasing GDP (or whatever) over a commitment to human dignity, should human dignity be counted as the fundamental value of the modern, liberal state? This objection is especially poignant today, with rising tides of right-wing populism in the US and Europe (especially but certainly not only in Hungary, Poland and Austria) placing the "dignitarian"[1] credentials of many regimes – and the dignitarian commitments of many voters in liberal societies – in question. To ask again, then, more bluntly, does dignity really look fundamental in a world of Donald Trumps and Marine le Pens? And does human dignity really look fundamental after seventeen million Britons voted to leave the European Union, not merely, as "some"[2] may wish to claim, because they disliked the idea of being dictated to by a non-British Parliament, but also and more typically because they disliked those who had been using EU free movement rights to settle peacefully in British communities?

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[1] My use of this term is indebted to Bruce Ackerman, *Dignity is a Constitutional Principle* – available here: http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?_r=0.

[2] I am thinking here, in particular, of Boris Johnson, the UK Foreign Secretary at time of writing. In the lead up to the UK's EU membership referendum, Johnson campaigned aggressively for the official "Vote Leave" campaign, which made the reduction of EU immigration the central plank of its "Brexit" manifesto. Immediately after the referendum, with the British people having voted to leave the European Union, Johnson wrote an article for the *Daily Telegraph* newspaper, claiming that what people "really" cared about was returning full, legal sovereignty to the UK Parliament, not lowering immigration, which he now implied would not actually happen (although he framed the issue from the opposite side, promising that British people would still have full legal rights "to work… live… and to settle down" in other EU countries). See here for Johnson's article: http://www.telegraph.co.uk/news/2016/06/26/i-cannot-stress-too-much-that-britain-is-part-of-europe--and-alw/. And for a brief, journalistic analysis of the challenge facing "dignitarians" today, see this piece by Nick Cohen: https://www.theguardian.com/commentisfree/2016/sep/24/only-liberalism-can-thwart-demagogues.

This is point one: that even if individual dignity was once a candidate for the foremost value of the West's public culture, it is becoming harder and harder to see its influence in light of today's increasingly drastic, political shifts to the right. A second point, by contrast, is that most of the states that identify as liberal are guilty, in practice, of shirking their commitments to human dignity on a regular basis. One example of this is surely the embrace of detention without trial after 9/11 (especially at Guantanamo), as well as the recent emergency measures put in place by the French government after the Paris and Nice attacks. Another example, more arguably, is the emphasis on fiscal "austerity"[3] as a response to the economic crisis in Europe, with public services that benefit poor, disadvantaged citizens being defunded drastically in the name of "shared"[4] sacrifice. In both cases: the question is whether the sacrificial character of such practices renders a state's commitment to human dignity a sham. Can we really be "for" dignity if we (and more specifically, our elected representatives) routinely engage in practices that disrespect or deny it?

In his great treatise, *The Common Law*, Oliver Wendell Holmes Jr. (an American legal theorist and Supreme Court Justice) answered this question in the negative, suggesting that violations of human dignity, i.e. government "uses" of human life, are an insurmountable part of political reality. To be more specific, Holmes felt that the plurality of needs that exists in even the richest society would often leave governments with no choice but to sacrifice the interests of some citizens (and perhaps even the most basic interests of some citizens) in order to maximize the net wellbeing of society, as a whole. In his words:

> "No society has ever admitted that it could not sacrifice individual welfare… [to safeguard]… its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will and his welfare to that of the rest."[5]

[3] Numerous studies have been done on the modern phenomenon of economic austerity, but for a concise introduction, see Brian Nail, *Austerity and the Language of Sacrifice*, available here: https://criticalreligion.org/2013/10/15/austerity-and-the-language-of-sacrifice/.

[4] In the UK, former Prime Minister David Cameron received criticism for defending austerity with the claim that "We're all in this together." Naturally, many people found a hollow ring in Cameron's statement, given that vulnerable citizens who rely on public services inevitably bear the brunt of cuts to those services. For Cameron's original speech, see here: https://www.theguardian.com/politics/2009/oct/08/david-cameron-speech-in-full.

[5] OLIVER WENDELL HOLMES JR., THE COMMON LAW – at 41.

As the reader may notice, there are descriptive *and* prescriptive points lurking in this passage. On the one hand, at a descriptive level, Holmes is noting that emphases on the dignity of the individual are a poor fit with the way that governments have conducted themselves throughout history. On the other hand, at a prescriptive level, he is noting that a bar on sacrificing the individual, i.e. a Kantian bar on "using"[6] the individual as a means to ends other than his/her own, would be impossible to comply with, since many of the essentials of a dignified human life, like the maintenance of national security or the development of infrastructure (Holmes's two examples), are achievable only by "using" certain individuals or groups in ways contrary to their wishes. In this sense, one may wonder whether a commitment to dignity will not inevitably end up being hollow in one of two ways. If it means that government should refrain from "using" citizens against their will, then it becomes hollow because impossible to fulfill; and if it means that government should "use" citizens only in the name of "maximizing" dignity across society, then it becomes an empty truism, something like, "government should act so as to make people's lives better."

Whether one agrees with Holmes or not, there are clearly plausible reasons for at least wondering whether human dignity is or should be the fundamental value of modern liberalism, and it is therefore necessary to clarify 1) what I mean when I make this claim, and 2) why my version of the claim avoids the various objections mentioned above. To this end, my pitch is as follows. When I say that human dignity is now the core value of modern, Western liberalism, I do not mean that it is actually accepted by all or even most Western citizens (it often isn't), that Western governments are faithful to it in practice (they often aren't), or that it is necessarily the best value on which to found a society (I can hardly substantiate such a claim). On the contrary, what I mean – and indeed, *all I mean* – is that human dignity is the fundamental value of Western *law*, which is to say that it appears prominently in the basic texts of Western law, including national constitutions and transnational charters of individual rights. The question, of course, is why the law is a measure of public culture. Does law really tell us anything about culture, and about the public sentiments that bind or divide a community?

[6] In his article, *Civilizing Darwin: Holmes on Criminal Law*, Gerald Leonard is very explicit in pitting Holmes against the rationalist, individualistic moralities of the Enlightenment, especially those of Kant and Hegel (as was Holmes himself, for example, in the second chapter of *The Common Law*). The difference, as David Dyzenhaus frames it, is that for Holmes "the realm of the normative is exhausted by the values of order and stability," with no room for queries about what is independently "right" beyond social consequences. See David Dyzenhaus, *Holmes and Carl Schmitt: An Unlikely Pair?* – at 179.

In the first section of this chapter, I will offer a brief but hopefully adequate answer to this question, an answer that focuses on the role of law as a surrogate or substitute for a coherent public culture (a function that is often seen as essential in modern, pluralistic societies). From here, I then move, in the second section, to substantiate my claim that human dignity appears at the center of Western law. Although the centrality of human dignity in international law may seem to put this claim beyond dispute, it is worth noting that the strength of my claim – i.e. that human dignity permeates/orients Western law as a whole, not simply a few, particular legal systems – makes it necessary to offer a more detailed analysis of its role, looking not only at dignity's position in international human rights law, but also at its less obvious (or less explicit) role in countries like Canada and the United States.

This will take us up to the final and most important section of the chapter, which asks what human dignity has come to mean, and how it can come to function, in Western/Westernized legal systems. Of course, it is impossible to provide a comprehensive review, in a single chapter, of how human dignity has been interpreted from state to state, and I will therefore limit myself to consideration of just one, influential approach: namely, the "object formula"[7] that has been constructed from the jurisprudence of the German Constitutional Court, and that is perceptible in the linguistic/interpretive choices of judges in Canada and South Africa (as well as Justice Brennan of the US Supreme Court, *inter alia*). Although there is no consensus on the relevance of the object formula throughout the West, my sense is that this is more a matter of semantic than theoretical disagreement. Indeed, as will become clear, the object formula can be reconstructed as a symbolic expression of a thought that one finds consistently at work in liberal theory more generally, from the "protoliberalism"[8] of Hobbes's *Leviathan*, to the "political liberalism"[9] of John Rawls: namely, the thought that governance is only legitimate if it is conceivable as consent-worthy, from the point of view of the governed.

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[7] I will define the object formula in the third section of the chapter, but the key point to flag for now is that it is essentially derived from Kantian morality, which turns on the guiding principle that one should always treat another person as an end in him/herself, and never merely as a means to ones own, personal ends. See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS. And for a definitive introduction to Kant's morality, see JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY – especially at 143-216.

[8] See THOMAS HOBBES, LEVIATHAN. I borrow the term "protoliberalism" (as applied to Hobbes) from Frank Michelman's paper, *The Subject of Liberalism* (at 1812), although I note that there is disagreement over whether Hobbes should be classed as a liberal at all. See, for example, RONALD DWORKIN, LAW'S EMPIRE – at 441 ("Why should Hobbes be counted a liberal?").

[9] This will be the subject of the next chapter. See JOHN RAWLS, POLITICAL LIBERALISM, and, for a concise introduction, see Martha Nussbaum, *Rawls's Political Liberalism: A Reassessment*.

I. Law as a Substitute for a Public Culture?

So: why does the *legal* importance of human dignity in the Western/Westernized world make it a feasible candidate for the fundamental value of that world? To answer this question, we can look briefly below at the work of John Rawls – a liberal philosopher (perhaps *the* liberal philosopher of the last fifty years) to whom I will give more attention in the next chapter. For now, suffice it to pick up on only one aspect of Rawls's work, namely, its "constructivist"[10] approach to moral and political theory, which was apparent since the early 1950s (and indeed, since Rawls's first academic paper, "Outline for a Decision Procedure in Ethics"[11]). In essence, Rawls's constructivism stems from a very simple observation, which is perhaps best expressed in the following quote from a 1973 article:

> "I suggest that for the time being we put aside the idea of constructing a correct theory of right and wrong, that is, a systematic account of what we regard as objective moral truths. Since the history of moral philosophy shows that the notion of moral truth is problematical, we can suspend consideration of it… [or "bracket the problem," as Rawls says a little further on]… until we have a deeper understanding of moral conceptions."[12]

In Rawls's later work (discussed in chapter two), this "problematical" quality of moral truth is more clearly framed as a matter of the "reasonable disagreement"[13] that persists in modern, liberal societies over the content of morality. To explain: if one accepts that moral disagreements in liberal societies are both reasonable and persistent (as many scholars now do), then the question arises whether such societies can become and remain stable. More specifically, the question is how people can be convinced to obey the law (surely a "necessary" condition of social stability, as Rawls notes), given that 1) the law will inevitably embody some particular, moral standard, and 2) not everyone will agree with this standard, since they disagree, reasonably, over morality in general.

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[10] For an introduction to the idea of constructivism, see John Rawls, *Kantian Constructivism in Moral Theory*, as well as chapter three of RAWLS, POLITICAL LIBERALISM, which focuses on the idea of *political* constructivism, specifically.

[11] Rawls's paper is available in JOHN RAWLS, COLLECTED PAPERS – at 1-19.

[12] John Rawls, *The Independence of Moral Theory* – at 288.

[13] Rawls talks about "the fact of reasonable pluralism," or "reasonable disagreement," frequently in JOHN RAWLS, POLITICAL LIBERALISM. For example: "political liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines… [i.e. moral belief systems]… including both religious and nonreligious doctrines" (at xxiv).

This is where Rawls's idea of reflective equilibrium comes into play. To put it simply, reflective equilibrium seeks to overcome the instability of liberal societies through a strategy of avoidance, a strategy that asks us to refrain from invocations of moral truth in politics (since they will ultimately divide us), and confine ourselves instead to non-comprehensive but plausibly "shared" conceptions of morality that can (and to some extent, already do) link us together. One way of explaining the difference here is as a shift from moral philosophy to moral sociology (or "moral theory,"[14] as Rawls calls it), a shift from asking what everyone *should* believe, as a matter of right morality, to asking what everyone really *does* believe, as a matter of political reality. How, though, can we determine what we really do believe, when the problem is precisely that we believe different things? Here is Rawls's proposal:

> "We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent political conception of justice. These convictions are provisional fixed points that it seems any reasonable conception must account for. We start, then, *by looking to the public culture itself*… [my emphasis]… as the shared fund of implicitly recognized basic ideas and principles. We hope to formulate these ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must accord with our considered convictions… in what I have called elsewhere reflective equilibrium."[15]

We begin, then, by seeking out provisional points of moral agreement, truths our community *already* seems to "hold… self-evident"[16] – to the point where calling them into question publicly will lead routinely to vilification or, at least, dismissal. The wrongness of slavery (as mentioned by Rawls) is a telling example of this. To be sure, there will be and are people in liberal societies who would privately love to see slavery made legal again, but one can hardly deny that a public expression of these beliefs (e.g. in front of one's national Parliament, or at some other level of government) would be social and political suicide (although of course, small, closed off communities can exist within liberal societies in which nationally unacceptable beliefs are accepted and even celebrated).

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[14] Once again, see John Rawls, *The Independence of Moral Theory*.
[15] JOHN RAWLS, POLITICAL LIBERALISM – at 8.
[16] Reference to the American Declaration of Independence (1776): available at http://www.archives.gov/exhibits/charters/declaration_transcript.html. I'll explain the significance of this phrase a few pages further on with reference to Hannah Arendt's work on the American Revolution.

On the one hand, then, the emphasis here is on what we share, but, on the other hand, since the measure of what we share is public discourse, it is less a matter of what we *really* share – in our hearts and minds – than of what we "appear"[17] to share, and of how we present ourselves to one another in the public arena. We will look more at this distinction and its importance in a moment, but first, let us move to consider how Rawls treats these "appearances" in his pursuit of "reflective equilibrium."

To go rather quickly, then: once a stock of apparently accepted public truths has been collected, reflective equilibrium requires us to regard these truths as symptoms of a "public culture"[18] – a shared but thin conception of political morality, or justice – that we rather optimistically presume to exist beneath the thick waves of dissensus that are characteristic of modern, Western societies. From here, we can then set about reconstructing our public culture by proposing moral/political principles that fit with and explain our stock of public truths. Since it is unlikely that we will find principles that will perfectly explain all of the truths that we have amassed, both principles and truths will have to be "pruned and adjusted"[19] so they hang together. So for example, if we end up with principles that fit all but two or three of our accepted public truths, we can either accept that those truths are not as "truthy"[20] as we thought, and discard them, or we can accept that our proposed principles are not quite right, and adjust them accordingly. Whichever of these paths we choose, the idea, as noted already, is that we select a theory of justice not because of its truth – which is unverifiable and anyway controversial – but because it fits well with what we already accept, collectively.

For the moment, I am not interested in whether this adequately resolves problems of moral/political disagreement in liberal societies (see chapter two), but only in the idea of a public culture that it relies on. Put simply, then: a public culture is for Rawls a "shared fund of implicitly recognized" values that undergirds a political community, and that can be reconstructed by looking first to that which *appears* in the public realm. What does it mean, though, for something to "appear" in the public realm?

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[17] As will soon become clear, my emphasis on the word "appear" here is a nod to the work of the great political theorist Hannah Arendt, which draws on the phenomenological tradition – a tradition that runs from Edmund Husserl through to the likes of Martin Heidegger, Maurice Merleau-Ponty, and Jacques Derrida, *inter alia* – in asking not how things *are*, i.e. as a matter of "objective" reality, but how things appear, and how they come to be constituted, precisely, *as things* in one's field of consciousness. For an introduction to this idea, see here: http://plato.stanford.edu/entries/phenomenology/.

[18] See JOHN RAWLS, POLITICAL LIBERALISM – at 13 (and elsewhere).

[19] See JOHN RAWLS, A THEORY OF JUSTICE – at 18.

[20] I hope that the reader will forgive the pop culture reference here to Stephen Colbert's political satire on *The Colbert Report*. Colbert frequently used the phrase "truthiness" when parodying the many loud-mouthed, over-zealous conservatives working in American politics.

Rawls's answer to this question is somewhat implicit, but one finds an explicit version in the work of another great, twentieth century philosopher, Hannah Arendt. Without going into too much detail on Arendt's work, we can look briefly to a remark that she made in her renowned book, *On Revolution* – a remark that finds her moving "very close to"[21] her one time teacher, Martin Heidegger, and his "heightened regard for linguistic disclosure"[22] as an essential condition for an object's appearance. As Arendt writes:

> "[Since]… political thought can only follow the articulations of the political phenomena themselves, it remains bound to what appears in the domain of human affairs; and these appearances, in contradistinction to physical matters, need speech and articulation, that is, something which transcends mere physical visibility as well as sheer audibility, in order to be manifest at all."[23]

For Arendt, then (as for Rawls), political phenomena only come to the fore through discursive interactions "in the domain of human affairs."[24] To explain: while few would disagree that parliamentary declarations – and in particular, laws – are a political phenomenon, Arendt takes this thought a step further by defining such declarations as *the* political phenomenon, i.e. as fully constitutive of a political or public culture. In one sense, this is the worst aspect of Arendt's work, since it potentially conceals social conflict beneath a shimmering "political theatre."[25] However, in another sense, defining politics in this way can be seen as an "indispensable"[26] move in societies that are divided over the source and nature of morality (as Rawls thought liberal societies would inevitably be). This was why, for example, Arendt praised Thomas Jefferson for opening the American Declaration of Independence with the words "we *hold* these truths to be self-evident" as opposed to "these truths are self-evident" – because it shows a "dim"[27] awareness on Jefferson's part that social cohesion has to be *declared*, in the name of a community and a truth that is not yet present, as such.

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[21] Johan van der Walt, *Law and the Space of Appearance in Arendt's Thought* – at 66.
[22] Ibid.
[23] HANNAH ARENDT, ON REVOLUTION – at 19. I take this reference from Johan van der Walt, *Law and the Space of Appearance in Arendt's Thought* (cited already above).
[24] As far as I am concerned, this can be loosely taken to mean something like "in the public realm, traditionally understood as the space in which citizens deliberate over how to structure their being-together."
[25] Once again, see Johan van der Walt, *Law and the Space of Appearance in Arendt's Thought* – at 73. Van der Walt is particularly critical of the way that this aspect of Arendt's work brings her to dismiss the relevance of poverty, and socio-economic deprivation, as properly political concerns. In this regard, see also Emilios Christodoulidis, *De-Politicising Poverty: Arendt in South Africa*.
[26] Again, see Van der Walt, *Law and the Space of Appearance in Arendt's Thought* – at 80.
[27] HANNAH ARENDT, ON REVOLUTION – at 193.

To be sure, from the moment that such a declaration enters the world, and the "light"[28] of the public realm, it slips back into darkness again, as each member of the community interprets it in terms of their own, private experiences (and beliefs). However, and crucially, the declaration *itself* – the signifier, in linguistic terms – remains in the light, and, for as long as it remains in the light, and holds sway, it at least narrows the range of issues on which citizens can disagree, converting political debates from debates over morality as such to debates over the interpretation of an already given morality, a morality that has been declaratively substituted for what used to be God's law, or the law of a divinely entitled monarch. As Frank Michelman has noted, this is perhaps the core function of modern, liberal constitutionalism: namely, to convert pervasive, moral disagreements in free societies into narrower, interpretive disagreements over how to read and apply a shared language. In turn, as Michelman suggests in a recent article, such interpretive disagreement may be narrowed further where we bind ourselves not only to the language of the law, but also to the interpretations of that language that are issued by "trusted" institutions (like well-functioning, popular Supreme Courts). To quote Michelman:

> "A… [legal norm]… cannot be a self-applying rule… [and its]… correct applications to testing cases can no more be certain or self-certifying – can no more be proof against the ravages of disagreement – than all-out justice itself. It…[therefore] seems self-evident that no such liberally-satisfactory standard can possibly be framed with both sufficient breadth to serve as a widely acceptable clause in a public contract on legitimacy and, at the same, sufficient closure to fend off good faith interpretative controversy at the point of application: not "freedom of expression," not "arbitrary arrest," and no, not even torture…
>
> This is where… [a Supreme or Constitutional Court]… can come to the rescue… a dedicated institutional service whose considered judgments regarding such questions… [are]… in fact widely trusted to fall within the bounds of honest, discursive defensibility – not, of course, infallibly but with a frequency sufficient to qualify those judgments as publicly authoritative."[29]

[28] This reference is again to Johan van der Walt's piece on Hannah Arendt, which uses the terms "light" and "darkness" or "light" and "shade" as metaphors for "the public" and "the private," respectively (as does Arendt, e.g. in THE HUMAN CONDITION – at 71, and elsewhere).

[29] Frank Michelman, *Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests* – at 195-196. For an exegesis of the "constructivist" thrust of Michelman's work, as illustrated by this passage, *inter alia*, see Johan van der Walt's paper in the same volume, *Delegitimation by Constitution? Liberal Democratic Experimentalism and the Question of Socio-economic Rights* – especially at 310-319.

Michelman calls these two turns – the turn to constitutionalism, on the one hand, and the turn to constitutional/judicial review, on the other – the "two proceduralizations"[30] of liberal law. Perhaps obviously, what underlies and impels these two proceduralizations is a "Hobbesian"[31] belief that we have "good reasons"[32] for wishing to avoid social disunity, and for binding our own hands – i.e. limiting our own freedom – so as to bind ourselves together, and attain for ourselves the "very great goods of government by law,"[33] e.g. "social pacification, cooperation, coordination, and justice."[34] In *Leviathan*, Hobbes suggests that the only way to attain these goods is by giving ourselves up to a brutal sovereignty, with the motivating alternative being a "natural" life that is "solitary, poor, nasty, brutish and short."[35] Michelman, of course (along with Rawls and Arendt), goes in a different direction, but the underlying belief – that life will be better if it is "always under law,"[36] lived as if the law were "self-evident" – remains key (although I note that living as if the law is self-evident doesn't mean passivity before the law, but rather a commitment to the use of legal means of effectuating legal change, at least "most of the time"[37]).

With that said, my point here is simple. When I say that the values of the law should be taken as the values of a public culture, I mean that law, in a modern society, provides a much needed substitute for a public culture, and that citizens have "good reasons," as Michelman puts it, for making the securement and maintenance of a public culture one of their priorities – the principal reason being that a shared, public culture, even if imperfect and contestable, brings with it a range of core, social goods ("social pacification, cooperation,"[38] etc.). To be sure, our legal system may be so lacking in moral value (or may be so "wicked"[39]) that acceptance and compliance just isn't worth it, but I assume with Michelman that this will only be the case where the basic values of the system are *themselves* morally bankrupt, so that the system provides no resources for its own improvement.

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[30] Again, see Frank Michelman, *Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests* – at 194-197.
[31] Elsewhere, Michelman follows Rawls in referring to this belief as "Hobbes' thesis." See Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 346.
[32] Ibid at 345.
[33] Ibid at 358.
[34] Ibid at 352.
[35] Quote from THOMAS HOBBES, LEVIATHAN – at Chapter XIII, *Of the Natural Condition of Mankind as Concerning their Felicity and Misery*.
[36] Reference to Frank Michelman, *Always Under Law*.
[37] Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 347.
[38] Ibid at 352.
[39] See DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY (a critique of adjudication in apartheid era South Africa).

II. Human Dignity as a Fundamental Legal and Public Value

With these clarifications in mind, our next step is surely to ask how and where human dignity has now "appeared" in the legal discourse of Western/Westernized states. Although human dignity is a very old and even ancient idea, its current status as a legal value can be traced, quite readily, to the end of WWII, with the atrocities of the war functioning as the "big bang"[40] moment in the evolution of what Catherine Dupre calls our current "age of dignity."[41] As the well-worn story goes: after WWII, states from around the world came together, momentarily, with a fervent resolve to ensure that the crimes of fascism could never reoccur. Most famously, this resolve was expressed in the texts of the UN Charter (1945) and the Universal Declaration of Human Rights (1948), both of which acknowledge the "primacy of human dignity"[42] as a way of symbolically surmounting the horror of the then recent past. The key clauses on this front are:

* The Preamble of the UN Charter, which proclaims a collective determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person… [and] in the equal rights of men and women of nations large and small."[43]
* The Preamble of the Universal Declaration, which states that, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[44]
* Article 1 of the Universal Declaration: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[45]

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[40] Perhaps obviously, the idea of a "big bang" moment in the legal recognition of human dignity is something of an oversell. However, while the appearance of human dignity can be traced to and perceived in numerous moments throughout modern history, the very particular way in which it appears today in legal texts owes much to the post-WWII, international experience, as I will try to show over the course of this section. See, for example, Lorraine Weinrib, *Human Dignity as a Rights-Protecting Principle*.
[41] See CATHERINE DUPRE, THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE.
[42] See Henk Botha, *Human Dignity in Comparative Perspective* – at 171 (footnote 1).
[43] Full text available here: http://www.un.org/en/documents/charter/.
[44] Full text available here: http://www.un.org/en/documents/udhr/. For a comprehensive account of the framing of the UDHR, the reader may wish to consult either MARY ANN GLENDON, A WORLD MADE NEW – which focuses on the role played by Eleanor Roosevelt in the framing of the UDHR – or Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*. For an account of the general development of human rights law in the wake of WWII, see Michael Ignatieff's *Tanner Lectures on Human Values* – available at http://tannerlectures.utah.edu/_documents/a-to-z/i/Ignatieff_01.pdf.
[45] Full text available here: http://www.un.org/en/documents/udhr/.

The symbolic thrust of all three of these quotes is of course abundantly clear, and is captured aptly in the famous phrase, *never again*. Put simply, the idea is that human beings should never again be subordinated to (and "used"[46] in the service of) collective projects so far removed from (and indeed, antithetical to) their own wellbeing. For this reason, both documents – the UN Charter and the UDHR – affirm the absolute priority of the individual, each and every individual, over state and community. This means that from the perspective of the UN Charter and the UDHR, state and community projects are legitimate if and only if they display minimal levels of "concern, respect, and consideration"[47] for the singular human lives affected by them. In Christopher McCrudden's terms: "recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa."[48]

As a point of contrast here, consider Holmes again: "If a man is on a plank in the deep sea which will only float one, and a stranger lays holds of it, he will thrust him off if he can. When the state finds itself in a similar position, it… [*legitimately*]… does the same thing."[49] I have already suggested that this Holmesian position is neither unreasonable nor unpopular, but there can be little doubt, I think, that the UN Charter and the UDHR represent an intentional shift beyond Holmes's logic, i.e. a refusal to simply accept it as inescapable. In the years that followed, the influence of these texts – and their anti-sacrificial logic – spread, in essence, along two paths. To quote Aharon Barak:

> "The first was the international path. Human dignity… was expressed in international declarations and conventions that recognized it – whether as a value or as a right – as part of the bill of human rights. The second was the national path. Human dignity was recognized in the constitutions of various states. These constitutions recognized human dignity – whether as a value or as a right – as part of the constitutional bill of rights."[50]

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[46] This word will accrue added significance when we discuss the object formula, or the *objektfomel*, to use the original German, later in the chapter.
[47] I borrow this phrase from the Canadian Supreme Court, which, in turn, seems to have lifted it (and then amended it slightly, by adding the word "consideration") from the work of Ronald Dworkin. For the classic expression of this idea, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY – e.g. at 7.
[48] See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* – at 679.
[49] OLIVER WENDELL HOLMES JR., THE COMMON LAW – at 42. I add and emphasize the word "legitimately" here to highlight a component of Holmes's position which, although clear in other aspects of his work, is not really captured by this quote.
[50] AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT – at 35.

Since this thesis is concerned with national politics/law, I will mention Barak's "international path" only briefly. To keep things simple, then, we can loosely divide the key developments along the international path into two categories: 1) UN covenants drafted after the UDHR, and 2) regional or continental conventions and charters. With regard to the first category, the key examples are surely the two UN covenants of 1966 – 1) the International Covenant on Civil and Political Rights (the ICCPR), and 2) the International Covenant on Economic, Social and Cultural Rights (the ICESCR) – both of which "refer to the content"[51] of the UDHR, specifically by quoting and thus reaffirming its claim that the recognition of human dignity stands as "the foundation of freedom, justice and peace in the world."[52] This same message, on the necessity of recognizing and protecting human dignity, is also expressly conveyed by a whole host of other, more specific UN conventions: from the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and the 1989 Convention on the Rights of the Child, all of which reaffirm the status of human dignity as an orienting value of international law.

This brings us to the second category, regional/continental charters. Since this chapter (and, indeed, this whole thesis) is concerned with the legal/public culture that, according to my argument, exists today across the West, we can safely limit ourselves here to referencing a few key Western (and more narrowly, European) examples of regional conventions: namely, the European Convention on Human Rights of 1950 (or the ECHR, for short) and the EU Charter of Fundamental Rights. With regard to human dignity, the latter example is the most strikingly relevant, declaring grandly as it does that:

* "The… [European]… Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity"[53] and that;
* "Human dignity is inviolable. It must be respected and protected."[54]

[51] Ibid at 39. To avoid repetition, I note upfront that much of the information on this page about human dignity's role in international law is taken from AHARON BARAK, HUMAN DIGNITY – at 37-49.
[52] Again, see the Preamble of the UDHR, available at http://www.un.org/en/documents/udhr/.
[53] See the Preamble of the Charter of Fundamental Rights of the European Union, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN.
[54] See Article 1 of the Charter of Fundamental Rights of the European Union (Ibid). Note in particular the very striking similarity between this provision and Article 1(1) of the German Basic Law (discussed a few pages further on).

The ECHR, on the other hand, did "not include any express mention of human dignity"[55] until the enactment of the 13th Protocol in 2002, and even then, it was only referenced in the limited context of the death penalty. However, taken on its own, this fact is misleading, for two reasons. The first is that the European Court of Human Rights (or the ECtHR) has repeatedly invoked the value of human dignity, both in its interpretation of specific Convention rights – especially but not exclusively Articles 2, 3 and 8 – and as one of the fundamental values underlying the Convention as a whole. As the Court wrote in *Pretty v. UK* (echoing *SW v. UK*, and a plethora of other cases): "The very essence of the Convention is respect for human dignity and human freedom."[56]

The second reason is more general, and is captured by Jürgen Habermas's suggestion that "the appeal to human rights… [always]… feeds off the outrage of the humiliated at the violation of their human dignity."[57] Put differently (and to quote Habermas again), one may say that "historical conditions… [and especially the traumatic events of WWII]… have merely made us aware of something that was inscribed in human rights implicitly from the outset – the normative substance of the equal dignity of every human being that human rights only spell out."[58] The point here is that even if the concept of human dignity *was* absent from the text of the ECHR, and the jurisprudence of the ECtHR, it would nonetheless still be an integral part of both, since every single right listed in the Convention seeks to protect a particular aspect of human dignity, a particular interest that the drafters viewed as essential to a dignified, human life.

We will discuss this – the "nexus" between human rights and human dignity – a little later. First, though, let us move on to look at what Barak called the "national path" along which the influence of human dignity has developed. This takes us back again to WWII, and more specifically to the swiftly enacted, "postwar constitutions of Germany, Italy, and Japan… the successor regimes of the countries that caused and participated directly"[59] in the atrocities of the war. From the perspective of this project, the key provision to emerge from these texts is surely Article 1 of the German *Grundgesetz* (1949) – a provision that, more than any other, sought to bury the depravity of the nation's recent past. It reads as follows:

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[55] AHARON BARAK, HUMAN DIGNITY – at 44.
[56] *Pretty v. United Kingdom* (2346/02) 2002 ECHR 423. See also *SW v. United Kingdom* (20166/92) 1995 ECHR 52.
[57] Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights* – at 466.
[58] Ibid at.467.
[59] Ibid at 465.

"1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."[60]

In the years since its enactment, this provision has had an absolutely tremendous influence on the trajectory of national constitutionalism throughout the Western/Westernized world. Indeed, as Luis Roberto Barroso has suggested, "it is… [now]… generally recognized that the rise of human dignity as a legal concept owes its origins most directly to German constitutional law,"[61] coupled, of course, with the influence of transnational human rights instruments like the UDHR. Barroso's observation is backed up in spades by the fact that no less than one hundred and sixty[62] other countries – Western, Westernized and non-Western – now have constitutions that refer to and in many cases prioritize human dignity. To be sure, the vast majority of these constitutions have arisen as a result of specific crises and social movements at a national/regional level, which is to say that they bear no direct causal link to the crises of the postwar period, or the German *Grundgesetz*. However, despite this lack of direct causality, the German text has clearly influenced the linguistic choices made by subsequent generations of constitution-makers – often to the point where constitution-makers have more or less directly imported the language of the German Article 1 into their own national law. For example:

* Article 2(1) of the 1975 post-dictatorship Greek Constitution states that: "Respect and protection of the value of the human being are the primary obligations of the state."[63]
* Article 7 of the 1999 Swiss Constitution states simply that: "Human dignity is to be respected and protected."[64]

[60] See the Basic Law of the Federal Republic of Germany, available at: https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.
[61] Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in Transnational Discourse* – at 337.
[62] See Doron Shultziner and Guy Carmi, *Human Dignity in National Constitutions* – at 2.
[63] Full text available here: http://www.hri.org/docs/syntagma/.
[64] Full text available here: https://www.admin.ch/opc/en/classified-compilation/19995395/201405180000/101.pdf.

* Article 51 of the 2014 Egyptian Constitution states that: "Dignity is a right for every person that may not be infringed upon. The state shall respect, guarantee and protect it."[65]
* Article 1 of the Charter of Fundamental Rights of the European Union, as noted previously, requires that human dignity be "respected and protected."[66] Granted, this is not an example within the context of strictly national constitutionalism, but I mention it here 1) because it copy-pastes the language of the German *Grundgesetz*, and 2) because the EU Charter is now, since Lisbon Treaty, enforceable in the national courts of EU Member States (although its scope is significantly narrower than either national constitutional law or the ECHR).

Several of these examples – namely, Greece and Egypt – represent a regional "wave"[67] of constitutionalism or constitutional change, but the German model has also been influential in more limited, local contexts. In this regard, the most famous example is probably South Africa's post-apartheid constitution (1996), in which human dignity takes centre stage. As in Germany, the South African text emphasizes the need for each person's "inherent"[68] dignity to be "respected and protected,"[69] but with one, notable difference: namely, that the South African Constitution's dignity clause (Section 10) lacks the German text's apparently qualifying emphasis on "state authority" as the addressee of its message, i.e. as bearer of the duty to "respect and protect" dignity. Far from being an accident, this difference likely represents the South African text's unprecedented level of commitment to the *real realization* of human dignity, which becomes especially clear in its Section 8(2) insistence on the legal and legally binding duty of "natural and juristic persons"[70] (as well as the organs of the state) to comply with the Bill of Rights where "applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[71]

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[65] Full text available at: http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav_odredbe.php?id=218.
[66] Full text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN.
[67] There have been a number of such "waves" over the course of the twentieth century (e.g. Southern Europe in the 1970s, South America in the 80s, and Eastern Europe in the 90s), many of which are unreferenced here because they resulted in commitments to human dignity that deviated from the language of the German text. For example, human dignity appears in many of the constitutions (and constitutional amendments) that emerged in Eastern Europe after the fall of the Berlin Wall, but, as far as I can tell, none of these texts copy the German model, semantically speaking, although the resulting jurisprudence may have been influenced by the German judiciary. See CATHERINE DUPRE, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY.
[68] The Constitution of the Republic of South Africa (Section 10), available at: http://www.gov.za/documents/constitution-republic-south-africa-1996.
[69] Ibid.
[70] Ibid at Section 8(2).
[71] Ibid.

We will return in chapter five to the question of whether and how a Bill of Rights can bind "natural or juristic persons," but for now, let us look instead to one other, important similarity between the references to human dignity in the South African and German Constitutions. Put simply, what both documents (and many of the other constitutions enacted since WWII) share is that they use human dignity as a way of juxtaposing the state's new settlement to the shame and trauma of its past. In this sense, and as I noted vis-à-vis the UN Charter and the UDHR, human dignity often functions as a cry of "never again" – a cry that is less about evoking some distinct, political philosophy, i.e. a philosophy of dignity, and more about commemorating a traumatic situation or "event" that a renewed state defines itself against. In South Africa, as we will see (again, in chapter five), this has led the Constitutional Court to pay particular attention to economic deprivation caused by apartheid, and in Germany, it led the Constitutional Court to exhibit a glaringly overzealous commitment to fetal life – to the point of *requiring* the criminalization of abortion – in its *Erste Abtreibung* (or First Abortion) decision of 1975 (a commitment that the Court *explicitly* derived from Germany's "historical experience"[72] with National Socialism).

One way of explaining this function of human dignity is via the work of Alain Badiou, a French philosopher who describes ethics as a matter of maintaining "fidelity"[73] to an "event."[74] At its most basic, Badiou's claim is that a dominant ideology – a dominant interpretation of a social "situation"[75] – will always conceal something, some excess of "truth" that can be unearthed only by the chance of an unprecedented event. In love, this event would be the spark of a first encounter, and in science, it would be the liberating "eureka"[76] moment when a new reality first presents itself. In each case, the point is that the "event" rips through the fabric of my everyday experience, and challenges me to live an alternative existence that affirms the event and its truth – i.e. that aspect of reality, or of "the Real"[77] as Badiou might even say, that was previously concealed.

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[72] BVerfG 1, 39 (1975) at 66. The South African decision that I have in mind is *The Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC), discussed in chapter five.
[73] For a concise introduction to Badiou's thought, see ALAIN BADIOU, PHILOSOPHY AND THE EVENT. And, for a much more comprehensive account, see ALAIN BADIOU, BEING AND EVENT.
[74] Ibid.
[75] This is Badiou's term, which is well explained in Slavoj Zizek, *Psychoanalysis and Post-Marxism: The Case of Alain Badiou*, available here: http://www.lacan.com/zizek-badiou.htm.
[76] See Daniel Bensaid, *Alain Badiou and the Miracle of the Event*, available at: https://www.marxists.org/archive/bensaid/2004/xx/badiou.htm.
[77] Badiou is heavily influenced by the French psychoanalyst Jacques Lacan, and occasionally invokes Lacanian ideas like the idea of "the Real" as an extra-symbolic realm, a space of impossible experience unmediated by language. See JACQUES LACAN, ECRITS. And, for one of Badiou's invocations of "the Real," see this lecture at the Art Centre College of Design in Los Angeles: https://www.youtube.com/watch?v=os2L-ssWaX0.

Using this framework, one may see Germany's actions during the Second World War as an archetypical example of such an event. To explain: we begin in what Badiou calls a *situation*, with a sleepy belief that whatever else democratic states are capable of, they are at least not capable of *that*, i.e. the systematic, machine-like destruction of human life. We then move to an event, the Holocaust, that jolts us awake, presenting us with a new reality, or truth: namely, that democratic states are very much capable of *that*, of "using" and abusing human lives in the way a child uses a toy, as a disposable object.

Having undergone this jolt, Badiou would then present us with a choice. Either we can affirm this new truth, and work in its shadow, or we can go back to business as usual, writing off the "truth" of the event as an exception, or a blip. In essence, the legal protection of human dignity represents our resolve to take the former path, although various moments in our history since WWII have surely found us lapsing into the latter. For example, as I noted at the start of the chapter, one can argue cogently that we are now experiencing such a lapse, with vast swathes of Western citizens rejecting postwar liberalism, and linking new "events" – the rise of Islamic terrorism, for example, or the global economic crisis – to a new truth, the truth of liberalism's insecurity, or hypocrisy, or whatever. Are these events really of the moral magnitude of Nazism, though? Or has time simply diluted the moral magnitude of Nazism and, in turn, the symbolic force of our commitment to human dignity?

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For the sake of brevity, I will let this question linger, and note simply that states like Germany and South Africa represent the thick end of the wedge when it comes to legal and constitutional invocations of human dignity. By contrast, some of the most prominent liberal states in the world – including Canada, the UK, and the US – have gone in a different direction, eschewing references to human dignity in their respective Bills of Rights (perhaps due to their spatial or emotional distance from the kinds of traumatic experience that influenced constitution-makers in countries like Germany, South Africa, etc.). This raises the question: if some of the largest, Western states have rejected human dignity as a constitutional value, what sense is left in my claim that dignity is now the basic, legal/public value of Western liberalism?

There are several responses that we can give to this question. For a start, we can note that all of the Western/Westernized states that lack references to human dignity in their national constitutions are signatories to transnational human rights conventions that *do* reference human dignity. For example, although there are twelve European states that eschew dignity as a constitutional value/right, every single one is a member of the Council of Europe, rendering them subject to the jurisdiction of the ECtHR, which, as we have seen, recognizes human dignity as a fundamental value underlying the European Convention on Human Rights. In addition, all of these states are members of the UN, and seven of them are members of the European Union, which places them – via Article 2 of the EU Charter – under an additional duty to "respect and protect" human dignity in their implementation of EU law (although the precise contours of that duty remain legally ill-defined).

This is the first point. The second point, on the other hand, shifts our focus from the transnational human rights commitments of Western states to the activity of their Supreme or Constitutional Courts. In this regard, the simple fact of the matter is that Supreme and Constitutional Courts in modern, Western states have been frequently willing to read human dignity into their national law where it lacks textual anchorage. For example, although the Canadian Charter of Rights and Freedoms (1982) makes no reference to human dignity, the Supreme Court of Canada has nonetheless invoked it incessantly as one of the Charter's most fundamental values. Arthur Chaskalson, the former President of the Constitutional Court of South Africa, makes reference to this phenomenon when he remarks that:

> "[In]… Canada, where the Constitution contains no reference to dignity, the Canadian Supreme Court has… [nonetheless] said that the genesis of the rights and freedoms in the Canadian Charter includes "respect for the inherent dignity of the human person," [in *R v. Oakes*]… and that "the idea of dignity finds expression in almost every right and freedom guaranteed by the [Canadian] Charter" [in *R v. Morgentaler*]…"[78]

[78] See Arthur Chaskalson's Bram Fischer Lecture, *Human Dignity as a Foundational Value of our Constitutional Order* – at 198. Citations for the two Canadian cases mentioned here are as follows: *R v. Oakes* (1986) 1 SCR 103 (at 64), and *R v. Morgentaler* (1988) 1 SCR 30 (at 166). It is also worth noting that the Supreme Court of Canada has relied directly on the concept of human dignity in its interpretation of particular provisions of the Charter of Rights and Freedoms. The most famous example of this is probably its Section 15 jurisprudence on equality, running from *Law v. Canada* (1999) 1 SCR 497 to *R v. Kapp* (2008) 2 SCR 483 via *Gosselin v. Quebec* (2002) 4 SCR 429. For a summary of how the concept of human dignity was used in *Law v. Canada*, see AHARON BARAK, HUMAN DIGNITY – at 218.

The same is true of the US Supreme Court, although the situation there is more complicated. The complication, to be precise, is that many of the judges who have served on the US Supreme Court have been strenuously opposed 1) to recognizing the constitutional status of concepts lacking a clear basis in the text of the US Constitution, 2) to judicial invocations of abstract moral concepts like human dignity, concepts that lack a clear or agreed-upon meaning, and 3) to taking instruction or inspiration from foreign law, much of which, as suggested, regards the protection of human dignity as the "raison d'etre"[79] of the modern, liberal state. However, despite these three points of resistance, there have been a number of USSC Justices who have pled a very passionate case for the status of human dignity as a loudly implied, fundamental value of US constitutional law, with Justices William Brennan and Anthony Kennedy serving as some of the best known, most recent examples. With regard to the former, Frank Michelman once remarked that "the inestimable value of the ever-redeemable dignity of the individual" lay right "at the core of Brennan's constitutional jurisprudence,"[80] as evidenced by the following passage from his oft-cited, 1972 decision on the death penalty. To quote:

> "Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the *dignity of the individual is the supreme value*… [my emphasis]… can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States… the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic… [and revolutionary] movements of the eighteenth century."[81]

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[79] Johan van der Walt makes this claim in his book, TANGIBLE MAIS INTOUCHABLE, LA LOI DU TACT, LA LOI DE LA LOI – at 115.

[80] See FRANK MICHELMAN, BRENNAN AND DEMOCRACY – at 40. And, further on in the same text: "Brennan's special greatness as a judge – judicial greatness, in his case… so much consisted in the fight he fought so ably to make the law look out for the dignity and intrinsic worth of every person" (at 144).

[81] *Furman v. Georgia* (1972) 408 US 238 (at 296). A mere four years later, Brennan would write (partially quoting his own concurrence from *Furman v. Georgia*) that: "The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded… [rather than as]… human being[s] possessed of common human dignity." See *Gregg v. Georgia* (1976) 428 US 153 (at 230).

The last sentence of Brennan's judgment already directs us towards a crucial point, which we will pick up on in a moment. First, though, a few words on the other US Supreme Court Justice mentioned above, Anthony Kennedy. As is well known, Justice Kennedy has carved out a reputation as the swing vote on the presently active Roberts Court, which means that, unlike Brennan, whose invocations of dignity often came in dissent, Kennedy quite often has the honour of seeing his opinions transformed into binding law. The result of this is that, when Kennedy wrote – in his recent majority opinion on the (un)constitutionality of bans on gay marriage – that the US Constitution protects those "personal choices… [that are]… central to individual dignity and autonomy,"[82] it is quite plausible to say that he is tacking an amendment onto the US Constitution to that effect, assuming that we are willing to treat constitutional jurisprudence as tantamount to a constitutional amendment.

This raises an important question, though. The question is: if there isn't even moderate consensus among US judges over the constitutional status of human dignity, then can we really regard human dignity as a legitimate and even fundamental value in American legal/public culture? In this regard, the US is very different from Canada, where even the conservative judges sitting on Supreme Court have had no trouble agreeing that human dignity is a fundamental, constitutional value, despite its absence from the Constitution itself. By contrast, I can think of far more members of the USSC who have either explicitly or effectively rejected human dignity as a constitutional value, and this should leave us hesitant, surely, to enlarge its importance as an aspect of US law.

I wonder, then: despite my best efforts to suggest otherwise, is the US – as Kai Moller has suggested – "an outlier,"[83] a lone wolf against the grain of a now "global model of constitutional rights"[84] that references and typically prioritizes human dignity? Before accepting this conclusion, I have one more argument to offer, which brings us back to Justice Brennan's claim that "beliefs in the… dignity of the common man were born of the democratic movements of the eighteenth century."[85]

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[82] See *Obergefell v. Hodges* – not published at time of writing, but a draft is available at: https://www.law.cornell.edu/supct/pdf/14-556.pdf. *Obergefell*, though, is only a recent example of a line that Justice Kennedy has been taking for many years now. See also his opinions in *Lawrence v. Texas* (2003) 539 US 558 and *United States v. Windsor* (2013) 133 S. Ct. 2675 – both of which involve the protection of LGBT rights under the US Constitution.

[83] See KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS – at 17-20 (suggesting that the US may buck many of the global trends in contemporary constitutional rights law, especially but not only trends towards rights inflation and the constitutional protection of socio-economic rights).

[84] Ibid.

[85] See again, Justice Brennan's opinion in *Furman v. Georgia* (1972) 408 US 238 (at 296).

Jürgen Habermas makes a similar observation when he writes that the prioritization of human dignity was already "a legacy of the constitutional revolutions of the eighteenth century."[86] The point, in Habermas's case, is that although human dignity was rarely referenced in law until after WWII, its effective function in the postwar period was merely to re-package an approach to law and government that was already on display in the great, liberal texts that came out of the American and French Revolutions. In this regard, it is appropriate that Catherine Dupre's new book, *The Age of Dignity*, dedicates a full, early chapter to the French Declaration, but the "dignitarian" thrust of the American Declaration of Independence (1776) and the original US Bill of Rights (1789) is equally clear, with the former's promise that "all men" are equally entitled to the enjoyment of "life, liberty and the pursuit of happiness,"[87] and the latter's insistence that no person shall be "deprived… of life, liberty, or property, without due process of law" (under the Fifth Amendment), and that no "cruel and unusual punishments"[88] will be inflicted (under the Eighth Amendment).

In the next section, I will say more on the "content" of human dignity as a legal concept, but for now, suffice it to say that the above provisions and promises converge in the idea that individuals should not have their core interests – for example, their interest in avoiding serious pain (as per the Eighth Amendment), or their interest in seeking happiness *in their own way* (as per the Fifth Amendment, and the Declaration of Independence) – sacrificed by government, and in the correlative (although perhaps more fundamental) idea that individuals should not be treated, by government, in ways to which they have not consented or *could not conceivably consent*. On this point, it is notable that Jennifer Nedelsky has tied the founding of the American Republic to a basic concern that governance be at all times based on "consent"[89] – a concern that quickly fragments into opposing commitments to "individual rights" (legal bars on forms of treatment that no "rational" person could/would consent to), and majoritarian voting (a capacity to actually register one's consent to government, at least by electing one's political representatives).

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[86] Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights* – at 479. I should also note that this same point – or something very much like it – was made by Eleanor Roosevelt in her role as one of the framers of the UDHR. As Mary Ann Glendon has written, Roosevelt felt that human dignity is the thing that justifies and anchors the protection of human rights: the thing that explains "why human beings have rights to begin with." See MARY ANN GLENDON, A WORLD MADE NEW.

[87] The American Declaration of Independence (1776), available here: https://www.archives.gov/founding-docs/declaration-transcript.

[88] The American Bill of Rights (1789), available here: https://www.archives.gov/founding-docs/bill-of-rights-transcript.

[89] See JENNIFER NEDELSKY, PRIVATE PROPERTY AND AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY – especially at 4-5.

Although it is surely unclear thus far, I will argue in the next section that this emphasis on "consent-worthy" treatment – and the schism that opens up between the consent of the vulnerable and the consent of masses – is also at the heart of modern-day, constitutional commitments to human dignity, which is to say that while human dignity doesn't appear in the US Constitution, it is nonetheless there, as its motivating, moral ideal. If this is true, though, why have so many American judges hesitated to affirm human dignity as a constitutional value? For the most part, the answer is simply that they have embraced a "textualist"[90] or "originalist"[91] conception of their institutional role, which bars them from the use of language that is missing from the Constitution. If these judges looked deeper – if they allowed themselves to look deeper – I'm sure they would find a great deal of resonance between what we now call human dignity, and the language of their own Constitution. But I leave to one side, for now, the question of whether they *should* look deeper, as Supreme Court Justices acting within a system of divided governmental power.

III. The Meaning of Human Dignity: A Minimum Core Content?

Setting the US experience to one side, then, we can now go on to ask: from the perspective of the legal and public culture just described, what *is* human dignity, i.e. what does it actually mean? This is really quite a formidable question, since human dignity – like any other abstract, moral concept – has a very rich, diverse history. For example, human dignity is every bit as central to the teachings of Judaism, Christianity and Islam[92] as it was to the philosophy of the European Enlightenment[93] and "the civil rights movement in the United States."[94] Naturally enough, then, different aspects of this diverse history – by which I mean different religious and philosophical traditions – have influenced the modern day turn to human dignity, a fact which leads Christopher McCrudden to note that although the vast majority of states now recognize that "human dignity… [is morally]… central,"[95] they rarely if ever agree on "why or how"[96] this is so.

[90] See, in particular, ANTONIN SCALIA, A MATTER OF INTERPRETATION.
[91] See ROBERT BORK, THE TEMPTING OF AMERICA – especially at 143-265.
[92] See AHARON BARAK, HUMAN DIGNITY – at 18-23.
[93] Ibid at 25-28. As is well known, the most notable European Enlightenment theorist to rely on the idea of human dignity was the great German thinker, Immanuel Kant. We will talk about Kant a little further on when we discuss the object formula, or *objektformel*, in German law.
[94] See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* – at 663.
[95] Ibid at 678.
[96] Ibid.

Despite this disagreement, McCrudden suggests that one can discern a "minimum core content"[97] of human dignity, a common meaning that transcends the many different implications that it carries as a legal concept in different countries. For McCrudden, this minimum core comprises three, simple ideas: 1) the idea that "every human being possesses an intrinsic worth, merely by being human,"[98] 2) the idea that "this intrinsic worth should be recognized and respected by others… [and that]… some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth,"[99] and 3) the idea that "recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual… and not vice versa."[100]

The message here is simple, then: human beings are special; they accordingly deserve special treatment; and the primary duty of the state is to ensure that they receive such treatment. The first thing that may strike the reader about this definition is that it is very thin, substantively. To be sure, it is not an empty formulation, since it already directs us toward certain "anti-utilitarian and anti-authoritarian"[101] elements that are essential to the idea of human dignity. But it certainly leaves a lot of questions unanswered. For example, what is so special about human beings? What kind of treatment are they entitled to? And who should decide when they have been given what they are entitled to?

McCrudden evades these questions deliberately. He does so because he is seeking a definition of human dignity that could lead to a level of "transnational consensus on the importance of dignity"[102] – that would be minimal enough to generate agreement amongst the many states committed to the protection of human dignity, despite the diversity of religious and philosophical traditions from which their various commitments have grown. For the purposes of the present project, though, we need not limit ourselves to such an extremely thin formulation, because we are looking at human dignity from an exclusively Western viewpoint, as opposed to the more ambitious "global" perspective sought by McCrudden. We can therefore feel free to pursue a slightly "thicker" formulation, as I now will.

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[97] This has become something of a buzzword in the context of contemporary constitutional theory, especially in the context of socio-economic rights. See for example, Katharine Young, *The Minimum Core of Social and Economic Rights: A Concept in Search of Content*.
[98] Ibid at 679.
[99] Ibid.
[100] Ibid.
[101] See Roberto Luis Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in Transnational Discourse* – at 363.
[102] Henk Botha, *Human Dignity in Comparative Perspective* – at 171. McCrudden talks about his aim here as a matter of finding a concept of dignity that could command a transnational overlapping consensus – a term borrowed from Rawls. See McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* – at 679.

Insofar as Article 1(1) of the German *Grundgesetz* has played a key role in the spread of human dignity as a constitutional concept, it will make sense, I suppose, to begin by looking at how it has been developed and interpreted by the German judiciary, and, more specifically, by the German Constitutional Court (or the *Bundesverfassungsgericht*, in German). As it turns out, the German Court's favoured definition of human dignity has itself been tremendously influential, gaining endorsements from judges on the South African Constitutional Court and the Supreme Court of Canada, *inter alia*. In constitutional theory, this definition is typically referred to as "the object formula,"[103] a phrase coined by the Gunter Dürig in his 1956 paper, *Der Grundrechtssatz von der Menschenwurde*. "Human dignity as such," in Dürig's often-quoted words:

> "is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Violations of dignity involve]… the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled."[104]

To begin teasing out the more precise connotations of this definition, let us look at some of the Constitutional Court's statements on the matter. For example, in its *Life Imprisonment* decision (1977), the Court wrote that a criminal "may not be turned into a mere object of… [the state's]… fight against crime under violation of his constitutionally protected right to social worth and respect,"[105] and that it "would be inconsistent with human dignity… if the state were to claim the right to forcefully strip a person of his freedom without… [his]… having at least the possibility to ever regain freedom."[106] Thirty years later, the Court took a similar tack in its *Aviation Security* decision (2006), which concerned the constitutionality of a law authorizing the German military to shoot down a hijacked passenger plane so as to prevent an even larger scale terror attack. In a remarkable and densely philosophical judgment, the Court held that the statutory authorization of such an act is inconsistent with the constitutionally protected dignity of the plane's passengers. To quote:

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[103] A concise description of the object formula is provided by Henk Botha in his paper, *Human Dignity in Comparative Perspective* (at 183-186). For a more comprehensive analysis of human dignity's role in the jurisprudence of the German Constitutional Court, see Christoph Enders, *A Right to Have Rights – the German Constitutional Concept of Human Dignity*, or DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY – especially at 298-313.
[104] Translation taken from Henk Botha, *Human Dignity in Comparative Perspective* – at 183.
[105] BVerfGE 45, 187 (1977). Translation here: http://www.hrcr.org/safrica/dignity/45bverfge187.html.
[106] Ibid.

> "Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By… [using]… their killing . . . as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake."[107]

As Jurgen Habermas suggests: "The echo of Kant's categorical imperative is unmistakable in these words of the Court."[108] This is most obvious in the Court's concern with the way that the plane's passengers would, in such a situation, be used "as a means to save others"[109] – "sacrificed in the name of the community's integrity."[110] This last quote is a little misleading, though. To explain: in actuality, the plane's passengers would not merely be used, in such a situation, for the sake of some abstract sense of "the community's integrity," but rather for the sake of actively safeguarding the lives and dignity of civilians on the ground, the would-be victims of a seemingly immanent terrorist attack. With this point in mind, the *Aviation Security* case becomes less a matter of individual dignity versus communal integrity, and more a matter of pitting the state's Article 1(1) duty to "respect" human dignity – to refrain from violating human dignity – against its Article 1(1) duty to "protect" human dignity, i.e. to prevent non-state violations of dignity where possible. In this respect, the truly Kantian element of the Court's decision is not merely that it refuses to accept the reductive use of individuals by the German government, but that it appears to comprehend morality more in terms of the integrity of one's own (and in the context of constitutional law, the state's own) actions than in terms of the consequences that one may bring about.

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[107] The quote here is from an English translation of the *Aviation Security* decision, available at http://humanities.princeton.edu/files/AviationCase.pdf.
[108] Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights* – at 465.
[109] Although Kant's formula is surely famous enough that it need not be quoted, I nonetheless include it here for the sake of thoroughness. The relevant version (the second of three renowned formulations) reads: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS – available at http://www.pitt.edu/~mthompso/readings/GroundworkI.pdf.
[110] Quote from Christoph Enders, *A Right to Have Rights – the German Constitutional Concept of Human Dignity* – at 261.

This Kantian element – this tendency to privilege the negative duty to respect dignity over the positive duty to protect it – is a recurrent theme in Western constitutional law, for several reasons. One reason, for example, is that without a preference of this kind, human dignity would cease to mean anything at all, since it would constantly be engaged, and would constantly require conflicting courses of state action, as I have just shown with the *Aviation Security* decision. Another reason, conversely, is linked to the widely recognized difficulties with penalizing omissions (both in constitutional law and in other areas), since a person or state's capacity for action will often be resource-limited, or otherwise difficult, thereby making it unfair to place failures to act on the same plain of liability as deliberate acts – acts that involve, traditionally speaking, a positive mobilization of one's will.

I will return to this problem in chapter five, but for now, we should keep moving, and look at two other Supreme/Constitutional Courts that have relied on the object formula: namely, the Constitutional Court of South Africa, and the Supreme Court of Canada. Despite its relative youth, the South African Constitutional Court has already said a lot about the value of (and indeed, the right to) human dignity that appears in the country's post-apartheid Constitution (1996), but one of its most interesting comments remains one of its first, in a decision – *Makwanyane* – that abolished the death penalty under the authority of the country's Interim Constitution (1993). In a long, considered opinion, Chaskalson P wrote that:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three… [of the Interim Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby."[111]

[111] See *S v. Makwanyane* 1995 3 SA 391 (CC) – at para 144. *Makwanyane* is littered with such invocations of the object formula. For example, one of the other judges who issued an opinion in the case wrote that "[the death penalty]… dehumanises the person and objectifies him or her as a tool for crime control" (at para 316), and that the death penalty "instrumentalises the offender for the objectives of State policy" (at para 313).

Six years after its *Makwanyane* decision, the Constitutional Court took a similar approach in *S v. Dodo*. Like *Makwanyane*, *Dodo* was about the constitutional limits of criminal punishment, but this time in the context of laws making life sentences mandatory for particular crimes. Once again, then, the Court was called on to consider whether an openly sacrificial approach to the criminal law could be sustained in light of the country's new Constitution, and it concluded, in the spirit of its *Makwanyane* judgment, that "the imposition of a disproportionately severe sentence… would amount to treating the offender as a means to an end,"[112] and would be to:

> "ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities… [as Kant famously wrote]… to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."[113]

With both of these decisions – *Makwanyane* and *Dodo* – we find the same, Kantian logic that was embraced by the German Constitutional Court in its *Aviation Security* decision. Where the death penalty and mandatory minimums are used as a means of crime prevention, and not simply as retribution, the aim is quite clearly to safeguard the lives and dignity of individual members of the community, i.e. prospective victims of criminal behavior. However, this aim – the aim of actively protecting human dignity under threat from non-state actors – is subordinated, for reasons already mentioned, *inter alia*, to the state's negative duty to refrain from acting in ways that violate or degrade human dignity. In other words: according to the object formula, where the state must choose between treating someone as an object, and passively allowing objectifying treatment, the balance should be tilted in favor of the latter, although an application of the proportionality test that is now an essentially "global"[114] feature of constitutional and human rights law may obviously tilt it back the other way. Of course, this is a far cry from Kant's theory of punishment, substantively, but the structure is the same, with the focus being on how to avoid engaging in objectifying treatment, rather than on how to lower the level of objectifying treatment that exists in one's society.

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[112] This quote is from Henk Botha, not from the Court. See Botha, *Human Dignity in Comparative Perspective* – at 202. I should also note (so as to give credit where credit is due) that the reference to *S v. Dodo* on this page comes from Botha's article as well.

[113] *S v. Dodo* (2001) 3 SA 382 (CC) – at paragraph 38.

[114] See KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS – at 2-15 (suggesting that the proportionality test is a broadly "global" feature of modern constitutionalism).

With that said, we come now to the Supreme Court of Canada, and to a case that can help us shed a little more light on a question that we have so far neglected: namely, the question of what it actually means to treat someone as an object, from the perspective of the object formula. The case in question – 1988's *R v. Morgentaler* – concerned the constitutionality of a regulatory framework under the Canadian Criminal Code that left many women in Canada with no safe way of obtaining an abortion. For now, we need not go into any detail about this regulatory framework, or, indeed, the Court's decision, but can limit ourselves to the role played by human dignity in the concurring opinion of Justice Wilson. In condemning the restrictive regulatory framework, Justice Wilson wrote that each pregnant woman seeking an abortion in Canada at the time:

> "[Was] truly being treated as a means – a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture new life. Can there be anything that comports less with human dignity and self-respect?"[115]

The crucial phrase here is "passive recipient." To explain: an inanimate object – a hammer, or a textbook – is a passive recipient because it lacks the capacity for autonomous action, or choice, i.e. the capacity to break out of the natural cycle of cause and effect (I drop the hammer, the hammer falls). By contrast, an important part of modern, Western culture is that it conceives of human beings as *active recipients* – as autonomous subjects capable of not simply reacting to the world, organically, but of choosing how to react, and, more importantly, how to live. Of course, this isn't an unimpeachable interpretation of the human condition (see Freud, or modern neuroscience, *inter alia*), but it is nonetheless part of our Western self-image, with objectifying treatment being condemned, accordingly, as a denial of human nature: a denial of our status as autonomous subjects.

Autonomy, then, is a fundamental aspect of the object formula, as it was for Kant, an aspect that we recognize and prioritize when we protect human dignity as a constitutional value. At the risk of simplifying, we think that our "cultural nature" as autonomous subjects warrants recognition, and that such recognition requires leaving as much room as possible for us to act, "naturally," as self-directing subjects. As Wilson continues:

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[115] *R v. Morgentaler* (1988) 1 SCR 30 (at 173). I will discuss the Morgentaler case in more detail in chapter five. See also Richard Mailey, *Political Liberalism and Civil Disobedience: The Morgentaler Affair, Revisited*.

> "The… [compliant, dignity-respecting]… state will respect choices made by individuals and, to the greatest extent possible will avoid subordinating these choices to any one conception of the good life… Thus, an aspect of the respect for human dignity *on which the Charter is founded*… [my emphasis]… is the right to make fundamental personal decisions without interference from the state."[116]

Reading this we could be forgiven for thinking that human dignity is nearly fully synonymous with personal autonomy. Indeed, one prominent constitutional theorist, Kai Moller, has suggested that personal autonomy is *the* fundamental value of modern constitutional and human rights law, to the point where all references to other values (like dignity, equality, etc.) can be readily reframed in terms of autonomy. It is worth taking a closer look at Moller's argument on this point, since it takes us deeper into the question of what the object formula is all about. As a constructive foil, Moller pits his position against the following passage from Cecile Fabre's book, *Social Rights Under the Constitution*:

> "[We]… do not only give a wheelchair to the disabled, we also relieve their physical pain, even when doing so does not increase their autonomy. But there are other examples. Think about hunger. What we find unbearable when we watch images from Somalia, Ethiopia, from any country devastated by famine is not only the fact that these people are unable to be autonomous agents – in fact it is not generally the first thing we think of. Rather, it is the realization that they suffer horribly. Relieving hunger is also a matter of relieving suffering. Equally, we do not want to give shelter or housing to homeless people only because without a home they cannot enjoy freedom and privacy and are therefore seriously restricted in the plans they can make for their lives, but also because they suffer from cold and exhaustion."[117]

Moller disagrees with this argument. He begins his response by noting that, "almost everyone, when pain kicks in, immediately makes it her project – often her primary project – to get rid of the pain."[118] It therefore follows for Moller that "by relieving her pain, we assist… [the sufferer]… in succeeding in her project; and therefore, we have assisted her in living an autonomous life."[119]

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[116] Ibid at 166.
[117] CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE – at 20 (quoted in KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS – at 112-113).
[118] Again, see KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS – at 113.
[119] Ibid.

I don't disagree with this claim, as such, and I would even add to it by noting that pain relief not only assists the sufferer in their immediate project of stopping the pain, but also in the pursuit of their many other, richer projects that are put on hold by the experience of pain. However, I wonder, is Moller not missing one of the key subtleties of Fabre's argument here? To explain: Fabre is not actually suggesting that pain relief does not promote autonomy, as Moller seems to think. On the contrary, Fabre's point is surely that the promotion of autonomy is not the first or main thing that we think of when we see somebody in pain. Is this not a fair point? After all, it seems a little strange to imagine seeing somebody in pain and thinking, honestly and instinctively, "What an awful loss of autonomy!"

Moller, though, denies that there would be anything strange about this. To support his position, he invokes the figure of the "masochist,"[120] a person who has freely chosen to pursue pain and whose pain we tend to accept. To an extent, Moller is surely right about this: the fact that pain is autonomously chosen does dampen our impulse to prevent it, since it changes the way that we view the pain, at least with regard to the particular sufferer who apparently takes pleasure in it. However, this is not always the way that we think about autonomously chosen pain, or, to introduce a new term into the mix, degradation. For example, liberals often accept (or at least sympathize with) the criminalization of prostitution, despite the fact that this limits the sexual and economic autonomy of both prostitutes and prospective customers.[121] In a similar vein, restrictions on dwarf-throwing contests in France[122] and peep shows in Germany[123] have been ruled constitutional, despite the fact that they limit not only the autonomy of dwarves and vulnerable women, but also their ability to make money, and to enjoy the massive sphere of personal autonomy and "capability"[124] that is unlocked by a decent wage. These examples show us that, in jurisdictions that prioritize human dignity, "the appearance of consent is not necessarily determinative."[125] To be sure, dignity has a lot to do with consent or autonomy, but there seems to be something else at stake as well, an aspect of dignity that is not captured by the idea of autonomy.

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[120] Ibid at 114.
[121] See for example the South African Constitutional Court case of *Jordan v. The State* 2002 (6) SA 642 (CC): "The very character of the work that… [prostitutes]… undertake devalues the respect that the Constitution regards as inherent in the human body" (at para 74). This example is taken (as with others on this page) from McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* – at 706.
[122] See Conseil d'Etat, 27 Oct. 1995 – req. Nos 136-720 (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Aix-en-Provence).
[123] See 64, 274 BverfGE (1981).
[124] This is a reference to Martha Nussbaum, *Capabilities and Human Rights* (discussed further in a footnote on the next page).
[125] Quote from the Canadian Supreme Court in *R v. Butler* (1992) 1 SCR 452.

At this point, it may seem like we have Moller beaten, but he has one more trick up his sleeve: namely, to expand (or dilute, depending on one's perspective) his definition of autonomy. In this regard, Moller begins with the no doubt uncontroversial observation that real autonomy interests across a community will often clash (or, we might add, will often be skewed by the tendency of vulnerable groups to "adapt"[126] to and accept levels of abuse that an outsider would find abhorrent), which is to say that respect for the real autonomy of citizens will often leave us at an impasse (or morally dissatisfied, in the case of victim adaptation). The question, then, is how we decide which autonomy interests should prevail in the event of a clash, or when a lack of political will on the part of a vulnerable social group (e.g. women) or a vulnerable citizen (e.g. a woman in an abusive relationship) should be dismissed, so that intervention can taken up on their behalf.

In response, Moller turns to the work of Mattias Kumm, which is in turn heavily influenced by the work of John Rawls (discussed more extensively in the next chapter). At the risk of oversimplification, Rawls's solution to the above problems (*inter alia*) is a variation on a strategy that can be traced back to early liberals like Immanuel Kant, and that emphasizes the legitimating role of "rational autonomy," or "hypothetical" autonomy, as opposed to the real autonomy of real people. As Kant frames it in *Theory and Practice*, this strategy involves taking the hypothetical potential for consent as:

> "the test of rightfulness of every public law. For if the law is such that a whole people could not possibly agree to it (for example, if it stated that a certain class of subjects must be privileged the ruling class), it is unjust; but if it is at least possible that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse to consent to it if it were consulted."[127]

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[126] In her article, *Capabilities and Human Rights*, Martha Nussbaum refers to this phenomenon as the problem of "adaptive preferences," citing the way that women in developing countries – and more precisely, in countries with low standards vis-à-vis gender equality – often report low levels of social frustration, despite the fact that they lack the capacity to go to school, take up employment, etc. Nussbaum's solution to this problem is that we focus less on what people want (or say they want), and more on what they are capable of achieving, regardless of their actual (or at least, *reported*) desire. In effect, this is Nussbaum's version of what I will typically call a shift to "hypothetical" autonomy, which deals with adaptive preferences by shifting focus from what people really want to what an idealized person would want, i.e. one yet to have their expectations or desires lowered by a life of subordination. See also MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH.

[127] I take this quote from JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY – at 11 (quoting Immanuel Kant, *Theory and Practice*). As the next chapter will make clear, Rawls's approach is not exactly the same as Kant's approach, but it at least shares its emphasis on the need for some kind of *hypothetical* consent as a basic component of political legitimacy.

In his paper, "Always under Law," Frank Michelman frames this Kantian/Rawlsian project as a quest for "reasons of the governed,"[128] by which he means that the legitimacy of governmental action, from the perspective of this project, depends on its capacity to be justified in terms that affected parties – i.e. the governed – could plausibly accept. Moreover, Michelman suggests that this is perhaps the most basic, uncontroversial principle that lies at the heart of modern, liberal theory, and one may accordingly wonder, I suppose, whether human dignity, as the value that now appears at the heart of Western law, is simply an attractive way of packaging a very old ideal, the ideal of government not necessarily *by* the governed, but by *reasons* of the governed, by a logic that can be reasonably and sincerely attributed to the governed.

The problem, though, is that it will often be unclear when real consent should be taken as representative of meaningful consent, and when real consent should be "trumped" by a hypothetical construction of consent. Consider, in this regard, the example of prostitution. Why should the real consent of someone seeking to engage in prostitution be taken as inferior to the consent of a hypothetical, rational person, an ideal, "unencumbered"[129] person who apparently objects to (or at least, accepts the legitimacy of laws against) prostitution? One reason could be that prostitution is a profession in which there is a real potential for abuse, but why, then, does the government not strengthen the mechanisms for preventing and responding to abuse, as they do in other areas (labor law, landlord-tenant law, etc.), as opposed to criminalizing it, and limiting sexual autonomy? The answer, I think, is that the "hypothetical" person often becomes a vehicle for deep-seated moral beliefs that are not justifiable purely in terms of autonomy. To be sure, we value autonomy, but it is for most of us not *all* that we value, and Moller's expanded definition of autonomy offers a way of explaining other, perhaps more traditional or moralistic commitments as *aspects* of autonomy – aspects of autonomy that we would all accept in an ideal situation, but that corrupting forces and power imbalances in the real world have led some (e.g. prostitutes) to miss.[130]

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[128] See Frank Michelman, *Always under Law* – at 233-235.

[129] This is a reference to Michael Sandel, who has complained that contemporary liberal theories – most notably the liberalism of John Rawls in *A Theory of Justice* – are anchored in an unrealistic conception of the person, which he describes as an "unencumbered" conception, detached from the particular passions and beliefs and interests that one invariably encounters in real life. See Michael Sandel, *The Procedural Republic and the Unencumbered Self*. And, for a more comprehensive version of Sandel's critique, see his book, LIBERALISM AND THE LIMITS OF JUSTICE.

[130] This is also the logic at work in Martha Nussbaum's notion of "adaptive preferences," although in her case, the connection to autonomy is more genuine, because she is concerned with people whose field of choice is severely limited due to traditional, cultural or religious standards. See footnote 126 on the previous page.

How does this affect Moller's response to Fabre? Well, in essence, it means that while Moller's redefinition of autonomy as "hypothetical" may make sense of human dignity and the object formula, it does so only at the cost of fractiously problematizing human dignity, leaving a choice to be made in each case between a recognition of real consent, on the one hand, and an arguably moralistic imposition of hypothetical consent, on the other. The same is true, in this regard, when it comes to the conundrum of judicial review in liberal theory. Put simply, the question for Moller's liberal is when a commitment to real-time, majoritarian decision-making, and the real community's right to form its own identity or moral path, should be trumped by the opinion of a hypothetical or idealized community, a community that would *never* violate the core interests or basic "rights" of its membership (and that would *never again* descend to prior depths of depravity, whether those depths are a matter of national or international experience).

In chapter five, we will look carefully at how this difficulty opens up in practice, but we must look first, in chapters two through four, at how it can be treated in theory. More specifically, our question will be how someone who accepts the normative promise of liberal culture – i.e. the core value of human dignity (as defined via the object formula) – can respond to the schism that I have pointed to so briefly above. In other words: our question is what it means to honor human dignity when it seems to point in different directions and hence, in no direction at all.

In her book on US constitutionalism, Jennifer Nedelsky notes that James Madison, one of the most influential founders of the American Republic, was existentially and philosophically torn between commitments to individual rights (and more specifically, to the rights of the propertied class against wealth redistribution, "debtor relief,"[131] etc.) and the rights of the many to determine their own, common destiny. Today, few of us accept Madison's version of this dilemma, but we can surely sympathize with his sense that these commitments are co-original consequences of a liberal commitment to governance by consent. In the end, Madison's responses to this dilemma were context-dependent, but with a mild preference, according to Nedelsky, for individual rights (especially to property). The question is: assuming that we ditch Madison's focus on property, can we (and can liberalism) do better than his circumstantial balancing of conflicting interests?

[131] Once again, see JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY. Early in her book, Nedelsky notes that Madison's emphasis on the protection of property stems in large part from his umbrage at the "debtor relief" laws that were enacted by the individual states pre-federation.

Conclusion: The Paradox of Human Dignity

Having offered these rudimentary remarks on what I see as the key dilemma of a philosophy that opposes individual objectification – a philosophy that I find deeply embedded in the legal/public culture of Western liberalism – let us turn back, in conclusion, to remarks that I made in the second section of the chapter. As the reader may recall, I briefly noted in that section that human dignity often performs an additional and highly context-specific social function: namely, the function of directing legal, political and social actors to a negative event in their country's history, an event that their new, dignity-oriented regime is supposed to repel, like the matching poles of two magnets.

Although this is surely a worthy function in societies that are marked by moral trauma and retrospective shame, it is important to note, now, that it is also a function that potentially conflicts with the more "universal" or intentionally non-contingent connotations of human dignity as a resistance to objectification (leaving aside, for the moment, the schism that exists within this ideal). The reason for this is simple: because, as we will see more clearly in chapter four, *inter alia*, rigid state philosophies are in themselves forms of objectification, however much they try to repel a prior age of particularly traumatic or even deadly objectification. Of course, this does not mean that postwar Germany or post-apartheid South Africa are meaningfully "like" the regimes that they replaced, but it *does* mean that human dignity points beyond the rule of memory, or trauma, to what one might call a community of critique: a community that is capable not only of rejecting its past, but of coming to terms with the elements of objectification and abuse that will persist in (and maybe even stem from) the inversion of that past.

In this regard, the key example that springs to mind is the *Erste Abtreibung* decision issued by the German Constitutional Court, which not only hesitated to protect a woman's constitutional right to abortion (as a liberal court arguably should, at least where abortion is a hotly contested moral issue), but went so far as to demand criminal restrictions on abortion, citing the Constitution's commitment to human life and dignity, and reading those commitments in light of the country's "historical experience."[132] As Johan van der Walt has written, quite aptly, of this decision:

[132] BVerfG 1, 39 (1975) at 66. To quote a key passage from the judgment: "The Foundational law is founded on principles of state formation that can only be explained with reference to the historical experience and the spiritual and moral response to the system of National Socialism." (Translation by Johan van der Walt, in *Law – That which is Gained in Translation*, at 13 of unpublished draft).

> "The historical consciousness that informed… the *Erste Abtreibung* judgment is surely laudable. But so fixed was this historical consciousness on distancing itself from the toxic nationalism of the past, that it became partial to a new "nationalism" that was completely out of touch with the new historical reality that Germany and especial German women were facing in 1975."[133]

The problem with this decision is that it underestimates the tension between human dignity as a purportedly timeless value, and human dignity as the time-specific and highly contingent rendering of a "path away from… [a particular, national]… nightmare."[134] Is this not often the case with purportedly universal, "timeless" philosophies? For example, Thomas Hobbes's personal experience of the English Civil War is often cited as a key motivator behind his *Leviathan*, and, on Nedelsky's account, it was the perceived, highly specific threats of the day that played the most significant role in shaping the "self-evident" truths of the American founding, including the original Constitution's socially regressive preoccupation with property rights and the protection of private wealth.

In effect, this already presents us with the key tension at the heart of this study, the tension between a real community, in the here and now, and a better community, a community "of the future"[135] that exceeds the many blind spots and prejudices of its current membership. Put differently, human dignity points at the same time to the past and the future, which is to say that it simultaneously provides us with an anchor point – typically an experience of collective trauma, whether national (as in Germany and South Africa) or international (as Lorraine Weinrib suggests is the case in Canada, which she sees as a belated subscriber to the postwar, political "truth"[136] captured by the UN Charter and the UDHR) – and asks us to hoist up that same anchor, and to look beyond the potentially regressive connotations of a firmly held, dogmatic state philosophy. This can take us back, finally, to the quote with which this chapter began, from Mattias Kumm:

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[133] See Johan van der Walt, *Law – That which is Gained in Translation*. Elsewhere in the same paper, Van der Walt writes: "Nationalistic parochialisms… are not always marked by obnoxious ideologies. Sometimes they are stamped by the very need to get rid of obnoxious ideologies." *Erste Abreibung* is in Van der Walt's estimation just such a case of an obnoxious drive against an obnoxious ideology.

[134] Lorraine Weinrib, *Human Dignity as a Rights-Protecting Principle* – at 337.

[135] In chapter four, I will look at the philosophy of Jacques Derrida, to which this phrase is a reference. For now, suffice it to say that Derrida finds in modern liberalism a certain, future-oriented drive, a drive towards a hospitality or an ethics that would no longer exhibit the logic of sovereignty that is implied in the act of welcoming an "other" into one's "own" space.

[136] Once again, this is a reference to Alain Badiou, and his theory of ethics as a practice of fidelity to an event – a moment of rupture that presents one with a new "truth."

> "Europe no longer see its legal foundation in a collectivist macro-subject, which started its life as a mythical monster called Leviathan. [On the contrary]… in Europe that monster has been tamed, for the time being, and duly pushed off its throne and replaced by the idea of human dignity as the foundation of law. Human dignity is no less mysterious as the foundation of law than sovereignty, probably more so. But whatever is required to understand that mystery, it does not require idolatrous submission to a Leviathan that conceives of itself as an earthly god, an earthly god that not only claims to provide the ultimate horizon of meaning and defines for its citizens the limits of who they are… [but]… also claims to have the coercive power to… sacrifice their lives."[137]

What Kumm is talking about here is the future-oriented promise of human dignity, and I will end the chapter, now, by examining his words in light of my preceding analysis. For a start, what is notable about Kumm's position is that it pits human dignity against a preceding culture of "sovereignty," a culture that he defines in much the same way as Oliver Wendell Holmes Jr. defines politics per se, i.e. as sacrifice. On one level, and perhaps tellingly, Kumm doesn't reject Holmes's claim that a non-sacrificial politics is impossible in practice, but merely claims – somewhat more modestly – that "Europe" (and I would add, the vast majority of Western/Westernized states outside of Europe) "no longer sees its legal foundation" in sacrifice and sovereignty, which is to say that it has re-oriented its political aspirations if not necessarily its political practice.

Secondly, and even more importantly, one of the fundamental features of sovereignty is for Kumm its tendency to "provide the ultimate horizon of meaning… for its citizens," thereby defining "the limits of who they are." But doesn't human dignity *itself* function in this way in at least one respect, by defining an emergent social order in terms of – and more precisely, in opposition to – a previous experience to be avoided at all costs? In this sense, human dignity would not simply be opposed to sovereignty, but would rather be divided paradoxically between a principled opposition to sovereignty, as such (sovereignty as objectification, imposition, violence), and the sovereign provision of a new, distinct horizon of meaning: a horizon that revolves around the idea that our political future will be defined by and more precisely against the trauma of some particular, political past.

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[137] Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review* (at 32), available at: http://cadmus.eui.eu/bitstream/handle/1814/7708/EJLS_2007_1_2_9_KUM_EN.pdf?sequence=1&isAllowed=y. See also Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review.*

Can one not take this even further? Because even if we no longer view human dignity as an opposition to a particular, political past, is there not still something problematic and paradoxical about a value that claims sovereignty, i.e. status as the primary value of a political community, at the same time that it is presented as an opposition to sovereignty? Is this not still an "ultimate horizon of meaning," even if it is a more abstract one? For now, I shan't push this observation any further, but its work is essentially done, because it already directs us to the tension that will be the focus of the thesis: namely, the tension, within the concept of human dignity itself, between the ideal of a non-coercive community, and the coercive implications of *every* political community, i.e. the extent to which every political community will turn on a "horizon of meaning" that essentially "objectifies" its subjects. What does it mean to affirm dignity, as a political actor with a power of decision, when affirmation is always an act of imposition upon one's community? Does the paradox at stake here render the ideal of human dignity political inept, and in need of alteration? Or is there a way of exercising a power of political decision that somehow honors the radical implications of human dignity as a resistance to objectification, and sovereign imposition?

CHAPTER TWO

The Fundamental Contradiction #1: A Critique of Rawls's *Political Liberalism*

Introductory Quote:

"In politics I think you make a distinction between what I call the plumbers and the priests. Now the plumbers are the people who do things – make things happen, get laws through, improve things – but they get their hands dirty. And the priests have… high moral values and principles. I think if you're serious, you have to become a plumber… [This]… means compromise, it means making trade offs. I mean, that's what democracy and that's what democratic politics is all about. And when I hear people talking about honesty and authenticity… that's fine – but… if you're going to deliver in government, in local government, as an effective opposition, then you have to work with people who you don't necessarily like or agree with, and that means compromise."

Vince Cable – British Politician and UK Secretary of State for Business, Innovation and Skills from 2010 to 2015

Introduction

If chapter one was successful in presenting human dignity as the core value of modern, liberal democracy, it has nonetheless left us in the dark over how this abstract concept – which I at least identified as an opposition to the state-sponsored objectification of individuals – is to be fleshed out. Now, in this chapter, I want to address this issue by offering a critical examination of the work of John Rawls – arguably the foremost liberal philosopher of the last fifty (or perhaps even a hundred) years. Of course, not all (or even most) liberal scholars agree with the details of Rawls's unquestionably distinctive theory, but I use his work as a representative of modern liberalism in spite of this 1) because his work has been influential on so many other influential scholars (Martha Nussbaum, Ronald Dworkin, etc.), 2) because it is surely better to scrutinize the work of a single thinker than to conflate all liberals into one, falsely homogenous grouping, and 3) because the "political turn"[1] that defines Rawls's later work is principally concerned, precisely, with the problem that this thesis views as the definitive problem of modern politics: namely, "the fact of reasonable pluralism."[2]

To explain this last point: pluralism is the name that Rawls gave to disagreement over what it means to live well, and, in his later work, Rawls came to see 1) that the existence of liberal-democratic institutions would actively breed such disagreement, 2) that such disagreement will rarely be quenched by an appeal to "right"[3] or even common rationality, and 3) that this would make it much more difficult to establish a meaningful link (as the principle of human dignity insists that we must) between governmental action/power and individual consent. The reason for this difficulty is that reasonable (and apparently interminable) differences of opinion vis-à-vis general morality ("*reasonable* pluralism") will lead, naturally, to differences of opinion vis-à-vis the morality of particular exercises of governmental power, which, in turn, means that governmental power will often, and must often, be exercised in the face of serious dissent – i.e. without a plausible connection to what Frank Michelman describes as "reasons of the governed."[4]

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[1] See PAUL WEITHMAN, WHY POLITICAL LIBERALISM? ON JOHN RAWLS'S POLITICAL TURN.
[2] See JOHN RAWLS, POLITICAL LIBERALISM – constant references to this phrase are made throughout this text, for example, at 4, 25 and 36.
[3] As we will see a little further on, Rawls is not a believer in "right" or optimally rational solutions to political problems. On the contrary, Rawls's whole project – and especially his quest for reflective equilibrium, which was described briefly in the last chapter, and will be revisited in the first section of this chapter – is an attempt to propose a theory of justice founded on plausible commonality rather than right or true reason.
[4] See Frank Michelman, *Always Under Law?* – at 233-235. See also the final section of the previous chapter, on the link between human dignity and social contract theory.

Rawls's solution to this problem is to embrace a version of liberalism that is "political, not metaphysical."[5] Put simply, such a "political liberalism"[6] would be defined by its abstinence from controversial questions of moral, philosophical or religious truth, and would rest only on certain scant or "shallow"[7] ideals that could be embraced by all "reasonable" persons regardless of their more comprehensive views on morality. In particular, this means that we – as liberals (and I assume here that you, the reader, are minimally liberal, at least to the extent that you endorse liberal institutions and basic norms) – must loosen any commitment that we may have to Enlightenment-style rationalism, and "unencumbered"[8] individualism, so as to accommodate those who find moral value elsewhere: especially those who believe that individualism should be subordinated to what Charles Larmore calls "Romantic… values of belonging and custom."[9] The hope is that these "nonliberal"[10] groups that exist within (and are unlikely to disappear from) liberal societies can come to see liberalism as a political philosophy and a form of governance worthy of their consent. In other words: Rawls's turn to political liberalism is about how we keep the contractualist impulse (and, once again, this is the impulse to link governmental action to individual consent) alive and well when we face the contemporary problem that most insistently threatens to thwart its realization, namely, the fact of reasonable pluralism.

Here we hit a stumbling block, though: because a looser commitment to liberalism as a comprehensive morality – which is precisely what political liberalism aims at – means (or at least risks) a looser commitment to any liberal policy, however cherished, that rouses minimally rational dissent from the "nonliberal" segments of our society. This includes comprehensively liberal policies (*inter alia*) on socio-economic rights and poverty, on abortion, and on assisted suicide: policies that serve as fixed stars within what we might call today's liberal, "constitutional imagination."[11]

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[5] See John Rawls, *Justice as Fairness: Political not Metaphysical.*

[6] See RAWLS, POLITICAL LIBERALISM (or PL hereafter). For an earlier indication of Rawls's shift towards this position, see John Rawls, *Kantian Constructivism in Moral Theory* (1980).

[7] See PL at 242. The relevant quote is: "[political liberalism]… can seem shallow because it does not set out the most basic grounds on which we believe our view rests." See also Johan van der Walt, *Law, Utopia and Event* – at 89-90. Van der Walt quotes Rawls on the shallowness of political liberalism, and retorts with a question: is the shallowness of political liberalism perhaps better conceived as an "inverse depth," given that its aim is precisely to transcend or rise above the problem of reasonable pluralism?

[8] This is a reference to Michael Sandel, *The Procedural Republic and the Unencumbered Self*. See also MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE.

[9] Charles Larmore, *Political Liberalism* – at 343.

[10] This is Rawls's own phrase: see PL (especially the highly instructive "Introduction to the Paperback Edition" at xxxix and xlv).

[11] See Martin Loughlin, *The Constitutional Imagination*.

This problem leads us to the last section of the chapter, which comes under the title of "Rawls's Abortion Footnote." This section looks at how Rawls occasionally resists the full, democratic implications of his political turn, and, more specifically, at his rather clumsy defence of a woman's right to first trimester abortion – a defence that comes in spite of the widespread, well-intentioned resistance to such a right that persists in many liberal democracies (and especially in Rawls's home country, the United States). The apparent inconsistency of Rawls's response on this point reveals (so my argument goes) an important tension within political liberalism, which one theorist, Robert Westmoreland, depicts as a tension between the indiscriminate and sectarian connotations of a commitment to the basic, liberal ideal of state neutrality vis-à-vis morality. To quote Westmoreland:

> "Liberal neutrality… [at which political liberalism aims]… involves a delicate balance. To one side is indiscriminateness. We cannot found basic principles of social order on a common denominator among extant conceptions of human flourishing. Even if there were a coherent set of such principles, the influence of intolerant and even irrational conceptions would support the caricature of liberalism as the view that won't take its own side in a debate. Liberal neutrality is not literal neutrality.
>
> To the other side is sectarianism. Comprehensive liberalism prescribes neutrality in the name of individual autonomy. The moral locus of the person is the capacity to choose ends and moral principles autonomously. One whose conception of the good is not genuinely self-willed is a reflection of those around her rather than a fully realized person. So the state must not favour, by force or insinuation, any conception of the good. Basic principles of social cooperation should cultivate this sort of critical reflection in all areas of life."[12]

The problem is that political liberalism, with its dream of reasonable neutrality, and its dream of reaping the consent of those who hold non-liberal visions of moral truth, potentially leads us towards an occasionally indiscriminate politics of abandonment, whereby the fate of individuals whose protection would be secured by a more comprehensive (or a more sectarian, as Westmoreland puts it) theory of liberalism is left hanging in the balance (at least on the provisio that any "non-liberal" groups that oppose their protection can explain their opposition in terms of relatively "neutral"[13] principles of justice).

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[12] Robert Westmoreland, *Realizing "Political" Neutrality* – at 541.

[13] See again, Robert Westmoreland, *Realizing "Political" Neutrality*. See also Herbert Wechsler's famous piece on American constitutional law (cited approvingly by Rawls in PL at 191), *Toward Neutral Principles of Constitutional Law*.

My argument, ultimately, will be that this tension is a manifestation of what Duncan Kennedy calls "the fundamental contradiction"[14] in liberal theory, an idea that will be discussed comprehensively in chapter four, but that can be described for now as a tension between liberalism's apparent aversions to both zealous exercises of state power, and the failure of government to act decisively and *zealously* to remedy individual suffering and indignity, i.e. the failure of government to avoid a posture of individual abandonment. *This* is the active tension that I take to define Rawls's "political" liberalism – between an undesirable politics of zeal, and an equally undesirable politics of abandonment – and it should be kept closely in mind as we proceed to the chapter's first section, below.

I. The Original Position and the Inviolability of the Person in Rawls's Work

The philosopher Simon Critchley has remarked that "philosophy begins in disappointment."[15] If this is true – and let us assume for the sake of argument that it is – then we must ask: what disappointed Rawls? The standard answer, from which we need not presently part, is that Rawls was disappointed with the way that liberal political institutions were typically explained and legitimated by the most prominent political philosophies of the modern West – especially the utilitarian theories that were popularized in the 1800s by thinkers like Jeremy Bentham and John Stuart Mill. Although Bentham and Mill were both "politically"[16] liberal, Rawls evidently came to feel (and I say that he "came to feel" because his early papers like "Two Concepts of Rules"[17] were remarkably sympathetic to utilitarianism) that they were not liberal *all the way down*. To explain: for thinkers like Bentham and Mill, the fundamental test by which we may assess the justice or morality of political institutions is whether those institutions maximize "the net level of everyone's gains and losses"[18] – the total sum of welfare or utility (or whatever you like) – across the entirety of one's community. Charles Larmore puts this succinctly when he writes that "utilitarianism… looks at social life with the eye of an administrator… charged with allocating benefits and burdens among a given population in the most efficient or welfare-maximizing fashion possible."[19]

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[14] For example, see Duncan Kennedy, *The Structure of Blackstone's Commentaries* – especially at 211-221.
[15] See for example SIMON CRITCHLEY, THE FAITH OF THE FAITHLESS: EXPERIMENTS IN POLITICAL THEOLOGY – at 18.
[16] I do not mean that they were political liberals like Rawls but merely that they held liberal political views. In other words: their politics were "liberal," but they were not "political liberals" per se.
[17] See John Rawls, *Two Concepts of Rules* – especially at 29-32.
[18] See CHARLES LARMORE, THE AUTONOMY OF MORALITY – at 74.
[19] Ibid at 75.

The reader may already have a sense of why this approach is not liberal all-the-way-down, but we should pose the question anyway. So: what did Rawls find illiberal, or insufficiently liberal, about utilitarian theories of justice? To answer this question, we need to return to the idea of reflective equilibrium that was laid out in the previous chapter. As may be recalled, reflective equilibrium is a method of moral deduction that swaps out the quest for moral truth (an overly burdensome and ultimately unrealistic endeavour, according to Rawls) for a more holistic approach; one that implores us to seek out principles of justice that "match our considered convictions of justice or extend them in an acceptable way."[20] What does Rawls mean, though, by our considered convictions of justice? The understandable tendency here is perhaps to read this phrase with a kind of "natural law"[21] slant, but this is not how it was meant. In fact, as Rawls explains quite clearly in his later work, our considered convictions of justice are only those moral sentiments that publicly *appear* "to be self-evident"[22] within the ultimately contingent/artificial limits of our own community. As Rawls puts it (and to rely again on a key quote from the previous chapter):

> "We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent political conception of justice. These convictions are provisional fixed points that it seems any reasonable conception must account for. We start, then, *by looking to the public culture itself*… [my emphasis]… as the shared fund of implicitly recognized basic ideas and principles. We hope to formulate these ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must accord with our considered convictions, at all levels of generality, on due reflection, or in what I have called elsewhere reflective equilibrium."[23]

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[20] Ibid at 17.

[21] Rawls's early work has sometimes been mistakenly interpreted as a kind of natural law theory. For example: see David Gray Carlson, *Jurisprudence and Personality in the Work of John Rawls* – at 1831-1832. As Carlson writes: "Though one is never confident in stating exactly what kind of system Rawls… [has in mind]… the system is apparently *not* a procedure for discovering justice. Rather, it is a procedure for testing the quality of some intuition of justice a person already has. Justice has already been observed and hence is a natural law concept… [to which the person is subject]… whether she likes it or not."

[22] This is a reference to Hannah Arendt's famous remarks on the American Declaration of Independence (as discussed in chapter one). Arendt suggests that Thomas Jefferson "must have been dimly aware of" the need to artificially construct one's political community, since he wrote that the truths of the Declaration were to be "held" as self-evident, and not simply that they "are self-evident." See ARENDT, ON REVOLUTION – at 193. See also Johan van der Walt, *Law and the Space of Appearance in Arendt's Thought* – at 79-80.

[23] PL at 8.

As noted in the last chapter, the emphasis here is on that which *appears* in the public realm. To explain, and to use one of the examples provided by Rawls in the passage above: since support for slavery no longer appears – i.e. can no longer be effectively sustained (at least not without dismissal and/or extreme vilification) – in the American public realm, and more generally in the public realms of liberal-democratic societies throughout the world, we can take the wrongness of slavery as a "provisional fixed point," a provisional truth that we use to fashion an equally provisional, plausibly common conception of justice. In other words: beliefs that *appear as* publicly shared, like our belief that slavery is inherently unjust, are taken to be symptomatic of a "public sense of justice"[24] that is also communally shared, and that, once worked out, can be used to both justify and criticize present social arrangements.

This brings us back to Rawls's opposition to utilitarianism, because in his first book – 1971s *A Theory of Justice* – Rawls took issue with utilitarianism precisely on the grounds that it does not square well with our considered convictions: especially convictions like the modern, liberal-democratic belief that slavery is inherently unjust. To explain: by definition, a utilitarian can only advocate the abolition of slavery (and/or the practice of treating it as inherently unjust) if this would raise the net level of welfare or satisfaction (or whatever) across his/her whole community. This means that, as Kant may have put it, utilitarianism can only offer a "hypothetical"[25] or conditional critique of slavery, which is to say that a utilitarian condemnation of slavery will always and can only be dependent on the existence of some present state of affairs that, if altered, may de-necessitate that condemnation.

Why is this necessarily a problem? Well, it becomes a problem, as Rawls would have it, when we adopt the perspective required by his method of reflective equilibrium. This is because – according to Rawls – we (and by "we" I mean "we liberal-democratic citizens," or "we who accept the dignity of the human person as our first principle") persistently and publicly hold it to "be self-evident"[26] that there are certain non-conditional limits on the kinds of treatment to which we may legitimately subject one another, limits that aren't adequately reflected or taken seriously by utilitarian theories of justice. As Rawls puts it, we feel (and the public culture of modern democracy suggests) that:

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[24] See JOHN RAWLS, A THEORY OF JUSTICE (or TJ hereafter) at 5 and 432.

[25] For Kant, a hypothetical morality – where the rules fluctuate with the circumstances in which we find ourselves – enslaves us to the sheer chance and contingency of the world. See for example, IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS. For a classic introduction to Kant's moral theory, see ROGER SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS.

[26] Once again, this is a reference to Arendt on the Declaration of Independence (see footnote 22).

> "Each person possesses and inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many."[27]

We can, I think, take this passage as a specification of the "highest" principle that Rawls finds implied by, as he would only later put it, "the public culture of democracy,"[28] the culture that went into full bloom, globally, in the years since WWII: the public culture of constitutionalism, human rights and human dignity that I described in the last chapter. Of course, as we saw then, this principle on its own gives us scarcely any substantive content to work with, since it really only tells us that certain basic interests and/or entitlements of individuals are to be taken as morally prior to the interests of the wider community. We might therefore say that, although it already points away from utilitarianism, and, indeed, from any theory that accepts the sacrifice of the one in the name of the many, it does not yet tell us when such sacrifice is barred, i.e. which individual interests are beyond sacrifice.

The next question, then, is how we work out which interests are beyond sacrifice, and this brings us to Rawls's well-known (and indeed, best-known) idea of "the original position"[29] – an idea that, in turn, rests on a very specific and very specifically liberal conception of the person that Rawls finds already latent in the public culture of democracy as he understands it. This conception begins with the thought that persons possess "two moral powers connected with the… idea of social cooperation."[30] As Rawls writes:

> "[Persons are assumed to have]… a capacity for a sense of justice and a capacity for a conception of the good. A sense of justice is the capacity to understand… and to act from the public conception of justice which characterizes the fair terms of social cooperation… [and the]… capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one's rational advantage or good."[31]

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[27] TJ at 3. See also TJ at 24-30, where Rawls explains how utilitarians sometimes try to cope with this sentiment of justice – and, indeed, incorporate it into their own theory – by suggesting that when such a sentiment is roundly, socially accepted, the net level of social satisfaction will be increased. On this interpretation, the sentiment itself would be denied intrinsic worth, but would instead be explained as socially useful, or, we might say, as having a high social use-value from the perspective of utilitarian theory.
[28] PL at 36.
[29] Ibid at 22-28. Also see Chapter Three of TJ.
[30] Ibid at 19.
[31] Ibid.

Later in the same text, 1993s *Political Liberalism*, these two moral powers are reframed in terms of what Rawls calls "the reasonable and the rational"[32] – a conceptual pair that is closely akin to Kant's famous distinction "between the categorical and the hypothetical."[33] The reasonable here corresponds to the first moral power, the capacity to recognize and honor "fair terms of cooperation,"[34] whereas the rational corresponds to the second power, the capacity to hold, revise and pursue a personal conception of the good, or to engage in "the free development"[35] of one's personality. As Rawls puts it:

> "[Knowing]... that people are rational we do not know the ends they will pursue… [but]… only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well-being. The disposition to be reasonable is neither derived from nor opposed to the rational but is incompatible with egoism, as it is related to the disposition to act morally."[36]

Like I said, the obvious comparison here is with Kant, but one can also link this distinction to Freud, who saw social life as a competition between the pull of antisocial desire and the necessity of social cooperation. If this is an apt comparison, though, it must nevertheless be qualified, since Rawls is less concerned with the Freudian tension between "Eros and civilization"[37] than with a tension that exists and persists *within* (*and only within*) the rational bounds of liberal-democratic civilization: a tension between our often opposed thirsts for public order and private fulfillment. The tension is this: we want/need to cooperate with one another, and to enjoy social stability, but, inasmuch as we conceive of ourselves as autonomous beings with the capacity to hold, revise and pursue a conception of the good, we are hesitant about the loss of freedom that this seems to entail. And so we ask, naturally enough: how can we conceive of a fair scheme of cooperation that would be maximally compatible with our freedom, and the pursuit of our private interests or desires?

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[32] See PL – especially at 48-54.
[33] Ibid at 48 (footnote 1) – where Rawls explains the relation between his distinction and Kant's.
[34] This phrase appears constantly throughout PL (at 16 and 302, for example).
[35] See Article 2(1) of the German Grundgesetz: "Everyone has the right to the free development of his personality." Full text available at: https://www.btg-bestellservice.de/pdf/80201000.pdf
[36] PL at 49 (footnote 1).
[37] This is a reference to HERBERT MARCUSE, EROS AND CIVILIZATION, which provides a fresh interpretation of Freud's social theory as laid out in his famous text, *Civilization and its Discontents*.

This is where the idea of the original position comes in. Put simply, the function of the original position is that it gives us an apparently fair procedure for the assessment of moral principles that may regulate "the basic structure of society,"[38] i.e. "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[39] To explain: Rawls asks us to imagine that we are parties (or as he suggests in his later work, representatives of parties) to a new social convention, and that we must exercise our second moral power, of rationality, so as to choose between different regulatory principles whilst under a "veil of ignorance"[40] – with no knowledge of the concrete social position that we will occupy (or of the particular rational interests and/or conceptions of the good that we will come to hold and pursue) in the emergent social order.

As Rawls explains it, the purpose of these limits on information is to try to "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage."[41] We may accordingly reason that, although we are only asked to deliberate with our own rational interests in mind, we will nonetheless be structurally compelled to think reasonably as well, at least on the (quite plausible) assumption that we wish to minimize the risk that the basic structure of our society-to-be will eventually leave us – or the persons we represent – out in the cold, with a far from adequate share of social goods (and with little hope of social progression). As Rawls says:

> "While the original position as a whole represents both moral powers… and therefore represents the full conception of the person, the parties as rationally autonomous representatives of persons in society represent only the rational: the parties agree to those principles which they believe are best for those they represent...
>
> The reasonable… which here is their capacity to honor fair terms of social cooperation, is… [then]… represented by the various restrictions to which the parties are subject in the original position and by the conditions imposed on their agreement."[42]

[38] See TJ – especially at 6-10. I will discuss this more a bit further on, but for now I simply note that the original position only applies to the basic structure of society, which is to say that legislators and judges need not (and are not supposed to) think of themselves as occupants of the original position, but must merely comply with their constitution and the laws that issue from it (provided that the constitution itself complies with principles that may be chosen in the original position).
[39] Ibid at 6.
[40] Ibid – especially at 118-123.
[41] Ibid at 118.
[42] PL at 305.

What Rawls gives us here is a representation of "pure procedural justice."[43] This means that, in the end, "whatever principles the parties select,"[44] or, rather, whatever principles we sincerely believe the parties would select, are to be "accepted as just."[45] Of course, Rawls proposes principles of his own – his two principles of "justice-as-fairness"[46] – that he thinks would be chosen by the parties in the original position. But, as his later work makes clear, these principles are only meant as one specific conception of a "higher concept"[47] of liberal-democratic justice: a higher concept of justice that takes any prospective products of the original position – the principles that reasonable and rational persons (or their representatives) would choose to regulate the basic structure of their society – to represent "the appropriate principles of justice for free and equal persons."[48]

With this said, we can perhaps now see how Rawls fleshes out the principle of human inviolability mentioned above. To explain: the original position – as a representation of pure procedural justice – interprets the inviolability principle to require that coercive state action syncs up with the will of the coerced, which is to say that it must be explainable as an essentially self-inflicted wound. However, since coercive action, by definition, contradicts the will of the coerced, Rawls takes the standard, contractualist step of requiring only that state action syncs up with the presupposed, "rational autonomy"[49] of the coerced. This requirement is then given a "kind of dualist"[50] twist, so that individual state acts are not legitimated directly, but rather through their compliance with the basic terms of a consent-worthy system, a system – and more specifically, a set of fundamental principles of justice – that would be chosen in the original position. In other words: our duty to obey a particular governmental act turns not on whether the act itself is consent-worthy, but 1) on whether our system is consent-worthy, and 2) on whether the act is a valid, or constitutional, product of our system.

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[43] Ibid at 72.
[44] Ibid.
[45] Ibid.
[46] These two principles are as follows: 1) "Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all," and 2) "social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair quality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society." See PL at 291. For an account of how these principles changed in Rawls's work over time, see David Gray Carlson, *Jurisprudence and Personality in the Work of John Rawls* – at 1835-1841.
[47] When I make this distinction, I have in mind Ronald Dworkin's famous distinction between concepts and conceptions. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY – at 163-184.
[48] PL at 72.
[49] See PL at 72-77.
[50] See Frank Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment* – at 1409.

So: to accept Rawls's theory is to dream of a step away from coercive government. As a theory of democratic liberalism, it accordingly shuns the rather facile fairness of ordinary majoritarianism, and dreams instead of a thicker, more substantively rich democratic project – one that requires governments to at least try to speak with and for all, as opposed to merely with and for those who have proven determined/lucky enough to find themselves in a contingent position of political power. Of course, given the utopic thrust of this position, it must be quite substantially tempered to fit the real world, and Rawls does this (as he obviously must) via two the provisos just mentioned: 1) that governmental action need only command the rational and not the actual consent of the governed, and 2) that this rational consent need not be to each and every governmental act, but to the constitution, which can then legitimate subsequent acts as "products" of a rationally "respect-worthy" constitution/system. These two provisos ensure that Rawls's work is not vainly or naively utopic, but more a blueprint for a "realistic utopia"[51] – an imperfect model of mutual respect and fair cooperation in an ultimately fallen, violent world.

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The purpose of this section, then, has been to introduce the reader to Rawlsian theory, and to provide an overview of the basic concerns that make it tick. The crucial points of this overview have been as follows: 1) Rawls's first concern is to construct a theory of justice that comports with and represents the "public political culture of a democratic society."[52] 2) Rawls takes this public culture – as I did, explicitly, in the last chapter – to rest on a fundamental principle of the "inviolability" of the person, which promises that the "key interests of individuals"[53] will not be sacrificed for the sake of their wider community. 3) Rawls then suggests that the most appropriate way to pin down these "key interests" is to ask ourselves: what key interests would I prioritize out of my own rational self-interest, and under fair conditions of ignorance that make me into a "representative for any and all members of a modern plural society?"[54]

[51] See JOHN RAWLS, THE LAW OF PEOPLES. See also Johan van der Walt, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice* – at 18.
[52] See PL at 43 (similar phrases peppered throughout the text).
[53] See Jeremy Waldron, *A Right-Based Critique of Constitutional Rights* – at 30. "To believe in… [liberal]… rights is to believe that certain key interests of individuals… deserve special protection."
[54] Frank Michelman, *The Subject of Liberalism* – at 1823.

To slightly oversimplify, then, we might say that the core problem that Rawls's work seeks to address is the problem of coercion – the problem of how we liberals (we who "shy away from coercion"[55] as Frank Michelman once put it) can find moral/philosophical satisfaction in political and legal landscapes that are "always fraught with the potential for coercion."[56] The full depth of this problem, though, has yet to be explained, because it has not yet been cast in terms of Rawls's quest for an even more realistic "realistic utopia" in his second book, *Political Liberalism* (or PL hereafter). Granted: much of what I have presented thus far has relied on explanations provided in PL (and some of the academic papers related to it), but it has not yet tended to the core problem that PL brings to the fore, namely, the problem of serious and apparently intractable social dissensus that Rawls calls the "fact of reasonable pluralism."[57] Let us turn now to confront this problem, in the next section.

II. Political Liberalism and Public Reason: Justice as Justification?

As I have already stated, the main problem that Rawls addresses throughout PL is the problem of reasonable pluralism. What does this mean, though? In short, reasonable pluralism is the term that Rawls uses to describe the potentially problematic consequences of the liberal-democratic tolerance that his work advocates – i.e. the state of affairs that comes about when a state scrupulously respects and protects the "rational autonomy" of its citizens and endorses their moral power to hold, revise and pursue their own conceptions of the good. Rawls describes this state of affairs as follows:

> "A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally. Nor should one expect that in the foreseeable future one of them, or some other reasonable doctrine, will ever be affirmed by all, or nearly all, citizens."[58]

[55] Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 352.
[56] Frank Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment* – at 1409. The full quote here points us in the right direction: "Rawls understands law to be a medium always fraught with the potential for coercion. How, then, he asks, is it possible that schemes of social ordering by law may be morally permissible and perceived as such *by all*… [my emphasis]."
[57] See again, footnote 2 of the present chapter.
[58] See the original "Introduction" to PL at xvi.

To explain, then: not only does Rawls think that liberal-democratic citizens who live "under conditions of freedom"[59] will disagree reasonably over questions of moral/philosophical truth; he also thinks that such disagreements are a product and "permanent feature of the public culture of democracy."[60] In his early work, Rawls was not cognizant of this apparently causal link between liberal democracy and pluralism. Indeed, his initial (and naïvely optimistic) hope was that citizens who live with/under liberal principles – and especially citizens who live with/under his own two principles of "justice-as-fairness"[61] – would over time come to accept such principles as expressions of a more comprehensive and comprehensively liberal theory of moral truth (or as expressions of a liberal theory of the good and not merely the right, to put it in more patently "Rawlsian"[62] terms).

This hope evaporated completely with Rawls's political turn, which took shape with texts like 1985s "Justice as Fairness: Political not Metaphysical" and hit its apex with the publication of PL some eight years later. By then, Rawls had come to comprehend that the more likely consequence of a commitment to the fundamental freedoms that anchor liberal societies (and especially the freedoms of thought, speech, religion, etc.) may also paradoxically and even necessarily yield instability, since these freedoms will facilitate the growth of moral sentiments that are deeply antithetical to a more comprehensive or "perfectionist"[63] theory of liberal truth. It would therefore seem that, inasmuch as it dreams of cosmopolitan inclusion, and the transcendence of Schmitt's "friend-enemy"[64] distinction, liberalism essentially sows the seeds of its own instability. It is this problem, this paradox, even, that defines and drives Rawls's political turn. To quote:

> "[The]… problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the same political conception of a constitutional regime."[65]

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[59] Martha Nussbaum, *Perfectionist Liberalism and Political Liberalism* – at 15.
[60] PL at 217.
[61] See again, footnote 46 of the present chapter, which lays out the two principles of justice-as-fairness as presented in PL (and as updated from their earlier formulation in TJ).
[62] See PL – especially at 173-211.
[63] See Martha Nussbaum, *Perfectionist Liberalism and Political Liberalism* – especially her description of "perfectionist" theories at 7-14.
[64] See CARL SCHMITT, THE CONCEPT OF THE POLITICAL (discussed further in chapter three).
[65] See the original "Introduction" to PL at xviii.

This is the core problem of PL – the problem of how a liberal society can at the same time: 1) protect a stock of fundamental freedoms that provoke reasonable pluralism, and 2) maintain itself as a minimally unified, stable community. This is where PL directs the bulk of its attention, and it does so largely through an engagement with two key questions. The first is the question of where we ought to draw the line between the tolerable and the intolerable – between the forms of dissent that liberalism can cope with, and the forms of dissent that it must simply exclude – so as to balance the needs to avoid instability *and* individual coercion. The second question, then, is the question of why liberal-democratic citizens who hold "nonliberal" or not-so-liberal conceptions of the good should maintain a commitment to their liberal-democratic government, despite the fact that they lack any deep connection to liberalism as a comprehensive theory of moral truth. To rephrase in terms of an example, why might a devout Catholic be well advised to endorse (and remain faithful to) a governmental structure that permits abortion, or other liberal practices that they view as abhorrent? Why should they not work to disrupt this governmental structure? And why should they not seek the Catholicization of that governmental structure if they are ever lucky enough to attain a position of political power?

Let us keep this example in mind as we turn to the first of our questions above, i.e. the question of where a liberal society should draw the line between tolerable and intolerable moral doctrines so as to avoid chronic instability, but without sacrificing the non-coercive resolve that makes it, precisely, a "liberal" society. The answer that Rawls gives to this question relies on a somewhat conventional public-private distinction, and, more specifically, on an "idea of public reason"[66] that received its "best statement"[67] in his renowned paper, "The Idea of Public Reason Revisited."[68] To quote:

> "For… [some]… the political relation may be that of friend or foe, to those of a particular religious or secular community or those who are not; or it may be a relentless struggle to win the world for the whole truth. Political liberalism does not engage with those who think this way. The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship."[69]

[66] For a comprehensive explanation of this idea, see PL at 212-254.
[67] Ibid at 438. These words are from Rawls himself, who assessed his then new paper in a letter to the editors of PL's paperback edition (a letter that was included in subsequent editions of the book).
[68] John Rawls, *The Idea of Public Reason Revisited* – printed in PL at 440-490.
[69] Ibid at 442.

To explain: citizens of liberal-democratic societies – societies that respect/protect the rational autonomy of all persons as well as the fundamental freedoms associated with that autonomy – are (of course) entitled to hold, revise and pursue their own conceptions of moral truth. However, in accordance with Rawls's principle of public reason, such citizens are decidedly not entitled to bring these conceptions with them into the political arena. On the contrary, when such citizens put their political hats on, and when they act in concert so as to democratically alter the authority of their government, they must reinvent themselves and their commitments in terms of principles that their fellow citizens (or rather, reasonable and rational persons – which may or may not be an accurate description of their fellow citizens) could be expected to accept. In other words: when we interact in political/public fora – and especially (as Rawls was often keen to stress) when we confront questions of constitutional or fundamental justice in such fora – "we should not appeal to the whole truth as we see it,"[70] but only to the kind of limited, plausibly communal truth that we present to ourselves when we imaginatively occupy the original position.

Once again, there is a link to be made between Rawls and Freud on this point. To explain: Freud's political theory begins with the thought that the "history of man is the history of repression,"[71] where the history of man signifies the development of human culture and civilization. On Freud's account, culture and civilization are repressive because they are rooted in and made possible by the "permanent subjugation"[72] (or productive sublimation) of our most fundamental drives: namely "Eros [and its]… deadly counterpart, the death instinct."[73] This resonates with Rawls's principle of public reason because Rawls understands (as Freud clearly does) that social stability is only realistically sustainable through the "renunciation and restraint"[74] of fundamental/personal desire (although in Rawls's case this applies to our moral/rational desire as opposed to our irrational psychic drives). Of course, this does not mean that we must relinquish our desire in full, but only that we reinvent it when we act politically. In terms of our earlier example, Catholics (as well as other nonliberal groups) are absolutely entitled to try and "win the world" for their whole truth, but only if they are willing and able to couch that truth in a moral language that may appeal to non-Catholics (or more precisely, rational and reasonable persons) as well.

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[70] PL at 218.
[71] See HERBERT MARCUSE, EROS AND CIVILIZATION – at 11.
[72] Ibid at 3.
[73] Ibid at 11.
[74] Ibid at 13.

Another philosophical comparison that we may draw here is between Rawls and Plato. I say this because the essential move that Rawls makes when he invokes the principle of public reason – i.e. when he expels private truth and zealousness from the realm of legitimate liberal politics – is in some senses a modern version of Plato's expulsion of "imitative poetry"[75] from his rational utopia in Book X of *The Republic*. As Plato saw it, the problem with poetry is that it "waters the passions instead of drying them up."[76] This means that poetry (and specifically the tragic and epic literature that was so popular in the Greek polis) lures us away from the transcendent lighthouse of our common reason, and replaces that reason with a "truth" that is utterly partial, utterly personal, and utterly useless as the basis of a (minimally stable) political community.

Now, Rawls is certainly not a believer in the unimpeachable "truth" of human reason, and nor is he a proponent of Platonic idealism; but when he suggests that we must banish private truth and zeal from politics – that we must banish the undemocratic zealot, as opposed to the irrational poet, from politics – he nevertheless repeats the Platonic denunciation of passion in the name social stability. Simply put, then: the Platonic poet and the Rawlsian zealot are two representatives of the same threat, the threat of a passion that shakes up the safe sameness of our common world, and that must accordingly be exorcized in the name of what Frank Michelman has called the "inestimable benefits"[77] of political cooperation.

I will say more about this shortly. Suffice it to say, for now, that although I understand (and actually share) Rawls's opposition to zealousness in political fora, I am not sure that Rawls applies that opposition as robustly to his own conception of truth as he does to the not-so-liberal truths of others. Indeed, I am not sure that Rawls *should* apply that opposition as robustly to his own conception of truth, because to do so would mean sacrificing the radical principle on which his work rests: the principle of human inviolability (or of no coercion without a plausible rendering of consent). Let us hold this thought, though, because we still have another key element of PL to explain, which we may turn to below.

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[75] See Book X of Plato's *Republic* – available at http://classics.mit.edu/Plato/republic.html. I hope that this comparison is not too laboured. It is merely meant to emphasize that what Rawls ultimately expels from his realistic utopia in PL is a form of passion, and a figure whose disruptive capacity is linked precisely to his lust for passion, and for his own conception of the truth, i.e. the figure of the zealot.
[76] Ibid.
[77] See Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 352.

We may now return to our second question, which can be represented as follows: Rawls says that a liberal community may remain stable over time where there is widespread compliance with the principle of public reason, but why exactly might liberal-democratic citizens – who hold their own, not-necessarily-so-liberal conceptions of moral truth – choose to comply with such a principle? In other words (and to refer back to our previous example yet again): why might a devout Catholic play his/her part within a liberal system that permits abortion, or other practices that he or she finds morally abhorrent?

In response to this question, Rawls makes a distinction between two ways in which political settlements might be endorsed. On the one hand, we might endorse a political settlement as a "mere modus vivendi."[78] This means that we accept the settlement as an "instrumental"[79] maximization of our self-interest, and that we will accordingly be "ready"[80] to go against it if it ever ceases to effectively serve this function. There are a number of reasons that may underpin such an instrumental, or conditional, acceptance of the requirements of public reason. For example:

1) We may hold what Robin West describes as an "attitudinal commitment to the preferability of Hobbesian *Peace* over a Hobbesian *Warre*."[81] In short, this means that we attribute tremendous personal value to the stability of our political system, and that we worry that such stability will not "persist without an experientially justified expectation on the part of each participant that the others – most of them, most of the time – will play by the rules."[82] We therefore resolve to play by the rules only for as long as it contributes to such stability.
2) We may realize that, since our society is riven by apparently intractable disagreement, we are unlikely to ever "win the world" (or rather, our own society) for the whole truth as we see it. We may therefore turn to the principle of public reason as a "next best" alternative: an alternative that promises that even if we can't win the world for our own truth, we at least can't *lose* the whole world to a truth that is antithetical to ours (although we may change tack if it ever looks like we *can* gain full control of our political order).

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[78] See PL at 147. This is where Rawls defines a modus vivendi, and describes it as an agreement where "social unity is only apparent, as its stability is contingent on circumstances remaining such as not to upset the fortunate convergence of interests." See also Frank Michelman, *The Subject of Liberalism* – at 1828-1829.
[79] See Frank Michelman, *The Subject of Liberalism* – at 1828.
[80] See PL at 147 (parties to a modus vivendi are "ready to pursue their own goals at the expense of" the agreement, and at the expense of the other parties to the agreement).
[81] Robin West, *Reconsidering Legalism* – at 131.
[82] Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 353.

Since such bases of agreement are purely circumstantial/hypothetical, and since they rest only on the cold shoulders of our rational self-interest, Rawls quite understandably wonders whether there might be a way to move past them, towards a "true moral"[83] consensus on the requirements of public reason. His claim is somewhat predictably that such a consensus is indeed within reach, specifically insofar as the requirements of public reason can be seen to express only a few self-consciously thin or minimal moral sentiments that are compatible with (or that are perhaps even already present within) the many reasonable comprehensive doctrines that divide our liberal-democratic community. In other words: if we wish to defend the requirements of public reason, and if we want this defense to transcend the unstable circumstantiality of a mere modus vivendi, then Rawls's advice is that we confine ourselves to a defense that is "political… [and]… not metaphysical."[84] This means that our defense must abstain from moral controversy in favor of a "shallow"[85] theory of public morality – a theory that applies only to political/public conduct, and that leaves its own foundations "incompletely theorized"[86] so that each of us may accept it in our own way.

So: which moral sentiments (or ideas) are shallow enough to command community-wide consensus in liberal communities – i.e. communities that are indelibly marked, precisely, by a lack of moral consensus? Rawls's response is arguably twofold: 1) the idea that all exercises of human reason are subject to what he calls the "burdens of judgment,"[87] and 2) the idea that each of us is at least "politically" respect-worthy. The first idea – on the burdens of judgment – comprises an awareness of the "many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment."[88] As Martha Nussbaum points out, the existence of such hazards (and the high risk that we will fall prey to them) is not so controversial. Indeed, it is borne out: 1) by the persistence of moral disagreement under conditions of political freedom, and 2) by the way that such disagreement is apparently "not caused by anything so simple that we could remove it"[89] such as a "mistake of fact"[90] or a moment of logical inconsistency.

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[83] Frank Michelman, *The Subject of Liberlism* – at 1828.
[84] The reference here is once again to John Rawls, *Justice as Fairness: Political not Metaphysical* – one of the earlier papers of Rawls's political turn. See also footnote 5 of this chapter.
[85] PL at 242 (see also footnote 7 of this chapter).
[86] See Cass Sunstein, *Incompletely Theorized Agreements in Constitutional Law*. See also RONALD DWORKIN, JUSTICE IN ROBES (at 66-72), where Dworkin critiques Sunstein's preference for incompletely theorized answers to questions of constitutional law.
[87] PL at 54-58.
[88] Ibid at 56.
[89] Martha Nussbaum, *Perfectionist Liberalism and Political Liberalism* – at 15.
[90] Ibid.

We may be tempted to think that an acceptance of this idea will suffice to instill us with a sense of detachment vis-à-vis our own comprehensive doctrine – a sense of detachment that can lead us to a full, moral acceptance of public reason. However, as Rawls quite frequently stressed, our acceptance of the burdens of judgment does not necessarily mean (and indeed, should not mean) that we must soften our commitment to whole truth as we see it, but only that we admit that our commitment will always and can only rest on an element of raw faith. This means that we may still shirk the requirements of public reason if we think that our own raw faith is enough to warrant the coercion of others – unless (of course) we are under the sway of some other moral sentiment that propels us to condemn such faith-based coercion. Cue the idea of political respect, which Martha Nussbaum explains as follows:

> It seems to me that reference to respect is necessary at this point: for why otherwise would the confident monist not be ready to go ahead and coerce fellow citizens into salvation? Just noticing that people don't agree about such matters does not, all by itself, supply a reason against forcing them to agree.
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> As I (along with both Rawls and Larmore) use the idea of respect, respect for persons is not a subjective emotional state, such as a feeling of admiration. It is… [rather]… a way of regarding and treating persons, closely related to the Kantian idea of treating humanity as an end and never merely as a means. Respect is thus closely linked to the idea of dignity, to the idea that humanity has worth and not merely a price. Equal respect would then be respect that appropriately acknowledges the equal dignity and worth that persons have as ends. Although this idea has a definite ethical content, it has long been recognized (for example, in the framing of the Universal Declaration of Human Rights) that one may endorse it for political purposes without thereby endorsing a comprehensive Kantian doctrine or any other specific comprehensive doctrine: thus one may endorse it while believing a form of religious doctrine that Kant would not accept, or while holding a view about freedom of the will that is not Kant's. Equal respect is… [therefore]… a political, not a comprehensive, value; thus one might in principle accept it while continuing to believe that persons do not deserve equal respect in religious or metaphysical respects, although such a view will contain tensions that may be difficult to negotiate."[91]

[91] Martha Nussbaum, *Perfectionist Liberalism and Political Liberalism* – at 18-19. I must note here that Rawls does not refer directly to the notion of respect, but rather restricts himself to an argument more-or-less purely from the burdens of judgment. I include the notion of political respect here because I – like Nussbaum, and like others such as Charles Larmore – see it as both essential, and implied by, what Rawls says about the moral bases of political liberalism. See also CHARLES LARMORE, THE AUTONOMY OF MORALITY – at 75.

A purely "political"[92] or shallow ethic of respect, then, can function as the chain that connects our acceptance of the burdens of judgment – our acceptance of the ultimate fallibility of our own (and indeed, every) comprehensive doctrine – to the requirements of public reason. This surely makes a lot of sense: after all, it undeniably becomes very difficult if not impossible to justify the imposition of our own comprehensive doctrine on others when 1) we accept that they do not accept it, 2) we accept that we cannot, due to the burdens of judgment, definitively explain to them why they should accept it, and 3) we respect them as at least "political" equals – as persons with a legitimate interest (much like our own) in the free exercise of their second moral power, the rational power to hold, revise and act in accordance with a comprehensive doctrine or moral philosophy.

So: if we respect one another politically, and accept the burdens of judgment (as Rawls thinks that most liberal-democratic citizens should be able to), then we apparently have all the reasons we need, morally, to embrace the requirements of public reason, and to limit ourselves to political interactions – at least where questions of fundamental justice or constitutional interpretation are at stake – that retreat from moral/metaphysical controversy. A failure in this regard, a failure to heed the requirements of public reason, then appears in a new shade: as a failure to treat one's fellow citizens with respect – a failure so totally fundamental that political liberalism need "not engage with"[93] those who are guilty of it. This means that the opponent of public reason, the one who wishes to take his own truth, un-translated, into the political arena, can be legitimately banished from Rawls's realistic utopia; legitimately denigrated as an "irrational"[94] and perhaps even "mad"[95] zealot whose coercion would no longer appear as coercion, but only as a matter of necessary and hence fully legitimate containment. As Rawls puts it, with typical frankness: "the problem is to contain them so that they do not undermine the unity and justice of society."[96]

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[92] Once again, I use the term "political" here in what I take to be the Rawlsian sense: to refer narrowly to the conventional space of the public or political realm, meaning the space in which we discuss and seek to modify the conditions under which political power may be legitimately exercised.
[93] Once again, see John Rawls, *The Idea of Public Reason Revisited* – at 442. To put this phrase into context, see footnote 69 of the present chapter, which is attached to the full quote from Rawls's text.
[94] PL at 126.
[95] Ibid. Note that Rawls does not say that all unreasonable comprehensive doctrines are mad, but only that unreasonable comprehensive doctrines may "sometimes" be mad, which I suppose means wildly incompatible with the common reason of constitutional democracy.
[96] See the original "Introduction" to PL at xvii.

Let me summarize what I have said in this section. I have noted that the fundamental problem of PL is the problem of how a liberal society – a society that protects the fundamental freedoms (and especially but not only the freedoms of thought, speech and religion) of its citizens and that is accordingly inhabited by free citizens who hold divergent conceptions of morality and the good life – can remain stable over time without losing its status as a liberal society, i.e. a society at least *intentionally* opposed to coercion. Rawls's response is that such stability is attainable where citizens accept themselves as split: where they are ready to sacrifice their comprehensive doctrines to gain entry to the political arena, so that they adopt a kind of "political" or public persona – a persona that voices their personal concerns and claims via principles that all "may reasonably be expected"[97] to accept. The next move is then to explain why these limits may themselves "reasonably be expected" to gain cross-community consent, and Rawls attempts to do this when he suggests that such limits may be taken to rest on only a few, shallow moral sentiments that are essentially compatible with any *reasonable* comprehensive doctrine: 1) a recognition of the burdens of judgment, and 2) a recognition of a minimal principle of mutual respect, a principle that is very close if not equivalent to the principle of human dignity described earlier.

PL therefore rests on an exclusion: namely the exclusion of truth, and the truth-thirsty zealot, from the chambers of the liberal Parliament, and, indeed, from all liberal spaces of political action. This includes (quite remarkably, I think) a space of political action that is typically thought of as quite comfortably and rightly private – the confined, curtained space of the voting booth. As Rawls tells us:

> "[The] ideal of public reason not only governs the public discourse of elections insofar as the issues involves… fundamental questions… [that relate to basic justice or constitutional interpretation]… but also how citizens are to cast their vote on these questions. Otherwise, public discourse runs the risk of being hypocritical: citizens talk before one another one way and vote another."[98]

[97] This phrase is taken from Rawls's formulation of "the liberal principle of legitimacy" in PL. Although this principle is an encapsulation of ideas that have already been explained, it is an important and famous formulation, and so it seems necessary to quote it here in full: "Our exercise of political power is full 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." See PL at 137.
[98] Ibid at 215.

This shows how deep the requirements of public reason go. To explain: not only are citizens (and their representatives) supposed to conduct their political interactions in the language of public reason; they are also supposed to exercise their democratic power so as to weed out and exclude potential candidates whose campaigns fall foul of the requirements of public reason. On the one hand, this is quite understandable: if our votes are seen as exercises of political power, and if the legitimation/liberalization of political power is the fundamental purpose of public reason, then it would be odd and even inconsistent to advise citizens to vote without due regard for the requirements of public reason. On the other hand, though, one may reasonably ask: what does politics become when we cannot express ourselves – our fully comprehensive selves – when we vote? When we can no longer fight (or even vote for those who we think will fight on our behalf) in the name of the truth as we see it? And when our entry into politics is conditioned on our safe and sanitized sameness?

Johan van der Walt touches these questions when he scrutinizes the link that political liberalism apparently posits between justice and justification. For Van der Walt, one of the essential moves of PL is that it sheds the utopian sheen of Rawls's earlier work, and settles on a more modest and realistic theory of justice as justification; a theory where justice is essentially defined into reach, so that it is little more than political action that can be hypothetically justified to all as reasonable and rational. The problem with this is not, as Van der Walt makes clear, that political liberal justification is a "poor excuse for justice."[99] On the contrary, for Van der Walt, such justification may stand as the "very best excuse for justice that human beings are capable of"[100] – the most that we can hope for in a world riven by reasonable pluralism, and by the inescapable necessity of coercive state action.

We must ask, then: if political liberal justification – justification in terms of Rawls's principle of public reason – is the "very best excuse for justice that human beings are capable of," then why does Van der Walt hesitate to "link" justice and justification as Rawls apparently does? The answer is that the perfectly reasonable realism that underscores Rawls's conflation of justice and justification may also be read as the expression of a "resignation… [that]… exposes political liberalism to accusations of the worst political cynicism thinkable, namely the cynicism that defends political expedience in the name of respect for everyone as free and equal."[101] As Van der Walt explains:

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[99] Johan van der Walt, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice* – at 4.
[100] Ibid.
[101] Ibid at 7.

> "Serious cases of socio-political dissent and conflict expose the spuriousness of a surreptitious equation at the root of political liberalism, namely the equation between its concern with *an act that can be reasonably defended before everyone concerned as fully considerate of everyone as free and equal* and *an act that truly treats everyone as free and equal*. All cases of serious social dissent expose an unbridgeable and abyssal gap between these distinctly different kinds of acts… [a gap that]… does pose a major and not just a marginal problem for political liberalism. For how can a truly liberal political theory of justice sincerely maintain that it takes the concern with every one as free and equal seriously when it more or less complacently – or more or less anxiously (what difference does it make?) – conceptually resigns itself to the fact that an act that is *reasonably defendable before everyone as free and equal* does not add up to *actual treatment of everyone as free and equal* in cases where it really matters?"[102]

I fully agree with this criticism: Rawls loses something important when he equates justice and justification, because it paves over the injustice that can/will persist in a community of justification, rendering such injustice *just*, as opposed to politically defensible, or justifiable. Interestingly, there are moments in PL when Rawls seems to cave under the weight of this problem, and to drop his commitment to political civility in the name of a more searching sense of liberal justice. Some theorists – such as Paul Campos in his paper, "Secular Fundamentalism"[103] – have thrown this inconsistency at Rawls as an accusation, and it is easy to see why. However, one may ask, as I now will: if it is really cynical (per Van der Walt) to equate justice with a veneer of justification, would it not also be cynical to counsel against the at least exceptional pursuit of a justice beyond justification?

In the next section, I will explain this line more fully with reference to one of the most controversial passages of PL – namely, "Rawls's celebrated abortion footnote."[104] The abortion footnote finds Rawls jumping to the defense of a constitutional right to first trimester abortion. This is of course not remarkable in itself, since Rawls has always been a staunch defender of liberal rights and personal autonomy. However, it becomes remarkable – *and very remarkable at that* – when Rawls seems to claim that opposition to such a right is unreasonable: that such opposition can never comply with the terms of public reason. With that in mind, let us take a closer look at Rawls's note, below.

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[102] Ibid.
[103] Paul Campos, *Secular Fundamentalism* – especially at 1817-1821.
[104] See Robert Westmoreland, *Realizing "Political" Neutrality* – at 544.

III. Rawls's Abortion Footnote: Justice Beyond Justification?

When PL was initially published, first trimester abortion had enjoyed constitutional protection in Rawls's home country of the United States for some twenty years. As is well known, this constitutional protection was not a product of populist or conventionally democratic action, but came about due to the intervention of the US Supreme Court, which interpreted its own "right to privacy"[105] jurisprudence to cover a woman's right to first trimester (and to a lesser extent, second trimester) abortion. This created a sharp dislocation between US constitutional law and public opinion. On the one hand, many citizens (and especially more devoutly religious ones) still found abortion morally repugnant, but, on the other hand, the country's newly created/interpreted constitutional law left their dissent bluntly unregistered. So: although PL arrived at a time when abortion's constitutional status was technically (and I stress: *technically*) settled, this settlement must be understood in the context of the radical and widespread moral dissensus that the Supreme Court's decision could only pave over.

When we take this context into account, Rawls's abortion footnote looks all the more remarkable. I mean, how could someone who is so keen to foster respect and civility in politics – someone who is so concerned with the avoidance of moral controversy – be so ready to take sides on an issue as controversial as abortion, and so ready, as well, to accuse his opponents of unreasonableness? This is what Rawls says:

> "Suppose… we consider the question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens… Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force. Other political values, if tallied in, would not, I think, affect this conclusion. A reasonable balance may allow her such a right beyond this… [but]… any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable."[106]

[105] The right to privacy was initially "interpreted" into existence in the case of *Griswold v. Connecticut* 381 US 479 (1965), and the USSCs abortion decision came eight years later, in the case of *Roe v. Wade* 410 US 113 (1973), discussed further in chapter five.
[106] PL at 243.

Further on, Rawls also remarks that, "we would go against the ideal of public reason if we voted from a comprehensive doctrine that denied this right."[107] We must pause here to consider how incredible these statements really are. Why does Rawls not simply present this as his own, personal position: his own, comprehensively liberal preference? Why does he feel the need, instead, to claim that pro-lifers (and specifically those pro-lifers who would refuse to admit a basic right to first trimester abortion) are guilty of a failure to abide by the requirements of public reason? This is all the more incredible when we remember what this actually means: that political liberalism need "not engage with" the pro-life movement; that pro-life citizens can be legitimately coerced by their liberal government; and that pro-lifers can be condemned as zealots whose politics (at least on this particular issue) are non-civilized, disrespectful and illiberal.

Let us not beat around the bush: if Rawls's claim is that pro-life politics do not appeal to values that could be "hypothetically" accepted by all, then he is simply mistaken. For example, consider this argument (courtesy of the moral philosopher, Alasdair MacIntyre) that defends pro-life politics on essentially Kantian grounds:

> "I cannot will that my mother should have had an abortion when she was pregnant with me, except perhaps if it had been certain that the embryo was dead or gravely damaged. But if I cannot will this in my own case, how can I consistently deny to others the right to life that I claim for myself. I would break the so-called Golden Rule unless I denied that a mother has a general right to an abortion."[108]

This argument does not appeal to religion, as critics of the pro-life movement often complain. Nor does it invoke moral ideals that are especially controversial. Rather, it rests on the fairly moderate – and dare I say, "liberal" – thought that the rational "universalizability"[109] of a particular practice is morally *relevant*. With this in mind, it is perhaps quite easy to see why Paul Campos thinks that the Rawlsian ideal of reasonableness occupies a "lexical space that in many other discourses would be filled by God"[110] – that it simply functions to shut down arguments in ways that fit a comprehensive left-liberal agenda.

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[107] Ibid at 244.
[108] ALASDAIR MACINTYRE, AFTER VIRTUE – at 6-7. This is not presented as MacIntyre's own argument, but merely as one of three ways in which he suggests that we may confront the abortion question from a perspective of secular rationality.
[109] Again, see Paul Campos, *Secular Fundamentalism* – at 1815.
[110] Ibid at 1817.

I understand why Campos makes this claim, but in the end, I do not think that Rawls is *necessarily* inconsistent in this way. To explain: Rawls's claim is not merely (as I briefly supposed above when I invoked MacIntyre) that pro-life politics must command the hypothetical assent of all, but rather that pro-life politics – and specifically a pro-life opposition to a right to first trimester abortion – must rest on principles that would likely be chosen in the original position. This is an important distinction, because there is a specificity to the way that parties are represented in the original position that may bar or at least limit the consideration of certain interests. Two aspects of the original position are especially relevant here: 1) that the parties to the original position are "not… endowed with any moral sensibility… [but are]… merely *rational*, engaged in the efficient pursuit of their ends."[111] And 2) that the parties "are adults"[112] – fully formed persons with two moral powers – who must live and participate in the society that they will form.

Let me explain why these two aspects of the original position may enable Rawls to explain the abortion footnote as a consistent extension of his theory. Think about it like this: when the veil of ignorance is lifted, many of the parties who occupy the original position will obviously discover themselves to be women. This means that all parties to the original position are well advised, from the perspective of the rational self-interest to which their considerations are confined, to choose principles that do not obviously undermine what they see as the basic interests of women (and I assume that this will include at least some element of interest in personal and reproductive freedom).

On the other hand, inasmuch as they are already represented as fully formed, or as reasonable and rational, none of the parties need worry that they will suddenly find themselves in the position of the unborn when the veil is lifted. The consequence of this is that the protection of the unborn does not appear as a direct part of the rational self-interest of the parties to the original position, at least not in the same way – and with the same weight – that the protection of a woman's interest in personal/reproductive autonomy may appear. Indeed, if it appears at all, then the protection of the unborn will only appear as a general and peripheral social interest, or as an interest that the parties may see as important from the perspective of a comprehensive doctrine that they may hold when the veil is lifted, and that they may therefore wish to accommodate to some extent.

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[111] Charles Larmore, *The Moral Basis of Political Liberalism* – at 609. Note that this paper is reprinted as Chapter Six of CHARLES LARMORE, THE AUTONOMY OF MORALITY.
[112] See DM Shaw, *Justice and the Fetus: Rawls, Children and Abortion* – available at http://eprints.gla.ac.uk/49782/1/49782.pdf.

Now, not everyone will agree with this interpretation. Indeed, some have claimed that the original position leads us to the opposite conclusion: that a pro-choice vote in the original position would be irrational because it amounts to a vote for our own potential abortion. However, such claims – as I have tried to show – do not sit easily with an appreciation of the full intricacy of the original position, with its emphases on: 1) the pure self-interest of the parties and 2) their status as already full or fully formed adults who will become part of an emergent society. In other words: pro-life interpretations of the original position are only sustainable when the original position is stripped of its most specific characteristics – when it is reduced to something that is ultimately indistinguishable from the essentially Kantian requirement of "moral universalizability"[113] that MacIntyre invokes.

Let us assume that I am right on this point. Or at least, let us assume that there is some such argument that can link the specificity of the original position to a woman's right to first trimester abortion. What would this show? It might convince us that Rawls's abortion footnote is not as inconsistent as it may have otherwise appeared, but it only scores this point through the exposure of a much more significant problem: namely, that the basic assumptions that Rawls relies on – the assumptions that structure the original position – are themselves deeply controversial. In other words: if we wish to save the abortion footnote through an appeal to the original position, then we no longer confine ourselves to a shallow ethics of respect, but wander instead into a liberal doctrine that is far more comprehensive and far less acceptable to all liberal-democratic citizens as a matter of "their… common human reason."[114] To quote Jeremy Waldron on this point:

> "Important though Rawls's conception has been, we all know that there is barely a handful of academic political philosophers who accept the original position idea as Rawls expounds it or his view of the principles and guidelines that would be accepted therein. It seems odd… [then]… to select this extraordinarily controversial conception as the basis of one's view of public reason, that is, as the basis of one's normative view about the terms in which citizens may properly conduct and attempt to resolve their disagreements with one another about justice."[115]

[113] See again, Paul Campos, *Secular Fundamentalism* – at 1815 (on MacIntyre's argument).
[114] See PL at 55.
[115] JEREMY WALDRON, LAW AND DISAGREEMENT – at 153-154. In this book, Waldron is in many ways more faithful to the spirit of political liberalism, and public reason, than Rawls was himself.

Waldron is surely right. The original position is a nice idea, but when a specific and blatantly controversial conception of the original position is used to denigrate particular political positions – as my attempted defense of Rawls's abortion footnote would – then we can hardly claim fidelity to the spirit of political respect and civility that PL revels in. This links in neatly with one of Jurgen Habermas's famous criticisms of Rawls in his renowned paper, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism."[116] As Habermas puts it, although Rawlsian citizens are invited to question whether their legal/political system syncs up with a specific conception of their common reason, this conception itself remains problematically and rather undemocratically fixed. As Habermas explains:

> "The form of political autonomy granted virtual existence in the original position, and thus on the first level of theory formation, does not fully unfold in the heart of the justly constituted society. For the higher the veil of ignorance is raised and the more Rawls's citizens themselves take on real flesh and blood, the more deeply they find themselves subject to *principles and norms that have been anticipated in theory*… [my emphasis]… and have already become institutionalized beyond their control…
>
> [The result of this is that Rawlsian citizens]… cannot reignite the radical democratic embers of the original position in the civic life of their society, for from their perspective all of the essential discourses of legitimation have taken place *within the theory*… [my emphasis]."[117]

There is far more nuance to this argument than I can tend to now. Suffice it to simply remark that what Habermas and Waldron separately point out is that – in the name of the same type of political (and radically democratic) respect that PL itself advocates – the original position must be opened up to democratic scrutiny. In other words: the original position must not be taken as an irreplaceable or neutral foundation for public reason, because (as Waldron points out) there is not even consensus in the academic community on the acceptability of the original position, let alone in the disagreement riven streets and public spaces of the modern liberal polity. On the assumption that we accept it, then, this point leaves Rawls's abortion footnote in hot water again. So: what else might we say in its defense?

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[116] Jurgen Habermas, *Reconciliation Through the Use of Public Reason: Remarks on John Rawls's Political Liberalism*. See also Rawls's response to Habermas – *Political Liberalism: Reply to Habermas*.
[117] Ibid at 128.

We have (at least) two options. The first option is to accept that the abortion footnote was a zealous overstatement, and that (as Waldron in particular claims) meaningful, democratic respect for others (as both rational and reasonable) demands that we delink the principle of public reason from the controversial intricacies of the original position. This would surely leave us with a less controversial conception of public reason: one that would still require us to frame our political conversations with others via principles that they could plausibly accept, but that would abstain from the provision of specific requirements (except perhaps requirements of good faith) on how such principles are to be worked out. We may then find ourselves at an impasse, unable to decisively distinguish between my pro-choice argument from the original position, on the one hand, and MacIntyre's pro-life argument, on the other. In other words: we may well find that "both parties to the conflict… [are]… able to state their claims in terms of public reason,"[118] and that our only option, as liberals who oppose coercion and recognize the burdensome burdens of judgment, would be to accept that the abortion question must be resolved through a democratic vote – not through conflict-suppressive alterations to (or interpretations of) constitutional law.

This is the right approach. It is. It accepts that pro-lifers are not simply unreasonable zealots whose coercion is a matter of political necessity. It accepts that the original position is not the be-all-and-end-all of political justification. And it accepts that the moral spirit of reasonableness and civility that underscores PL requires extreme tentativeness where "hot-button"[119] questions are under consideration.

Again: this is the right approach. It is. And yet, I can completely understand why someone like Rawls – who is generally an exemplar of respect for different comprehensive worldviews – would take such an abrupt stance on an issue as controversial as abortion. I say this because I cannot help but feel a little disappointed at the thought of a liberal politics that would fully relinquish its ability to speak so abruptly, and that would deprive itself of the right to pursue a justice or a truth – a true justice, perhaps – that exceeds the spirit of rational cooperation that is undoubtedly at the heart of political liberalism.

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[118] See Johan van der Walt, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice* – at 11.

[119] Rawls actually seems to adopt this approach in a second, explanatory footnote on abortion, which appears in the introduction to PLs paperback edition. To quote: "Some have quite naturally read the… [first abortion]… footnote as an argument for the right to abortion in the first trimester. I do not intend it to be one (It does express my opinion, but an opinion is not an argument.) I was in error in leaving it in doubt that the aim of the footnote was only to illustrate and confirm… [that]… the only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance… of political values." (see liii-liv – footnote 31). I wonder, though, is this really all that Rawls's original note *represents* (leaving aside his intentions)?

This takes us back to Johan van der Walt's critique of political liberalism, which turns on the worry that political liberalism – in spite of its many merits – will slink into cynicism unless it remains (at least) ready to conceive of a justice that exceeds justification: a justice that would appear only in the light of a material reality (as opposed to a mere public discourse) of equal human dignity. This critique points to a very different way in which we might respond to the apparent zealousness of Rawls's abortion footnote: namely, to embrace this moment of apparent zealousness (and it surely is such a moment) as an admirable aversion to the cynicism that worries Van der Walt, and as a necessary attempt to ensure that a particular category of vulnerable citizens – pregnant women who have cause to seek early-term abortions – will not simply be abandoned before the unpredictable whims (and the potentially illiberal consequences) of an open discussion.

We might say, then, that the abortion note is symptomatic of a tension between two equally unfortunate forms of politics: a passionate politics of zeal, on the one hand, and a "political" or resolutely dispassionate politics of abandonment, on the other. To explain: it is undeniably zealous – a violation of the democratic spirit of public reason (as appealed to by Waldron and Habermas in their engagements with Rawls) – to insist on a woman's right to first trimester abortion over and above the ultimately reasonable dissent of others (and it is worse still to label those others as unreasonable zealots). However, when our distaste for zeal-in-politics turns into an absolute (and we might even say, zealous) aversion to moral controversy, we descend into what we can surely call a politics of abandonment: a politics that is forced (or forces itself) to accept concrete human pain (such as the pain of women whose right to choose is usurped by the state) where that pain has 1) majority support, and 2) complies with the terms of a modest/minimal doctrine of public reason.

This thesis will refer to the above opposition as "the fundamental contradiction"[120] – a term that I adapt from the work of the American legal theorist, Duncan Kennedy. We will begin to look at this term (and its intellectual roots) a little later, but suffice it to say, for now, that it is connected to a number of key oppositions that cut to the very heart of liberal-democratic politics: oppositions between reason and passion, neutrality and sectarianism, individualism and commun(al)ism, law and sovereignty, and democracy and constitutionalism. Not all of these oppositions will be scrutinized in what will follow. But some will prove very, very important.

[120] See again, footnote 14 of this chapter. See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*. I note upfront that my use of the term is inspired by but not exactly faithful to Kennedy's.

This is surely a good place to pause for a summary. In this section, I have claimed that Rawls's abortion footnote (as counter-democratic and insensitive as it seems) may be seen as a consistent extension of his theory when we remember that public reason is the reason of the original position. However, when we purchase consistency for Rawls in this way, we essentially make public reason itself an object of moral controversy, which de-neutralizes political liberalism in a way that undermines its status as "political" liberalism – its capacity to transcend the (*reasonable*) moral controversy that blooms out of conditions of liberal freedom. This recognition, then, left us at an impasse: either we could accept that Rawls's abortion footnote was an overzealous (and counter-democratic) overstatement, or we could embrace it, and accept that we will have thereby taken a step against the spirit of democratic civility that is the lifeblood of political liberalism. I have suggested, with a cue from Van der Walt, that the latter option must be at least thinkable if political liberalism is to become more than a politics of abandonment. This does not mean that political liberals must support a woman's right to first trimester abortion, but merely that they must be ready, on occasion, to break their own fundamental rule – the rule against political actions (or exercises of power) that rest more on a flicker of passionate zeal than on a commitment to reasoned deliberation and respect for alterity – in the name of a justice that exceeds the justice-as-justification that is bound up with this fundamental rule.

Why? Why must political liberals be ready to break their own fundamental rule? Why can they not simply accept that the politics of abandonment is a necessary (albeit unfortunate) down payment on the "very great goods of the political"[121] – especially the goods of cooperation, civility and mutual trust?

The answer to these questions goes back to what I have already called the fundamental problem of Rawls's work. To explain: the fundamental problem that drives and, indeed, tortures Rawls's work is (as I explained in the last chapter) the fundamental problem of social contract theory – namely, the problem of how state coercion can be linked to the political desire or will of the individuals-to-be-coerced. This assumes (as noted already) that 1) human beings possess an element of dignity that de-legitimates their coercion, and 2) that, since coercion is necessary to ensure political stability, we can legitimate particular acts of state coercion where we can link them (at least) to the will/reason of the individual.

[121] See again, Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System* – at 355. Elsewhere in the same text, Michelman lists these "very great" goods as follows: "social pacification, cooperation, coordination, and justice" (at 352). I hesitate to guess what he means by the word "justice" in this passage, or how it is connected to "law."

The fundamental problem of Rawls's work, then, is of how/whether we can provide each "individual with a reason to identify his or her political will or agency with the lawmaking and other acts of collective institutions… [so that he or she may]… claim such acts as his or her own."[122] The means that, quite understandably, it gets trickier – for any liberal whose work is directed at (and worried over) this fundamental problem – to defend the products of a respectful and respect-worthy democratic discussion (and to defend the apparent fundamentality of the democratic civility that underpins the political liberal turn in Rawls's work) the more these products entail the sacrifice of seemingly basic (although rationally contestable) human interests: interests such as a woman's ability to have a say in her own life's direction, and to have control over her own body.

We must remember at this stage that Rawls does not actually, at any point, claim that a woman's right to choose simply or plainly trumps the unborn's right not to be aborted. Rather, what Rawls says quite clearly is that both interests must be taken into account and balanced, and that a political argument that bluntly opposes first trimester abortion – under all circumstances – is difficult to square with this requirement. In this regard, Rawls's does not *exactly* "take sides" in the philosophical debate over abortion, but simply asks that the law reflect more than a zealous belief in the sanctity of unborn life. Is this an unreasonable demand? And more importantly, is it a demand that a liberal who is concerned with human dignity, and the ideal of a non-coercive community, can rule out in advance (as a more "disinterested" conception of public reason would arguably require)?

Perhaps the approach to abortion in Rawls's footnote is right, or perhaps not. The key point, though, is that his abortion footnote – as well as other moments where he exhibits a certain left-liberal zeal, and takes controversial stands on questions as diverse as whether democratic elections must be publicly financed, or on whether a right "to a social minimum"[123] is an essential component of a legitimate constitutional democracy – represents an admirable (although perhaps not rationally, or totally, defensible) readiness to seek a justice beyond justification; a readiness to occasionally, exceptionally, push political liberalism beyond itself, and beyond the principle of public reason that I have tentatively linked to a politics of abandonment.

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[122] See FRANK MICHELMAN, BRENNAN AND DEMOCRACY – at 12.

[123] See PL at 328 and 357 (Rawls's position on campaign finance) and at 228-229 (Rawls's position on the right to a social minimum). See also Robert Westmoreland, *Realizing "Political" Neutrality* (discussing Rawls's tendency to take controversial positions), and RP George, *Public Reason and Political Conflict: Abortion and Homosexuality* (providing an account of Rawls's inconsistent forays into "comprehensive" politics on issues like abortion and gay marriage).

Conclusion: Morgentaler Moments

Let me conclude with an example that, again, pertains to the question of abortion. Henry Morgentaler was a Polish-Canadian physician who carried out illegal abortions in Canada for a period of nearly twenty years (at the end of which he persuaded the Canadian Supreme Court to throw out the country's criminal rules on abortion). When Morgentaler opened his first unaccredited and hence illegal abortion clinic in Montreal, the Canadian Criminal Code (or the CCC for short) had recently been amended, and liberalized, actually, to allow abortions where the mother's physical or mental health was at risk. More specifically, the CCC recognized the legality of abortions where: 1) an accredited hospital, 2) exercised its discretionary power to establish a special, three-doctor committee, 3) which accepted that an abortion would be necessary to protect maternal health, whether physical or mental.

Perhaps inevitably, many hospitals were hesitant to exercise the discretionary powers provided to them under the CCC framework, with the result that many women in Canada had no way to procure a legal, safe abortion, even if their pregnancy was plausibly "high risk." The choice that remained for (at least some of) these women was then a blunt one: "on the one hand, they could carry their pregnancy to term, potentially at the expense of their physical or mental health; or, on the other hand, they could venture blindly"[124] into the "murderously dangerous back-alley,"[125] where their safety was equally, if not catastrophically, uninsured. Cue Morgentaler's intervention, which he self-righteously referred to as:

> "…a statement on my part that I know what is the right thing to do and I will do my part in helping a minority of people who were discriminated against and made to risk their lives at the hands of incompetent people and charlatans."[126]

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[124] Richard Mailey, *Political Liberalism and Civil Disobedience: The Morgenatler Affair, Revisited*. Note: this quote is taken from a paper that I wrote on how political liberalism seems to judge and ultimately condemn the behaviour of Morgentaler, and on whether this puts a dent in what we might call the overall "liberality" of political liberalism: its capacity to remain in touch with the promise of human dignity that lies at the heart of modern liberalism. Much of the information in this short conclusion is taken from that paper, and I accordingly cite some of the key sources of information that the paper relied on (and that the short description above relies on) here: 1) Morgentaler's obituary in the Toronto Globe and Mail, available at http://www.theglobeandmail.com/news/national/abortion-rights-crusader-henry-morgentaler-revered-and-hated-dead-at-90/article12221564/?page=all. 2) Bernard M. Dickens, *The Morgentaler Case: Criminal Process and Abortion Law*. And 3) Adam Gopnik, *Good Faith*, available at http://www.newyorker.com/news/daily-comment/good-faith. See also Morgentaler's Supreme Court cases: 1) *Morgentaler v. The Queen* (1976) 1 SCR 616. And 2) *R v. Morgentaler* (1988) 1 SCR 30.

[125] Phrase lifted from Adam Gopnik, *Good Faith* (cited above at footnote 124).

[126] See Morgentaler's Globe and Mail obituary (once again, cited above at footnote 124).

It is hard not to read this statement as a perfect template for the unreasonable zeal that Rawls seeks to exclude from his realistic utopia (or his realistically utopic public space) of public reason. Morgentaler "knew" what was "right," and "he acted accordingly,"[127] with no regard for the masses of pro-lifers who saw abortion as immoral at best, and as murder at worst. On the other hand, though, there is another phrase in this statement that no liberal can really ignore: "helping a minority… made to risk their lives." Would Morgentaler really have been "right," as such, to flake out on this minority that he was in a unique position to protect? He may have behaved undemocratically, and perhaps even just wrongly, when he performed abortions against the law and against the reasonable beliefs of so many Canadians. But would he have been "right," as such, to do otherwise?

This is the question that I think we need to focus on. Not whether Morgentaler was "wrong" – because for any sensible liberal, he is quite obviously wrong – but whether a situation like Morgentaler's actually admits a "right" answer, by which I mean a "most liberal" answer. My interpretation of Rawls's abortion footnote has been that it finds Rawls up against precisely this limit. And ultimately, I see a certain nobility in Rawls's move to insist, at the risk of illiberal incivility, that certain "truths… [*must* be held]… to be self-evident"[128] – even if others can provide us with reasonable reasons for their refusal to hold them, and even if we have nothing but our own, raw faith to wave against these "others" and their "reasonable" reasons.

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To finish, let us return, briefly, to the title quote of this chapter, which came from the UKs former business secretary, Vince Cable. Cable quite wisely denounces politicians that act, in his terminology, like "priests" – who have "high moral values and principles" and who zealously stick to these principles at the expense of real political action. Real political action, Cable seems to suggest, means compromise and concession, a willingness to work with others and to occasionally give them ground, so that we can all move forward together (even if our personal hopes for society have to take a few steps back in the process). Real political action, then, is best left to the "plumber" – the guy who knows how to get his hands dirty, and who is ready to sacrifice his own integrity for the sake of political stability, or civility.

[127] Again, see Richard Mailey, *Political Liberalism and Civil Disobedience: The Morgenatler Affair, Revisited*.
[128] Reference to Arendt's commentary on Jefferson and the Declaration of Independence (again).

This figure of the "plumber" – with his/her penchant for compromise – is surely an apt personification of the politics of political liberalism: a politics that prioritizes cooperation over any loftier aspirations that we might hold – aspirations to shape our social world, substantively, as best we can. The question that I have asked here (and to which we have sketched only a skeletal answer, thus far) is whether liberalism can really live – and most importantly, remain worthy of its own name – without the plumber's opposite number, the priest. In other words: can liberalism remain liberal without a readiness to take a stand, a mad, perhaps even irresponsible stand, in the name of the individual, and in the name of a justice that exceeds the bounds of political liberal justification? Let us leave this question open, for now, as we move on to the next chapter.

CHAPTER THREE

The Fundamental Contradiction #2: Schmitt and Ackerman on "Institutional Heroism"

Introductory Quote:

"It is as if the universe of law – and more generally, the sphere of human action insofar as it has to do with law – ultimately appear[s]… as a field of forces traversed by two conjoined and opposite tensions: one that goes from norm to anomie, and another that leads from anomie to law and the rule. Hence a double paradigm, which marks the field of law with an essential ambiguity: on the one hand, a normative tendency in the strict sense, which aims at crystallizing itself in a rigid system of norms whose connection to life is, however, problematic if not impossible (the perfect state of law, in which everything is regulated by norms); and, on the other hand, an anomic tendency that leads to the state of exception or the idea of the sovereign as living law, in which a force of ~~law~~ that is without norm acts as the pure inclusion of life."

Giorgio Agamben – State of Exception

Introduction

So: where are we now? We have seen that Rawls's "political turn"[1] begins when he opens his eyes to the problem of reasonable pluralism, i.e. when he comes to see such pluralism as a permanent feature of states that aim to remain neutral (or as neutral as possible) on the question of what it means to live well. This led Rawls to formulate a principle of public reason (or the "liberal principle of legitimacy"[2] as he sometimes calls it) which requires/asks that we express political arguments in terms "that 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."[3] The two fundamental hopes that underlie this principle are: 1) that it will push the deepest disagreements that are associated with the persistence of reasonable pluralism into the private realm, so that our political associations may remain stable in spite of our apparently interminable disputes over what it means to live well. And 2) that a "political liberalism"[4] based on a commitment to public reason can find anchorage in moral sentiments that are minimal/shallow enough to appeal to any person, represented as reasonable and rational, whatever their deeper moral views.

We then saw that Rawls's own commitment to the democratic spirit of public reason is sometimes a little hazy, and my sense was (and is) that this reflects an aversion on Rawls's part to what we might call a politics of abandonment. This led, finally, to a tentative hypothesis: namely, that the most fundamental principle on which Rawls's liberalism rests – i.e. its contractualist insistence that the legitimation of state action hinges on its capacity to appeal to (and reap the consent of) affected individuals – dooms it "to shuttle back and forth"[5] between a politics of zeal, on the one hand, and a politics of abandonment, on the other (or alternatively, between a sectarian and an indiscriminate liberalism).

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[1] This phrase was used frequently in the previous chapter, but the original reference was to PAUL WEITHMAN, WHY POLITICAL LIBERALISM? ON JOHN RAWLS'S POLITICAL TURN.

[2] For a basic description of this principle, see either the "Introduction to the Paperback Edition" of POLITICAL LIBERALISM (PL hereafter) at xliv, or PL at 137. I do not know if these two principles – the principle of public reason, and the liberal principle of legitimacy – are completely interchangeable, but my point is simply that they rest on the same basic idea that political arguments must be acceptable to all persons (or rather, more specifically, to all persons who possess the two moral powers of rationality and reasonableness).

[3] PL at 137.

[4] Ibid. For examples of non-Rawlsian political liberalism, see BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE, and CHARLES LARMORE, THE AUTONOMY OF MORALITY (as well as the recent work of Martha Nussbaum, e.g. POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE).

[5] See David Dyzenhaus, *Liberalism after the Fall: Schmitt, Rawls and the Problem of Justification* – at 14. Dyzenhaus's paper has been one of the main inspirations for the present chapter, and I will refer to it (as well as a number of his other papers) frequently throughout.

This brings us to the present chapter, which will aim: 1) to make my critique of Rawls more refined, and 2) to ask whether one can (and how one can) remain liberal if such a critique is sustained. In this regard, no modern thinker has laid out a more cogent (or indeed, ruthless) critique of liberalism's contradictoriness – to my knowledge – than Carl Schmitt, "the fascist legal theorist"[6] famed for his controversial interventions in the political debates of Weimar-era Germany. As David Dyzenhaus frames it, the definitive aspect of Schmitt's critique is that he takes liberalism to be stranded, hopelessly and haplessly, between 1) a drive to *actually* de-politicize the state (a drive that, we might say, goes hand in hand with a politics of abandonment, since it entails a posture of state neutrality which may leave citizens vulnerable to threats from both enemy states and non-state actors within their own state) and 2) a drive to *covertly re-politicize* the state under cover of a common, or neutral, rationality (so that more forceful and/or zealous exercises of state power can be legitimated, exceptionally, as expressions of a higher morality that transcends and supersedes ordinary politics). In other words: Schmitt thinks that liberalism lacks the resources (and rather more bluntly, the guts) to choose between zeal and abandonment. As Dyzenhaus explains:

> "What distinguishes Schmitt… from other critics of liberalism is that he does not understand liberalism as committed to particular problematic positions. He does not, for example, take it to be committed essentially either to global neutrality between ideologies or to a position that attempts to find some substantive basis for contesting ideologies that assert a global superiority for themselves. He does not claim that liberalism is more naturally aligned either with a positivist view about the nature of law or with a view that claims there is a higher law beyond the positive law to which the positive law is somehow subject. He does not claim that liberalism either presupposes its own truth or makes no claim to truth. And he does not claim that liberalism is either political or anti- or apolitical. Rather, what is distinctive about his position is that he claims that liberalism is doomed to shuttle back and forth between these alternatives."[7]

[6] This label (and its application to Schmitt) is taken from DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY – at 4. Although it would be wrong to simply dismiss Schmitt as a fascist, it would be worse, surely, to pretend that fascism is not a significant and even partially defining feature of his work – especially in the 1930s.

[7] David Dyzehnaus, *Liberalism after the Fall* – at 14. As noted already, this chapter will rely quite heavily on Dyzenhaus's reading of Schmitt, another version of which can be found in his book, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR – specifically at 38-101.

Admittedly, this is a rather crude summary of Schmitt's critique, but I hope that it will suffice as an introduction to what will now follow. With this point in mind, the chapter will begin below with a summary of Schmitt's critique, and will then offer some brief remarks on how it might be applied to Rawls's brand of "political" liberalism. The final section of the chapter will then look at Schmitt's populist (and undeniably dictatorial) alternative to Rawlsian liberalism, and, subsequently, at the contemporary, liberal version of Schmitt's populism which we arguably find in the work of the American constitutional thinker, Bruce Ackerman. In this regard, the aim is to ask whether Ackerman's alteration of Schmitt's populism can serve as an adequate and meaningful liberalization of Schmitt in a way that avoids the moralism that I ultimately attribute (via Schmitt) to Rawls. My answer, in the end, is that it cannot. But I digress: let us leave this issue aside as we confront Schmitt, below.

I. Schmitt's Critique of Liberalism: The Reality of Political Enmity

The reader may recall that, in the previous chapter, I referenced Simon Critchley's suggestion that philosophy tends to originate in disappointment. This could not have been truer of Schmitt. To put it simply, Schmitt's work was reactionary, in the sense that it reflected and was often directly responsive to the political tumult of Weimar-era Germany. Most importantly, for Schmitt, this tumult was a product of the same problem that would spawn and orient Rawls's political turn over half a century later, namely, the problem of liberal pluralism. In this regard, Schmitt accepted the diagnosis of modernity that was laid out by his one-time teacher, the German social theorist Max Weber. As Weber wrote:

> "[The]… fate of an epoch that has eaten from the tree of knowledge is that it must know that we cannot learn the meaning of the world from the results of its analysis, be it ever so perfect; it must rather be in a position to create this meaning itself. It must recognize that general views of life and the universe can never be the products of increasing empirical knowledge, and that the highest ideals, which move us most forcefully, are always formed only in the struggle with other ideals which are just as sacred to others as ours are to us."[8]

[8] This quote is from Weber's famous text, THE METHODOLOGY OF THE SOCIAL SCIENCES – at 57. The brief interpretation of Weber's theory that follows is taken from David Dyzenhaus's excellent paper, *The Legitimacy of Legality*, which reviews and draws extensively from Jurgen Habermas's *Facticity and Validity* (later published in English as JURGEN HABERMAS, BETWEEN FACTS AND NORMS).

Weber's point here is that in the secularized state of modernity, "reason has become detached from the religious world-views in which it was once embedded, and has become purely instrumental."[9] For Weber, this leaves us with no obvious or "rational"[10] way to choose between the "warring gods and demons"[11] (or as Rawls puts it, somewhat more soberly, the different comprehensive doctrines) that vie for our attention, and this leads in turn to what Rawls called "the fact of reasonable pluralism"[12] as an ultimately irreversible by-product of secularization. The question, then, as we saw when we looked at Rawls's PL in the last chapter, is how modern societies can remain stable when they are riven with interminable disagreement over morality. In other words: the question is how social stability is possible without social unity, and without the "bonds of community"[13] that would have been provided by shared religions and common customs in years gone by.

Weber's answer, as Dyzenhaus presents it, was that liberal-secular societies would be well advised to "[make]… constitutional space for a powerful executive president"[14] or sovereign with "the explicit authority to act with more or less unfettered discretion when (as he saw it) the need arose."[15] Of course, in modernity, such a president would have no "rational" means by which to defend his/her exercises of power, and will therefore always lack anything like ultimate "moral" authority. However, Weber's hope – or rather, the most that Weber thought we could hope for in a world "that has eaten from the tree of knowledge"[16] – was 1) that the president would possess enough *charismatic* authority to rule effectively, and 2) that this recourse to merely charismatic authority "would be just the exceptional last resort when conflict could not be resolved by compromise and thus threatened"[17] to de-stabilize the very core of the state apparatus.

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[9] David Dyzenhaus, *The Legitimacy of Legality* – at 146.
[10] The term "rational" here means either universally rational – i.e. as a matter of "true" or "right" rationality – or commonly rational – i.e. as a matter of a communally, contingently accepted rationality. The point is that, in modernity, secularization (and the ultimate failure of the Enlightenment project) has deprived us of non-subjective standards – whether natural, or constructed – to which we can appeal in order to resolve moral/philosophical disputes. Apart from Weber's work, the best account of this state of affairs is arguably found in Alasdair MacIntyre's renowned book, AFTER VIRTUE. For a summary of MacIntyre's book, see also STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS – at 70-101.
[11] This is a reference to David Dyzenhaus, *The Legitimacy of Legality* (at 146), which, in turn, is an uncited reference to Max Weber (probably *Science as a Vocation*).
[12] Once again, see PL – especially at 36.
[13] David Dyzenhaus, *The Legitimacy of Legality* – at 146.
[14] Ibid at 147.
[15] Ibid.
[16] See MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES – at 57. Credit for this reference must go to Peter Lassman, *Political Theory in an Age of Disenchantment: The Problem of Value Pluralism: Weber, Berlin, Rawls.*
[17] David Dyzenhaus, *The Legitimacy of Legality* – at 147.

Weber, then, saw presidential authority as a corrective to the inherent instability of a pluralistic society, and, as Dyzenhaus points out, this analysis served in effect as "the groundwork"[18] for Schmitt's anti-liberal (and to put it more bluntly, dictatorial) political theory – at least in the sense that it "provides no resource to impede it."[19] In this regard, all that Schmitt needed to do – i.e. the only "major respect in which he differs from Weber"[20] – was to swap out Weber's resignation at the necessity of charismatic authority and brute sovereignty for a sense of nostalgic reverence. More bluntly, in Schmitt's world, the imposition of a charismatic sovereign was not just an unfortunate or exceptional necessity, but potentially, the ultimate end of politics (specifically where the sovereign articulates a communal "vision"[21] that presupposes and can thereby "bring into being a substantially homogenous *Volk*"[22] or People).

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With this kinship between Schmitt and Weber in mind, let us dig a little deeper, to the utterly "pessimistic conception of man"[23] that drives Schmitt's work, and that links him neatly to early-modern thinkers like Hobbes and Machiavelli. On this point, Schmitt refers to Dilthey's interpretation of Machiavelli as an encapsulation of his own views: "Man… is not by nature evil,"[24] he says, but rather has an "irresistible inclination to slide from passion to evil"[25] when left unchecked. This doesn't mean that "man" has an innate or natural tendency to lose his way, morally, but rather that the human condition – which I presume to cover at least (and I quote Rawls here) "the fact that the scarcity of resources and the nature of our needs introduces competition"[26] – is such that men pose an existential threat to one another, to the point where "when one does not know him, man is not a man, but a wolf for man."[27]

[18] Ibid at 148.
[19] Ibid.
[20] Ibid.
[21] Ibid at 136.
[22] Ibid at 148.
[23] CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 65. See also RICHARD BERNSTEIN, VIOLENCE: THINKING WITHOUT BANNISTERS – specifically the first chapter, on Schmitt.
[24] Again, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 59.
[25] Ibid.
[26] JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY – at 44.
[27] See JACQUES DERRIDA, THE BEAST AND THE SOVEREIGN, VOLUME I – at 61. This is Derrida's translation of a passage from the Umbrian poet, Plautus. Much of Derrida's seminar, *The Beast and the Sovereign*, looks specifically at the role of the wolf in Western culture and folklore. See also GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE – at 104-111 (on "the wargus").

For Schmitt, then, the natural or "unchecked" state of humanity is a state of opposition and tension – a state that boils with the potential for a Hobbesian "war of all against all."[28] The proviso on this point is that Schmitt's war is not nearly as all-against-all (or as radically individualistic) as its Hobbesian counterpart. On the contrary, Schmitt's war is already a more (dare I say) socialized war, as Leo Strauss explains in a short commentary on Schmitt's masterwork, *The Concept of the Political*. As Strauss writes:

> "To be sure, the state of nature is defined by Schmitt in a fundamentally different fashion than it is by Hobbes. For Hobbes, it is the state of war of individuals; for Schmitt, it is the state of war of groups (especially of nations). For Hobbes, in the state of nature everyone is the enemy of everyone else; for Schmitt, all political behavior is oriented toward friend and enemy. This difference has its basis in the polemical intention of Hobbes's state of nature: for the fact that the state of nature is the state of all against all is supposed to motivate the abandonment of the state of nature. To this negation of the state of nature or of the political, Schmitt opposes the position of the political."[29]

So: as Strauss understands it, the Schmittian state of nature is a state in which human beings coagulate into groups (of friends) that are at least potentially, existentially, opposed to one another (as enemies). The last sentence of Strauss's comparison is particularly crucial here, where he draws an opposition between "the position of the political" and the Hobbesian "negation of the state of nature or of the political." What does this tell us about Schmitt's position? Two points stand out: 1) the Schmittian concept of "the political" and the state of nature are more-or-less directly equivalent, which is to say that Schmitt reverses the Hobbesian opposition between our natural tendency towards conflict and "the artificial"[30] peace of political society. And 2) Schmitt is not interested – once again, in stark contrast to Hobbes – in the containment of our predilection for conflict, but implores us instead to understand conflict as a permanent feature of the human condition: "the reality of the political"[31] that can "never be fully contained."[32]

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[28] See THOMAS HOBBES, LEVIATHAN. For Schmitt's most direct engagement with Hobbes's work, see CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBES.
[29] Leo Strauss, *Notes on Carl Schmitt: The Concept of the Political* – at 90 (citation to version in CARL SCHMITT, THE CONCEPT OF THE POLITICAL).
[30] For a critique (or rather, a deconstruction) of the distinction between natural and artificial objects in Hobbes's work, see JACQUES DERRIDA, THE BEAST AND THE SOVEREIGN, VOLUME I – at 32-62.
[31] Leo Strauss, *Notes on Carl Schmitt: The Concept of the Political* – at 96.
[32] See RICHARD BERNSTEIN, VIOLENCE: THINKING WITHOUT BANNISTERS – at 24-25.

It is clear, then, that Schmitt's pessimism runs deep. To explain: not only does Schmitt think that our nature tends towards the political, i.e. towards friend-enemy relations and adversarial tribalism; he also thinks that the political in this sense is a "basic characteristic of human life."[33] What does this mean? And to be more precise, how does Schmitt think the "reality of the political" requires us to live? Schmitt's very straightforward answer is that we must live "politically,"[34] embracing the sheer facticity of political tribalism, and remaining ready (or poised, perhaps) to name and confront our enemies where their existence and aspirations come to threaten our own. Of course, this is not the only way in which one might respond to the reality or facticity of the political, and so one may ask: why does Schmitt choose this approach over, say, a more pacifistic one? In *The Concept of the Political*, we find a response that is as unequivocal as one may hope. To quote:

> "A people that exists in the political sphere cannot, despite entreating declarations to the contrary, escape from making this fateful distinction… [between friend and enemy]… If a part of the population declares that it no longer recognizes enemies, then, depending on the circumstance it joins their side and aids them. Such a declaration does not abolish the reality of the friend-and-enemy distinction." [35]

To explain: for Schmitt, the pacifist cannot opt out of or wish away the reality of conflict – "the reality of the political" – but must make a difficult choice between his/her idealistic opposition to conflict, and the preservation of his/her way of life as a concrete reality. Schmitt's point, then, is simply that an active commitment to the former, the pacifistic ideal, necessarily jeopardizes the efficacy of one's commitment to the latter, so that, in an unintended but nonetheless meaningful way, pacifists are their own worst enemies: obstacles to the preservation of their own community or way of life as a concrete reality. To further clarify this argument, we can turn briefly to Derrida, who takes a somewhat similar position when he unravels the various implications that are bound up in the Western concept of hospitality. For Derrida, there is a tension within the concept of hospitality between what he calls "the two figures of hospitality."[36] As he explains:

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[33] Leo Strauss, *Notes on Carl Schmitt: The Concept of the Political* – at 95.
[34] Note the implied difference between Schmitt and Rawls here. Because whereas Rawls's "political" liberalism is about trying to maximize social inclusion, Schmitt locates the political, conversely, in gestures of *exclusion*, gestures that draw a line between the inside and the outside of one's political community.
[35] See CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 51.
[36] See Jacques Derrida, *The Principle of Hospitality* – at 6. See also JACQUES DERRIDA, OF HOSPITALITY.

> "Doubtless, all ethics of hospitality are not the same, but there is *no culture or social bond without a principle of hospitality*… [my emphasis]. This principle demands, it even creates a desire for, a welcome without reserve and calculation, and exposure without limit to whoever arrives [*l'arrivant*]. Yet a cultural or linguistic community, a family, a nation, can not not suspend, at the least, even betray this absolute principle of hospitality: to protect a home, without doubt, by guaranteeing property and what is "proper" to itself against the unlimited arrival of the other."[37]

Why does this amount to a tension between "two figures" of hospitality? Why not a tension between a single "principle of hospitality" and a somewhat selfish distaste for its consequences? We can answer this question with a question: do we act hospitably towards our family or community (or whatever) when we welcome foreigners or strangers "without reserve and calculation?" Of course not: we imperil our family, or community, with such a welcome. This is why Derrida's theory posits two figures of hospitality – an ideal of hospitality (an ideal that corresponds to the ideal of pacifism mentioned above), on the one hand, and, on the other hand, "laws of hospitality"[38] that imply a certain friend-enemy distinction, and that limit the pursuit of ideal hospitality "in the name of" that same ideal, so as to extend hospitality not only to "the foreigner," but also to those we "love," i.e. the friends and family members we wish to protect from harm.

What Derrida's analysis reveals is therefore that pure hospitality (or pure pacifism, in Schmittian terms) is impossible: that a display of hospitality in one direction entails a denial of protection/hospitality, or protection-as-hospitality, in another direction, and that, by the same logic, an act of absolute pacifism amounts to a performative posture of self-enmity (a performative opposition to one's "own" way of life, or one's own "friends"). This is the first part of Schmitt's critique of liberalism: that where a liberal state aims at neutrality, or hospitality, or pacifism, it exposes itself to ruin. To put it in the terms of the last chapter, when liberal states refuse to take a stand, morally, they slide into a politics of abandonment, a politics that sides not with what's "right," but with what *happens* – i.e. with whoever has enough power and/or public support to control the effective operations of the state, whether they are liberal (and care about liberal values like tolerance) or not.

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[37] Jacques Derrida, *The Principle of Hospitality* – at 6. Elsewhere, in his essay *On Cosmopolitanism*, Derrida suggests that the idea of "an ethic of hospitality" is "tautologous," which is to say that for him, ethics is *always* about hospitality – about when it is owed, and to what extent. See JACQUES DERRIDA, ON COSMPOLITANISM AND FORGIVENESS – at 16.

[38] JACQUES DERRIDA, OF HOSPITALITY – at 75 (and frequently throughout the book).

This raises a new question for us: why, if it entails self-enmity, does liberalism persist as a way of life? Why did it not die off many years ago – a victim of natural selection in Schmitt's state of nature? The answer that can be gleaned from Schmitt's work is that although liberalism aspires toward moral neutrality, and pacifism, liberals/liberal states are often more than ready to invoke and act on the friend-enemy distinction. The problem is that liberalism's enemies are rarely, if ever, recognized as the happenstance opponents of a particular community, but are cast instead as the barbaric nemeses of humanity and human dignity.[39] In other words: when liberals and liberal states show their teeth, the basic promise of their state philosophy – i.e. the avoidance of friend-enemy politics – forces (or at least encourages) them to do so under a veneer of neutrality and universality. And, as Schmitt explained in one of the most famous sections of *The Concept of the Political*, such a move may lead, ironically, to the most inhumane forms of politics imaginable:

> "That wars are waged in the name of humanity… has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy.
>
> The concept of humanity is… [therefore]… an especially useful ideological instrument for imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity."[40]

[39] For an excellent account of how modern-day liberal states have castigated and de-humanized their enemies in this way, see WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE. Brown is particularly astute in her assessment of the Bush administration's post-9/11 rhetoric (e.g. its description of Islamic terrorists as "barbarians"), and it is easy to see how such rhetoric may have undergirded the administration's reliance on torture and detention without trial at Guantanamo Bay. Indeed, does all of this not confirm Schmitt's warning, i.e. that a war in humanity's name may nonetheless "be driven to the most extreme inhumanity?" See WENDY BROWN, REGULATING AVERSION – at 1-24.

[40] See CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 54.

For Schmitt, then, liberalism's dreams of moral neutrality, and its conceited presentation as *the* philosophy of human dignity and humanity, will lead either 1) to a timid and self-destructive pacifism, or 2) to one of the most inhumane and sanctimoniously self-assured forms of political tribalism conceivable. In both cases: liberalism's core crime – as far as Schmitt is concerned – is that it is intellectually and existentially dishonest, since it presents itself as an exception to the harsh but inescapable reality of political enmity, when it in fact sways haplessly between self-enmity, on the one hand, and extreme enmity, on the other. Schmitt's point is therefore not that liberalism is actually "unpolitical or suppresses the political, but that it hides or denies its own political character"[41] (and its inevitable participation in tribal, friend-enemy style politics).

We could say, then, that Schmitt's critique turns on two thoughts: 1) that friend-enemy relations are a matter of unavoidable, concrete reality (although this does *not* mean that it is always or indeed ever self-evident when one is confronted with an enemy, i.e. a threat to one's existence or way of life[42]), and 2) that the appropriate way to confront this reality, or the most (dare I say) "moral" way to confront this reality, is to accept that *we cannot do so morally*, by appeal to universal or otherwise transcendent standards of human decency. On the contrary, for Schmitt, morality entails "nothing more or less than the courage and honesty to affirm one's own will to power as the only ground of the… [political] decision."[43] This is why Richard Bernstein refers to Schmitt's philosophy as an "amoral moralism"[44] – because his conception of morality is opposed to conventional morality, where conventional morality is taken as an attempt to subsume action under a previously determined general norm. In Schmitt's theory, there is no "previously determined" order from which political reality can be reckoned with. On the contrary, like Nietzsche, Schmitt thinks that life typically comes down to one's "will to power,"[45] and that morality – inasmuch as it always involves limits on one's capacity to deal with the relations of power in which one is naturally entwined – is either dishonest (at best) or self-destructive (at worst).

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[41] See Robert Howse, *From Legitimacy to Dictatorship – and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt* – at 89. See also David Dyzenhaus, *Liberalism after the Fall* – at 14.

[42] This point is well made by Panu Minkkinen, in his short paper, *Hostitlity and Hospitality* (at 55). In his words: "It should be more or less obvious… that Schmitt's distinction between friend and enemy does not come about by itself," which is to say that it relies on a real, unsecured *decision*.

[43] Robert Howse, *From Legitimacy to Dictatorship – and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt* – at 80.

[44] RICHARD BERNSTEIN, VIOLENCE: THINKING WITHOUT BANNISTERS – at 41

[45] See, for example, FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL – at 44 ("life as such is will to power"). See also Martin Heidegger's volumes on Nietzsche's will to power, including MARTIN HEIDEGGER, NEITZSCHE, VOLUMES I & II: THE WILL TO POWER AS ART.

II. Rawls via Schmitt (or Lincoln's Heroism)

Schmitt, then, criticizes liberalism because it is intellectually dishonest, but does this criticism apply to Rawls? This is the question that I will now answer, ultimately in the affirmative. To explain: let us recall, firstly, that Rawls's political turn stems from the same concern – namely, a concern with the persistence of pluralism in modern societies (and under liberal-democratic conditions of freedom) – that troubles Schmitt. However, whereas Schmitt sees pluralism as a symptom of liberalism's innate frailty and instability, Rawls – as a liberal who insists that state action be explainable in terms of "reasons aptly attributable to *all affected persons*… [my emphasis]"[46] – sees it instead as a challenge (or, more precisely, *the* challenge) to which liberalism must rise. The question, then, is how? And Rawls responds: liberalism can rise to the challenge of pluralism if it is reconceived as a purely "political"[47] doctrine anchored in a principle of public reason, a principle that requires the "privatization"[48] of moral/religious views so as to ensure 1) that all citizens are shielded from the public entrenchment of moral/religious views with which they disagree, and 2) that liberal politics can remain stable despite the persistence of deep moral (and religious) disagreement.

In other words: Rawls thinks that liberal-democratic citizens are prudentially, morally well-advised to tolerate one another's moral/religious views – (at least) on the modest condition that those views are couched, publicly, in terms that can pass as neutral or non-controversial. This view, and "the spirit of toleration"[49] that it flows from, is surely admirable. However, a commitment to it is easier professed than maintained, since it will at least occasionally be tested by neutrally-presented arguments that cut hard against our personal conception(s) of morality. As the communitarian thinker, Michael Sandel, writes:

> "Even granting the importance of securing social cooperation on the basis of mutual respect, what is to guarantee that this interest is always so important as to outweigh any competing interest that could arise from within a comprehensive moral or religious view?"[50]

[46] This is Frank Michelman's version of the basic, liberal demand for consent-worthy governance (as presented at the end of chapter one). See Frank Michelman, *Always Under Law?* – at 234.
[47] Once again, I use this term in the Rawlsian sense: to refer to a theory of justice or political morality which applies only to public discourse and mainly to questions of fundamental, public justice, not to more fundamental, controversial questions of morality, religion or philosophy.
[48] See Michael Sandel, *Political Liberalism*, a review of Rawls's book of the same name.
[49] Ibid at 1784.
[50] Ibid at 1777.

Sandel's concern here is surely borne out by the fact that Rawls himself embraces a host of controversial and seemingly zealous positions on a number of hot-button issues (such as abortion, poverty, and campaign finance). This inconsistency, or apparent inconsistency, raises an important question: is it realistic and reasonable to ask citizens to endorse a theory of justice that leaves no room for beliefs that are fundamental to them, and that asks them, moreover, to tolerate minimally "rational" affronts to those beliefs? Sandel says no: partly because he thinks it will lead to an impoverished, bloodless public discourse, and partly because it would deprive citizens of the linguistic resources that they need to argue effectively. Consider, for example, the way that Abraham Lincoln argued against Stephen Douglas's claim that "because people were bound to disagree about the morality of slavery… national policy should be neutral on that question."[51] To quote Lincoln, via Sandel:

> "I say, where is the philosophy or the statesmanship based on the assumption that we are to quit talking about… [slavery]… and that the public mind is all at once to cease being agitated by it? Yet this is the policy… that Douglas is advocating – that we are to care nothing about it! I ask you if it is not a false philosophy? Is it not a false statesmanship that undertakes to build up a system of policy upon the basis of caring nothing about *the very thing that every body [sic] does care the most about*?"[52]

We will say more about this further on, but for now let me simply state the problem as follows. If we privatize morality, then we not only suck life out of the public realm, but we also risk turning our dearest moral values into mere "hobbies"[53] – low-rank, background interests that we readily, if unhappily, sacrifice when they conflict with the (admittedly important) social goods of cooperation and mutual respect. I do not know if Rawls would have accepted such a suggestion, but his own forays into political controversy indicate that he at least felt its force. To put this in Schmittian terms: Rawls surely sensed that an over-tolerant conception of public reason, or a too-*zealous* insistence on political toleration, would amount to a gesture of pacifistic self-enmity; a shot to the moral integrity of (and the prospective beneficiaries of) a more comprehensive liberalism, which insists on each person's full autonomy to self-direct their own life (as far as possible).

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[51] Ibid at 1779.
[52] Ibid at 1780.
[53] This is a reference to a quote from American comedian and political commentator, Jon Stewart: "If you don't stick to your values when they're being tested, they're not values: they're hobbies." Stewart's point, I think, is similar to one of Schmitt's: namely, that the exception (or the *testing* moment in Stewart's terms) reveals the truth of one's way of life, i.e. the things that one *truly* values.

A Rawlsian might concede: these moments in Rawls's work *are* departures from "the spirit of toleration it otherwise evokes."[54] However, they are only momentary departures: exceptions that are inevitable (and that we must accordingly accept) in a fallen social world, a world in which we can only ever choose between "necessarily compromised offerings of necessarily damaged goods."[55]

This is all well and good. But to argue in this direction, as Dyzenhaus has suggested, is to "play… directly into Schmitt's hands."[56] To explain: in his well renowned book, *Political Theology*, Schmitt claims that political normalcy and the regular rule of law are not self-sustaining. On the contrary, in Schmitt's view, political normalcy always implies and turns on a passive sovereign decision: a decision, on the part of those with the power or capacity to declare the suspension of the law, to refrain from wielding that power. The true nature of the state is then revealed not in its "torpid"[57] normalcy, but, precisely, in the moment of exception, where "the power of real life… breaks through the crust"[58] of so-called normalcy, and reveals not only the identity of the political sovereign, but also the existential limits of the community (which the sovereign's decision simultaneously posits and then attempts to defend in his/her declaration of a state of emergency, or exception).

With this in mind, a Schmittian critique of Rawls might proceed as follows. Rawls, we might say, would only be a "political" liberal to the extent that his definitive abstinence from moral/religious controversy is exception-less. However, insofar as Rawls frequently courts such controversy, we may wonder whether Rawls's foundational principle – and, indeed, the true essence of his theory – is less a "principle of toleration"[59] and more a principle of tolerating-that-which-is-already-tolerable, i.e. positions that are compatible with a comprehensively liberal way of life. In my view, this makes Rawls exactly the kind of liberal that Schmitt's work takes to task: a liberal who advocates tolerance, and shies away from declarations of political enmity, but who – at certain exceptional moments – sways away from such tolerance to defend a commitment to a comprehensively liberal way of life, one that in Rawls's case is closely linked to individual autonomy and empowerment (e.g. the empowerment of pregnant women to determine their own futures).

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[54] Michael Sandel, *Political Liberalism* – at 1784.
[55] See FRANK MICHELMAN, BRENNAN AND DEMOCRACY – at 8.
[56] David Dyzenhaus, *Liberalism after the Fall: Schmitt, Rawls and the Problem of Justification* – at 24.
[57] CARL SCHMITT, POLITICAL THEOLOGY – at 15.
[58] Ibid.
[59] To quote Rawls: "[Political]… liberalism applies the principle of toleration to philosophy itself." See PL at 10. See also Richard Rorty, *The Priority of Democracy to Philosophy* (discussed further in chapter four).

Rawls's work, then, can be seen as contradictory. But is this really a problem? I mean, Schmitt himself notes that tolerance (or pacifism, and the rejection of the friend-enemy distinction) is tantamount to self-enmity, so should a Schmittian not commend Rawls for his performative renunciations of tolerance? Are these not precisely the *political* – and I mean political here from a Schmittian as opposed to a Rawlsian perspective – moments in Rawlsian liberalism, the moments in which Rawlsian liberalism accepts the agonistic reality of the political, and bears its teeth?

Perhaps. The problem, though, is that this merely leads us to Schmitt's main critique of liberalism: namely, that liberalism is intellectually dishonest. The difficulty here is that Rawls never presents his moments of intolerance as moments of intolerance. On the contrary, he presents them as expressions of a *reasonable* theory of justice – a reasonable theory to which all, as free and equal, or reasonable and rational, can be presumptively taken to assent. In this regard, Rawls acknowledges that his theory cannot and does not accommodate pluralism *as such*, but only *reasonable* pluralism. And, as it turns out, reasonable pluralism is merely internal disagreement – disagreement between those who already accept "the essentials of a democratic regime"[60] as Rawls understands them.

Now, as Chantal Mouffe has suggested, this limit/distinction is an unavoidable and understandable one. However, Mouffe's thoroughly Schmittian concern is that Rawls misrepresents this limit/distinction as an aspect of common, liberal-democratic morality as opposed to a matter of an unassured, political *decision*. As she writes:

> "What Rawls is really indicating with such a distinction... is that there cannot be pluralism as far as the principles of the political association are concerned, and that conceptions which refuse the principles of liberalism are to be excluded. I have no quarrel with him on this issue. But this is the expression of an eminently political decision, not of a moral requirement. To call the anti-liberals "unreasonable" is a way of stating that such views cannot be admitted as legitimate within the framework of a liberal-democratic regime. This is indeed the case, but the reason for such an exclusion is not a moral one. It is because antagonistic principles of legitimacy cannot coexist within the same political association without putting in question the political reality of the state."[61]

[60] See, for example, the original "Introduction" to PL at xvi.
[61] CHANTAL MOUFFE, THE DEMOCRATIC PARADOX – at 25. Mouffe has written a number of pieces on Rawls's work, all of which criticize it from a leftist-Schmittian perspective. See also Chantal Mouffe, *Political Liberalism. Neutrality and the Political*, and Chantal Mouffe, *The Limits of John Rawls's Pluralism*.

The plot then thickens. Because not only does Rawls fail to accept his distinction between the reasonable and the unreasonable as a point of contingency; he also sets it to work as a veil of legitimacy to drape over his own, comprehensive preferences for state policy, and, in particular, constitutional law. For example, in the last chapter, I provided a fairly detailed reconstruction of Rawls's refusal to tolerate opposition to first trimester abortion on the grounds that such opposition is unreasonable (by which he means that such opposition cannot rest on a principled appeal to all reasonable and rational persons). However (and once again, as explained in the preceding chapter), the concept of reasonableness on which such a refusal would need to ground itself can only be a controversial one. And if the concept of reasonableness itself (and remember, this concept is concerned precisely with the essentials of a democratic regime) is controversial, then Rawls's whole enterprise caves in. After all, how can one claim to abstain from moral controversy when one's own politics rest on a controversial account of liberal reasonableness and democratic essentials?

This takes us back to Abraham Lincoln's response to Stephen Douglas on slavery. For a Rawlsian, Lincoln's opposition to Douglas could have been presented, like Douglas's position, in a way that avoided moral controversy. In this regard, the Rawlsian defense of Lincoln's position would be that an argument for slavery can *never* comply with public reason, because it can *never* be framed as an appeal to *all* persons as free and equal, or reasonable and rational, i.e. since we may presume that no reasonable and rational person would vote for their own forced servitude.[62]

Is this the really the case, though? Think about it: supporters of slavery (and slave-owners) did not necessarily or typically disagree with the political liberal promise of consent-worthy governance, which was enshrined in American law from its earliest days. On the contrary, supporters of slavery rather insisted – as many of us would still insist in relation to non-human animals – that non-whites were simply not parties to that promise: that their innate inferiority rendered them unworthy of constitutional consideration. I suggest (alongside Sandel and Lincoln) that there is no way to counter this vile, racist claim without taking what is ultimately a moral stand – i.e. without insisting that non-whites are full, constitutional people, and that their hopes and dreams and interests should be factored into any minimally legitimate scheme of governance.

[62] In other words: from a Rawlsian perspective, one may argue that Lincoln need not court moral controversy in arguing against slavery, because he can easily appeal to a principle of consent-worthy governance 1) that all people have reason to accept, and 2) that can't possibly be presented as "unviolated" by the practice of slavery (since nobody could conceivably, rationally consent to their own enslavement).

The problem with political liberalism, then, is that it refuses to concede the necessity of *extra*-political, passionately moral arguments in cases like these. Instead, as Schmitt complained, political liberalism presents itself as a more or less neutral ally of humanity, which enlists and relies only on a limited, "political" morality that all persons – as reasonable and rational – may endorse. The real rub is then that Rawls uses this apparently minimal moral language, the language of public reason, to denounce a range of well-intentioned if impeachable political positions: from pro-life fundamentalism to run-of-the-mill libertarianism. I happen to agree with Rawls's opposition to both positions. But there is – again, as Schmitt complains – something disingenuous and unsatisfactory about a liberalism that casts its enemies as unreasonable at the same time that it heralds its own anchorage in a radical principle of toleration. Both moves – exceptional declarations of enmity, on the one hand, and a general commitment to political neutrality, or toleration, on the other – may be necessary from a liberal perspective. But one surely negates the other, and a liberal discourse that conceals or lies about the fundamentality of this rift (or the fundamentality of the fundamental contradiction, as I called it in the previous chapter) is therefore difficult to sustain if one cares at all about political authenticity.

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Let me immediately clarify on this point. Schmitt's accusation of intellectual dishonesty may stick to the walls of Rawlsian liberalism, but for me, this only undermines Rawls's more ambitious attempts to present his own policy preferences as extensions of a plausibly common, public reason. My core criticism of Rawls's political turn is therefore that he fails to accept the fundamentality of the rift between liberalism's two impulses (even as his work flails between these impulses): one which strives to avoid a politics of anti-pluralistic and intolerant zeal, and one which nonetheless insists on a certain intolerance or zeal in an effort to protect and empower more vulnerable members of the liberal community, and which, accordingly, cuts against a politics of abandonment (or, by a more Schmittian turn, a pacifistic politics of self-enmity). Dyzenhaus makes this point well when he notes that in spite of its intellectual rigor and novelty, PL never transcends the starkest choice that liberals and liberal states face today. In his words:

> "The tension… [in Rawls's work]… can be reduced in two different ways. First, Rawls could give up on the justificatory project altogether. But that would take Rawls along the Kelsenian path, whose danger is not that it is paved exclusively for either saints or sinners, but that it cannot discriminate between the two. That is, the tension is reduced at the theoretical level but in a way which leads to the principled defenselessness of liberalism… [and, we might say, to a politics of liberal abandonment]… The tension is displaced into a free-for-all of politics, where politics is conceived as a kind of normative vacuum, a space contested by groups making distinctions between friend and enemy, on whatever lines they care to define.
>
> Second, Rawls might develop a full justification for the values of the "political." But that justification would have to avoid what Rawls correctly wants to avoid – the privileging of any particular view of the good life."[63]

Dyzenhaus's own belief is that liberalism must take the latter path, and present itself as a full and thereby controversial theory of political morality, a la Joseph Raz's "perfectionism."[64] How, then, can liberalism avoid "what Rawls correctly wants to avoid – the privileging of any particular view of the good life?" Will a full, comprehensive justification not do exactly that? Dyzenhaus answers: not if liberalism is ready to "accept its fall into democracy."[65] This means that rather than seeking to transcend the reality of the political, liberalism (at least for Dyzenhaus) must accept is own partiality, and fallibility, and "take its place as one of the political positions contending within democracy."[66]

In taking this position, Dyzenhaus is in distinguished company. For example, in *Law and Disagreement*, Jeremy Waldron makes a similar suggestion, claiming that there is a "dignity"[67] to legislation, as a product of open debate, that renders external (e.g. judicial) checks on the substantive constitutionality of legislation inappropriate, not least of all because such checks will for Waldron demean the *liberal* dignity of ordinary people as properly rational beings – rational beings capable of having a say in (and rightfully free to have a say in) their own political destiny.

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[63] David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?* – at 132-133. For another account of this tension in the more practical context of Canadian constitutional law, see David Dyzenhaus, *The New Legal Positivism*.

[64] See JOSEPH RAZ, THE MORALITY OF FREEDOM. For the application of the perfectionist label to Raz's theory, see Martha Nussbaum, *Perfectionist Liberalism and Political Liberalism*.

[65] See Dyzenhaus, *Liberalism after the Fall: Rawls, Schmitt and the Problem of Justification* – at 27.

[66] Ibid.

[67] See JEREMY WALDRON, LAW AND DISAGREEMENT – especially at 19-146. Alternatively, for a shorter version of Waldron's critique of judicial review, described in the latter half of the above paragraph, see Jeremy Waldron, *The Core of the Case Against Judicial Review*.

Waldron's position here is compelling, and it comes as a breath of fresh air against the many forms of liberalism that accept the institutions of judicial review and legal constitutionalism more or less uncritically. However, compelling as it may be, one finds an equally compelling objection to Waldron's position when one turns back to the work of Schmitt. In the next section, I will say more about this part of Schmitt's work, but for now, suffice it to say that Schmitt's key objection to thinkers like Waldron is that the institutions of parliamentary democracy – the institutions that receive so much praise from Waldron in his *Law and Disagreement – tend* to promote a form of politics that is paradoxically "non-public." To explain: for Schmitt, although parliamentary politics enables superficially public debate, it does so by encouraging a competition between different and distinctive groups – each promoting its own conception of "private interest"[68] with the aim of shifting the law in its own, preferred direction. The problem, perhaps obviously, is that in such a system, there is little room for consideration of a more distinctly "public interest," as such, and nothing to ensure against "the factional abduction of the state,"[69] i.e. the reduction of the state to whatever a particular, self-interested interest group wants it to be.

Judicial review, which Waldron argues against, is the standard liberal response to this problem, with the idea being that judges can invoke the "public interest" (expressed by the Constitution) as a bulwark against factional abduction, or against legislative behavior that is otherwise out of step with the public interest (again, as expressed by the Constitution). However, for Schmitt, liberal judicial review is problematic because it obscures the fully political character of such intervention, since it presents it (on most accounts) as the non-violent unfolding of prior law (a fiction without which the democratic legitimacy of judicial review is sometimes thought to collapse). The question, then, is how the public interest can be effectively protected without indulging in the liberal fiction of an apolitical, non-decisive, neutral intervention – a non-coercive exercise of public power. And in the next section, we will look both at Schmitt's answer to this question, and at the liberalization of Schmitt's answer that one arguably finds in the work of Bruce Ackerman, a Yale law professor who avoids at least some of the problems just located in Rawls's work.

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[68] See CHANTAL MOUFFE, THE DEMOCRATIC PARADOX – at 52. This aspect of Schmitt's critique became especially clear in 1931, when he published a short text entitled, *The Guardian of the Constitution* (*Der Hüter der Verfassung*, in German), and his disdain for liberalism and especially parliamentarianism had apparently grown even further by the time he wrote the maligned, *Staat, Bewegung, Volk*, in 1933.

[69] See JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 303.

III. Institutional Heroism: Schmitt's Solution and its American Incarnations

With all of this in mind, we can return now to Schmitt's debt to Weber, and, more precisely, to the question of how his "pessimistic conception of man" informs his response to moral pluralism at the intra-state level. In a nutshell, Schmitt criticizes pluralism's liberal advocates – those who think that the state should act as a neutral, purely procedural arbiter vis-à-vis the various moral doctrines that persist under conditions of freedom – because they tend to naively or dishonestly deny the sectarian character of their own position. Put more polemically, we could say that Schmitt's liberal sees his/her politics not as one more moment in human history, but as a moment of transcendence that represents "the end of history,"[70] the end of history as a story of warring ways of life. As Gopal Balakrishnan writes:

> Despite Schmitt's reservations, Italian Fascism appealed to him because it represented a determined rejoinder to the chorus of voices… all proclaiming the death of the state as the sovereign order. Schmitt warned that these representatives of contemporary pluralism had not thought through the consequences of their prediction. Actually existing pluralism, seen through Hobbesian eyes, was one step away from a condition of civil war… [in which]… parties and interest groups were powers which, if unchecked, would devour the great Leviathan from the inside out."[71]

To explain: in Schmitt's view, morally neutral states are not *really* neutral, but on the contrary, endorse and create what is ultimately a watered-down (but still intolerable) version of Hobbes's state of nature, where private entities and interest groups vie to capture public policy for their own conception of "private interest."[72] Put differently, one could say that the minimization of state sovereignty – the most obvious consequence of a state's moral neutrality – does not actually protect individuals from the brunt of raw power, but merely shifts power into the private realm. The consequence of this shift is then, as Chantal Mouffe puts it, that the state is "reduced to a purely instrumental function… [and] loses its ethical role and its capacity to represent the political unity of the people."[73]

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[70] This is a reference to Hegel, and his idealistic conception of history, although the more relevant reference here is perhaps to Francis Fukuyama's much-maligned defence of modern-day liberalism as the final phase of an otherwise bloody, uncivilized world history. See FRANCIS FUKUYAMA, THE END OF HISTORY.
[71] See GOPAL BALAKRISHNAN, THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT – at 124.
[72] See CHANTAL MOUFFE, THE DEMOCRATIC PARADOX – at 52 (again).
[73] Ibid.

This last point should make us pause and ask: why would Schmitt, who revels in and celebrates the so-called reality of the political, exhibit such concern over the existence of group conflict at the intra-state level? The simple answer is that Schmitt does not see private interest groups (and the antagonisms that exist between them) as "properly" political, since conceptions of private interest are little more than contingent expressions of want/need, as opposed to indications of a group's participation and anchorage "in a common substance."[74] For Schmitt, then, the reality of the political – or the reality of the friend-enemy distinction – is not just a matter of enmity, but rather, and more specifically, of enmity between distinctive peoples and ways of life: between groups whose members partake in and see themselves as "partaking in a common substance."[75] This means that when Schmitt embraces the "position of the political"[76] he simultaneously poses a question: namely, the question of how a distinctive and unified people can emerge from the dense thickets of modern pluralism – i.e. from a secularized society that "has eaten from the tree of knowledge."[77]

We have already seen that Schmitt's answer to this question is essentially in sync with Weber's: that, when pluralism threatens political stability, the only appropriate solution is a presidential/sovereign decree that flattens out the pluralistic mass of private interests and wants into a "homogeneous *Volk*"[78] or People. Schmitt's answer is therefore openly sacrificial, since it crushes dissent, whether reasonable or not, beneath a sovereign decision that substitutes itself for (but which is ultimately meant to produce) actual political unity. To exemplify this position, historically, we can refer once again to Abraham Lincoln. As Agamben writes in his short book, *State of Exception*:

> "Acting counter to the text… [of the US Constitution]… on April 15, 1861, Lincoln decreed that an army of seventy-five thousand men was to be raised and… [he]… convened a special session of Congress for July 4. In the ten weeks that passed between April 15 and July 4, Lincoln in fact acted as an absolute dictator… [and on]… April 27, with a technically even more significant decision, he authorized the General in Chief of the Army to suspend the writ of habeas corpus."[79]

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[74] Ibid at 38 and 50.
[75] Ibid at 50.
[76] See *Leo Strauss, Notes on Carl Schmitt: The Concept of the Political* – for example, at 111.
[77] Once again, see MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES – at 57.
[78] See David Dyzenhaus, *The Legitimacy of Legality* – at 148.
[79] GIORGIO AGAMBEN, STATE OF EXCEPTION – at 20.

The legitimacy of Lincoln's behavior, from a Schmittian point of view, has nothing to do with its technical constitutionality, or its dictatorial quality, but hinges instead on the extent to which Lincoln's charisma, and his interpretation of the American way of life, could, and ultimately did, find traction in the hearts and minds of ordinary Americans: the truest measure of legitimacy in Schmitt's eyes. Implied in this formulation is Schmitt's distinction between the real and relative constitutions of a state in his book, *Constitutional Theory* (*Verfassungslehre* in the original German). As Johan van der Walt explains:

> "[For Schmitt, constitutional laws]… basically remained empty husks that gave way to the doctrines of the absolute constitution and constituent power that he developed in his *Verfassungslehre*. According to these doctrines, the concrete unitary existence of a people is the real or absolute constitution of that people (*Absoluter Verfassungsbegriff/Verfassungs als Gesamtzustand konkreter Einheit und Ondnung*). Written constitutional documents and the sum of particular laws, in comparison, only represent the relative constitution of the people (*Relative Verfassungsbegriff*). The relative constitution only contains present arrangements of governments that the people happened to choose… [or perhaps simply happen to tolerate]… for the time being. In its capacity as absolute constitution the people can change these arrangements again and do so at will, that is, unrestrained by any provisions of the relative constitution and therefore also unrestrained by constitution amendment clauses that require raised parliamentary majorities for constitutional changes."[80]

Interestingly, then, at the core of Schmitt's conception of the real (or absolute) constitution is a rather counter-intuitive appeal to democracy. The decisive role of the Schmittian sovereign is to retrieve a popular will (or the state's real/absolute constitution) that parliamentary politics will likely obfuscate (due to the influence of private/economic power and interest groups). Of course, in attempting such a feat, the sovereign constructs the very "people" to which he/she makes appeal, which is to say, once again, that his/her appeal tramples over and conceals significant pockets of dissensus within the population. In this sense, Schmitt's democratic moment is rampantly anti-liberal, since it shirks the fundamental principle that this thesis attributes to modern liberalism: namely, the principle of human dignity, which places core individual interests above communal ones.

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[80] Johan van der Walt, *The Literary Exception* – at 21. The primary sources in this regard, though, are CARL SCHMITT, CONSTITUTIONAL THEORY and HANS VINX, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW – the latter of which compiles several of Schmitt's statements on the role of the President as a populist mouthpiece.

To further clarify this position, consider the way that some British tabloids reacted to the High Court's recent *Miller* decision, on whether the UK government could begin its negotiations on Brexit (and more specifically, invoke Article 50 TEU to begin the formal process of withdrawal from the Union) without a vote in Parliament, i.e. without the consent of the country's legal sovereign. When the Court ruled that this would constitute a deprivation of fundamental rights that only Parliament could approve, *The Daily Mail* and several other tabloid newspapers ran headlines denouncing the responsible judges as "enemies of the people" (amongst other things). To quote one of *The Mail's* sources:

> "On 23 June the British people gave a clear mandate for the UK government to leave the EU. This case is a plain attempt to block Brexit by people who are out of touch with the country and refuse to accept the result…
>
> An unholy alliance of Remain campaigners, a fund manager, an unelected judiciary and the House of Lords must not be allowed to thwart the wishes of the British public. It would trigger a constitutional crisis if the Supreme Court upheld this vague and undemocratic verdict."[81]

As Thomas Poole puts it, this is "British Schmittianism"[82] to a tee. To explain: for *The Daily Mail*, it would seem, a position that receives the explicit assent of a majority of the British people need not be subjected to further debate, even if that further debate is required to ensure compliance with constitutional law, and in particular, its principle of parliamentary sovereignty. Never mind that only 30% (approx.) of the overall UK population voted for Brexit, and never mind that this minority voted to strip the country's citizens of fundamental rights and to render the status of many foreign residents precarious. Never mind any of that: *the people have spoken*, and the legitimacy of subsequent political action will accordingly depend not on its compliance with constitutional law or procedure, but, on the contrary, on its readiness to dispense with any and all requirements (even requirements to respect legally enshrined, fundamental rights) that obfuscate, delay or thwart the executive's compliance with the *real* constitution, i.e. the will of a "substantially homogenous Volk."[83]

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[81] See here: http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.
[82] See Thomas Poole, *Losing our Religion? Public Law and Brexit*, available at: https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/.
[83] Once again, see David Dyzenhaus, *The Legitimacy of Legality* – at 148. I refrain from saying whether Schmitt would have accepted this particular logic, but one can at least say that it moves in a Schmittian direction.

Put bluntly, this line of thinking is fundamentally anti-liberal, not because it is populist (all modern political theories derive their legitimacy from "the People"[84] in some way or another), but because it is dictatorial, which is to say that it renders citizens subject to the whims of a single, institutional voice, and a single interpretation of the public interest, thereby depriving all but the executive's supporters of *any role* in the constitutional reordering of the state. However, at the same time that one condemns the anti-liberal, sacrificial dynamics of this position, one may still concede that its concerns vis-à-vis judicial review are not completely misguided, for the reasons mentioned at the end of the last section. Granted, such concerns do not really apply to the *Miller* decision, which turned on the question of *how* constitutional reordering should take place (as opposed to *whether* and in which direction it should take place), but in general, the point is an important one. After all, why should *any* institution have a monopoly on deciding how to protect the public interest, and how to align the constitutional structure of the state with the interests or desires of "the public?"

Schmitt's simplistic but nonetheless forceful answer is that in the end, this is always what happens: the only question is which institution is best placed to "decide on the exception"[85] – i.e. to interrupt the normal flow of partisan politics in the name of protecting an eminently fragile public interest. In Weimar Germany, the political tumult of the day left Schmitt in no doubt that the President should take on this function, since the uninterrupted rule of Parliament would abandon citizens to rule by private interest, and since judicial interruptions of Parliamentary rule would merely disguise "juristocracy"[86] – the rule by unelected, unaccountable judges – as the rule of law (bearing the mind the particularly "open texture"[87] of constitutional language). This is all well and good, of course, as a critique of liberalism, but it is also *terrifying*. Do we really have no option but to accept and submit to the untrammeled sovereignty of a Hobbesian *Leviathan* – an acceptance and submission that, as noted above, would mark the death of liberalism as we currently know it? Or can we find a way to accept Schmitt's critique – and especially his conception of sovereignty as a force that we can ignore but not destroy (an energy that, like any other, can neither be created nor destroyed) – without also embracing his authoritarian populism?

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[84] Even Rawls appeals to "the People," although his appeal is to a hypothetical People, modelled as ideally reasonable and rational.
[85] See CARL SCHMITT, POLITICAL THEOLOGY – at 5. "Sovereign is he who decides on the exception." See also CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 51 (on liberal pacifism).
[86] See RAN HIRSCHL, TOWARDS JURISTOCRACY: ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM.
[87] See HLA, HART, THE CONCEPT OF LAW – specifically chapter seven.

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With these questions in mind, let us look back again at Schmitt's distinction between a state's real and relative constitutions. As Andrew Arato has pointed out, Schmitt actually has a number of modern-day, liberal allies on this point, whose constitutional theories rely similarly on "the doctrine of constituent power"[88] as a way to bypass the textual or technical constraints of one's constitutional order. For example, the American scholar Bruce Ackerman has relied heavily on Alexander Hamilton's assertion, in the 78th *Federalist*, "that the power of the people is superior"[89] to any and every crystallization of apparently representative governmental power, to the point where even the text of the US Constitution, to the extent that it no longer represents the authentic will of the American citizenry, can be amended for Ackerman without recourse to the formal amendment procedures set out in the US Constitution's Article V. Ackerman describes such amendments as a product of constitutional "moments"[90] – moments in which "the mass of American citizens mobilizes itself in a collective effort to renew and redefine the public good."[91]

Of course, due to the fact of liberal pluralism, and the sheer size of the US population, the idea of an unambiguous moment of civic mobilization is unrealistic (at best). For this reason, Ackerman makes way in his theory for bouts of *institutional heroism*, where institutional actors present and act on an interpretation of American values that challenges the constitutional status quo. The legitimacy of these acts depends in the first instance on their anchorage in pockets of already existent popular mobilization, and in the second instance on their submission to the checks and balances of the American system's robust separation of powers. Even then, for Ackerman, the legitimacy – or, more precisely, the constitutional status – of a particular vision (and the acts associated with it) will hang in the balance until a protracted sequence of legislative successes and electoral victories (on the part of the associated actors) make it possible to assume popular assent to a fundamental re-orientation of public values. To quote Ackerman:

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[88] See Andrew Arato, *Carl Schmitt and the Revival of the Doctrine of Constituent Power in the United States*.
[89] See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution* – at 1013. For the quote Ackerman is referencing, see HAMILTON, MADISON & JAY, THE FEDERALIST PAPERS (chapter 78).
[90] The most famous statement of Ackerman's views in this regard can be found in ACKERMAN, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS – the second volume of his three volume, "We the People" series. See also WE THE PEOPLE, VOLUME I: FOUNDATIONS, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION, and *Constitutional Politics/Constitutional Law* – all by Ackerman, all fleshing out his idea of the "constitutional moment."
[91] See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution* – at 1029.

> "Even when… [a fundamental]… public controversy reaches its height, ordinary Americans won't be on top of the ins and outs of the detailed debate in Washington, D.C. Nevertheless, something quite remarkable will be happening: a large proportion of the electorate will recognize that the country is reaching a constitutional crossroads, they will understand that the leading candidates for public office are pointing the country in very different directions, and they can explain the basic outlines of the collective choice at stake. Within this setting, popular sovereignty isn't a myth – ordinary Americans know what they are doing when they repeatedly support candidates espousing fundamental change. [And so]… when these elected representatives come to Washington to carry out their mandate from the people, the result of their labors deserves an honored place in the constitutional canon."[92]

With this last phrase, the US Constitution mutates from a cold, static text into a *constitutional canon*: a constantly unfolding story of national identity. Crucially, Ackerman's own interpretation of the American canon includes two moments that are usually seen as decidedly extra-constitutional: 1) The New Deal, which eschewed Article V in favor of ordinary legislation (such as The Social Security Act) and 2) The Civil Rights Revolution (or "The Second Reconstruction"[93] as Ackerman sometimes calls it) which, like the New Deal, includes pieces of ordinary legislation (such as The Civil Rights Act 1964) as well as certain well-known exercises of judicial leadership (e.g. *Brown v. Board of Education*).

Since the latter is Ackerman's most recent example of a shift in the American canon, let us use it to shed some light on his theory. To simplify, the CR revolution began with a "rich history"[94] of social activism, and with successive attempts to disturb the status quo of systemic racism that was represented in American law by the famous rule/slogan, "separate but equal."[95] This history, though, remained a social history, as opposed to a fully political (and fully visible) history, until it attained institutional recognition through the landmark opinion of Chief Justice Earl Warren in *Brown v. Board of Education* (1954): a decision that cut against the grain of prior jurisprudence in its effective refusal to apply the separate but equal rule to the public school system, with Warren claiming that separate facilities for white and black children would amount to "inherently unequal"[96] treatment.

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[92] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 42.
[93] Ibid at 1, and elsewhere.
[94] Ibid at 49.
[95] This rule is most closely associated with the *Plessy* case, in which the USSC upheld state laws requiring the racial segregation of public facilities. See *Plessy v. Ferguson* 163 US 537 (1896).
[96] See Chief Justice Earl Warren's landmark and often quoted opinion in the case of *Brown v. Board of Education* 347 US 483 (1954).

The obvious and immediate question here is how Ackerman's theory judges the moral status of Warren's opinion when it was written. Was it legitimate? Or was it a textbook example of judicial overreach? The answer, I think, is somewhere in between. On the one hand, Warren's opinion functioned as constitutional "signal"[97] to the American People: an institutional invitation to consider a re-orientation of public values that had already been, socially, shaken loose. On the other hand, this invitation, as an invitation to the people rather than an assured expression of their will, was *not yet*, when written, constitutional. On the contrary, as with any act of institutional heroism in Ackerman's theory, Warren's opinion could only *become* constitutional, eventually, after a sustained period of democratic and inter-institutional deliberation, and after its advocates earned the sustained admiration (over multiple elections) of ordinary Americans. In this regard, the electoral victories of Lyndon Johnson and Richard Nixon are taken as important evidence of the constitutional status of the CR revolution, as are the legislative achievements of the former, from the Civil Rights Act 1964 to the Fair Housing Act of 1968 (via the Voting Rights Act of 1965).

We might say, then, that Ackerman's theory implies a two-tiered test for acts of institutional heroism, like Warren's decision in *Brown*. The first-tier is immediately accessible to any institutional actor, and requires simply that they make a good faith attempt to prevent other institutional actors from acting against the constitutional/higher will of the American people. However, since the people's constitutional will is itself not accessible in advance, but must be daringly gleaned from moments of existent social mobilization, institutional heroism will not attain full legitimacy until it has been 1) submitted to the checks and balances of the American system, and 2) plausibly affirmed by the electoral behavior (over successive generations) of the American people. Ackerman's theory, then, is about balance and deliberation, so that his heroes – as much as they are a necessary remedy to moments of political crisis – can never work alone and can, hopefully, never jolt too sharply in some or other new direction. In his words: "A healthy constitution… should not depend on the public virtue of a single man."[98]

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[97] See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 48 (and elsewhere too). The idea of a constitutional signal is vital in Ackerman's work, and is more-or-less synonymous with what I will refer to here as *institutional heroism*. As far as I can tell, and as I will explain further on, the legitimacy of a constitutional signal is in part dependant on the effectiveness of a state's separation of powers. However, as Ackerman explains in a later article – entitled, *The New Separation of Powers* – effectiveness is not necessarily achieved through a more rigorous separation, but may (perhaps) be most ably achieved via a system like Germany's (or Canada's), i.e. a system of constrained parliamentarianism.

[98] See Bruce Ackerman, *The Tanner Lectures on Human Values: The Decline and Fall of the American Republic* – at 14. See also Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*.

From this description, it should be very clear that Ackerman is *not* an ally of Schmitt's authoritarianism, which is to say that the similarities between Ackerman and Schmitt – namely, that they both invoke the power of the people as a check on the formal constitution, and that they both rely on heroic individuals as vehicles or spokespersons for that power – should not be exaggerated. Indeed, rather than seeing Ackerman as a full or even quasi-Schmittian, it is surely better to see him as a recent responder on the scene of the fundamental contradiction, a recent responder who seeks a "third way"[99] between "legalistic perfection"[100] (Rawls) and "lawless force"[101] (Schmitt). To explain: on the one hand, the Rawlsian stance is that a "legitimation-worthy,"[102] liberal constitution 1) should be accepted/respected as a basically fixed foundation for one's political community, and 2) will contain an immanent conception of reason to which we may appeal to resolve disagreements about constitutional morality. Conversely, as we have seen, Schmitt thinks that such a constitution (whether "legitimation-worthy" or not) is always subordinate to the will of a more or less "homogenous *Volk*,"[103] so that a populist sovereign can bypass formal amendment procedures (and violate specific terms of the Constitution) where necessary to protect the "public interest."

Ackerman's third way, then, veers dangerously in Schmitt's direction, but it slams the brakes just before impact. The brakes here are twofold: 1) in the sense that the American separation of powers will de-soliloquize acts of popular heroism, and 2) in the sense that "the question of duration"[104] is made primary, so that only long-term and measurable public popularity will turn institutional heroism into the foundation of a full-fledged constitutional moment. I wonder, though: are these brakes as hi-spec as they need to be to give Ackerman's theory liberal appeal? Two very different questions stand out on this point: 1) what happens to those whose voices are silenced by the weight of a new constitutional moment (or more bluntly, what happens to those political losers who continue to oppose the new values after their unofficial and indeed unverifiable ratification in the constitutional canon)? And 2) if the final measure of legitimacy, for Ackerman, is a new value system's popularity, then is there anything to stop the constitutional canon from shifting in an illiberal direction?

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[99] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS – at 33. See also Sujit Choudry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures* – at 203.
[100] ACKERMAN, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS – at 116.
[101] Ibid.
[102] This is a reference to the prominent Rawlsian constitutionalist, Frank Michelman. See, for example, Frank Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away* – at 675
[103] Once again, see David Dyzenhaus, *The Legitimacy of Legality* – at 148.
[104] See Emilios Christodoulidis, *The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic* – at 967.

The difference between these questions is that each one comes from a different pole of the fundamental contraction, as laid out in the previous chapter, the contradiction between an illiberal politics of zeal, and an equally illiberal politics of abandonment. The first is a concern with the potential for zealous imposition in Ackerman's theory, specifically insofar as a handful of institutional actors can legitimately rewrite their state's constitution on the sly, without raising the alarms bells that surely sound with the initiation of a formal amendment process. And the second is directed at the risk that Ackerman's theory – if applied consistently, and neutrally – could be used to constitutionalize an illiberal value-system, a value-system that places a life of dignity out of reach for politically unpopular minorities (scapegoats). In other words: once again, we find ourselves caught between a politics of zeal, and a politics of abandonment. What is Ackerman's response?

With regard to the first question, Ackerman's answer is simple: democracy is never truly representative, or non-sacrificial, specifically inasmuch as we are always at the mercy of a few institutional actors – representatives who are supposed to reflect and act on a popular will that never quite appears. As Ackerman writes:

> "But let's not get teary-eyed about democracy and suppose that the People (with a capital P) can do more than change elites from time to time. We should dismiss the notion that ordinary men and women can participate affirmatively in their own self-government. This mythic stuff isn't worthy of a high school civics class. It is not only bad political science but positively dangerous – encouraging politicians to present themselves as genuine tribunes of the people and demonize their opponents in a desperate attempt to seize and maintain power."[105]

As it was for Alexander Hamilton, then, and for US Chief Justice Marshall in *Marbury v. Madison,* exposure to the raw power of a few institutional actors is an unavoidable evil, but one that – inasmuch as it is indeed an "evil" – must be structurally reined-in. Hence why Hamilton, Marshall and Ackerman all support judicial review (and, more broadly, a robust separation of powers): because it gives extra voices a chance to speak for the people and, in particular, a chance to contest the populist appeals (or abuses) that have come from other branches of government (see chapter five of this thesis for more).

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[105] See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 42. On the last line of this passage, two points may be raised: 1) these demonizing appeals are surely under way in the United States today, with Donald Trump frequently and very successfully pitching himself as the champion of "the people." And 2) one may ask, is this not another version of Schmitt's complaint about liberal humanitarianism, and its tendency to "demonize" opponents of a liberal way of life?

What about the second problem? Well, this is a little different. Here Ackerman relies on an optimistic belief – backed up by a somewhat selective reading of American history – that the procedural divisions of the US system are such that its constitutional canon will, substantively, "work itself pure."[106] To explain: Ackerman's account of US constitutional history is essentially *Hegelian*, in that the events that he marks as constitutional moments – specifically, the framing of the original US Constitution, the post-civil war Reconstruction, FDR's New Deal, and the CR revolution – imply a progressive evolution of the state's commitment to liberal dignity, so that new forms of individual deprivation or government abuse are sporadically identified and stamped as unacceptable. If we accept this version of American history, we may indeed wonder whether the US system simply "works itself pure." But is American history really so rosy? Ackerman himself suggests otherwise. In particular, the decidedly illiberal strategies associated with the "war on terror"[107] seem to mark a distressing turn "to… demagogic populism and lawlessness"[108] – a turn that continued into Obama's presidency (despite his promises), and that will certainly accelerate with the upcoming Presidency of Donald Trump. Curiously, Ackerman does not even consider this as a possible constitutional moment. As Emilios Christodoulidis explains:

> "[The current]… era of emergency and meltdown that we are traversing constitutes a "tipping point" of sorts… and it is also one that is replete with the kind of "signals" that Ackerman has on other occasions described as triggers of popular mobilization and of constitutional moments. How might one envisage the democratic response here, and would Ackerman suggest that it be staggered, postponed or spaced out differently? Or is it, perhaps, that Americans *have* responded, that a constitutional moment *is* underway, but it is not perhaps what one might have wished?"[109]

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[106] This is a reference to RONALD DWORKIN, LAW'S EMPIRE – especially at 400. Dworkin, I think, exhibits a moderate Hegelianism in his identification with the ideal of law working itself pure: hence why Emilios Christodoulidis names one of his papers on Dworkin, *End of History Jurisprudence: Dworkin in South Africa and Beyond* (as clear a reference to Hegelian thinking as one may hope to find). For an introduction to Hegel's philosophy, see ALEXANDRE KOJEVE, AN INTRODUCTION TO THE READING OF HEGEL: LECTURES ON "THE PHENOMENOLOGY OF SPIRIT."

[107] A number of sources are exemplary in this regard. Ackerman's own contributions include: BRUCE ACKERMAN, BEFORE THE NEXT ATTACK, and Bruce Ackerman, *Terrorism and the Constitutional Order*. A particularity useful assessment of the judicial record during Bush's war on terror is Kim Lane Scheppele, *The New Judicial Deference*, which argues that the USSC has presented grand-style defences of civil liberties in theory, but has been deferential and ultimately ineffective in practice.

[108] BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC – at 4.

[109] Emilios Christodoulidis, *The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic* – at 968.

So: in his work on the war on terror – and especially in his recent book, *The Rise and Fall of the American Republic* – Ackerman potentially misses a trick. Actually, this may put it too mildly, because not only is Ackerman's failure to consider the potential for a constitutional moment in today's "permanent state of emergency"[110] a "lost opportunity,"[111] but it also exposes him to accusations of (*de facto*) liberal moralism. In this sense, we may quite legitimately wonder whether Ackerman really endorses a post-Schmittian "fall into democracy," and whether his work is really as "historicist"[112] as he has claimed it to be. On the contrary, perhaps Ackerman is a liberal romanticist at heart, one who conceals his romantic moralism beneath an optimistic description of the ways in which constituent power – at least in the context of the American system – happens to manifest itself in practice (as the drawn-out completion of a public commitment to "dignitarian"[113] justice).

This is where the fundamental contradiction – or the "paradox of constitutional democracy,"[114] as Michelman calls it – comes clear in Ackerman's work. Because as much as Ackerman wants to offer us a neatly balanced "third way"[115] between democratic (or Schmittian) populism, and liberal (or Rawlsian) moralism, he cannot quite sustain this initiative without some sleight of hand: specifically, without a floral, "rose-tinted"[116] depiction of an American constitutional canon that is popular, contingent and historicist, a la Schmitt, but which, by a phenomenal stroke of luck, happens to mark the (eminently *Hegelian*) evolution of a dignatarian morality. One could say, then, that Ackerman is a constrained/liberalized Schmittian, prescriptively, but a comprehensive liberal, descriptively. He accepts the fall into democracy, as Dyzenhaus suggests he/we should, but he has too much faith that this fall, in the context of US history, is always a fall in a non-degenerative direction, towards an ever-more dignitarian constitutional community.

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[110] For example, see GIORGIO AGAMBEN, STATE OF EXCEPTION – at 2 (and elsewhere). For a summary of Agamben's book in relation to contemporary trends in public law, see Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*.

[111] Once again, see Emilios Christodoulidis, *The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic* – at 968.

[112] Ackerman applies this term to himself: "I want to emphasize the historicist character of my critique... [insofar as t]he aim of… [my] interpretation is to understand the historical commitments that have actually been made by the American people, not those that one or another philosopher thinks they should have made." See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 34-35.

[113] See the following, previously referenced piece that Ackerman wrote for the *New York Times:* https://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?_r=0.

[114] See FRANK MICHELMAN, BRENNAN AND DEMOCRACY – at 4-11.

[115] See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS – at 33.

[116] Drucilla Cornell uses a variation on this phrase ("rose-colored") in reference to Ronald Dworkin's method of legal interpretation, which Dworkin himself acknowledged as a way of explaining away "mistakes" in one's legal and political history. See Drucilla Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation* – for example, at 1153.

Conclusion: Agamben's Two Drives

Why have I spent so much time over the last few pages on Ackerman? The reason is simple: because Ackerman offers us one possible way in which a liberal might accept Schmitt's critique but reject/modify his celebration of dictatorial charisma. In this regard, Ackerman's insistence on spatial and temporal tests for heroic responses to political crises (and emergent constitutional movements) may – *may* – be viewed as an adequate liberalization of Schmitt's and Weber's reverence for (or in Weber's case acceptance of) charismatic authority. Most importantly, Ackerman's work provides a window (*perhaps*) beyond Rawls's normativism (or moralism), which legitimates seemingly heroic acts (such as atypical judicial decisions) not through tests of dialogue or time but, on the contrary, via moral standards which are *always already there* (passed down, we might say, by the blind oracles who occupy Rawls's original position). In other words: Ackerman gives us one way in which we might swap out Rawls's moralism, and the desire to place ourselves "always-under-law,"[117] for a fall into democracy and, as importantly, into the fateful hands of history (as Dyzenhaus insists we must).

However, as I have just noted, this fall does not even seem tolerable for Ackerman, since the historical narrative that accompanies his normative theory implies that his fellow Americans are bounded at all times by a dignitarian impulse – a "preexistent scheme of political morality or right"[118] that transcends and radiates through their acts of "mega-political"[119] will-formation at every turn. Ackerman, then, is perhaps not so different in the end from Rawls – at least insofar as he too fails or is unable to countenance the harsh truth proposed by Schmitt: namely, that all politics is power politics.

Must we accept Schmitt's truth, then? Perhaps. But this does not mean that we must place all versions of power politics on the same level. On the contrary, perhaps the *real* value of liberalism, which rises above and survives Schmitt's attack, is that it refuses to settle for power politics (even if power politics is ultimately inevitable). *This* is what we can carry forward, even where we dismiss the Rawlsian pretense of "reasonable limits" to which all, as reasonable and rational, may agree: namely, the (impossible) quest for a way beyond power and enmity, and beyond the dense darkness of Schmitt's theory.

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[117] See Frank Michelman, *Always under Law?*
[118] Frank Michelman, *Can Constitutional Democrats be Legal Positivists? Or Why Constitutionalism?* – at 297.
[119] The reference here is to Ran Hirschl's book, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (at 169, for example), which uses the term "mega-politics" to refer to disputes over national identity and the terms of one's political association.

This said, let us now return, briefly, to the Agamben quote with which this chapter began, and let us consider, moreover, how Agamben's words bear on and illuminate the respective positions of Schmitt, Rawls and Ackerman (vis-à-vis constitutional law and politics under conditions of moral/religious pluralism). Agamben claims that "law… and more generally, the sphere of human action insofar as it has to do with law"[120] is "traversed"[121] by two tendencies or two drives: one "that goes from norm to anomie, and another that leads from anomie to law and the rule."[122] To complete the quote:

> "Hence… [we are dealing with]… a double paradigm, which marks the field of law with an essential ambiguity: on the one hand, a normative tendency in the strict sense, which aims at crystallizing itself in a rigid system of norms whose connection to life is, however, problematic if not impossible (the perfect state of law, in which everything is regulated by norms); and, on the other hand, an anomic tendency that leads to the state of exception or the idea of the sovereign as living law, in which a force of ~~law~~ that is without norm acts as the pure inclusion of life."[123]

One does not need to stretch their imagination too far to see how this relates to (or at the very least, can be used to explicate) the concept of liberalism's fundamental contradiction, and the problem of moral/religious pluralism that has come to occupy center stage in liberal-democratic theory, today. As I understand it, the two impulses of which Agamben speaks represent two ways in which one may seek to deal with pluralism, and, more generally, with crises that threaten the political unity of one's state. In slightly different terms: Agamben's two drives represent two (crucially opposite) ways in which one may deal, theoretically, philosophically, with a breakdown in appearances of political normalcy, and legal certainty/commonality/order (or, perhaps more fundamentally, with the problem of how law's *authority* is finally explained, and filled up).

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[120] GIORGIO AGAMBEN, STATE OF EXCEPTION – at 73. I must stress that my use of Agamben here is purely explanatory, and it therefore probably does a certain amount of violence to Agamben's words considered in their full context (by which I mean in the full context of the argumentative thread at work in *State of Exception*). For a more textured and context-specific interpretation of Agamben's book, see Leila Brannstrom, *How I Learned to Stop Worrying and Use the Legal Argument: A Critique of Giorgio Agamben's Conception of Law*. And for Agamben's other engagements with the tension described in the referenced passage, see GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE, as well as the other books in the "Homo Sacer" series (e.g. *The Sacrament of Language*, *The Highest Poverty*, etc.).

[121] Ibid.

[122] Ibid.

[123] Ibid. It is perhaps worth noting, incidentally, that this single passage is the inspiration for the key argument developed in this thesis.

On the one hand, we have a normative tendency, which is all too clear in Rawls. To explain: in Rawls's view, the law *almost* never runs out, because we can *almost* always appeal to public reason as an acceptable – by which I mean, acceptable from the perspective of reasonable and rational persons – mode of dispute resolution. The problem, as we have seen, is that a plausibly common conception of public reason would have to be so thin that opposite sides of a fundamental dispute could (sometimes if not often) comply with it, which is to say that public reason would (sometimes if not often) "fail."[124] Conversely, a substantively thicker conception of public reason – one which would yield more regular resolutions – would likely prove too controversial to appeal to all, and would thereby fail in a different way, namely, in its capacity to transcend the fact of moral/religious pluralism.

According to David Gray Carlson, the appropriate label for Rawls's jurisprudence is therefore "mechanistic, correlative jurisprudence."[125] Carlson takes this term from Arthur Jacobson's paper, *Hegel's Legal Plenum*, and uses it to refer to theories that conceive of a "legal universe… [as *more or less*]… complete."[126] Apt as this might seem, though, we should apply this term to Rawls with caution, since he *does* accept that one will, exceptionally, encounter political questions that public reason cannot resolve. As Rawls says:

> "Public reason often allows for more than one reasonable answer to any particular question. This is because there are many political values and many ways they can be characterised. Suppose, then, that different combinations of values, or the same values weighted differently, tend to predominate in a particular fundamental case. Everyone appeals to political values but agreement is lacking and more than marginal differences persist. Should this happen, as it often does, some may say that public reason fails to resolve the question, in which cases citizens may legitimately invoke principles appealing to non-political values to resolve it in a way they find satisfactory…The ideal of public reason urges us not to do this in cases of constitutional essentials and matters of basic justice."[127]

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[124] For a comprehensive engagement with the ways in which public reason might fail, see Johan van der Walt, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice*.
[125] See David Gray Carlson, *Jurisprudence and Personality in the Work of John Rawls* – at 1828.
[126] Ibid at 1829. For the original expression of this idea, see Arthur Jacobson, *Hegel's Legal Plenum*. See also Jacobson, *The Other Path of Law*, and Jacobson, *The Idolatry of Rules*.
[127] PL at 240-241. Credit goes to Johan van der Walt's paper, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice*, which alerted me to this passage.

Rawls may wish to dismiss these moments of failure as exceptional and thereby unimportant, but, as I noted earlier, Schmitt's theory of the exception judges them (correctly, I think) as moments of revelation: when the true and truly violent foundations of one's political theory, or one's political community, slip out into the open. In other words: Rawls's attempts to endow law and liberal democracy with an immanent normativity grind to a halt, unfortunately, with a trip to the other end of Agamben's spectrum, the anomic end, where law descends into the contingency of history, and power politics.

This is Schmitt's end of the spectrum. For him, there is nothing beneath the law but the reality of tribal enmity, and the reality of a sovereignty that always loiters behind the law as potentiality (as a "living law"[128] that may, as a matter of cold facticity, bring about the law's suspension). We can never, from Schmitt's point of view, fill this void with law, but only with a sovereign's authentic readiness to issue an authentic appeal to his/her People. We can, then, fill the void with democracy, but only where democracy is accepted as a sacrificial reduction of pluralistic masses into a falsely homogenous *Volk*. This is classic anti-liberalism, and, indeed, classic totalitarianism. To use Jean-Luc Nancy's terminology, it is classic "mythmaking,"[129] which entails the construction of an identity that has not only not-yet-appeared at the time of its construction, but that only ever appears to the extent that counter-narratives and dissenting voices (not to mention the persistence of each person's radical singularity and uniqueness) are buried, silenced, excluded.

We then come to Ackerman, and, to the extent that his historical/descriptive theory has a normative dimension, we can see his project as an attempt to revive populist mythmaking as a legitimate aspect of constitutional governance: a project which is surely understandable given the centrality of "We the People" in American "state-lore." In particular, Ackerman attempts to unleash and legitimate *exceptional* deployments of constituent power, while at the same time insisting on a generation-spanning competition between such deployments – a generation-spanning competition which is meant to ensure 1) that dissenting voices and counter-narratives can seep into (or at least test) a new narrative before it becomes constitutionally-hardened, and 2) that the people's apparent wish to renovate the terms of their association is not merely a kneejerk reaction, but a more tectonic and intentional shift in their self-understanding.

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[128] See again, GIORGIO AGAMBEN, STATE OF EXCEPTION – at 73.
[129] This is a reference to Jean-Luc Nancy, *Myth Interrupted*, an essay that appears in his book, THE INOPERATIVE COMMUNITY. For a more concise explanation of Nancy's conception of "mythmaking," see Johan van der Walt, *The Literary Exception* – at 36.

What if America's "We the People" want to dispense with such competition, or want to move in an otherwise anti- or non-liberal direction? Ackerman never fully considers this possibility, which suggests that he retains a foundational attachment to a substantive or perhaps simply procedural morality that exceeds and curbs his appeal to constituent power. In the end, then, the desire that government remain "under law," and under a warm, fuzzy blanket of immovable morality, seems like it may be an insatiable one (at least for liberals). The question, then, is how liberalism can proceed if it involves an insatiable desire for governance under law, when, in actuality, governance under law always comes down, as Schmitt understood, to a moment of more-or-less raw coercion: a moment where an un-assured set of moral values must be affirmed as common, and, in turn, imposed on certain minimally reasonable individuals and social groups without their consent.

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Let me sum up. The main problem that Schmitt's work poses for liberals is a very basic one: namely, the problem of how we understand the law's ultimate foundations. More precisely, the problem is whether the law can be taken to have a "legal" foundation – a "pre-existent scheme of morality of right" – which is more than a matter of mere political power. Schmitt says no: there is "nothing outside the text"[130] of political power, no assured, moral foundation to which we can look as a "neutral" or plausibly common arbiter in cases of crisis and disagreement (only charismatic leaders).

As we have seen, liberalism, and specifically the liberalisms of Rawls and Ackerman, cannot quite tolerate this conclusion. In the end, as much as Ackerman presents himself as a champion of popular sovereignty, and as much as he acknowledges the unassured heroics that underlie shifts in a country's (and in particular, his own country's) constitutional canon, Ackerman cannot (or does not) countenance the thought of an illiberal constitutional moment – a moment which shatters either the procedural checks or the substantive guarantees of his own, liberal system. In this sense, Ackerman does not rise to Schmitt's challenge of existential honesty, but rather, ends up right back where Rawls left us: with an insatiable desire to exclude the voices of a People that disagrees with his own, dignitarian conception of political morality.

[130] This is a reference to JACQUES DERRIDA, OF GRAMMATOLOGY – at 163. See chapter four of this thesis for a more extensive discussion of Derrida's work.

Perhaps obviously, one of the basic concepts at stake in this analysis is the concept of *institutional heroism*, which was introduced in the final section of the chapter. In a nutshell, an institutional hero is a political/public actor (or a political/public institution) who takes decisive and thereby zealous action in response to moments of political crisis or (deep) disagreement. Rawls's understanding of liberal democracy leaves little room for such heroism, because he assumes that political actors and institutions need not act zealously, for the most part, but can appeal instead to a conception of public reason that is already part of their public culture. This means that the political deciders in Rawls's system will rarely be (or need rarely be) meaningfully heroic, since they can always rely on the system itself, i.e. the law, to conclusively resolve social tensions or conflicts: hence why Rawls proposes that Supreme Courts can function as "exemplars of public reason."[131]

However, as Schmitt makes abundantly and convincingly clear, this merely amounts to a concealment of the heroic (or coercive) foundations of Rawls's theory. *This* is why Ackerman is so refreshing: because in his work, heroic foundations come out in the open, so that institutional actors responding to moments of constitutional crisis cannot claim legitimacy, as such, but must rather *ask* for it. Then they wait (the "hardest part,"[132] as Tom Petty called it). They wait for a decision on legitimacy from the court of history, a court populated by successive generations of ordinary people.

The question, then, is whether liberalism can tolerate its own submission to the brutal contingency of history, and Ackerman's own hesitations on this point suggest that maybe it can't. We must ask: why? Well, in my opinion, it is because to accept a fall into history – regardless of whether that fall is a plausibly democratic one – is to accept a politics of abandonment: a politics that deprives itself of the right to (at least exceptionally) *insist* on certain minimal standards of human dignity, and that must instead risk the erosion of those standards by a People (or perhaps more accurately, a political system) that has other things in mind. Conversely, to resist such a fall, and to insist on governance under law, can only amount to zealous imposition, or a politics of zeal: a politics that thrusts an always partial vision of justice on citizens who (again) have other things in mind. Is there any way out of this impasse? The next chapter will pose an answer, to which we may now turn.

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[131] See PL at 231. See also David Dyzenhaus, *Liberalism after the Fall: Schmitt, Rawls and the Problem of Justification*, and DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (e.g. at 219-235).

[132] Tom Petty, *The Waiting*, from the album *Hard Promises* ("The waiting is the hardest part, every day you get one more yard; you take it on faith, you take it to the heart, the waiting… is the hardest part").

Appendix to Chapter Three: A Note on Schmitt's Concept of Sovereignty

Before we move on to the next chapter, I sense that it will be useful if not necessary to pause and consider a key concept in Schmitt's work that was somewhat latent in my analysis thus far, namely, the concept of sovereignty, or of "the sovereign."[133] Five years before he wrote *The Concept of the Political*, and defined the political in terms of the distinction between friend and enemy, Schmitt wrote another book called *Political Theology*, in which he defined the sovereign in similarly bold and closely related terms: as "he who decides on the exception."[134] In a technical sense, this means that the sovereign is for Schmitt he who is capable of suspending the law, i.e. of deciding that the law must cede to the power of a more effective, untrammelled administration. Of course, this will normally be because of a threat to the integrity of the state, but Schmitt makes no mention of this in his definition: all he says that that the sovereign *decides* on the exception, *not* that the sovereign decides on the exception when a particular, emergency situation arises.

This already tells us something important about Schmitt's conception of sovereignty. Put simply, the sovereign for Schmitt is not constrained by reason, or law, but is simply whoever happens to decide that the law should be suspended, and, more precisely, whoever is *capable* (as a matter of fact) of making a decision that has the *effect* of suspending the law. To be sure, this will most likely be an actor who is empowered by law to make such a decision, but not necessarily. On the contrary, for Schmitt, all that matters is how a prospective sovereign (and "prospective" is the key word here) is perceived by other members of their social system (can these "other" actors effectively challenge their decision?), not whether one can present a cogent, legal argument in support of their sovereignty (although such an argument may go quite some way in staving off challenges to a prospective sovereign). For example, a constitution may be explicit in granting power to the President to declare a state of emergency, but if Parliament takes on this function in the face of Presidential inaction, *Parliament* will be sovereign from a Schmittian perspective, assuming that its actions are not met with an effective challenge by some other actor (governmental or otherwise).

[133] It is worth noting that when I say that the concept of sovereignty (or the sovereign) is "somewhat latent" in my analysis of Schmitt's work, the emphasis is on the "somewhat," because not only is Schmitt's concept of sovereignty closely linked to his concept of the political – which was discussed quite extensively – but it is also on display in his constitutional theory, and, in particular, in his glorification of presidential authority as an optimal solution to the problem of moral/political pluralism (and interest group politics). See section one (and the early pages of section three) of the present chapter.

[134] See CARL SCHMITT, POLITICAL THEOLOGY – at 5.

What does this tell us about Schmitt's understanding of sovereignty? Well, at the risk of oversimplification, it tells us that sovereignty is for Schmitt not something that can be possessed, legally, but is rather something that bursts forth, and is revealed in practice (again, *as a matter of fact*). In the next chapter, the distinction that Mattias Kumm makes between human dignity and sovereignty (see chapter one) will bring me to explain my position, from time to time, in terms of a certain approach to sovereignty, and I accordingly want to make clear now that I use the term in approximately the same way as Schmitt, albeit with an added proviso: namely, that when I talk about sovereignty, I refer not only to a capacity to make a decision that suspends the law in the face of an emergency, but, more generally, to one's capacity to make a decision, *as such*, a decision that exceeds the bounds of some other authority beyond one's self. I do not know if Schmitt would have embraced precisely this use of the term, but I am confident that it is at least *not inconsistent* with his usage. On the contrary, as Schmitt noted in *Political Theology*, the state of exception is not unique in law, but rather exemplifies a legal concept, i.e. the power of decision, that is constantly on display in legal practice, for example, when a judge fills a gap in the law (e.g. where a strict application of a legal rule would yield absurdity, or gross injustice) by exercising his/her discretion. In other words: for Schmitt, the judge exercising discretion, although not sovereign, per se, is closely linked to the sovereign insofar as they also find themselves confronting life in an anomic rather than a normative space, i.e. in a way that is closer to the anomic end of Agamben's nomic-anomic spectrum.

CHAPTER FOUR

The Fundamental Contradiction #3: Kennedy and Derrida on the Impossibility of Liberal Justice

Introductory Quote:

"I believe there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit. Real people are involved, even if there are not very many whose lives the decision can affect. The altruist judge can view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized, but to adopt this attitude is to abandon the crucial proposition that altruistic duty is owed by one individual to another, without the interposition of the general category of humanity."

Duncan Kennedy – Form and Substance in Private Law Adjudication

Introduction

The last chapter ended with a question mark, and this is where we can reconvene now. Our basic question is simple: what is left for liberalism in the wake of Schmitt's critique? In this regard, the most significant problem that Schmitt's work exposes is surely liberalism's almost chronic dishonesty. To explain (again): liberalism begins by presenting itself as a philosophy beyond/above politics and morality, a philosophy that transcends the many bitter disagreements that persist in the modern, democratic world over how human beings should live. In reality, though, liberalism is not beyond/above morality, but simply approaches moral disputes in a peculiar way. On the one hand, liberal states regularly seek to abdicate their role in promoting particular, comprehensive visions of morality, which limits their ability to intervene, politically, in the name of vulnerable but unpopular citizens (as well as their ability to defend themselves internationally, and to correct the more destructive tendencies of the so-called "free" market). On the other hand, such abdication, insofar as it leads to a politics of abandonment and even "cruelty,"[1] is then typically corrected by an insistence that certain, fundamental rights and freedoms are inviolable, because – in Rawls's case – all "reasonable"[2] people would apparently agree on their inviolability. Of course, real, seemingly reasonable people do not *actually* agree on their inviolability, but this is the device that Rawls uses to give his work the appearance of neutrality, or non-partisanship.

Why? Why does Rawls try so strenuously to present his theory as neutral, or, more accurately, as *reasonable*? The answer is simple: because that's what his liberalism *demands*. Remember, in this regard, that the first principle of Rawls's liberalism is a principle of non-coercion, a principle by which individuals must be viewable as the co-authors of their own constitution, as well as the more specific laws of their system, by derivation. To concede, at any point, that his philosophy revels in pure imposition – and, in particular, in the coercion of basically "reasonable" people – would therefore be for Rawls to admit failure, and to concede to Schmitt that politics is really just coercion "all the way down." Can Rawls concede this point without also voiding his credentials as a liberal: as somebody fundamentally, meaningfully opposed to coercion, violence, and cruelty?

[1] I use this term as a reference to Judith Shklar's presentation of liberalism in terms of an orienting opposition "to cruelty," which Shklar defines as "the worst" of all political vices. See Shklar, *Putting Cruelty First*, and Shklar, *The Liberalism of Fear*. See also John Kekes, *Cruelty and Liberalism.*

[2] For a full discussion of what Rawls means by "reasonable" people, see JOHN RAWLS, POLITICAL LIBERALISM – at 48-54. See also chapter two of the present study.

I should clarify on this point. The problem here, as Schmitt points out so scrupulously, is not that Rawls occasionally sneaks comprehensive moral positions into an otherwise neutral, non-coercive theory. No: the problem is that Rawls's theory is always caught between being an apology for coercive, illiberal laws – i.e. for any and every law that can be dressed up in the language of public reason – and being a relatively strong form of political coercion in itself, specifically where it insists that arguments that one may colloquially describe as "reasonable" are actually "unreasonable" from a political liberal perspective, and are thereby fully, finally barred from public consideration. Indeed, one could even go a step further here, and note that public reason's ban on comprehensive moral argument is far from neutral, but on the contrary, involves a view of politics which many democratic citizens – citizens that one would hardly call unreasonable, again, colloquially-speaking – simply do not hold. Don't get me wrong, I, personally, think that Rawls's conception of public reason is a remarkably modest solution to a remarkably steep problem, namely, the problem of democratic pluralism. But I also recognize that even some liberals – Jospeh Raz[3] and Michael Sandel, for example – think that it renders politics sanitary, cold and false.

With all this said, I will pose my main question again, in a somewhat different way. The question is: what does liberalism become when it accepts coercion as a political inevitability? Or, to put it differently again: can liberalism still stage itself as a philosophy of human dignity, i.e. a philosophy that is fundamentally opposed to individual coercion and cruelty, when it accepts coercion and felt cruelty as facts of political life?

This chapter will try and offer an optimistic answer to these questions: an answer that accepts the gist of Schmitt's admittedly compelling critique, but retains an utterly *liberal* refusal to accept coercion *as a fact*, so to speak. In framing this answer, I will look to and focus on the work of two thinkers who are not usually categorized as liberals: namely, Duncan Kennedy and Jacques Derrida. Despite appearances to the contrary, I will present Kennedy and Derrida as the true heirs to the liberal tradition, specifically insofar as they provide us with a way forward in the dark shadows of Schmitt's critique. Why, though, should Kennedy and Derrida be counted as liberals? Do their own, sustained critiques of liberal institutions and theories not render them a poor fit with the tradition?

[3] I referenced Sandel's critique of Rawls in the last chapter, and so I surely need not mention it again here. Raz's critique, on the other hand, is well worth a look, and I regret that I cannot give it any direct attention within the confines of the present study. See, in particular, JOSEPH RAZ, THE MORALITY OF FREEDOM, as well as Martha Nussbaum's essay, *Political and Perfectionist Liberalism*, which offers a simple account of the differences between Rawls's political liberalism and Raz's perfectionist liberalism.

I think not. To be sure, Kennedy and Derrida have each spent a lot of time "trashing"[4] mainstream liberal philosophy, but this has always been a matter of "immanent"[5] rather than external critique, which is to say that each of their critiques "seeks its… [normative] standards in the situation that it finds itself in,"[6] the "situation" of liberal or constitutional democracy, and then asks whether those standards are adequately reflected in the material reality of the same situation. To be more precise, what Kennedy and Derrida share with mainstream liberals like Rawls – i.e. what they take from the constitutional-democratic "situation" in which they find themselves – is an unwavering commitment to the principle that I described in the first chapter of this thesis: the principle (or promise) of human dignity. Recall, in this regard, Gunther Dürig's concise and now widely accepted formulation:

> "Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity. [Violations of dignity involve]… the degradation of the person to a thing, which can, in its entirety, be grasped, disposed of, registered, brainwashed, replaced, used and expelled."[7]

Although Durig's object formula, or *objektformel*, has certain, clear Kantian overtones which are not shared by Kennedy and Derrida, I should note again at this juncture (as I did in chapter one) that legal/judicial references to the object formula have clearly not amounted to an endorsement of Kantian thought in all its particularity, but have instead reflected a more limited, "political"[8] principle – one that shirks many of the most controversial aspects of Kant's views on morality in favor of a more abstract resistance to the "use" or "objectification" of human life. Put simply, *this* is what Kennedy and Derrida share with modern liberalism, which is to say that the moral sensibility on which their work turns implies a basic resistance to *objectification*, or, as one commentator puts it in relation to Kennedy, a "horror of reification."[9] I will not say more about this now, but I will try to make the connection a bit clearer as we move through the chapter.

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[4] I use this term not because I actually like or endorse it, but rather to reference a standard, mainstream understanding (or misunderstanding, perhaps) of critical theory in law. See, for example, Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS* – at 539.
[5] For a concise definition of this idea, see Emilios Christodoulidis, *Strategies of Rupture* – at 6-7.
[6] Ibid at 6.
[7] Translation taken from Henk Botha, *Human Dignity in Comparative Perspective* – at 183. Durig's original formulation, in German, is found in Durig, *Die Menschenauffassung des Grundgesetzes*.
[8] See my discussion of "political" liberalism in chapter two.
[9] Pierre Schlag, *Politics and Denial* – at 1135.

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With this in mind, the plan is to proceed as follows. In the first section, I will lay out the basic elements of Kennedy's legal theory, focusing in particular on his place in wider canon of American legal theory, and on his notion of the fundamental contradiction, which was presented in a number early law review articles (e.g. "Form and Substance in Private Law Adjudication" and "The Structure of Blackstone's Commentaries"[10]). The second section will then offer a reading of Kennedy's later, 1986 paper, "Freedom and Constraint in Adjudication: A Critical Phenomenology"[11] – a paper that Kennedy himself ranks as his "single most important… contribution"[12] to legal theory, and that I have chosen to focus on because it gives us insight into how Kennedy thinks institutional actors (and more specifically, judges) ought to navigate what I have previously called the tension between a politics of zeal, and a politics of abandonment (not that Kennedy uses those terms).

Then, in the third, fourth and fifth sections of the chapter, I will move on to the work of Derrida, which takes us further than Kennedy's work does in the direction of a cogent response to Schmitt's critique. In particular, the fourth and fifth sections will provide a possible response to Schmitt by engaging in a close reading of Derrida's only direct foray into legal theory in "Force of Law: The Mystical Foundation of Authority." At the risk of oversimplification, what I take away from this text (and indeed, from much of Derrida's later work on ethics and politics) is a model for political decision-making that is more meaningfully and insistently "dignitarian" than Rawls's turn to public reason: a model that no longer explains away moments of violence and objectification (or seeks to transcend/transubstantiate such moments), but, on the contrary, exposes the extent to which such moments are embedded in the *structure* of political decision-making as a practice that is always (and can only ever be) suspended between zeal and abandonment, where zeal is represented by the moment of decision, and abandonment is represented by indecision, or deference to some other decision-making authority (known or unknown).

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[10] These texts are from the late 70s: a remarkably prolific, important period in Kennedy's career, which saw him "deconstruct" classical legal consciousness and, by derivation, its modern iterations. See also DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (originally unpublished, but released thirty years later – in 2006 – by Beard Books).

[11] For a summary and critique of Kennedy's position in this paper, see Brandon Hogan, *The Misplaced Role of Phenomenology in Duncan Kennedy's Theory of Legal Interpretation*. See also Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation.*

[12] Duncan Kennedy, Tor Krever, et al, *Law on the Left: a Conversation with Duncan Kennedy* – at 26.

I. Kennedy's Fundamental Contradiction: There is Nothing Outside the (Moral) Text

Before we look directly at Kennedy's work, we can and should begin by looking at how it fits into the wider canon of "American jurisprudence."[13] As is well known, Kennedy's main relevance in this regard is that he was one of the founders of the Critical Legal Studies (or CLS) movement in the US – a diverse affiliation of "leftist" legal scholars that emerged in the late 1970s as a counter-punch against other, more prominent schools of American legal theory, like liberal legalism or Chicago-style economic analysis of law. Such a counter-punch was necessary, from a CLS perspective, because more prominent legal theories tended to promote – and indeed, normalize – an undesirable conception of political morality, namely, liberal individualism. For CLS scholars like Kennedy, or Peter Gabel, liberal individualism was not only a recipe for particular instances of social injustice, but also for a more pervasive social culture of "moral dislocation, social isolation, and meaninglessness"[14] – a state of cultural "alienation"[15] of a type not unfamiliar to readers of Marx.

In the context of contemporary political theory, this aspect of CLS surely places it quite comfortably alongside the "Communitarianism"[16] of thinkers like Alasdair MacIntyre or Michael Sandel. Within contemporary *legal* theory, on the other hand, the most obvious equivalent is usually cited as the American "Legal Realist"[17] movement of the 1920s and 30s. As with the main strands of CLS theory, Legal Realism turned on a sense that then dominant conceptions of law – and in particular, "Langdellian formalism,"[18] *the* dominant conception of American law at the turn of the twentieth century – were neutralizations of a non-neutral, individualistic conception of morality. There were many different aspects of this critique, but one is particularly important here: namely, the Realist's assault on "legal conceptualism"[19] (a tendency to assume that concrete legal decisions can be derived, neutrally and deductively, from abstract legal principles and concepts).

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[13] For a critical perspective on uses of this term, see Brian Leiter, *Is There an American Jurisprudence?* See also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE.
[14] See Peter Gabel, *Critical Legal Studies as a Spiritual Practice* – at 516.
[15] See Peter Gabel, *Reification in Legal Reasoning* – a key example of CLS theory focusing on the alienating effects of liberalism.
[16] The classic "Communitarian" texts are: ALASDAIR MACINTYRE, AFTER VIRTUE, CHARLES TAYLOR, SOURCES OF THE SELF, and MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE.
[17] For a reconstructive assessment of "Legal Realism" as a more or less unified body of thought, see Joseph Singer, *Legal Realism Now*.
[18] See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE – at 11-25.
[19] See for example, Max Radin, *Legal Realism* (at 827): "Realism is the sworn enemy of conceptualism as a legal ideal."

Now, on one level, the Realist's issue with legal conceptualism was that it is a lot of "transcendental nonsense,"[20] since abstract concepts tell us little, in actuality, about how concrete legal cases should be decided. However, on another, more important level, the Realist's problem with conceptualism was also that it diverts legal practice from its "true" nature, as a fundamentally "instrumental"[21] enterprise. To explain: from a Realist perspective, as expressed well by the work of Felix Cohen, law is only worth what it can actually achieve, socially. Put simply, this means that a law loses its social/moral value when it no longer furthers the purpose it was enacted to serve, which is always some specific variation on, "to make people's lives better,"[22] or easier, or whatever. To be sure, Realism did not deny that there were general purposes that could be served by law (such as the stability of social expectations), but merely insisted that these general purposes of law do not and must not be taken to mean that judges can act without a fresh consideration, in each case, of how their decision will affect the real lives of real people. In the end, such a consideration may lead a judge to decide that some concrete social need, or aspect of social justice, must be sacrificed in the name of legal consistency. But that answer would then come as a more thoughtful assessment of the law's overall social utility, not as a thudding homage to its past.

In a significant way, CLS reiterates this aspect of Realism, but with a key difference: namely, that CLS lacks the relative unity, philosophically speaking, of Legal Realism. To explain: whereas Realism was a plausibly unified, coherent attempt to present "American Pragmatism"[23] as a philosophy of law, CLS was more of a "political location"[24] – to use Mark Tushnet's interesting turn of phrase – in/at which a diverse array of left-legal scholars could sit somewhat uncomfortably together. In this regard, the main division within CLS scholarship is/was arguably between "dogmatic" and "anti-dogmatic"[25] theory, where the former criticizes present arrangements in the name of a particular theory of justice (as with Marxist and Feminist approaches), and the latter advises critical distance and skepticism with regard to discourses of justice, generally.

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[20] See Felix Cohen, *Transcendental Nonsense and the Functional Approach*. For an alternative account of Cohen's theory, see Felix Cohen, *The Ethical Basis of Legal Criticism*. And for a liberal critique of Cohen's "functionalism," see Jeremy Waldron, *"Transcendental Nonsense" and System in Law*.

[21] See Joseph Singer, *Legal Realism Now* – especially at 468-475.

[22] See again Felix Cohen, *Transcendental Nonsense and the Functional Approach*.

[23] In this sense, Realists were heeding Roscoe Pound's call to make American Pragmatism a "philosophy of law." See WOUTER DE BEEN, LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM – at 18.

[24] Mark Tushnet, *Critical Legal Studies: A Political History* – at 1515.

[25] I take these labels directly from a recent interview with Duncan Kennedy. See Kennedy, Tor Krever et al, *Law on the Left: A Conversation with Duncan Kennedy*.

With this divide in mind, we can come now, finally, to Duncan Kennedy. Where does Kennedy's work fall on the dogmatic/anti-dogmatic spectrum? Well, as he remarked in a recent interview, Kennedy is essentially an "anti-dogmatic"[26] radical, whose work sets him apart from a great many other leftists – "dogmatic" scholars whose work is anchored, uncritically, in a particular conception of justice, or community, or whatever. This squares quite neatly with Kennedy's self-identification, in his *Critique of Adjudication*, as a proponent of "modern/postmodern"[27] leftism, or a "left/mpm position."[28] The idea here is that CLS/leftist projects – which aim by definition at the "transformation of existing social structures on the basis of a critique of their injustice"[29] – can sometimes look more like "natural law" than critical theory, which is to say that they insist (zealously, perhaps) on their own "rightness"[30] as a remedy to the "wrongness" of present arrangements. Kennedy, conversely, is an "mpm" leftist to the extent that his work evinces a "loss of faith"[31] in such rightness. As he explains in his *Critique of Adjudication*:

> "An important strand, a defining strand in the mpm project is a particular attitude toward rightness. This is the attitude that the demand for agreement and commitment on the basis of representations with the pretension to objectivity is an enemy. The specific enemies have been the central ethical/theoretical concepts of bourgeois culture, including the autonomous individual choosing self, conventional morality, the family, manhood and womanhood, the nation state, humanity. But the central ethical/theoretical concepts of the left have also been targets, including the proletariat, class solidarity, party discipline and socialist realism, and, more recently, sexual and racial identity.
>
> The mpm impulse is to counter or oppose the producers of these artifacts with others. The transgressive artifacts are supposed to put in question the claims of rightness and, at the same time, induce a set of emotions – irony, despair, ecstasy, and so on – that are crushed or blocked when we experience the text or representation as "right.""[32]

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[26] See Duncan Kennedy, Tor Krever, et al, *Law on the Left: a Conversation with Duncan Kennedy* – at 22.
[27] See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION – for example at 346-348. For a concise engagement with some of the core themes of Kennedy's book, see Dennis Davis, *Adjudication and Transformation: Out of the Heart of Darkness* (as well as a list of other papers presented at the same Cardozo Law School symposium and published in March, 2001). See also JOHAN VAN DER WALT, LAW AND SACRIFICE – especially at 160-164 (providing a detailed summary of Kennedy's work).
[28] Again, see KENNEDY, A CRITIQUE OF ADJUDICATION – at 357.
[29] Ibid at 340.
[30] Ibid – especially at 339-342 (and elsewhere too).
[31] Ibid at 8.
[32] Ibid at 341.

So: Kennedy's mpm theory is definitively not about getting anything "right." On the contrary, and as Kennedy makes very clear, mpm accepts its lot as a "philosophy"[33] of experience, which chases those moments of emotional liberation (which may be positive or negative – ecstatic or desperate) that accompany a *momentarily* fresh outlook on one's social world. This leaves an interesting disjoint between the two components of the phrase, "mpm leftism." Because if leftism is – as Kennedy claims – about "transformation" in response to "injustice," then does an mpm impulse not deny to leftists the very thing that they need: namely, a defensible vision of justice? This is the fascinating paradox that cuts through Kennedy's work, the paradox of how one can, at the same time, be a proponent of leftist transformation, and a postmodern critic of all sure grounds of transformation, all notions of justice or rightness on which a transformative enterprise can rest its laurels. More briefly, then, Kennedy invites us to ask: what does it mean to pursue justice when one accepts (as an mpm theorist) the flicker of uncertainty that haunts every declaration of justice?

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Let us step back. Twenty years or so before he spoke of mpm leftism in *A Critique of Adjudication*, Kennedy wrote a now canonical paper for the Harvard Law Review, entitled, "Form and Substance in Private Law Adjudication" (or FS for short). The central argument of FS can be unpacked as follows. Firstly, Kennedy claims that law – and more specifically, American contract law, the "primary"[34] subject of his paper – is indeterminate inasmuch as it contains an uneasy mix of mechanically-applicable rules and open, discretionary standards. For example, the rules of consideration, which bar courts from looking at "the substantive fairness of… [a] bargain"[35] where there is a formal display of mutuality, can be contrasted with a more abstract standard against unconscionable bargains – bargains which are formally sound, and which comply with the rules of consideration, but which are catastrophically contrary to the interests of one party.

[33] I hesitate, however, to use the word "philosophy" here. I say this because of something that Kennedy says in a dialogue published in the Stanford Law Review with his CLS colleague Peter Gabel. To quote: "I don't want to construct a philosophy… I do want to talk about… *experience*." See Duncan Kennedy and Peter Gabel, *Roll over Beethoven* – at 6.

[34] Duncan Kennedy, *Form and Substance in Private Law Adjudication* – at 1686: "I will use the law of contracts as a primary source of illustrations."

[35] For a short run-down of similar tensions in US contract law, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES – at 18-25.

Is this a controversial claim? Hardly. Indeed, it is a claim that liberal jurists like HLA Hart – surely one of the foremost (and perhaps *the* foremost) Western legal philosophers of the twentieth century – have made rather casually, and that the majority of even first-year law students would probably already, intuitively, agree with. As Hart puts it:

> "[All legal] systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."[36]

Hart's claim here is more-or-less identical to Kennedy's. So why, one may wonder, has Kennedy's version of the claim received so much attention? The answer lies in what Kennedy adds to Hart's claim: specifically, an insistence that the law's formal schizophrenia is not merely due to the complexity of our social world, but is in fact symptomatic of the law's (and our own) *substantive* schizophrenia. To be more precise, in Kennedy's view, the rules-standards dichotomy corresponds – somewhat imperfectly, or "fuzzily,"[37] one must stress – to a deeper tension between what Kennedy refers to as individualist and altruist worldviews within Western legal culture. To explain:

1. At the most basic level, individualism involves a "belief that a preference in conduct for one's own interests is legitimate."[38] This corresponds to legal rules (as opposed to standards) because rules – insofar as they attain basic levels of publicity and clarity – enable individuals to "play" freely within known limits (even in ways that are anti-social or selfish).
2. Conversely, and again, at the most basic level, altruism involves a "belief that one ought not to indulge a sharp preference for one's own interest over those of others."[39] This corresponds to legal standards because the openness of standards gives individuals little assurance that the law will not be applied against them, thereby disincentivizing anti-social conduct (since it is thereby more likely to lead to legal sanctions).

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[36] HLA HART, THE CONCEPT OF LAW – at 127. See also Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory* – at 13.
[37] This is a reference to Mark Kelman, who claims that Kennedy only diagnoses a "fuzzy" link between form and substance in the law. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES – at 17.
[38] FS at 1713.
[39] Ibid at 1717.

To put it simply, then, the uneasy but apparently permanent co-existence of concrete rules and discretionary, ad-hoc standards in Western law – as recognized more mundanely by Hart and others – is for Kennedy intimately connected to (and symptomatic of) a deeper ambivalence over the nature and role of substantive morality in Western law. A few years on, this rift would mutate in Kennedy's work, changing from a contradiction between individualism and altruism in his FS paper, to the notion of a fundamental contradiction "between self and other"[40] which appeared in his essay on *Blackstone's Commentaries* in 1979. As Johan Van der Walt points out, the crucial passage from the latter work is surely this one:

> "Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all… [since]… they provide us the stuff of our selves and protect us in crucial ways against destruction…
>
> But at the same time that it forms and protects us, the universe of others… threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.
>
> The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears… [then]… to be inextricably bound up with the liberation of that same individual."[41]

[40] See Duncan Kennedy, *The Structure of Blackstone's Commentaries* – especially at 211-221. For a sustained engagement with the role and development of the fundamental contradiction in Kennedy's work, see JOHAN VAN DER WALT, LAW AND SACRIFICE – at 152-167. See also Johan van der Walt, *Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought* – especially at 222-230 (an earlier formulation of the arguments in Van der Walt's book, cited above).

[41] Again, see Duncan Kennedy, *The Structure of Blackstone's Commentaries* – at 211-212.

How can one reconstruct Kennedy's argument here? Well, let's begin with its basic elements. Firstly, we can note – non-controversially, I hope – that Kennedy's argument turns on an acceptance of what he calls "the goal of individual freedom"[42] as the legitimate and apparently primary end of "American legal culture."[43] Although Kennedy does not define "individual freedom" as such, he does identify certain threats to individual freedom which can be used to generate a negative definition. For example, Kennedy mentions the "high"[44] price of demands for conformity, and impositions of hierarchy, which are derided as "illegitimate"[45] without qualification or reason. The inference that we might draw from this – and, in particular, from the absence of any qualification or reason vis-à-vis the charges of illegitimacy – is that Kennedy is opposed to conformity and hierarchy *in general*. This inference is backed up by Kennedy's claim, in a recent interview, that he drew "very intensely"[46] on the work of Jean-Paul Sartre when he wrote FS (as well as in the many subsequent papers that expanded on its core ideas).

We will say a bit more about the "Sartrean background"[47] of Kennedy's work as we move further on, but for now, suffice it to say that Sartre's work turns on the well-known, existentialist slogan, "existence precedes essence."[48] Without getting into the atheistic undertones of this slogan, we can note simply that Sartre (much like Schmitt) sees all moral values – inasmuch as their applicability cannot be "proven"[49] – as choices that human beings impose upon themselves. As he puts it in *Existentialism is a Humanism*:

> "What do we mean by saying that existence precedes essence? We mean that man first of all exists, encounters himself, surges up in the world – and defines himself afterwards. If man as the existentialist sees him is not definable, it is because to begin with he is nothing. He will not be anything until later, and then he will be what he makes of himself."[50]

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[42] Ibid at 211.
[43] Ibid.
[44] Ibid at 212.
[45] Ibid.
[46] Duncan Kennedy, Tor Krever, et al, *Law on the Left: a Conversation with Duncan Kennedy* – at 18.
[47] JOHAN VAN DER WALT, LAW AND SACRIFICE – at 154.
[48] See Jean-Paul Sartre, *Existentialism is a Humanism*. A version of the full text can be accessed quickly here: https://www.marxists.org/reference/archive/sartre/works/exist/sartre.htm.
[49] Ibid. Note also: when we sever Sartre's philosophy from his atheism, his argument may be said to rely on something like Rawls's notion of the "burdens of judgment." As the reader may recall, the burdens of judgment are those flaws in human reason which render all moral doctrines fallible to at least some degree. I note this connection only in passing, though.
[50] Ibid.

The problem that this description of human experience raises is then as follows. If one's moral justifications and self-conceptions are freely chosen, then social relations are always tainted with a sense of unjustified imposition, since they always involve demands or expectations for conformity which undercut the "nothingness"[51] (or radical freedom) at the heart of each individual's being – the nothingness that is the "worm at the heart of being,"[52] as Kennedy likes to say. From this perspective, then, social relations are a "mutual hell."[53] Because social relations (and, indeed, even the mere act of "looking"[54] that is perhaps the simplest of all intersubjective relations) reduce existentially free subjects to "reified"[55] objects: characters who are expected to "play" a presumptively-fixed social role.

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As noted, we will return to this later. Firstly, though, we have to ask: how might Kennedy's Sartrean prioritization of individual freedom translate into law? The most obvious and intuitively appealing answer is perhaps that it should translate into an *individualistic* conception of law. To explain: the legal individualist's dream is the dream of a system which is facilitative and non-moralistic, and which accordingly shies away (as far as possible) from the type of reification/objectification that Sartre fears. In such a system, as I said before, individuals are free to "play" within a clear, neutral, minimal scheme of "background"[56] rules. They are accordingly conceived as free and responsible subjects whose clear intentions can be made legally enforceable (as in contract law) and whose basic interests – *as free and responsible subjects* – will be protected from both individual and state intrusion (as in criminal, constitutional, and tort law, *inter alia*). We might say, then, that the idea is to simulate the individualistic freedom of an unregulated state of nature within a regulatory framework which provides (at least) the more basic protections – of "liberty, private property, and bodily security"[57] – which a "real" state of nature would lack.

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[51] See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS.
[52] See Duncan Kennedy and Peter Gabel, *Roll over Beethoven* – at 17.
[53] This is the way that Johan van der Walt puts it in his book, LAW AND SACRIFICE (at 155). The original expression is in Sartre's play, "No Exit," and is usually translated as "hell is other people."
[54] See JOHAN VAN DER WALT, LAW AND SACRIFICE – at 155.
[55] Ibid. See also Peter Gabel, *Reification in Legal Reasoning* (a classic CLS paper which takes inspiration from Sartrean existentialism).
[56] See FS at 1719 and 1745 (and elsewhere too). See also Mark Tushnet, *The State Action Doctrine and Social and Economic Rights* (at 168-172), which sums up the idea of individualistic background rules (and which I discuss more extensively in the next chapter).
[57] See FS at 1729. On this point, see also Joseph Singer, *Catcher in the Rye Jurisprudence* – at 275.

Of course, such a system is not merely a hazy, fanciful ideal, but was actively pursued by American jurists and judges in what Kennedy calls the "Classical"[58] era of "laissez-faire economics"[59] in the US (1850-1940 approx.). The jurists and judges of this Classical period not only believed that a system of clear, minimal background rules was preferable for the sake of their nation's overall prosperity, but also that such a system could be "logically derived"[60] – in its minutest details – from the ideal of personal liberty that Kennedy himself prioritizes. Perhaps the best-known example of this attitude is provided by the US Supreme Court's decision in *Lochner v. New York,* which struck down New York's maximum working time regulations for bakers as an unjustifiable interference with individual "liberty"[61] (as protected by the Fourteenth Amendment). This gave rise to (and became the namesake of) the Supreme Court's so-called Lochner era, which saw the court repeatedly invalidate social welfare laws – from prohibitions on "yellow-dog contracts"[62] to minimum wage rules for women and children[63] – in the name of an apparently "natural" ideal of legal liberty.

At one level, this era may be criticized as an era of judicial activism: an era marked by a gratuitous under-valuation of "political autonomy"[64] as expressed in democratic legislation. However, an alternative and arguably more potent criticism can be gleaned from what Kennedy writes in FS: namely, that the liberty at stake in the "Lochner era" cases was not merely a matter of "natural" liberty, but rather of what the Supreme Court *chose* to count as liberty, and of the social costs that it *chose* to tolerate in the name of that liberty. As Karl Klare has explained, it is simply not the case that:

> "…power dynamics in the private sphere of ordinary relationships exist apart from and unbuttressed by law. How is it that a landlord can "privately" refuse to let a flat because of a prospective tenant's race? The landlord can do that because, and only because, the applicable legal regime permits her to do so."[65]

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[58] See FS – especially at 1728-1731. See also Duncan Kennedy, *The Rise and Fall of Classical Legal Thought.*
[59] See FS – especially at 1746-1748.
[60] Ibid at 1747.
[61] As protected under the Fourteenth Amendment's Due Process Clause, which promises that no state shall deprive any person in its jurisdiction of liberty "without due process of law." See *Lochner v. New York* 198 US 45 (1905).
[62] *Coppage v. Kansas* 236 US 1 (1915).
[63] *Adkins v. Children's Hospital* 261 US 525 (1923).
[64] See KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS – especially at 100-123.
[65] See Karl Klare, *Legal Culture and Transformative Constitutionalism* – at 185. For a similar example in American constitutional law, see *Shelley v. Kraemer* 334 US 1 (1948), discussed in chapter five.

This is the major problem with an individualistic conception of law (especially in its classical, laissez-faire guise). To put it simply, there is just no such thing as an un- or under-regulated private sphere.[66] On the contrary, from the moment that we speak of law, we are already, immediately, dealing with an entire universe of law, which is to say that from the moment that a sovereign claims authority over a particular territory, his/her authority is imprinted on every "private" act from which his/her regulatory power withdraws. Frank Michelman refers to this as a "simple, Hohfeldian point"[67] – a simple point which, in the context of modern constitutional law, becomes the problem of "horizontal effect"[68] or "state action"[69] which has been the subject of so much sustained, scholarly debate in recent years.

In a nutshell, the problem is this. Constitutional law is traditionally (since at least the 1880s in America) conceived as the branch of law that is concerned with the vertical relationship between individuals and the state: not the so-called "horizontal"[70] relationships between individuals. However, when we accept Michelman's "simple, Hohfeldian" point, we may feel that we have little choice but to accept that constitutional law can and perhaps even must have ramifications for "horizontal" as well as vertical legal relationships. To explain (via Klare's example): when a private landlord refuses to rent property to a prospective tenant because of his/her ethnicity, and the prospective tenant takes legal action, the state *cannot but* respond *actively*, either by declaring an absence of legal limits on the landlord's discriminatory refusal, or by declaring the presence of such limits. Either way, it is impossible for the state to "refuse" to regulate the private relationship at stake, because a refusal to regulate is as much a part of the regulatory framework, and as much a part of the political morality that is immanent in the state's legal order, as a more obviously and directly moralistic intervention.

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[66] Perhaps no theorist has stressed this point more clearly or insistently than the property law (and CLS) theorist Joseph Singer. For the classic formulation of Singer's position, see Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*. For a more recent and concise expression of the same position, see Singer's paper, *Subprime: Why a Free and Democratic Society Needs Law*. Here is a relevant passage: "The truth is that markets function because we have the rule of law, and liberty is possible only if we have a robust regulatory state. Markets are defined by a legal framework that sets minimum standards for social and economic relationships. And because we live in a free and democratic society (or aspire to do so), our regulations must be compatible with the norms, ideals, and values that democracies represent. This means that the question is not whether to regulate the free market but what legal framework best promotes the values of a free and democratic society that treats each person with equal concern and respect" (at 142 of Singer's *Subprime* paper, cited above).

[67] Frank Michelman, *W(h)ither the Constitution?* – at 1076.

[68] See Stephen Gardbaum, *The "Horizontal" Effect of Constitutional Rights*.

[69] See Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*.

[70] See JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – especially at 1-36.

The question, then, is never whether a state should or should not regulate particular, economic relations – whether it should or should not impose a particular "vision of the universe," or a particular morality, on its citizens. On the contrary, if we accept the "simple, Hohfeldian point" that animates the modern problematic of horizontal effect/state action in constitutional law, then the question is always already a matter of *which* vision of the universe should be preferred and imposed at a given moment. In other words (and to borrow Derrida's phrase): Michelman's Hohfeldian point amounts to a recognition that "there is nothing outside the text"[71] of state sovereignty, no "natural" realm of private liberty that would not already bear the mark of sovereignty, and the mark of a moralistic choice between worldviews.

If we accept this claim, then our ability to decisively separate law and morality wears thin, and the law fills up with the urgency of a cold, stark choice: between an individualistic ethics of "self-reliance,"[72] on the one hand, and an altruistic ethics of "sharing and sacrifice,"[73] on the other. Was this not also Schmitt's point in the previous chapter? To be sure, Schmitt does not start from (or even really value) the goal of individual freedom that animates Kennedy's work, but he surely agrees that there is no way to avoid morality, and the choice between concrete "ways of life,"[74] when one acts politically.

In this regard, Kennedy's (unavoidable) moral preference is for an at least nominal shift towards altruism, and for a context-sensitive re-balancing of individual/economic power relations in the name of a more level, socially-open playing field: a field on which the promise of individual freedom and equality would match up more plausibly with material reality. However, unlike some strains of CLS theory, Kennedy's work harbors no grand or self-righteous illusions about the possibility of a "transcendent"[75] imposition of altruistic "justice." This is where the mpm side of Kennedy's leftism rears its head again, and where the fundamental contradiction re-imposes itself as a check on any optimism vis-à-vis the "realizability" of individual freedom. Here is one way in which he explains this re-imposition in his FS article:

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[71] See JACQUES DERRIDA, OF GRAMMATOLOGY – at 163.
[72] See FS at 1713-1716.
[73] Ibid at 1717-1722.
[74] In this regard, Kennedy's relationship to Schmitt is an indirect but clear one, as he explains in one of his later articles. See Duncan Kennedy, *A Semiotics of Critique* – at 1164. "For many years, when I happened to be peddling antinomian ideas in Europe… some purportedly friendly European law prof would take me aside and tell me that I sounded just like Carl Schmitt, and then that Schmitt was a decisionist and also a Nazi, and that I might want to rethink my position in light of the resemblance." We will return to this similarity, briefly, in section three of the present chapter.
[75] By which I mean an imposition of altruistic justice that would be more than mere preference, and, as such, more than a matter of ultimately arbitrary imposition.

> "I believe there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit. Real people are involved, even if there are not very many whose lives the decision can affect. The altruist judge can view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized, but to adopt this attitude is to abandon the crucial proposition that altruistic duty is owed by one individual to another, without the interposition of the general category of humanity."[76]

In a way, this quote is the perfect encapsulation of Kennedy's left mpm position, with the first half representing Kennedy's leftist (or altruistic) impulse, and the second representing his mpm impulse. To explain: the key term in the first half of the passage is "real." There is "an element of real nobility," says Kennedy, in judicial or institutional decisions which seek to counter the exploitation of "real people."[77]

In Kennedy's Sartrean vocabulary, what is at stake here is "authenticity,"[78] and the avoidance of "bad faith."[79] For Sartre and Kennedy, bad faith is the condition that results from a failure to comprehend the fullness of one's existential freedom: the freedom that one always retains to shirk the conventional expectations of society (or, indeed, of oneself). In the context of adjudication, this translates into an insistence – as we can see above – that the judge get "real," where getting real means accepting that the conventional expectations linked to his official role do not inhibit his ability *to do otherwise*, and do not absolve him of real, *personal* responsibility for his decisions. As Kennedy explains further in FS:

> "[An]… instrumental… [or individualistic] theory of judging lies to the judge himself, telling him that he has two kinds of existence. He is a private citizen, a subject, a cluster of ends "consuming" the world. And he is an official, an object, a service consumed by private parties. As an instrument, the judge is not implicated in the legislature's exercise of force through him. Only when he chooses to make his own rules, rather than blindly apply those given him, must he take moral responsibility."[80]

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[76] FS at 1777.
[77] This thought places Kennedy quite firmly, as I will note again further on, within the tradition of American Legal Realism. See the conclusion of section two of the present chapter.
[78] As the familiar reader will know, this term is a central component of existentialist philosophy, and features prominently in the work of Kierkegaard, Heidegger and, of course, Jean-Paul Sartre.
[79] Kennedy talks about "bad faith" frequently in his book, A CRITIQUE OF ADJUDICATION. For Sartre's explanation of "bad faith," see JEAN PAUL SARTRE, BEING AND NOTHINGNESS – at 70-94.
[80] FS at 1772.

> "By contrast, altruism denies the judge the right to apply rules without looking over his shoulder at the results… [and suggests instead that the judge]… must accept that his official life is personal, just as his private life, as manipulator of the legal order and as litigant, is social. The dichotomy of the private and the official is… [therefore] untenable, and the judge must undertake to practice justice, rather than merely transmit or invent it."[81]

For Kennedy, then, altruism demands that the judge embrace his existential freedom, and his "real" responsibility for the "real" lives before him. Fair enough, you might think. But how, and in which direction, should the judge *actually* rule? The only answer that the above quote suggests is that the judge must decide "authentically," or "responsibly." But authenticity does not necessarily lead to *substantive* altruism. On the contrary, a judge may hold an utterly "authentic" or "real" preference for individualism, and may hesitate to impose moralistic limits on exploitive consumer contracts (as per the example above) not because he sees himself as professionally unfree or rule-bound, but rather because he thinks that restrained, *consciously predictable* adjudication is more beneficial to the "real" members of his community than a series of ad-hoc attempts to block "the exploitation of the poorest class of buyers on credit."[82]

This takes us to the second part of the Kennedy quote on the previous page. To explain: Kennedy's own preference is evidently for a *substantively* altruistic response to exploitive consumer contracts – a leftist response in the name of those whose lack of "political vision and energy and raw power"[83] renders them vulnerable to abuse. However, the problem, from Kennedy's Sartrean point of view, is that a judge who sees himself as a vehicle for altruistic justice is (potentially) just as vulnerable to charges of "bad faith" as the judge who sees himself as legally rule-bound. The reason is that the altruist judge – inasmuch as he identifies *as an altruist* – conceals his own radical subjectivity beneath a "universalization project"[84] which 1) consumes and flattens out his identity, and 2) turns the "real" members of his community into objects: pieces to be moved around and used in the furtherance of altruistic justice. Hence Kennedy's dejected admission that:

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[81] FS at 1773.
[82] Ibid at 1777.
[83] This phrase is taken from Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* – at 521.
[84] See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION. For Kennedy, one of the key features of a "universalization project" (which he also describes simply as an ideology) is that it attempts to translate a partisan or subjective preference into a "higher" logic to which all "ought" to "yield" (at 41 of Kennedy's *A Critique of Adjudication*). Sound familiar?

> "The altruist judge can view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized, but to adopt this attitude is to abandon the crucial proposition that altruistic duty is owed by one individual to another, without the interposition of the general category of humanity."[85]

As this passage hopefully makes clear, what Kennedy craves (via Sartre) is not just an altruistic shift in policy, but rather a moment of altruistic, intersubjective *fusion*, a moment that would no longer be governed (and flattened out) by conventional, essentialist understandings of "justice," or "humanity." In a dialogue with his CLS colleague Peter Gabel, Kennedy referred to this as an experience of *intersubjective zap* – a moment in which the "barriers between the self and the other are in some sense dissolved"[86] so that the two *experience* one another without the destructive mediation of (as Kennedy puts it) "reflective understanding."[87] It is surely not hard to see the kinship between this notion of intersubjective zap and a commitment to altruistic policy, but for Kennedy, such a commitment will *always* fall short of intersubjective zap: partly because of the double objectification (of self and others) that comes with a commitment to a "universalization project" (see the previous page), and partly because – as Kennedy wrote in his paper on *Blackstone's Commentaries* – altruistic, interventionist adjudication involves a "massive increase"[88] in the state's *direct* control over our lives (and, one might add, because altruistic, interventionist adjudication may not have the social effects that the altruistic, interventionist judge wants it to have). Put simply, then, Kennedy's position turns 1) on a quest for an unmediated, altruistic relation between self and other, and 2) on an awareness of the various ways in which particular, altruistic interventions in public policy will inevitably involve mediations and risks which thwart the possibility of such a relation. This is mpm leftism, in a nutshell: a quest for altruistic justice (or "love,"[89] as some CLS scholars have called it) coupled with an mpm "loss of faith"[90] in the possibility of altruistic justice as a concrete reality.

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[85] See again, FS at 1777.
[86] Duncan Kennedy and Peter Gabel, *Roll Over Beethoven* – at 54.
[87] Ibid.
[88] See again, Kennedy's definition of "the fundamental contradiction" in Duncan Kennedy, *The Structure of Blackstone's Commentaries* – at 211-212.
[89] See Peter Gabel, *Critical Legal Studies as a Spiritual Practice* – at 516.
[90] See again, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION – especially at 339-376.

At this point, the reader may ask: how exactly does the preceding analysis of Kennedy's work relate to the subject matter of this study, i.e. modern liberalism, and its fundamental promise of human dignity? Thus far, I have left the answer to this question implicit, but it surely requires little imagination to see how "the goal of individual freedom" that Kennedy finds at the heart of Western legal culture in his *Blackstone's Commentaries* paper is connected to human dignity, as I presented it in chapter one. Put simply, Kennedy's goal of individual freedom *is also the goal of human dignity*, i.e. the goal of resisting or overturning the various processes of objectification that make the individual less than free, and less than personally sovereign over his/her life. Of course, as we saw in chapter one, Western law is quick to temper the more radical implications of this goal (consider, for example, constitutional law's tendency to focus on whether the state has acted in violation of a right, rather than on whether it has failed to prevent a non-state violation), but this is surely for the same reason that Kennedy insists on the fundamentality of the fundamental contradiction: namely, because a truly consistent and insistent resistance to objectification is impossible to abide by.

On this last point: why? The answer, as Kennedy makes clear, is not that we are scared of the consequences that would result from a "true" affirmation of individual freedom, but rather, that individual freedom is threatened and even destroyed by every possible course of action that a state (and indeed, any actor) can take. In one sense, this is so because we live in a pluralistic world: a world in which individual interests conflict, so that freedom for one is possible only at the expense of another, i.e. by limiting the freedom of another. However, in Kennedy's *Blackstone's* paper, the more profound concern that we find is with a certain paradox of sovereignty, a paradox whereby the liberty – or "sovereignty,"[91] as Bataille may have called it – of the individual is unthinkable without the support of a whole "universe of others"[92] that threatens it, and robs it of its sovereign character (assuming that dependency is antithetical to sovereignty, although that surely places the very notion of sovereignty in question, since there is no such thing as a sovereignty that does not depend, for example, on its recognition by an "other," i.e. a subject).

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[91] Like Sartre (Kennedy's philosophical hero), Bataille's ethics is directly opposed to (and indeed, demands the abandonment/destruction of) ethics as it is conventionally understood – i.e. as a search for requirements by which we ought to live – with "sovereignty" naming an (ultimately impossible) "moral summit" in which one would be fully liberated from all the ethical (or other) demands and requirements that suppress one's "total character." See my LL.M. thesis (at 44-45) for quoted phrases above: http://theses.gla.ac.uk/3716/1/2012maileyllm.pdf. See also MICHEL SURYA, GEORGES BATAILLE: AN INTELLECTUAL BIOGRAPHY – especially at 437-440.

[92] Again, see Duncan Kennedy, *The Structure of Blackstone's Commentaries* – at 212.

This last point is hardly trivial, but before we get stuck in the philosophical detail, it is worth presenting these thoughts more clearly in the language of liberalism, i.e. in terms of human dignity. Put simply, then, Kennedy's critique of Western liberalism is that its fundamental value, human dignity (or "the goal of individual freedom" as Kennedy calls it), leads to contradiction, because the negation of "objectifying essences" (Sartre) that threaten the individual's existential freedom (or to use a more "liberal" phrasing, that prevent the individual from developing his/her personality in an unconstrained manner) necessitates a simultaneous intensification and withdrawal of state authority (or some other authority beyond the individual him/herself – an authority that could, paradoxically, guarantee the individual's freedom at the same time that its existence as a higher authority undermines that same freedom). Significantly, this paradox is essentially identical to the one attributed to Schmitt's critique in chapter three, but with a key difference: namely, that whereas Schmitt takes the paradox as a sign of liberalism's bankruptcy, Kennedy accepts it, and asks institutional actors (e.g. judges) to exercise their power in its shadow, with a haunted awareness of its effects on the potential "rightness" of their work.

II. Altruism at the Coalface: Kennedy's Critical Phenomenology of Adjudication

In his 1986 paper, "Freedom and Constraint in Adjudication: A Critical Phenomenology,"[93] Kennedy took this theory (as presented above) to the coalface, so to speak, and imagined himself as a Federal district court judge torn between an individualistic impression of "the law,"[94] and a substantively altruistic "intuition of social justice."[95] Although Kennedy's paper is presented as a description of adjudicative experience, it is quite evidently not neutral. On the contrary, there is an unabashed, open normativity to Kennedy's description, specifically in the sense that it insists on and plays up what we might call the "tragedy"[96] of judicial experience – the tragedy of always having to navigate a plurality of often irreconcilable social needs and institutional demands.

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[93] The full paper is available here, on Kennedy's website: http://duncankennedy.net/documents/Freedom%20and%20Constraint%20in%20Adjudication_A%20Critical%20Phenomenology.pdf. It also appears in Kennedy's book, LEGAL REASONING: COLLECTED ESSAYS.
[94] See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*.
[95] Ibid at 551.
[96] One of the best accounts available of this "tragic" aspect of adjudication is Julen Etxabe's book, *The Experience of Tragic Judgment*, which draws parallels and seeks an exchange between Greek tragedy and the modern-day phenomenon of the legal "hard case." See also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (at 81-130) for an expressly "liberal" approach to so-called "hard cases."

To understand his position, we can briefly map out Kennedy's movements in his 1986 paper. To start with, Kennedy (or more accurately, Kennedy's "fictional judge-self"[97]) sets himself in front of a concrete case: a claim for injunctive relief from an employer whose business (a bus operator) is being hampered by the non-violent protests of his own, disgruntled employees – specifically, striking union members who wish to disrupt (by staging a "lie-in"[98] in front of the company's buses) the employer's use of non-union workers as replacements during their strike. Almost immediately, Kennedy's judge-self is confronted with two distinct and bluntly opposed "gestalts."[99] On the one hand, he has an educated but certainly not decisive "impression of the law,"[100] which congeals around an imagined rule against outside interference with "means of production."[101] And, on the other hand, he has a sense of "how I want to come out"[102] (or HIWTCO) that goes the opposite way; a guttural, moral instinct that "management *should*… [not]… be allowed to operate the means of production [m.o.p.] with substitute labor during a strike."[103]

The question, then, is how these two intuitions bear on each other, and how they *ought* to bear on each other, from Kennedy's left mpm perspective. From a very conventional, formalist/positivist point of view, one may assume that the "felt objectivity"[104] of a legal rule should prevail almost automatically, and that a base-level sense of respect for legality or the rule of law demands the outright exclusion of the judge's sense of social justice (regardless of its strength or insistence). Kennedy, however, suggests otherwise:

> "Isn't what I'm doing… [i.e. by thinking in terms of my HIWTCO]… illegitimate, from the standpoint of legality, right from the start? One could argue that since I think the law favors the company I have no business trying to develop the best possible case for the union. But this misunderstands the rules of the game of legality. All members of the community know that one's initial impression that a particular rule governs and that when applied to the facts it yields X result is *often* wrong. That's what makes law such a trip."[105]

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[97] I borrow this term from my LL.M. thesis ("Deconstruction and Law") at 79.
[98] See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* – at 525.
[99] Ibid at 531. For a concise introduction to "Gestalt Psychology," see Duncan Kennedy and Pauline Westerman, *Interview with Duncan* Kennedy – at 258-259.
[100] Ibid at 528 and 529, respectively.
[101] Ibid at 520.
[102] Ibid. This phrase is used constantly throughout the text, for example, at 556.
[103] Ibid at 520.
[104] Ibid at 546 and 560, respectively. Elsewhere, Kennedy describes a perception of a rule's "felt objectivity" as a sense that the rule is "unbudgeable" (at 547, for example).
[105] Ibid at 522.

The key phrase at issue here is "the game of legality,"[106] and it brings us to the first important point in Kennedy's argument. To explain: for Kennedy, "the law" is never simply *there*, telling us "what we have to do."[107] On the contrary, in Kennedy's view, the legal texts and decisions that collectively constitute a system of law are typically too complex, rich, overabundant (etc.) to grant us any definitive certainty about how a particular case should come out. We know that we sometimes experience "the law" with certainty, as an immovable barrier, but we also know that a little "work"[108] – a little "resourceful legal argument"[109] – will sometimes raise or even smash up that barrier, however immovable it once seemed. For this reason, Kennedy prefers to frame the law as a game that rewards intellectual creativity and imagination, or as an essentially open, pliable "medium in which one pursues a project."[110] As Kennedy explains:

> "When we approach it this way, law constrains as a physical medium constrains – you can't do absolutely anything you want with a pile of bricks, and what you do depends on how many bricks you have, as well as on your other circumstances. In this sense, that you are building something out of a given set of bricks constrains you, controls you, deprives you of freedom.
>
> On the other hand, the constraint a medium imposes is relative to your chosen project – to your choice of what you want to make. The medium doesn't tell you what to do with it – that you must make the bricks into a doghouse rather than into a garden wall. In the same sense, I am free to work in the legal medium to justify the workers' actions against the company. How my argument will look in the end will depend in a fundamental way on the legal materials – rules, cases, policies, social stereotypes, historical images – but this dependence is a far cry from the inevitable determination of the outcome in advance by the legal materials themselves."[111]

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[106] Towards the end of this chapter, when I note the distance between Kennedy and Derrida, one may come back to this phrase, "the game of legality." More specifically, one may (and perhaps must) ask: does Kennedy's presentation of legality as a "game" not obscure the genuine, moral value of legal consistency? By contrast, Derrida never evinces anything but the utmost respect for the practice (as opposed to "the game") of legality as a core component of what he calls justice. In the end, Derrida is not clear about how he understands the specific contours and merits of legality, but his respect for some kind of legality is surely there, and that arguably sets him apart from Kennedy, quite distinctly. See section five of the present chapter for more on this.
[107] Ibid at 526.
[108] Ibid at 526 and 527, respectively.
[109] See JOHAN VAN DER WALT, LAW AND SACRIFICE – at 195.
[110] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* – at 526.
[111] Ibid.

Legality, then, is for Kennedy little more than the requirement that legal officials pursue their personal projects and inclinations *within* the medium/language of the law (and of course within the limited time that they have to decide each case). At this stage of the paper, one may feel a little cheated. I mean, Kennedy's article is called "Freedom *and Constraint* in Adjudication"[112] (my emphasis), but his understanding of "the law" seems to accord a far more prominent role to judicial freedom than it does to constraint. In this sense, perhaps "The Freedom of Adjudication and its Limits" would have been a better, more apt title for Kennedy's paper, albeit a clumsier one: unless (of course) Kennedy has some other constraint in mind which makes law more than a vehicle for the deployment of the judge's partisan political/moral preferences.

Fortunately, he does. Because despite the (apparent) openness and fluidity of the law as a linguistic medium, Kennedy's judge is constrained by the fact that he is *not alone* – by the fact that it is not simply him, in his armchair, wrestling with a set of under- and over-determined legal materials. On the contrary, Kennedy's judge is always in the thick of a political community, and he is always burdened by the way that this community will 1) experience the effectual brunt of his legal work, and 2) cast their own judgmental eyes back on him and his work, based on their own understandings of or intuitions about "the law." In a sense, then, the judge is constrained by what other people – and this includes laypeople as well as other legal professionals – are likely to think about how well or faithfully he plays the game of legality. He may find a beautiful, dazzling interpretation in favor of the union workers (as in Kennedy's example). But this beautiful, dazzling interpretation will involve significant personal and professional "costs"[113] if other members of his community see it as an unreasonable "stretch"[114] vis-à-vis standard interpretations of the law. For example, a decision which seems like too much of a stretch may be overturned on appeal, or may otherwise deplete the judge's "stock of legitimacy"[115] (which, in turn, may limit the judge's capacity to pursue his personal projects from the bench in the future, since he will find it harder, due to raised suspicions against him, to convince colleagues and observers that he is acting in good faith, as an at least intentionally neutral arbiter).

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[112] This is a common concern with Kennedy's work, especially from those who identify him with an antinomian trend in contemporary American legal scholarship. See Kennedy's *A Semiotics of Critique* (at 1164), as well as JOHAN VAN DER WALT, LAW AND SACRIFICE (at 193), both discussing the concern that Kennedy's antinomianism puts him with Schmitt, against law and liberalism.
[113] Duncan Kennedy, *Freedom and Constraint* – at 528-530.
[114] Ibid at 529.
[115] Ibid.

This brings us to another way in which the judge's community may place limits on his freedom: namely, by providing *moral arguments* that have the potential to redirect his initial sense of HIWTCO (and that will perhaps even have shaped his HIWTO from the start). To explain: as Kennedy puts it near the end of his paper, legal texts and materials – the building blocks of legal opinions – are different from other, physical materials in an important way, despite their metaphorical similarity. The difference is that unlike a physical medium, such as bricks or clay, the "legal field"[116] includes (and more fundamentally, consists of) moral appeals which challenge and have the capacity to change their (judicial) handler's view of a particular situation-at-hand. In Kennedy's words:

> "I've been treating the law field as though it were a physical medium, clay or bricks, when what it is in fact is a set of declarations by other people (possibly including an earlier me) about how ethically serious people ought to respond to situations of conflict. As I manipulate the field, I am reading and rereading these declarations, apparently addressed to me, and trying to absorb their messages about what I ought to do. Indeed, before I ever heard of this case, I was already knowledgeable about hundreds of opinions by judges and lawyers and legislators about how to handle conflicts roughly analogous to this one."[117]

For the more optimistic, conflict-averse liberal, like Ronald Dworkin, the judge's sole task is to make sense of these declarations: to identify their cumulative, moral logic, and apply it to a particular case-at-hand. Kennedy's judge, though, is not interested in "making sense" of anything, but only in the 1) pursuit and 2) refinement of his personal, moral project. The law is involved in the first task (the project's pursuit) as a medium, or a vehicle for its realization. However, when it comes to the second task, the law takes on a very different function: namely, the function of moral instruction. The result is that Kennedy's project – the moral project of his fictional judge-self – is influenced by the very material that he uses to pursue it. On the one hand, his project shines like a guiding star as he works with and manipulates the law; on the other hand, the law – inasmuch as it offers compelling arguments for positions contrary to the judge's moral preference – will exert force on (and perhaps even change) his personal, moral project (which Kennedy even seems to encourage).

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[116] Ibid at 538.

[117] Ibid at 548. Elsewhere in his text, Kennedy describes these "messages" as the voices of "the ancients" (at 550-551), presumably to amplify the sense of authoritativeness that they surely have for many judges. One may wonder, though, how far this sense of authoritativeness applies to Kennedy himself, given his insistent battle *against* forces of authority in law.

This is one of (at least) two key tensions in Kennedy's article: between the law as a manipulable material, and the law as a font of moral wisdom. The second key tension, as already mentioned, is the tension between Kennedy's own views (as a fictional judge) and the views of the legal/lay communities in which he works. To explain: at the risk of oversimplifying Kennedy's not-so-linear phenomenology, we can assume that the judge will reach a point in his deliberations where he runs out of time, and where the two-way, tense interaction between the legal field and his sense of justice must be suspended. At this moment of suspension, the judge will have an optimal legal argument in mind, we can assume, which may pose a significant challenge – depending on both the judge's resourcefulness and the relative "plasticity"[118] of the law – to the understandings and expectations of his community. The judge may think he has struck oil, but it isn't really oil until enough people agree that it's oil. After all: he has to sell the stuff.

On one level, this problem is a real one, which unfolds between the judge and the real, flesh-and-blood members of his real, flesh-and-blood community (on whose opinions the judge's reputation, and capacity to convincingly "stretch" the law in the future, ultimately rest). On another, more interesting level, though, this is just another part of the judge's internal, psychic experience. The judge can easily shirk his communal responsibility (after all, he is *existentially free*), but this is not how he *feels*. On the contrary, he *feels* (one may suppose) a deep and importantly *personal* commitment to what Kennedy calls "the devil's compact"[119] – an imagined agreement between him and his community that he will honor "the law," and that he will not "direct the use of state force"[120] arbitrarily, without convincing, *legal* reasons. This is not an external force which impacts on the judge, but is more like an alternative HIWTCO that he carries with him from one case to another. In every case, the judge who accepts his commonality, will/should feel commonly responsible in this way, and will/should see the problematic connotations of a decision which rides roughshod over the more-or-less "shared"[121] (or at least more prominent) understandings and expectations that exist with regard to the law in his political community.

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[118] Ibid at 544 and 562, respectively.
[119] Ibid at 555-558 (section on "The Devil's Compact").
[120] Ibid at 556.
[121] On my understanding, this is essentially Gerald Postema's critique of Ronald Dworkin, which is presented clearly in his paper, *Protestant Interpretation and Social Practices*. Put simply, Postema's issue is that the legitimacy of an interpretation for Dworkin never hinges on whether the real, flesh and blood members of one's political and legal communities buy it, but only on whether the interpreter him or herself, looking at an interpretation carefully and sincerely, finds it to be an optimal reconstruction of the relevant legal materials. Is such an interpreter really a member of a *community*, in the full sense of that term?

This notion of an imagined/experienced compact between a judge and his community comes very close to Rawls's notion of public reason, which, as the reader may recall, requires public actors (and especially judges) to speak in terms that anyone could plausibly accept. The main difference is that Rawls's appeal is shallower, since it is directed only to a community of ideal/hypothetical persons represented as *reasonable and rational*. Of course, Kennedy's appeal is also and unavoidably to an imaginary community, but it is not to an *ideal* one like Rawls's. On the contrary, for Kennedy, the devil's compact is between the judge and the real members of his community, as he imagines them. In this sense, Kennedy is not concerned with how people should feel, or with how they would feel if they were perfectly reasonable and rational, but rather, with how they seem to (or are likely to) feel, in reality. This means that for Kennedy, it matters (a lot) if the real members of a community feel violated, or feel that a particular judge has flouted his role: even if their belief is unreasonable, or rooted in an over-simple understanding of legal interpretation.

The work that Rawls's appeal to persons as reasonable and rational does – as we have already seen – is that it enables him to overcome the non-liberal or not-so-liberal beliefs of a real, flesh-and-blood community, and to explain limits on these beliefs (such as court decisions against them) as ultimately *non-coercive*. Kennedy, on the other hand, prefers to accept and emphasize the coercive element in every governmental act which falls out of sync with people's real, pressing wishes. As he writes in a later article:

> "Imagine a group that makes choices under a norm of deliberation that is understood as dialogue, in which each participant attempts to win the others over to a position by appealing to mutually acceptable or universalizable principles. When time runs out without agreement, the relationship of the actors is no longer dialogic but strategic. This means that they now aim to make their position prevail according to whatever rules govern conflict. The result will be against the wishes of the losing parties. If we want to understand the outcome, we have to understand it as imposed by some on others in the sense of not agreed to."[122]

[122] Duncan Kennedy, *A Semiotics of Critique* – at 1164. Kennedy goes further, in the very next paragraph of the same article: "An outcome is the product of strategy rather than dialogue even if it occurs by application of an unambiguous rule of decision for cases where there is no agreement, for example, a rule of majority rule" (at 1164-1165). This means that the judge cannot conceal his coerciveness via the fact that parties to lawsuits have accepted, at least tacitly, the judicial decision (whatever it may be) as a way of resolving their dispute. In other words: despite their agreement to rely on the judge, the judge's decision will still, for Kennedy, amount to the brute coercion of the losing party.

The reason that Kennedy takes up this position, I think, goes back to his earlier insistence – in his FS paper – that the judge's primary but problematic duty is to maintain a sense of altruistic concern for the "real people… involved" in legal disputes. In the end, "Freedom and Constraint" descends into a terse battle between these "real people" – a terse battle that plays out not in reality, as such, but in the reality-focused, reconstructive imagination of the altruistic judge. On the one hand, we have the wishes and expectations of a "real" political community, which Kennedy refuses to dismiss (as so many liberals do) as dangerous expressions of "interest and passion."[123] On the other hand, we have the wishes and needs of particular, "real" litigants – particular, real litigants (and others who stand to bear the direct/material brunt of the particular judge's decision) whose relief is not clearly accommodated by "the law," as conventionally understood.

Of course, each of these categories of "real" interest represents a simplification of a more complex plurality, and so – as I hopefully made clear in the preceding pages – an important function of the adjudicative process is for Kennedy its capacity to test and perhaps even alter the judge's initial, gestalt-like perceptions (of the law, as conventionally understood, and of social justice, as he sees it). The crucial question, though, is how one should respond to a conflict between these perceptions once they have been adequately tested, and once the time for legal analysis expires. Kennedy does not answer this question. Or rather, Kennedy ends his paper by listing *every conceivable* answer to this question, with no clear preference for any one of them. Why, one may ask? Why does Kennedy's paper leave this most crucial of questions so frustratingly, achingly open? The simple answer, I think, is that this *is* Kennedy's answer. To explain: for Kennedy, the coerciveness of adjudication, coupled with the urgency of the many social realities to which adjudication must respond, means that a judge caught between a *re*-sistant body of law and an *in*-sistent HITWCO "will… [*and should*]… feel terrible"[124] whichever way his decision turns. The reason, again, is that "real people are involved." *Real people are involved, and real sacrifices are then inevitable*. How could a judge who cares about real people and the reality of their material existence not feel terrible in such a situation? Why should a judge who cares about real people not feel terrible in such a situation?

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[123] The reference here is to James Madison, who famously describes "interest and passion" as key dangers to the stability of the American Republic in *The 10th Federalist*.

[124] See Kennedy, *Freedom and Constraint* – at 557. I read the word "should" into this because I think it is consistent with Kennedy's work as a whole, factoring in his early thinking on the fundamental contradiction, and his later notion of a "loss of faith" in rightness in *A Critique of Adjudication* (discussed earlier).

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How can we summarize and classify Kennedy's position here? Wouter de Been has claimed that the phrase "Realism meets Radicalism"[125] adequately captures the spirit of CLS jurisprudence generally, and this is a fair comment. However, in Kennedy's case, I am more drawn towards the phrase *Tragic Realism,* because it separates Kennedy from the more "dogmatic," assertive radicalism that has existed within CLS alongside Kennedy's "mpm" stance. To explain: at his core, Kennedy is a Realist – or rather, a fitting heir to the Realist movement – because he resists the various mystifications and abstractions of legal theory, the "transcendental nonsense"[126] of legal theory, to focus exclusively on how judges and other legal professionals ought to navigate various tensions between "real people," people whose lives and needs and interests are so dearly dependent on the trajectory of the law. In this sense, "the law," for Kennedy, is not "real" – only the needs and interests of real people are real, which is to say that only they *mean* something, morally.

What makes Kennedy a "Tragic" Realist, then? Well, that takes us back to Kennedy's fundamental contradiction. Because while the Legal Realists of the 20s and 30s retained a certain optimism vis-à-vis legal decision-making (due to their faith in social science as a means of optimizing the law, and rendering it "functionally"[127] effective), Kennedy's existentialism ultimately brings him to see un-freedom in all law, and all state action. To be more precise, Kennedy's legal universe always involves a choice between two kinds of freedom, each with its own, concomitant logic of un-freedom. One can either be subject to a minimalist state, and risk becoming a serial victim of "private" abuse (a citizen of a "frontier"[128] state, as Johan van der Walt puts it), or one can endorse a more invasive logic of state sovereignty, at the cost of a "massive increase" in the state's control over one's life. It is (per Van der Walt) like "being lethally allergic to oxygen"[129] – one's freedom is both "threatened"[130] by and reliant on the interventions of the state.

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[125] See WOUTER DE BEEN, LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM – at 10.
[126] See again, Felix Cohen, *Transcendental Nonsense and the Functional Approach*.
[127] Ibid. See also LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960.
[128] Johan van der Walt, *Abdications of Sovereignty in Horizontal Effect and State Action Jurisprudence* – at 164. See also JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY.
[129] Ibid (*Abdications of Sovereignty*) at 172. I take this idea to be essentially the same as Kennedy's idea of the fundamental contradiction in liberal law.
[130] Ibid.

In "Freedom and Constraint," this thought turns into a fictional judge's tragic dilemma over whether to accept an individualistic conception of morality, which impels him to stick with a stable, predictable understanding of the law, and to keep his moral sentiments to himself, or an altruistic one, which impels him to intervene on behalf of vulnerable citizens (striking union workers), and unleash his own conception of political morality on a community that has presumably never endorsed it. In a sense, the fundamental contradiction appears here at two different levels. On the one hand, there is a tension between individualistic and altruistic (or pro-employer and pro-worker) forms of state power, and, on the other hand, there is a tension between judicial restraint (or judicial deference to conventional legal understandings) and judicial activism. In essence, the difference between these two levels is a difference between spheres of life, with the first level relating to the economic sphere, and the second relating to the political sphere. In each case, the question is whether the state (and the judge as a vehicle for state power) should muscle in on and try to correct moments of material un-freedom, or whether its role should rather be that of a facilitative middle man, regardless of whether this produces patterns of domination/un-freedom, either economically or politically, which are hard to stomach.

Of course, the "Hohfeldian point" that I mentioned in the previous section – i.e. that a lack of law (or rather, a legal permission) is every bit as much an example of state action as the most intrusive prohibition – renders the distinction between an intrusive (altruist) and a less-intrusive (individualist) state problematic, but it remains sustainable, I think, from the perspective of an individual, legal decision-maker, like a judge. Put simply, the judge always has a choice (as Kennedy suggests in "Freedom and Constraint") between a fresh consideration of what the law requires (or rather, what it should require, inasmuch as the law is a pliable medium, fizzing with potential) and an act of deference to some other authority, whether that "other" authority is a legal community, a lay community, or a community of so-called market actors. Should the judge act, and take a "heroic" stand in the name of individual freedom, i.e. the "goal" that Kennedy attributes to Western law. Or should the judge defer, either by affirming the right of some other authority "to decide," or by deciding in the way that he thinks some other authority would? In both cases: Kennedy's judge, as an individual with a *real* power of decision, is responsible for the substantive outcome. The only question is: which course is most conducive, on the whole, to the promise of liberal law, i.e. the principle of human dignity (or "the goal of individual freedom")?

III. Derrida on Hospitality and Sovereignty

Now, here's the rub. Because while Kennedy's work is exemplary as an exposition of what he calls the fundamental contradiction in law, it has been quite understandably accused of skating a little too close to Schmitt – not least of all in its suggestion that there is "an element of real nobility"[131] in what I earlier called institutional heroism (and more specifically, in "authentic," judicial attempts to improve the lives of "real"[132] people). Personally, my sense is that such accusations are often based on a caricature of Kennedy's work, which lumps his "mpm leftism" together with "dogmatic" forms of CLS scholarship. That being said, though, there is something troublingly authoritarian about the phrase that Kennedy uses when he defends judicial activism: "an element of real nobility." Does this not come close to a glorification of willful a-legality, very much like the glorification of sovereignty that we find in Schmitt? Remember, in the regard, the difference between Schmitt and Weber, as described in the previous chapter. With this difference in mind, the question is whether Kennedy is a Schmittian or a Weberian. Is his claim about the "real nobility" of (altruistic) judicial activism a moment of authoritarian relish (a la Schmitt), or a moment of deflation, which accepts "charismatic authority,"[133] exceptionally, as a necessary evil (a la Weber)?

One can (at least) make a case for the former. To explain: Kennedy does not only say that there is "real nobility" in judicial activism, but that there is "real nobility" in adjudication which pursues altruistic justice "every time the opportunity arises."[134] What is this, if not a shameless glorification of what Ran Hirschl calls "juristocracy?"[135] To be sure, Schmitt may not have embraced this precise sentiment, but the point is that Kennedy and Schmitt's positions are both celebrations of *institutional heroism*. Does it really matter that Schmitt generally desires populist, Presidential heroism, whereas Kennedy wants judges to function as heroic vehicles for altruistic values?

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[131] See Duncan Kennedy, *Form and Substance in Private Law Adjudication* – at 1777. It is important to note here that Schmitt's position on judicial activism was inconsistent. In his earlier work, Schmitt left no room for judges to act beyond conventional understandings of "the law," but by the mid-1930s he was suggesting that judges should infuse *all law* with the moral values of the state (*Nazi* values). For an account of Schmitt's evolution, see DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR – at 38-101.

[132] See again, Duncan Kennedy, *Form and Substance in Private Law Adjudication* – at 1777.

[133] See MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY – at 241-254.

[134] See again, Duncan Kennedy, *Form and Substance in Private Law Adjudication* – at 1777.

[135] RAN HIRSCHL, TOWARDS JURISTOCRACY. As may be guessed, Hirschl's notion of juristocracy refers to the current trend in liberal-democratic states towards judicial review, which potentially places judges and jurists in charge of defining the moral principles on which a state's law turns.

As far as I am concerned, it is not necessary to answer this question. On the contrary, the fact that we can even ask it already signals the need for caution in our reliance on Kennedy, which I supply here by turning to another titan of postmodern (or mpm) theory, namely, the Algerian-French philosopher Jacques Derrida. As with Kennedy, Derrida's work turns on a concern with the possibility of a non-objectifying, "loving"[136] relation, but it does so – unlike Kennedy, as I have just presented him – without even a mild preference for purportedly "noble" deployments of state authority. In this regard, the essential feature of Derrida's work is almost unquestionably its refusal of *all* authority, and, more precisely, its resolve to "deconstruct" authority at every turn. We will come back to this phrase – "to deconstruct" – later on, but for now, suffice it to say that deconstruction is basically Derrida's version of Kennedy's mpm position, which maintains but ultimately exceeds (and thereby undercuts) the thrust of conventional, leftist discourses of social justice.

With this note in mind, we can now proceed as follows. The present section will offer a cursory (and probably rather inadequate) introduction to Derrida's understanding of ethics, which has been posed, variously, as a critique of traditional, Western ideals such as "hospitality,"[137] "mourning,"[138] and "the gift."[139] The hope is that this section will lay down the necessary foundations for an engagement with Derrida's legal theory, which I will subsequently present through a focused reading of his renowned, controversial essay, "Force of Law: The Mystical Foundation of Authority," in sections four and five. More than any other, this essay, I think, offers a way of accepting Schmitt's critique of liberalism, without succumbing to his utterly brutal authoritarianism. And, as I have noted already, *this* is the core aim of the present chapter, to formulate a properly *liberal* response to Schmitt – a response that accepts the potency of his critique without accepting his authoritarianism.

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[136] I take this phrase from JACQUES DERRIDA, OF HOSPITALITY – at 29. A key point of contrast between thinkers like Derrida and more conventional liberals is precisely the willingness of the former to model his politics on a certain ideal of "love" – to start from an ideal of essentially unconditional love before moving to the question of how love can guide us in a political context of human plurality. The exception to this rule, if there is such a rule, is Martha Nussbaum: a political liberal like Rawls who has nonetheless embraced the value of passion and even love in political life wholeheartedly. See MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE. And, for a classic statement of the opposing position, see RONALD DWORKIN, LAW'S EMPIRE – at 215.

[137] See Jacques Derrida, *The Principle of Hospitality*.

[138] See JACQUES DERRIDA, THE WORK OF MOURNING.

[139] See JACQUES DERRIDA, GIVEN TIME: I. COUNTERFEIT MONEY.

We are very nearly ready for our assessment of Derrida's ethical and legal theory, but before we dive in, we can attain some crucial context by taking a quick look at one of his earlier, more "playful" texts: specifically, a short essay that he wrote in the 1960s on the relationship between GWF Hegel and the famous French thinker, Georges Bataille. This text – "From Restricted to General Economy: A Hegelianism without Reserve" (or FRGE for short) – is not one of Derrida's best known, and often falls by the wayside in relation to other, earlier works like *Of Grammatology*, or "Structure, Sign and Play in the Discourse of the Human Sciences."[140] However, when viewed in terms of Derrida's later work on ethics and law, FRGE takes on a new relevance, especially insofar as it bears heavily on the question of what it means to relate to "The Other,"[141] i.e. those experiences that exceed the "reassuring certitude"[142] of one's own world, or worldview.

In a nutshell, FRGE considers the very different ways in which Hegel and Bataille conceive of that which is most (conventionally) other with respect to life: namely, death. On the one hand, Hegel ascribes great significance to an individual's encounter with death, suggesting that, "by looking at death directly, one accedes to lordship"[143] (or to "sovereignty,"[144] as Bataille puts it). On the other hand, for Bataille, Hegel's ascription of *significance* to death – his positioning of death as the sublime summit of life, which can convert a servile, unfree life into one of freedom and lordship – is precisely to destroy the otherness of death, and to turn death into another, ultimate form of "knowledge"[145] to be appropriated or won. In Bataille's words (as quoted by Derrida):

> "The privileged manifestation of Negativity is death, but death, in truth, reveals nothing. In principle, death reveals to Man his natural, animal being, but the revelation never takes place. For once the animal being that has supported him is dead, the human being himself has ceased to exist. For man finally to be revealed to himself he would have to do so while living – while watching himself cease to be."[146]

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[140] See JACQUES DERRIDA, OF GRAMMATOLOGY and JACQUES DERRIDA, WRITING AND DIFFERENCE (an early book that contains both "Structure, Sign and Play" and the essay that we are concerned with here, "From Restricted to General Economy," *inter alia*).
[141] This is a common term in Derrida's work, and in postmodern theory, more generally, from Lacan to Levinas.
[142] See Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences* – at 352.
[143] Jacques Derrida, *From Restricted to General Economy: A Hegelianism without Reserve* – at 321.
[144] For a concise explanation of this term, see MICHEL SURYA, GEORGES BATAILLE – at 437-440.
[145] See again Jacques Derrida, *From Restricted to General Economy: A Hegelianism without Reserve* – at 321.
[146] Ibid at 329.

The fundamental point that Derrida takes away from Bataille's critique of Hegel is that a self-interested dalliance with the other (represented here by death), an engagement which seeks understanding and appropriation, is not really an engagement at all. On the contrary, it is a use of the other – an investment in the other through which one seeks to emerge "enriched or enlarged."[147] For Derrida, this is an example of "restricted economy,"[148] where expenditure always aims at a more substantial return. A core aim of Derrida's essay, in this regard, is to compare this utterly conventional notion of economy with the more radical notion of general economy that appears in Bataille's work. General economy, in stark contrast to restricted economy, concerns a moment of absolute expenditure, with no eye on returns and no regard for risks: expenditure "without reserve,"[149] as Derrida puts it.

Does this sound familiar? I think it should, because it is essentially another way of explaining the distinction between individualism and altruism in Kennedy's FS paper. On the one hand, we have an ethics of self-reliance, which endorses self-interested investments and arm's length bargaining, and, on the other hand, we have an ethics of "sharing and sacrifice,"[150] which endorses selfless and even self-destructive investments in the name of something completely other or "heteronomous"[151] to one's self.

Like Kennedy, though, Derrida is not simply concerned here with one policy versus another. No: for Derrida, as for Kennedy, concrete policy (as a matter of real realities and possibilities) is always a matter of calculation, and restricted economy. General economy, conversely, marks an impossible summit – of pure altruism, or pure expenditure – towards which particular policies can only lean. With regard to death (which, again, represents otherness in Derrida's text), it is surely quite obvious why general economy is impossible: because it aims at an experience of the "un-experience-able." However, why is a pure relation with the "living other" impossible? Can one not conceive of a supremely, purely altruistic gesture – a gesture of ultimate self-sacrifice, perhaps?

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[147] See Johan van der Walt, *When Time Gives: Reflections on Two Rivonia Renegades* – at 39. Here is how Van der Walt describes actors in restricted economies: "They only spend for purposes of investment. The risk they take with others and otherness through the temporary forfeiture of possession has one aim only, and that is to increase possession" (again, at 39).
[148] See again, Jacques Derrida, *From Restricted to General Economy: A Hegelianism without Reserve*.
[149] Ibid.
[150] See Duncan Kennedy, *Form and Substance in Private Law Adjudication* – at 1717.
[151] See SIMON CRITCHLEY, INFINITELY DEMANDING: ETHICS OF COMMITMENT, POLITICS OF RESISTANCE – especially at 38-68.

In essence, these are questions that Derrida would not take up explicitly, or directly, until over twenty years later. But when he did confront them directly, he *really* confronted them, producing a remarkable oeuvre of ethico-political texts between the late 1980s and his death in 2004. Of course, one can hardly do justice here to such a vast oeuvre, so suffice it to offer a brief examination of just one of its more persistent themes: namely, the concept of "hospitality."[152] As Derrida wrote in his 1997 essay, "On Cosmopolitanism," hospitality is not merely one ethical concept amongst others. No: for Derrida, hospitality is absolutely "coextensive with"[153] the domain of the ethical, since it is concerned precisely with the question of how one receives and relates to others. To quote Derrida:

> "To cultivate an ethic of hospitality – is such an expression not tautologous? Despite all the tensions or contradictions which distinguish it, and despite all the perversions that can befall it, one cannot speak of cultivating an ethic of hospitality. Hospitality is culture itself and not simply one ethic amongst others. Insofar as it has to do with ethos, that is, the residence, one's home… [and] the manner in which we relate to ourselves and to others, to others as our own or as foreigners, ethics *is* hospitality."[154]

From this recognition, Derrida goes on to identify two notions that coexist uncomfortably within the traditional, Western notion of hospitality. On the one hand, there is a law (singular) of hospitality, which advocates universal inclusion, as evinced by Kant's famous essay on "Perpetual Peace."[155] On the other hand, there are also always laws (plural) of hospitality, which specify particular limits on the first "law" of hospitality, and which lay down normative specifications vis-à-vis what a host owes to the foreigner, and, more importantly, what we can rightfully deny to (or ask of) a foreigner who seeks refuge in our home (whether that means our home country, or our private residence). Derrida's question, in "On Cosmopolitanism" and elsewhere, is how these two connotations of hospitality relate to one another. Can/must one simply choose between them?

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[152] Much of Derrida's work on this concept can be traced back to Immanuel Levinas's work on ethics. See in particular, IMMANUEL LEVINAS, TOTALITY AND INFINITY. For a short introduction to Levinasian theory, see also SIMON CRITCHLEY, INFINITELY DEMANDING: ETHICS OF COMMITMENT, POLITICS OF RESISTANCE – especially at 56-63.
[153] See Jacques Derrida, *On Cosmopolitanism* – at 17.
[154] Ibid at 16-17.
[155] See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*. There are many references to Kant's essay in Derrida's later work. For example, see JACQUES DERRIDA, OF HOSPITALITY (at 71), as well as Jacques Derrida, *On Cosmopolitanism* (at 19).

Derrida believes otherwise. To explain: in his view, and as he states explicitly, there is only one law or "principle of hospitality,"[156] "*the* law of hospitality,"[157] to which all more concrete "laws (plural) of hospitality"[158] can be traced as inadequate compromises. This one law of hospitality is the ideal, which impels us to open our homes and countries to the other, to welcome the other "without reserve and without calculation."[159] In the terms of the previous chapter, this is also what we might call *the* law of liberalism: the law of pure "pacifism" which caught Schmitt's scornful attention, and to which his whole political theory, with its emphasis on existential conflict and enmity, was vehemently opposed.

As I remarked in the last chapter, Derrida is not really so different from Schmitt in his critique of this supreme, liberal law. On the contrary, for Derrida, this law of hospitality, "*the* law of hospitality," is not just practically unrealistic, but practically and absolutely unfollowable, for much the same reason that Schmitt gives when he chides liberal opponents of his friend-enemy distinction. To (re)quote Schmitt:

> "If a part of the population declares that it no longer recognizes enemies, then, depending on the circumstance it joins their side and aids them. Such a declaration does not abolish the reality of the friend-and-enemy distinction."[160]

The Derridean version of this argument is as follows. If we obey "*the* law" of hospitality with respect to some particular other, or foreigner, we simultaneously and necessarily disobey it with respect to those other others who make up our own country, or community, or family, or whatever. In more general terms: to extend hospitality in one direction is always already to revoke it or subvert it in another direction, to impose an uninvited "risk"[161] on those whose safety or comfort is made vulnerable inasmuch as a "welcome without reserve"[162] – and without inquisition – can always backfire (and can always turn out to have inflicted a criminal or a "parasite"[163] on one's country, community, family, etc.).

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[156] See Jacques Derrida, *The Principle of Hospitality*.
[157] See JACQUES DERRIDA, OF HOSPITALITY – at 77.
[158] Ibid.
[159] See Derrida, *The Principle of Hospitality* – at 6.
[160] See again, CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 51. As we will see in the final sections of this chapter, the similarity between Schmitt and Derrida ends here, since Derrida explicitly and strongly rejects Schmitt's glorification of sovereignty.
[161] See DERRIDA, OF HOSPITALITY – at 55.
[162] See Derrida, *The Principle of Hospitality* – at 6.
[163] See DERRIDA, OF HOSPITALITY – at 61.

The problem, then, appears to be a matter of social pluralism. To use Hannah Arendt's well-known phrasing, the problem is that "men, not Man, live on the earth and inhabit the world,"[164] and that the needs and interests of different "men" (different human beings) necessarily, unavoidably conflict. Is this the only problem, though, and the only reason why Derrida's "law" of hospitality is unfollowable? Not quite. Another, somewhat deeper problem is linked to the unavoidable power dynamics of the self-other relation. To explain: suppose that we bracket the problem of pluralism, and consider only the ethics of a single, isolated relation between self and other. *I* welcome *you* to my home, without reserve. *I* ask *you* nothing, "not even your name,"[165] and I receive you not as an individual with a verifiable, secure status but as "something altogether other,"[166] an "anonymous new arrival."[167] Is this not the most perfectly "just and loving"[168] relation that one can imagine? And is it not – in Derrida's own terms – an example of "absolute… unconditional hospitality?"[169]

Derrida says no. The simple reason is that even as the above scenario marks a break with what we might call a politics of inquisition, it nonetheless remains marked, indelibly, by a certain politics of "sovereignty."[170] *I* welcome *you*, not vice versa, which is to say that I lay a tacit but significant claim to the territory – country, city, house, etc. – at stake. *I* am sovereign, "king of the castle,"[171] and I extend a benevolent welcome to *you*. I ask you nothing, and I expect nothing, but I nevertheless impose a hierarchy on you, the other, precisely by marking you as other, as a foreigner on my turf. The real paradox that opens up here is that the demand that issues from Derrida's one law of hospitality, the demand for universal/unconditional inclusion, is not only practically impossible in a pluralistic world, but "structurally impossible"[172] as well: because to even see the other, one must acknowledge them as other (and not merely as a self-reflection), which is already to place oneself above them, and to claim a certain "sovereignty of selfhood."

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[164] See HANNAH ARENDT, THE HUMAN CONDITION – at 7.
[165] See DERRIDA, OF HOSPITALITY – at 27-29. In the name of full disclosure, I must note that all of the quotes that appear in the second half of the above paragraph also appear in my LL.M. thesis on Derrida's work, which can be accessed at http://theses.gla.ac.uk/3716/1/2012maileyllm.pdf.
[166] JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP – at 38.
[167] DERRIDA, OF HOSPITALITY – at 25.
[168] Ibid at 29.
[169] Ibid at 135.
[170] Derrida's later work is persistently concerned with the problem of sovereignty, but perhaps his most famous essay on the subject is his late book, JACQUES DERRIDA, ROGUES.
[171] One extreme version of this logic in law is the American castle doctrine, which empowers individuals to use lethal force against intruders in their own homes. A man's home is his castle, as the saying goes.
[172] See Martijn Stronks, *Rereading: Of Hospitality* (Blog post on the Amsterdam Law Forum) – at http://amsterdamlawforum.org/article/view/49/63.

When we take these arguments into consideration, it becomes quite unsurprising that Derrida's work would veer more and more, in the later years of his career, towards "the question of sovereignty."[173] One example of this is Derrida's stance on the death penalty, which he explained in a series of seminars and, more clearly, in a well-known interview with the psychoanalyst and historian, Elizabeth Roudinesco. Derrida's stance can be summed up as follows. Today, in Western Europe, the abolition of the death penalty is routinely heralded as a sign of the West's cultural and moral superiority. However, for Derrida, such pride is misplaced, because although the death penalty has been legally abolished across Western Europe, it has nonetheless not been abolished, or even properly denounced, "in principle."[174]

What does this "in principle" mean? Well, to put it simply, Derrida's claim is that the practice (and logic) of the death penalty is intimately and indeed inseparably entwined with the practice (and logic) of state sovereignty. To explain: although Western European states have now declaratively and legally deprived themselves of a particular, archaic practice – the practice of putting violent criminals to death – they have evidently not deprived themselves of the sovereign right to wield death: the right to make and enforce laws (or executive orders) that produce death, both at home and abroad. The right to go to war (at least under certain circumstances) is surely the classic example of this logic, but there are others too. The austerity measures that have swept Europe in recent years spring to mind, not least of all because they have been linked so directly to death (and especially to the suicides of vulnerable citizens). Indeed, can one not see this same logic, this logic of sovereignty and death, in the most mundane aspects of Western property law? When I buy a piece of land, I buy, more than anything else, a right to exclude you (and others) from that land: a right to the sovereign's support in my insistence that you be excluded from "my" land. In other words: Western property law rests – as the Italian philosopher Roberto Esposito reminds us – on a logic of "immunization."[175] You may need basic amenities or shelter, but that is not my concern. As a property owner, I am *immune*, and I have the sovereign's word (and more importantly, the sovereign's force) firmly on my side.

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[173] See JACQUES DERRIDA, ROGUES. See also John D. Caputo, *Without Sovereignty, Without Being: Unconditionality, the Coming God, and Derrida's Democracy to Come*.

[174] See JACQUES DERRIDA AND ELIZABETH ROUDINESCO, FOR WHAT TOMORROW? – at 144. For a fuller account of Derrida's ideas on the death penalty, see JACQUES DERRIDA, THE DEATH PENALTY, VOLUME I. For a secondary introduction to Derrida's seminars on the death penalty, see Geoffrey Bennington, *Rigor, or, Stupid Uselessness*.

[175] See, in particular, ROBERTO ESPOSITO, IMMUNITAS. Also worth consulting in this regard is Achille Mbembe's *Necropolitics*.

Even if one is not convinced by this presentation of Western property law, though, one can still embrace the thought that the death penalty has not yet been abolished in Western Europe as a matter of principle. The crucial point is that as long as we still accept the capacity (and right) of the sovereign to impose potentially deadly commands and structures on his/her/its subjects, the abolition of the death penalty will remain a conditional and hence "unprincipled" phenomenon. With this in mind, Derrida's aim, in his work on the death penalty, is basically to ask what it would mean to step beyond this limit: to become, finally, an abolitionist *in principle*. More precisely, Derrida's aim is to explore how one might question not only the particular, archaic practice of the death penalty, but also the deeper *logic* of the death penalty, by which a sovereign's capacity (and right) to wield death is accepted and perhaps even (as in Schmitt's case) celebrated.

In essence, this is the same as asking how one might obey Derrida's one law of hospitality, because in both cases the question is very simply whether one can conceive of a truly horizontal, or, let us say, non-vertical relation. I have already explained how Derrida answers this question with regard to the possibility of pure hospitality, but we can reframe it now, quite easily, with respect to the problem of sovereignty.

Suppose that the government of a state has collapsed, and that a civil war breaks out between rival political factions. Does such a state, in this moment of serious political uncertainty, lack a properly sovereign authority? The answer is of course that it depends on how we define sovereignty. If sovereignty is defined narrowly, as a particular kind of established or formal political authority, then it surely does disappear when a state's government falls apart. But there is another, perhaps more appropriate way in which we can define sovereignty, as a person or institution's "ability to do something,"[176] unimpeded. According to Friedrich Balke, this is Derrida's approach: to frame sovereignty as coincident with "liberty."[177] This kind of sovereignty is not destroyed when a state slips into civil war, but is rather redirected or dispersed (perhaps never residing in a single person, but rather bursting forth in particular acts and decisions). This is sovereignty, one might say, as *energy*. And like any other form of energy, it cannot be destroyed: *it just is*.

[176] See Friedrich Balke, *Derrida and Foucault on Sovereignty* – at 71.

[177] Ibid at 72. It is well worth noting, again, that this is also how Schmitt understands sovereignty, not as the authority of the state, but as a power of decision, or a capacity for effective action which, from the perspective of his authoritarian philosophy, *ought to but may not fall to the office of the President*. Remember, in this regard, how Schmitt defines sovereignty? To quote: "Sovereign is he who decides on the exception." See CARL SCHMITT, POLITICAL THEOLOGY – at 5.

Sovereignty *as such*, then – sovereignty as liberty, or as energy – cannot be opposed in principle, which is to say that critiques of particular forms of sovereignty can only ever be calls for a new form of sovereignty, or a dispersal of sovereignty. In essence, this is the same as saying that pure hospitality is impossible, since pure hospitality is the negation of sovereignty, where sovereignty is understood as liberty, or verticality.

Where does this leave us? And more specifically, where does this leave the possibility of a "principled" opposition to sovereignty, an opposition that would no longer relate to a particular form of sovereignty, but to the concept of sovereignty itself, sovereignty as liberty? Derrida's answer, which took slightly different forms at different points in his career, is that even if sovereignty is an inescapable reality (as Schmitt also suggested, and as I noted in the previous chapter), one can at least "deconstruct" legitimations of sovereignty, i.e. those discourses and rationales that seek to convert what would otherwise be a relation of oppression and violence into a matter of right, thereby taming the problematic verticality of sovereignty by either naturalizing it (as with the divine right of kings), or, as with the liberalisms that concern us here, "horizontalizing" it.

Surely, one may think, sovereignty is verticality by definition, so that a horizontalized sovereignty is an oxymoron. However, as the reader may recall, the thread that links the modern concept of human dignity (and modern liberalisms like Rawls's) to the "protoliberalism"[178] of Hobbes is an insistence that sovereignty cannot reap its legitimacy from God, or its conformity with tradition, but only through an appeal to the will of the governed, so that sovereignty would no longer appear as vertical imposition, but as a product of a free and equal agreement, i.e. a horizontal pact. Of course, there are some very stark differences between the Hobbesian and Rawlsian conceptions of legitimate sovereignty (Hobbes's Leviathan is far closer to Schmitt's President than to Rawls's vision of a constitutional democracy), but the significant similarity is that they are not only ready to draw the line somewhere (as one surely must), but also to present some particular arrangements as meaningfully legitimate, 1) because of their rationality, and 2) because this rationality connects them to the governed, modelled as minimally rational.

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[178] See Frank Michelman, *The Subject of Liberalism* – at 1812. See also JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY (linking Hobbes to his own project in books like *A Theory of Justice* and *Political Liberalism*).

In a nutshell, Derrida's work takes no issue with the act of line drawing, but it does take issue with – and indeed, seeks to "deconstruct" – the theories and discourses that present some particular lines and positions as non-violent, or as so lacking in implications of violence and coercion that they can be pursued with an essentially clear conscience. My hope is that the next two sections of the chapter will offer a fairly comprehensive elaboration of this (admittedly dense) description, but for the sake of clarity, it is worth saying a few words here about the most evidently foreign term in the above sentence: "deconstruct." Put simply, one can define deconstruction – perhaps Derrida's most famous idea – both passively and actively, as an "event," on the one hand (passive), and as a subjective response or attitude to that same event, on the other (active). As Derrida explains:

> "When I have to summarize very briefly what deconstruction is, and should not be, I often say: Deconstruction is quite simply what happens. It is not simply the theoretical analyses of concepts, the speculative desedimentation of a conceptual tradition, of semantics. It is something which does something, which tries to do something, to intervene and to welcome what happens, to be attentive to the event, the singularity of the event."[179]

The "event" that Derrida has in mind here, I think, is the eruption of a new logic – or, from a political/moral perspective, a new experience of injustice – that exceeds and undermines the accepted standards of a certain situation, whether philosophical, political or otherwise. Put differently, deconstruction, as an event (and especially as a *social* event), is an experience that is not counted or is not expressible within the language of a particular, political situation, or within the language and consciousness of a particular, political community. Perhaps someone experiences suffering, or humiliation, but their community and their law does not see their experience as a "wrong," despite the fact that their community is opposed to suffering, and humiliation. This would be deconstruction in its first sense: namely, a moment when an experience (or an event) calls the adequacy of our language into question.

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[179] Jacques Derrida, *Justice, Law and Philosophy: An Interview with Jacques Derrida* – at 280. It is worth noting here that this definition – which appeared in the South African Journal of Philosophy in 1999 – is strikingly similar to a definition that Derrida gave sixteen years earlier, in his short but rich *Letter to a Japanese Friend*. To quote: "Deconstruction takes place, it is an event that does not await the deliberation, consciousness, or organization of a subject, or even of modernity." The full text of Derrida's letter is available here: http://users.clas.ufl.edu/burt/Jacques%20Derrida%20-%20Letter%20to%20a%20Japanese%20Friend.pdf. For a slightly more extensive introduction to Derrida's notion of deconstruction, see JACQUES DERRIDA, POSITIONS – a book of interviews conducted early in Derrida's career.

In its second, active sense, then, one can "deconstruct" one's language – and throw the adequacy of one's language into question – simply by remaining "attentive to the event" of deconstruction in its passive sense, i.e. deconstruction as "what happens," rather than as something that one does. Deconstruction's attachment to both of these connotations is made clear, I think, by the fact that Derrida defines it both as "what happens" and as a resolve "to welcome what happens." We can therefore say, without contradiction, that deconstruction makes deconstruction possible, or, to put it a little more clearly, that the inadequacy of language makes critique (social, or otherwise) possible, for Derrida.

To make all of this a little less cryptic, we can look at LGBT rights in Europe and North America as a good, contemporary example of deconstruction in action. From a Derridean perspective, one may describe the gradual recognition of LGBT rights in law as a two-step process. Firstly, we have a group of people who were routinely made to suffer, and routinely humiliated, but whose suffering and humiliation was not legally or even publicly counted – despite the fact that their constitutions (and hence, their entire legal systems) turned on principles of human dignity which were surely antithetical to their suffering, and their humiliation. Secondly, and subsequently, we have individuals and groups who are increasingly willing to translate this silent/secret experience of suffering into public and then legal calls for justice. In the first case, deconstruction "happens" when there is a disjoint between the constitution's opposition to suffering, and the individual's experience of suffering. In the second case, it is "made to happen" when people accept this disjoint, or when they become "attentive to the event"[180] of LGBT suffering, as Derrida puts it.

I have surely gone too fast here, but it is enough that we now have a "sense" of Derrida's trajectory, at least. To recap: Derrida's ethics involves 1) a recognition of verticality or inhospitality (or whatever) in every social relation, and 2) a resolve to "deconstruct" discourses and rationales that conceal such verticality or inhospitality (or whatever). The question, now, is how this seemingly pessimistic conception of ethics (like Schmitt's "pessimistic conception of man,"[181] perhaps) plays out in the more specific domains of law and legal theory. And we can turn to this now, in the final sections of the chapter.

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[180] Consider Bruce Ackerman's work on this point (discussed in chapter three). For Ackerman, constitutional change takes place in three stages: 1) when ordinary people mobilize in opposition to an aspect of conventional, constitutional morality (e.g. its failure to recognize denials of LGBT rights as unconstitutional), 2) when institutional actors (or institutional heroes as I called them) see fit to represent these "new" moral claims in political or legal fora, and 3) when a sustained period of inter-institutional and popular dialogue results in widespread acceptance of said claims as legitimate, and as worthy of fulfilment.

[181] Once again, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL – at 65.

IV. Derrida's "Force of Law: The Mystical Foundation of Authority"

In the first two or three decades of Derrida's career, it would have surprised and perhaps even incensed a few people to read what I have just written: namely, a description of Derrida as a properly political thinker. The reason is simply that Derrida's earlier texts – and especially his more experimental ones like *The Postcard*, or his two-sided essay on Genet and Hegel, *Glas* – looked like (and to some extent presented themselves as) insular, literary comments on the philosophical/theoretical canon of the West. This apparent insularity led even sympathetic readers like Richard Rorty to dismiss Derrida's work as decidedly non-political. In Rorty's case, this was not exactly a criticism, but more a case of putting a dazzlingly "original"[182] oeuvre in its proper place. To explain: for Rorty, Derrida's greatest strength, as displayed by his more ironic, "literary" texts like *The Postcard*, is that he refuses so insistently to "play by the rules of someone else's final vocabulary."[183] This makes Derrida a perfect example of what Rorty calls a "private ironist"[184] – someone who is always ready to question pretensions of philosophical "Truth" – but unfortunately, it has little to offer us (and is positively disruptive) when we look to questions of political or public significance: questions which turn, precisely, on the need for a "shared" vocabulary, however provisional.

Now, Derrida was always criticized for this aspect of his work, but one can plausibly say that the tone of these slights underwent a marked shift in the 1980s: when two of his closest philosophical allies – Martin Heidegger (more a "precursor" than an ally, I suppose) and Paul de Man – were exposed as having "collaborated with fascism"[185] during WWII. Perhaps understandably, this led some members of the academic community to ask: are "private ironists" like Heidegger, De Man and Derrida (not to mention the apparently proto-fascist Nietzsche) really non-political, or politically useless? Or are they, on the contrary, political in the very worst way, so that one could construct a causal chain that would run from Heidegger and De Man's fascist sympathies back to the anti-philosophical, *deconstructive* approach to philosophy that binds them so neatly to Derrida?

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[182] See RICHARD RORTY, CONTINGENCY, IRONY, SOLIDARITY – at 123.
[183] Ibid at 133.
[184] Ibid. According to Rorty, the tradition of private "irony" also includes Martin Heidegger and Friedrich Nietzsche, with the common thread being that they all – Nietzsche, Heidegger and Derrida – engage in wholesale critiques of philosophical discourse, including its conventional standards of logic.
[185] See John P. MacCormick, *Derrida on Law: Or, Poststructuralism gets Serious* – at 395. See also SIMON CRITCHLEY, IMPOSSIBLE OBJECTS (at 8) for a brief discussion of the Heidegger and De Man scandals in the 1980s (as well as Critchley's own, rather early response to those scandals).

In the midst of this controversy, Derrida wrote separate texts on Heidegger (1987's *Of Spirit*) and De Man (1988's "Like the Sound of the Sea Deep Within a Shell: Paul de Man's War"), but his most direct and satisfying response to his critics came in 1989, when he gave a lengthy address at the Cardozo School of Law, entitled "Force of Law: The Mystical Foundation of Authority."[186] From the perspective of the present study, "Force of Law" is important for two reasons: 1) because it was Derrida's first *overt* attempt to emphasize the politically "liberal" core of his work (see the previous section), and 2) because it presents us for the first and indeed only time with what we might call Derrida's "legal theory." To clarify, Derrida had written about "the law" before (most notably in texts like "Before the Law" and "Declarations of Independence"), but "Force of Law" is special in that it was/is his only text addressed directly to a legal audience, and that relates to legal theory as a distinct discipline – one with its own, distinctive canon (Hart, Dworkin, Raz, et al.), and its own collection of core concerns.

The aim of this section, then, is simply to examine how Derrida's political and ethical theory translates into a legal theory and, in particular, an adjudicative theory, in his Cardozo address. Of course, there is not actually any "translation" involved here, because chronologically-speaking, "Force of Law" was the first of Derrida's "ethico-political" texts. Why, then, you may ask, am I considering Derrida's work out of chronological sequence, having already looked at later texts like 2000's *Of Hospitality* in the previous section? The simple answer is that it generally makes sense to consider a thinker's legal theory as a particularized application of his/her political theory, even if the former precedes the latter, as with Derrida. Whether this is fair to Derrida, I don't know, but any concerns that the reader has in this regard may be abated by a reminder that these sections are less about "getting Derrida right" (if such a thing were even possible), and more a matter of "extracting" something useful from his work: namely, an instructive commentary on the question of how one can honor a liberal commitment to human dignity, and consent-worthy governance, in the wake of Schmitt's critique. Let us bear this in mind as we turn to Derrida's text, below.

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[186] Identical versions of this essay can be found in JACQUES DERRIDA, ACTS OF RELIGION (at 228), and DRUCILLA CORNELL et al, DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (at 3). However, all references here will be to a third version, the original version, in the *Cardozo Law Review* (1989-1990), which will hereafter be cited simply as *Force of Law*.

So: what is "Force of Law" all about? As my preceding comments already implied, "Force of Law" can be seen, first of all, as Derrida's way of "taking the stand"[187] in response to the concerned members of the academic community, and as his attempt to defend himself against claims that his work somehow leads to (or is otherwise linked to) fascism. In his essay on "Force of Law," entitled "Derrida on Law: Or, Poststructuralism gets Serious," John P. MacCormick remarks that this act of "taking the stand" has a tremendous resonance in the history of Western philosophy, since the founding father of Western philosophy, Socrates, was similarly compelled to "take the stand" to defend his own, apparently dangerous "deconstructions" of Athenian custom. Accordingly, MacCormick claims that "Force of Law" can/should be seen as Derrida's "restaging of the trial of Socrates, with himself in the starring role."[188] Like his Greek forefather, Derrida is trying, says MacCormick, to defend the public relevance of philosophy, where philosophy is understood as unfettered, fearless inquisition rather than an already constituted, rule-laden discipline. How can *this* philosophy be anything but disruptive, or nihilistic, though?

Derrida's essay does not confront this question head on, or curtly, but rather eases us somewhat covertly into its consideration. He begins by noting the context of his address: specifically, the demands that have been placed on him, to speak in a language that is not "his own"[189] (English), and "to speak on a topic, justice, which he did not choose."[190] To clarify, Derrida's address was given at a symposium on "Deconstruction and the Possibility of Justice," and so one can perhaps already see how, with this title, an expectation is being placed on him that he will/must "take the stand" and explain why his "deconstructive" approach to philosophy is not so remote from a political concern with "justice." As MacCormick points out in his essay, this arguably harks back to the inaugural narrative of Western political theory, namely, the moment in Book I of Plato's *Republic* when Socrates (again) "is compelled by force, albeit friendly force, to discuss justice rather than enjoy himself during a festive evening out."[191] Derrida is enjoying himself, minding his own business (perhaps thinking about writing another *Postcard*), but his community is calling for him to say something more "public," about "political realities."[192]

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[187] See John P. MacCormick, *Derrida on Law: Or, Poststructuralism Gets Serious* – at 397-398.
[188] Ibid at 395. See also PLATO, THE LAST DAYS OF SOCRATES.
[189] See *Force of Law* – at 923 ("I must speak in a language that is not my own because that will be more just").
[190] Again, see MacCormick, *Derrida on Law* – at 397.
[191] Ibid.
[192] Costas Douzinas, *Violence, Justice, Deconstruction* – at 171. "Early deconstruction has been criticized for… scant recognition of political realities."

Now, significantly, the specific force which compels Derrida in "Force of Law"[193] is almost certainly, to quote MacCormick, a "friendly force," since the audience at Cardozo – an institution with a penchant for leftist and critical theory – is basically guaranteed to be a sympathetic one: one that is already suspicious of conservative attempts to link Derrida to fascism or, more mildly, to political indifference. Why, then, does Derrida feel the need to describe the context of his address (and especially the expectation that he comment on the relationship between deconstruction and justice) as "rather violent, polemical… [and] inquisitorial?"[194] Why does he not simply heed to this friendly force, as a friend surely *should* – politely, cheerfully, etc.? In this regard, one may quite reasonably think that Derrida is being a bad friend here, calling out his hosts – *his friends* – for a violence that is surely not intentional, and that is really quite trivial. Why would he do this?

The answer, I think, is that he does it to ease us into a consideration (as noted above) of "the law," the topic that has been placed (violently, says Derrida) on the agenda. To explain: perhaps the most fundamental thing that the law always does is the placing of a demand on some particular legal subject – calling someone to speak 1) defensively, 2) in a *legal* language that is not his/her own, and 3) on a subject that he/she not chosen (namely, their alleged crime, tort, whatever). What Derrida shows in the early pages of "Force of Law," then, is that these apparently "legal" operations are not confined to law as a social institution, but are rather features of even the most friendly, liberal (and seemingly innocuous) relation. Does this not ring a bell? It should, because what Derrida is already flagging up here, somewhat indirectly, is what he would later describe as the impossibility of hospitality, and of a properly ethical, intersubjective relation. In this sense, the problematization of the law is really just the problematization of the intersubjective relation, which raises the question: why is it necessary, if law is just one more example of an imperfect hospitality (or inevitable inhospitality), to consider law distinctly, on its own? In other words: what is it that makes law more problematic, or problematic in a different way, when compared with the violence – the inequality and asymmetry – that inheres in even the most friendly relation?

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[193] As already noted, Derrida's address was presented at a Cardozo Law School symposium on "Deconstruction and the Possibility of Justice." As such, one is surely well-advised to consult other texts presented at the symposium, of which the most important pieces are probably the first two direct responses to Derrida's essay, namely, Drucilla Cornell, *The Violence of the Masquerade: Law Dressed Up as Justice* (at 1047), and Dominick LaCapra, *Violence, Justice and the Force of Law* (at 1065). On the other hand, for an example of how *not* to read Derrida, or how to read Derrida legalistically, see Jack Balkin, *Tradition, Betrayal and the Politics of Deconstruction* (at 1613).

[194] See *Force of Law* – at 923.

The obvious answer to this question is frequently obscured by interpretation-oriented legal theories: "hermeneutics, semiotics and literary theory,"[195] for example (as Costas Douzinas notes). Quite simply, what law, as a social institution, adds to the "friendly" (and usually quite tolerable) violence that inheres in every request/demand is an implication of "enforceability,"[196] a promise or guarantee that "physical violence"[197] will be used against those who can/will not meet one of the law's demands. In this regard, as Robert Cover famously wrote, "legal interpretation takes place in a field of pain and death,"[198] since a judicial decision always implies and sanctions a "variety of violent acts."[199] For example, a criminal conviction often (but not always) results in the criminal being "taken away to a place of imprisonment or… execution,"[200] and "as a result of civil judgments, people lose their homes, their children… [or] their property."[201] Law, then, is not simply one example of imperfect hospitality amongst others. No: law is the most extreme form of organized, social violence that many of us will ever know, and it therefore poses an ethical problem that burrows much deeper than most others.

This brings us to a second difference between the violence of law and the inevitable violence of all intersubjective relations: namely, that the law, despite its intimate relation to physical violence – to "pain and death" – nonetheless attempts/claims to set itself above other forms of violence, morally speaking, to the point where its own, legal violence is not presented as "violence" at all, but as legitimate or "just force."[202] One of the core aims of Derrida's essay is to scrutinize this logic, albeit briefly, by asking how one can "distinguish between… [the] force of the law… and the violence that one always deems unjust?"[203] The standard answer to this question is surely something to do with "legality." The law is non-violent because (or when) legal actors comply with a principle of legal consistency (or legality), which requires that a new decision is linked to and authorized by a prior one, so that the new decision's violence is at least rendered predictable/forewarned (and perhaps also democratic, where it is connected cleanly to democratic legislation).

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[195] Costas Douzinas, *Violence, Justice, Deconstruction* – at 172.
[196] See *Force of Law* – at 925. "The word enforceability reminds us that there is no such thing as law (*droit*) that doesn't imply, *in itself, a priori, in the analytical structure of its concept*, the possibility of being… applied by force."
[197] See Costas Douzinas, *Violence, Justice, Deconstruction* – at 176.
[198] Robert Cover, *Violence and the Word* – at 1601.
[199] Costas Douzinas, *Violence, Justice, Deconstruction* – at 172.
[200] Ibid.
[201] Ibid.
[202] See *Force of Law* – at 927.
[203] Ibid.

However (as Derrida notes), this logic always fails at precisely the moment when we need it most: namely, when we ask what ensures the legitimacy of the legal order *itself*. To explain: every legal order will have emerged, inevitably, as a curt break with some prior system of law, "against the protocols of constitutional legality that existed at the time of… [its]… adoption."[204] One may object by pointing to examples of apparently "legal" transition, such as in post-apartheid South Africa, but this would merely mark a deferral of the problem. Think about it: a new constitution enacted under a previous constitution's amendment procedures may comply, superficially, with a certain spirit of legality, but what about the previous constitution, or the constitution before that? Somewhere along this line, we will come to a *first* law, one that appears or will have appeared in a burst of "originary violence… that could not have been authorized by any anterior legitimacy."[205] The question, then, is how one can affirm the legitimacy of this "first law," this law on which all other, subordinate laws depend for their legitimacy, where legitimacy is understood legally, as legality, or, via Luhmann, as "adequate complexity of *consistent* decision-making."[206]

Derrida does not consider this question as scrupulously as one might hope, but it is not so hard to fill in the gaps between his posing of the question and his ultimate acceptance of its potency. Consider, for example, Rawls's answer to Derrida's question. Rawls (like Derrida) accepts 1) that every legal order will, ultimately, rest on an "alegal"[207] act of founding, and 2) that there will be real power imbalances (and exclusions) in this act of founding which prevent it being seen, historically, as a true *agreement* – an agreement between free and equal persons. Indeed, even if one *was* firmly committed to a rose-tinted view of one's constitution as a historically balanced and "true" agreement, a further problem would arise quickly in relation to the founding generation's "posterity." How can they – future generations – be legitimately bound by a contract they never signed? Thomas Jefferson famously suggested that this problem may necessitate a new constitutional convention every "nineteen or twenty years,"[208] but few liberals – as we saw with my assessment of Ackerman in the last chapter – would be ready to risk such regular, unassured expressions of constituent power.

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[204] Costas Douzinas, *Violence, Justice, Deconstruction* – at 175.
[205] See *Force of Law* – at 927.
[206] See Gunther Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law* – at 9.
[207] For an extensive account of the notion of "alegality," see HANS LINDAHL, FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF ALEGALITY.
[208] For a (very) brief depiction of Jefferson's ideas on constitutionalism, see Mark Tushnet, *Peasants with Pitchforks and toilers with Twitter: Constitutional Revolutions and the Constituent Power* – at 640. For the original quote referenced above – which appeared in a letter from Jefferson to Samuel Kercheval – see here: http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/.

As a *liberal* democrat, Rawls is not ready to accept Jefferson's populism either. On the contrary, and as we have already seen, Rawls prefers the notion of an *ex poste facto* legitimation of one's constitution/legal order, so that the constitution, despite its inevitable status as a product of historical violence and exclusion, can be "redeemed" if we think that genuinely free and equal, reasonable and rational people – hypothetical figments of our liberal imaginations – would accept it in the here and now. In *Political Liberalism*, and again, as we have already seen, this *ex poste facto* legitimation strategy is presented as Rawls's "liberal principle of legitimacy,"[209] which accepts exercises of "political power" as "proper" when/if they are compliant with what Frank Michelman – one of Rawls's most faithful interpreters – calls a "legitimation-worthy constitution."[210] As Michelman explains:

> "The aim is… a constitution whose terms are such that they allow you or me to say, with a clear conscience, that any law whose process of enactment and whose content pass muster under the constitution's requirements can ipso facto be deemed a law *with which all within range have good enough reason to comply…* [my emphasis]."[211]

Now, this is a nice idea. But why, one may surely ask, do free and equal people – constructed in the very specific way in which Rawls sees them – get to decide whether a particular constitution/legal order is "legitimate?" Rawls's response to this question is actually one of the most refreshing aspects of his liberalism. In a nutshell, Rawls takes an unusually "historicist"[212] tack, suggesting that the desires or interests of free and equal persons (as he sees them) are what we – we modern, constitutional democrats – already, intuitively, think of as "justice." In other words: Rawls does not attribute any "natural" right to free and equal persons (again, as he sees them) to speak authoritatively, and to collectively rule the liberal state, but rather suggests that the sovereignty of free and equal persons (as he sees them) is so deeply embedded in the "public culture of constitutional democracy" that we are justified – given that we lack decisive knowledge of any other "natural law," and given what he calls the "burdens of judgment" – in *assuming* their authority.

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[209] See JOHN RAWLS, POLITICAL LIBERALISM – at 217.
[210] Michelman has used this term in numerous articles. See, for example, Frank Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away* (available here: http://icon.oxfordjournals.org/content/6/3-4/663.full) and Frank Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*.
[211] See Frank Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away* – at 686.
[212] On the historicism of Rawls's work, see Frank Michelman, *The Subject of Liberalism*, or Johan van der Walt, *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice*.

Now, yet again, this is a nice idea, but it's also an idea that deprives Rawls of any way around Derrida's problem. To be sure, I do not think that Rawls would fare any better if he dropped his tentative historicism in favor of a turn to natural law theory, or comprehensive morality (on the contrary, I think such an endeavor would be a pretty sore failure). However, by embracing historicism, and by endorsing a standard of legitimacy that he finds already within (or immanent to) the notion of a liberal community, Rawls says nothing – and deprives himself of the ability to say anything – about the liberal community's exterior or final legitimacy. The question, then, remains open in Rawls's work, and especially in his *Political Liberalism*: why is the construction of a particular, liberal community justified in the first place? Why is it preferable, say, to the construction of a more meaningfully egalitarian, socialist legal order? Or more troublingly, why is it preferable to the forms of popular dictatorship defended, for example, by Hobbes or Schmitt? As Frank Michelman asks: "Does the book… [*Political Liberalism*]… really mean no more than to commend political liberalism and justice as fairness to those for whom, by reason of cultural situation, the Rawlsian conception of the person is regulative already?"[213]

Richard Rorty thinks so. In his paper, "The Priority of Democracy to Philosophy,"[214] Rorty commends Rawls for precisely this aspect of his work: namely, his willingness to disassociate political "theory"[215] from the deepest mysteries of moral philosophy (as well as sociology, psychology, and similar disciplines), and its quest for eternal, non-contingent "Truth." At the same time, though, Rorty concedes that this leaves Rawls with no definitive recourse against anti-liberal thinkers like "Nietzsche or Loyola"[216] – thinkers who believe that constitutional-democratic citizens are simply "not what a human being should be."[217] Rawls has nothing, finally, to say to such thinkers. On the contrary, he can only (and does) dismiss them as "mad"[218] – not mad in the sense of wrong, or mentally unwell, but mad in the sense that they just don't "belong," and in the sense that "we are not going to get anywhere"[219] talking to them (we are not going to magically or suddenly "bring them around" to some sense of "reason" that they've just been missing thus far).

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[213] Frank Michelman, *The Subject of Liberalism* – at 1831.
[214] See also Richard Bernstein, *One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy* – an article in which Bernstein heavily criticizes Rorty's commendation of Rawls.
[215] In his earlier work, Rawls described this gesture as a move away from "Moral Philosophy" and towards "Moral Theory." See John Rawls, *The Independence of Moral Theory*.
[216] Richard Rorty, *The Priority of Democracy to Philosophy* – at 266-270.
[217] Ibid at 268.
[218] See again, JOHN RAWLS, POLITICAL LIBERALISM – at 126 and 144, respectively.
[219] Richard Rorty, *The Priority of Democracy to Philosophy* – at 269.

What does this mean? Well, ultimately, it means that Rawls's liberalism comes down to a Kelsenian "presupposition,"[220] or a moment of faith: a moment of sheer belief that his own, liberal-democratic system is preferable to a fundamentally non-democratic or non-liberal one. In the end, then, Rawls cannot (and does not) tell us decisively why we *should* disavow Nietzsche or Loyola (or other anti-liberal thinkers). He tells us only that we *do* disavow them – or rather, that the public culture of constitutional democracy disavows them. In turn, this means – to get back, finally, to Derrida's address – that Rawls can never quite explain why the exclusion of Nietzsche or Loyola (or other, deep critics of liberalism), is an example of legitimate, non-violent "force" as opposed to a "violence without ground."[221] On the contrary, from a Derridean perspective, what we see here is the naked reality of liberal law, the reality of liberal law's never fully or completely "present" legitimacy. A Rawlsian may respond: disavowing and even repressing those who question the existence of one's own system is not violence, per se, but self-defense (necessary *force*), but one may immediately shoot back by asking, *why*. Why is such force "necessary," i.e. what makes one's own, liberal-democratic system of governance so defense-worthy?

Derrida's response in "Force of Law" is that there is no final answer to this question, which is to say that there is no way, for him, to de-mystify the "mystical foundation" of law's (claimed) authority, or to decisively purify or legitimate the "law-conserving violence"[222] which is constantly doled out on unlucky legal subjects as a matter of course. This takes us to something of a crossroads in Derrida's essay, because by so scrupulously questioning and perhaps even erasing the distinction between legitimate, legal force and illegitimate, political violence, Derrida comes disturbingly close to Schmitt: *the* anti-liberal of the twentieth century. Remember, as we have seen already, Schmitt viewed political reality as a violent struggle, and he eventually came to embrace Nazism, in Hitler's Germany, as an apparently "appropriate" response to this reality. Does Derrida's analysis leave any ground on which one can denounce this embrace, in principle? Or is it possible that despite his clear intentions to the contrary, Derrida has stumbled head first into precisely the association – with totalitarianism – that his essay was meant to refute?

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[220] See for example, Hans Kelsen, *What is the Pure Theory of Law?*

[221] See *Force of Law* – at 947. "Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a *violence without ground* [my emphasis]… neither legal nor illegal in their founding moment."

[222] Ibid at 1001. "Law-conserving violence" is a term that Derrida takes from Walter Benjamin's essay, *A Critique of Violence*, although I do not discuss Derrida's analysis of Benjamin in *Force of Law* here, despite its general importance, because it would draw attention away from the core aims of the present chapter.

V. Deconstruction is Justice, and Justice is Impossible…

I think that one can answer this question in the negative. To explain: Derrida ultimately agrees with Schmitt that there is no way to completely transcend/transubstantiate political violence, but fortunately, this leaves a much more important question unanswered: namely, the question of how one *responds* to violence. As we have seen, Schmitt's work revels in violence: it *chooses* violence, and celebrates violence as the only adequate response to a fallen and violent world. Derrida, on the other hand, resolves to take a stand *against* violence, which is to say that he joins Rawls as a "realistic" liberal (and an opponent of violence). However, having erased the distinction between legitimate force and illegitimate violence, Derrida can no longer claim (with Rawls) the "transcendence" or "neutrality" of the liberal-democratic system. Accordingly, his key question in "Force of Law" is how one can (and whether one can) simultaneously oppose violence (or remain "liberal") *and* affirm Schmitt's insistence that violence is inescapable (as Derrida does).

Derrida's answer to this question is located in the most famous part of his essay, and it comes down to a mere three words: "Deconstruction is justice."[223] Finally, we come to the make-or-break moment of Derrida's testimony, the moment when he attempts to stand tall against his critics. To explain: as already noted, deconstruction, as an activity, involves a resolute openness to "the event,"[224] where the event is an experience or occurrence that makes no sense, or is not accounted for, within the generic "situation"[225] in which it takes place. As Derrida explained in a 1999 interview in South Africa:

> "Deconstruction is… something which does something, which tries to do something, to intervene and to welcome what happens, to be attentive to the event, the singularity of the event. [It]… did not appear in the twentieth century, nor as a modern movement in the academy in the West. No, I think in every event, not only philosophical, in every cultural event there is some deconstruction at work, something which displaces and opens a structure… to singularity, to something other."[226]

[223] See *Force of Law* – at 945.
[224] Derrida uses this term frequently, but it is also worth mentioning its centrality in the work of another French philosopher, Alain Badiou. For an introduction to Badiou's work, see ALAIN BADIOU, PHILOSOPHY AND THE EVENT (and my brief discussion in chapter one).
[225] Ibid. (This is more Badiou's term than Derrida's).
[226] Jacques Derrida, *Justice, Law and Philosophy: An Interview with Jacques Derrida* – at 280.

In other words: deconstruction is really what I previously called *hospitality*, a gesture that welcomes something other (something *Other*), without expectation or demand and, above all, *without violence*. This is why deconstruction is relevant to law, and to justice (and why deconstruction *is* justice): because deconstruction is precisely an attempt to bring violence to the fore, to expose relations and experiences of violence that would otherwise remain unseen or concealed. Derrida's position is therefore something like this: we cannot avoid violence (as Schmitt observes), but we can at least try our hand at a ceaseless *exposé* of violence, specifically by deconstructing or questioning the discourses of legitimacy, normalcy and necessity that work to conceal it (and render it as non-violent or legitimate force).

Why, then, does Derrida write, one page after he identifies deconstruction as justice, that "justice is an experience of the impossible?"[227] Surely what I have just described – the dedicated exposure of violence – is perfectly possible, perfectly practicable? After all, critical theorists (such as Marxists or feminists) spend plenty of time quite insistently unmasking violent power structures within the law, *deconstructing* the law, even. Why, then, if "deconstruction is justice," and if deconstruction is *apparently* possible, is justice described as an experience of the impossible?

The answer, I think, is that Derrida's notion of deconstruction is rather more intricate than (and somewhat different from) the superficially deconstructive critiques that one finds for example in some Marxist or feminist legal theory. To explain: Marxist or feminist modes of critique often (but of course not always) work in the name of a particular end, and a particular vision of justice: e.g. the liberation of certain oppressed groups (workers, women, etc.). Derrida's deconstruction, by contrast, begins by recognizing 1) that all plans for political action involve a certain repression of potentiality, i.e. the utopian potential of a justice beyond their own vision, and 2) that on account of this moment, even if Marxist and feminist critiques are necessary steps (or moments) in the negation of social/political violence, their identification with "justice," per se, would be to relinquish one's opposition violence *as such*, and to accept a particular form of violence as a moment of finally just force. (Recall, in this regard, Johan van der Walt's critique of political liberalism in the second chapter, which focused on the cynicism of Rawls's refusal to distinguish between the justification that one gains by respecting public reason, and justice).

[227] See *Force of Law* – at 947. In his later work, Derrida constantly referred to ethical ideals – from hospitality (as we have seen) to the "pure gift" – as *impossible*. See JACQUES DERRIDA, OF HOSPITALITY, and JACQUES DERRIDA, GIVEN TIME: I. COUNTERFEIT MONEY.

This puts Derrida alongside Kennedy, with his "mpm leftist" aversion to discourses of *realizable* justice. However, and more importantly, it also (one could argue) sets Derrida quite neatly alongside Rawls. To explain: recall that Rawls's argument for political liberalism, which rests partly on his idea of "the burdens of judgment"[228] (by which he means the limits on our powers of reason/deduction), accepts that reasonable disagreements about what is right/good will persist in any free, open society, and that we therefore have little choice but to "settle" for a theory of justice that "works" – a theory that proves acceptable to people who hold vastly different beliefs about what is right. In this sense, and as we have already seen, Rawlsian "justice" is to some extent "shallow,"[229] by which I mean that it is never full, final justice, "true" justice, but merely an adequate settlement in a world where agreement on "true" justice is simply unrealistic. This is reflected most clearly in Rawls's warning that political liberalism cannot and will "not engage with"[230] those who seek "true" justice: those seeking to "win the world for the whole truth"[231] (as they see it). This is not because political liberalism cannot countenance the *possibility* of a "true," final justice (a justice beyond its proposed settlement), but rather, and only, because it sees quests for such justice under conditions of moral pluralism as deeply destructive, and patently illiberal.

The affinity here between Rawls and Derrida is that both accept the illegitimacy of claims to "true" justice. But the affinity is limited. To explain: in Rawls's view, the exclusion of "true" justice/morality from the political agenda *becomes* justice, and, as such, becomes the definitive rule of the liberal community. For a Derridean, this gesture is perhaps not such a bad idea, but only if 1) we acknowledge its status as a violent exclusion, and 2) we remain exceptionally ready to turn against it and to betray it in the name of a "lesser violence"[232] – a singular justice that calls beyond the dictates of public reason and, indeed, beyond the dictates of *any* rule, or principle. Interestingly, Rawls essentially does this when he takes comprehensive positions on abortion, campaign finance, etc., but he always frames these moves as (dubious) applications of public reason, not as violent breaks with public reason's own violence, i.e. with the violent exclusions on which even public reason rests.

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[228] See again, JOHN RAWLS, POLITICAL LIBERALISM – at 54-58.
[229] See Johan van der Walt, *Law, Utopia, Event: A Constellation of Two Trajectories* – at 89. See also Johan van der Walt, *Law and the Space of Appearance in Arendt's Thought* – especially at 65 and 77.
[230] See John Rawls, *The Idea of Public Reason Revisited* – at 442.
[231] Ibid.
[232] See William Sokoloff, *Between Justice and Legality: Derrida on Decision* – at 346 (and at several other points). See also GEOFFREY BENNINGTON, JACQUES DERRIDA – at 257 (suggesting that Derrida's work seeks a "lesser violence in an economy of violence").

If Derrida can be presented as a Rawlsian liberal, then, he is an utterly self-reflexive or self-critical one, which is to say that a "Derridean Rawlsian" (or a "Deconstructive Liberal") may embrace Rawls's idea of public reason as an expedient equivocation of justice, but not *as* justice, not as an unbreakable/legitimate rule. Put differently, public reason may be accepted – to quote Derrida – as a "least bad"[233] but potentially violent/destructive "rule of thumb." Then, having accepted the violence of public reason, one can finally (says Derrida) take "responsibility,"[234] fully and personally, for one's commitment to public reason, and for the violent exclusions on which it rests. This means asking, in each case/situation, whether public reason is really the "least bad" form of violence available, or whether, on the contrary, there is some other, more insistent demand – some other, lingering "justice" – in the name of which one must work. *This* is deconstruction, in a nutshell: a refusal to write off, in advance, the possibility of a (violent) break with the (violent) justice of law, rule or norm.

I wonder, though: does this constitute an adequate response to Derrida's critics? To be sure, it is clear that Derrida *intends* to work against violence. But by Derrida's own admission, an author's intent does not control a text's logic, and cannot limit the trajectory of its performative "gesture."[235] We must therefore ask whether deconstruction's "war on violence" could still represent – despite Derrida's best intentions – a potential apology for violence (as his critics claim), and for zealous usurpations of the law in the name of one's own sense of extra- or non-legal justice.

In response to this question, the decisive part of Derrida's theory is surely his refusal to accept that justice is ever actually "present"[236] or done. This comes out clearly, in "Force of Law," when Derrida turns his attention to a number of "aporias" of adjudication: aporias which he finds embedded, already, in our most conventional understandings of law and legal justice. Since my concern here is with the law (as opposed to a more general category, like politics), we should look at these aporias carefully, and ask what kind of legal/adjudicative theory they imply. Let us therefore consider them one by one, directly below.

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[233] Jacques Derrida, *The Principle of Hospitality* – at 6. For the sake of clarity, the full quote here is as follows: "[It] is always in the name of pure… hospitality that it is necessary, in order to render it as effective as possible, to invent the best arrangements, the least bad conditions, the most just legislation."

[234] See *Force of Law* – at 953 (and elsewhere).

[235] See JACQUES DERRIDA, OF GRAMMATOLOGY – at 30. Here, Derrida describes his "deconstructive" reading of the Swiss semiotician, Ferdinand de Saussure, as a matter of contrasting Saussure's "gesture" – i.e. the logical implications of his work – with his "statement" – i.e. the way that he *presents* his work.

[236] This line goes back to Derrida's early work, when he claimed, following Heidegger, to be staging a critique of Western culture's reliance on a "metaphysics of presence." Ibid at 22 (and elsewhere). See also MARTIN HEIDEGGER, BEING AND TIME.

1) Epoke and Rule: "To be just," Derrida writes, "the decision of a judge… must not only follow a rule,"[237] but must at the same time "approve it… by a reinstituting act of interpretation, as if nothing previously existed of the law,"[238] or as if the "judge himself invented the law in every case."[239] If this seems in any way radical, then it shouldn't. On the contrary, the notion that "legal justice" (as the cool, programmable application of rules) is distinct from justice in itself – justice, per se – goes back to Aristotle, for whom justice depended on a careful consideration of each case's "particularity."[240] In Derrida's words: "Each case is other, each decision is different and requires an absolutely unique interpretation which no existing, coded rule can or ought to guarantee absolutely."[241]

This quote comes close to Aristotle, but there is an important limit to the similarity, namely, that Derrida denies (contra Aristotle) that a particularized, context-sensitive encounter between judge and judged can be described, in the end, as "just." The reason is that such a context-sensitive encounter effectively trashes the barrier – i.e. "the law" – between sovereign and society, or, more precisely, between judge (as a "mini-sovereign,"[242] or a spokesperson/agent for the sovereign) and society. This leaves us with a paradox, from which "it follows… that there is never a moment that we can say in the present that a decision is just… or that someone is a just man."[243]

In this regard, there is perhaps a certain similarity between Derrida and Agamben, and, more specifically, between Derrida's (first) aporia and the quote from Agamben's *State of Exception* that we examined in the last chapter's conclusion. To explain: you may recall that Agamben noticed a tension, in the history of Western culture and law, between two impulses – one running from "law to anomie,"[244] and one in the opposite direction. Could this be what Derrida has in mind here? Perhaps the comparison is a little strained, but I think that Derrida's point here (like Agamben's) is that we have good reasons for wanting legal decisions to be simultaneously rule-bound and rule-reinventing, if not rule-less.

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[237] See *Force of Law* – at 961.
[238] Ibid.
[239] Ibid.
[240] On this point, see Martha Nussbaum's summaries of Aristotle's theory of legal judgment in Martha Nussbaum, *Equity and Mercy* (at 92-97), and MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS (e.g. at 318-342). See also ARISTOTLE, THE NICOMACHEAN ETHICS (e.g. Chapter 10 of Book V, on equitable judgment as a corrective for strictly "legal" judgment).
[241] See *Force of Law* – at 961.
[242] See DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY – at 196.
[243] See *Force of Law* – at 961-963.
[244] See GIORGIO AGAMBEN, STATE OF EXCEPTION (at 73), as well as the concluding section of chapter three in this thesis.

The plainest way of putting this is perhaps that we – as heirs of a particular, Western legal culture – want legal decision-makers to simultaneously consider *and* defer the question of substantive or "true" justice: a question which will have been "buried, dissimulated, repressed"[245] since the moment of law's origin. On the one hand, we want this question (of justice) off the table, because its consideration implies an unpredictable gust of sovereign whim (an exception which reduces legal subjectivity to "bare life"[246] or "homo sacer"[247] in Agamben's terms). On the other hand, though, we also want to keep it firmly *on* the table, because to ignore it is to accept the "bloodless, bureaucratic violence"[248] of the "legal machine,"[249] the violence of a sovereignty, the sovereignty of law, that is effectively blind to the vagaries and particularities of social reality. As they say, we want justice to be blind (formal/machine-like). But in at least some way, we also want it to *see*.

2) The Ghost of the Undecidable: This second aporia switches from the tension between law and justice (as unpacked in the first one), to the tension between the necessity and destructiveness of a legal decision. To explain: for Derrida, a decision can only be free – can only be a decision, as such – if it goes beyond the mechanical, unthinking application of a rule, and embraces an element of "undecidability"[250] – a sense or experience of the outcome as unassured/unsanctioned vis-à-vis the rule. This may imply that justice, for Derrida, lies in a moment of tragic suspense, but this is not quite true. To quote Derrida:

> "A decision that didn't go through the ordeal of the undecidable would not be a free decision, it would only be in the programmable application or unfolding of a calculable process. It might be legal; it would not be just. But in the moment of suspense of the undecidable, it is not just either, for only a decision is just. And once the ordeal of the undecidable is past (if that is possible), the decision has again followed a rule… [and] is not longer presently… fully just."[251]

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[245] See *Force of Law* – at 963.
[246] See GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE – especially at 81-86 (although elsewhere too).
[247] Ibid – especially at 71-74.
[248] See Drucilla Cornell, *The Violence of the Masquerade: Law Dressed up as Justice* – at 1048 (published as a response to Derrida's Cardozo text).
[249] Ibid at 1050.
[250] See *Force of Law* – at 1021. This is the first use of the word "undecidability" in Derrida's text, although I note that the *concept* is referenced earlier in the text under the label of "the undecidable."
[251] Ibid at 963.

Let us unpack this carefully. Justice, for Derrida, clearly relates closely to the experience of undecidability, but it is evidently not reducible to it. Think about it like this: Derrida sees justice as deconstruction, which entails an insistent opposition to violence. Since every actual decision "cuts… [or] divides,"[252] and does violence, no actual decision can ever live up to the promise of deconstruction, the promise of a justice to come, beyond violence (or "beyond vengeance"[253] as Derrida wrote four years later, in *Specters of Marx*). However, without this moment of decision (or this cut), nothing will have happened, which is to say that there will have been no gesture of hospitality, and hence, no justice. In other words: only action (as opposed to passive reflection) can be just. And yet, action will always involve a certain violence, or a certain "cost"[254] – a moment which shuts down the openness that one experiences in the tense, "mad"[255] whirl of a real, free decision.

3) The Urgency that Obstructs the Horizon of Knowledge: No prizes to Derrida for the clunky name of this aporia, the third and final one that he considers in "Force of Law." Following on from his second aporia, this one focuses on a slightly different way in which a legal decision is both necessary and destructive vis-à-vis the experience of justice. Put simply, responsible decisions require knowledge – specifically, knowledge of all the "conditions, rules, or hypothetical imperatives"[256] that could supply their decisive justification – but they are also "always required immediately,"[257] or promptly, for the sake of the law's (or the legal machine's) smooth, continuous functioning. As Agamben once wrote:

> "As jurists well know, law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgment, independent of truth and justice. This is shown beyond doubt in the *force of judgment* that even an unjust sentence carries with it."[258]

[252] Ibid.
[253] See JACQUES DERRIDA, SPECTERS OF MARX – at 25 (on a "justice that one day… would finally be removed from the fatality of vengeance").
[254] On the idea that existence itself implies a certain cost, see Brian Nail, *Closing the Loop: "The Promise and Threat of the Sacred" in Rian Johnson's Looper* (especially footnote 27 at 36).
[255] See *Force of Law* (at 967), where Derrida paraphrases Kierkegaard ("The instant of decision is a madness").
[256] Ibid.
[257] Ibid.
[258] GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ – at 18.

Without disparaging Agamben, I sense that his observation covers only a somewhat mundane aspect of Derrida's aporia. To explain: as my analysis of Derrida's work has perhaps already made clear, he consistently denies that one can ever, fully justify one's decisions or actions. On the contrary, in Derrida's view, justice (as hospitality, or non-violence) is always deferred, which is to say that real world, legal decisions can only ever be surrogates for justice (a fact which is perhaps already reflected in the way that we talk about legal proof, whether as a matter of "balancing probabilities,"[259] or as placing a defendant's guilt "beyond a reasonable doubt"[260] in criminal trials). In other words: Derrida's position is not simply that justice requires the legal machine to keep on pumping, as per Agamben's observation (although it is surely that too), but is rather/also that decisions will always/inevitably be premature, partially justified, simply by virtue of the fact that they must be made *at some point*, before a decision can "furnish itself"[261] with the "*infinite* information"[262] required for a full, unassailable justification, a full claim to even "legal" justice.

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With these three aporias in mind, we can now ask what a deconstructive or Derridean theory of adjudication might look like, and how a deconstructive judge might conceive of his/her role. In one sense, the deconstructive judge will surely look a lot like Duncan Kennedy's fictional judge in "Freedom and Constraint" – torn, potentially, between an apparently firm legal rule and a lingering sense of justice (HIWTCO). However, despite the clear resonance between Kennedy and Derrida, there seems to be (at least) one important difference that persists between the two: namely, that Derrida is far less skeptical and cavalier vis-à-vis the "goods of government by law"[263] than Kennedy is – especially in his earlier essays like "Form and Substance in Private Law Adjudication" and "The Structure of Blackstone's Commentaries."[264]

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[259] As any common lawyer will surely know, this is a reference to the standard of proof in English civil law.
[260] And this is a reference to the standard of proof in English criminal law.
[261] See *Force of Law* – at 967.
[262] Ibid.
[263] Frank Michelman, *Ida's Way: Constructing the Respect-worthy Governmental System* – at 358. See also chapter one, section one of this thesis.
[264] For a discussion of Kennedy's early work, and of these essays in particular, see the first section of the present chapter, on Kennedy's notion of the "fundamental contradiction." See also JOHAN VAN DER WALT, LAW AND SACRIFICE (at 152-167), for a detailed analysis of Kennedy's work starting with his idea of the fundamental contradiction from these early papers.

At a glance, this may seem like a strange claim, since one of the most prominent and popular interpretations of Derrida's essay deems him guilty, despite his intentional opposition to political violence, of embracing a "politics of pure will"[265] – a politics *of* violence that destroys/undermines respect for "the law." The fatal flaw in this reading, I think, is that it is sustainable only if we neglect the many times in "Force of Law"[266] (and elsewhere) when Derrida insists that there is no justice without law, and without a system of rules that stands-in for and defers a full, unpredictable consideration of social justice in each new case. To be sure, Derrida also tells us that it is wrong to identify/conflate law with justice, but this does not amount to an opposition to law, or a move to "reject law."[267] On the contrary, Derrida *begins* with law, and with a call for a "least bad"[268] settlement – a "least bad" system of law – which can then be subjected to deconstruction's work, which disrupts the complacency of the law in the name of something more, some other justice which cuts against the inevitable violence of even the "least bad" system. Can one really, sincerely, call this a move contra law? Or, on the contrary, is it not more appropriate and honest to call it a resolve to refine or improve law, and, as William Sokoloff writes, to make law something more than an "apology" for a particular network of exclusions and violence?

With this question in mind, we can now come back to Kennedy, to ask how he relates to "the law." Now, I do not think – as MacCormick suggests in his essay, "CLS and Derrida"[269] – that Kennedy is really "against" law, but there is no smoke without fire, and the fire here is the speed with which Kennedy accepts his right (or the right of his fictional judge-self) to work around his original impression of the law in "Freedom and Constraint." To be sure, Kennedy's explanation for this move – that he is just exploring different sides of a naturally pliable material, i.e. "the law" – is somewhat persuasive. But one may wonder, what would Derrida say? It is hard to know how to answer this question. On the one hand, Derrida would surely accept the law's interpretive pliability, but, on the other hand, this does not necessarily render deference to *convention* in legal decision-making impossible, and it doesn't say anything about the moral/political value of such deference.

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[265] See William Sokoloff, *Between Justice and Legality: Derrida on Decision* (at 347), referencing MARK LILLA, THE RECKLESS MIND: INTELLECTUALS IN POLITICS (describing Derrida as a proponent of a "politics of pure will").

[266] For example, see the first aporia described in *Force of Law*, at 961-963. This provides a fairly clear example of Derrida insisting that there is no justice without law, and without a link between political action and a prior, authorizing, *legal* rule.

[267] Again, see William Sokoloff, *Between Justice and Legality* – at 346.

[268] Jacques Derrida, *The Principle of Hospitality* – at 6.

[269] See John P. MacCormick, *Schmittian Positions on Law and Politics – CLS and Derrida*.

Interestingly, Schmitt – in his "first scholarly work, *Gesetz und Urteil*"[270] (of 1911) – actually suggested that a legal interpretation's likely popularity, within a particular, "judicial community,"[271] should be decisive in legal decision-making. To explain: like Kennedy, Schmitt saw legal doctrine as inevitably indeterminate, or pliable. However, very much *unlike* Kennedy, Schmitt viewed this as a problem (as opposed to an invitation), and he therefore sought to provide a solution that could allow for legal consistency and stability in spite of legal indeterminacy. This solution, as noted above, was that judges could confine themselves to institutionally popular decisions: ones that most other members of their national judiciary would accept as "correct."[272] To be sure, this assumes a "significant degree of political, social, and doctrinal homogeneity within the… judiciary,"[273] but (as CLS scholars like Kennedy have pointed out) this is often an observable phenomenon in the legal profession.

Now, Derrida says nothing about Schmitt's theory of judging in "Force of Law," which is no surprise (not least of all because *Gesetz und Urteil* is not a well-known text). However, what *is* surprising is that Derrida also says nothing about legal indeterminacy, or about what he means when he talks – almost casually, unthinkingly – about "the law." Of course, we know from Derrida's early work (*Of Grammatology*, for example) that he holds no faith in the possibility of objective meaning. So one wonders: why does Derrida use the phrase, "the law," as if he is referring to something objective, or given?

The answer, I think, is that Derrida assumes (like Schmitt) that even if a legal text can never produce anything like an "objective" meaning, there can nonetheless be conventional/common readings of legal texts which give rise to particular, reasonable expectations vis-à-vis their judicial application. If this is true, then when Derrida says that there is no justice without law, what he means is perhaps more broadly that there is no justice without deference to one's community, and without a realization, in that sense, that one belongs to (and is "heteronomously"[274] responsible before) a community. In other words: the violence/injustice of a break with the law is for Derrida that it marks a violent break with one's community, with the community as "the Other" to one's self.

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[270] See David Dyzenhaus, *Holmes and Carl Schmitt: An Unlikely Pair?* – at 180.
[271] Ibid at 181.
[272] Ibid.
[273] Ibid at 182 (quoting William Sheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*).
[274] See SIMON CRITCHLEY, INFINITELY DEMANDING: ETHICS OF COMMITMENT, POLITICS OF RESISTANCE – at 38-68 (describing heteronomous forms of ethics as those that – like the ethics of Immanuel Levinas, for example – render the subject subordinate to "the Other," whose existence places a demand on the subject that is unrelated to his or her own choices and aspirations).

There is not enough in Derrida's essay on the nature of law to determine if this is a fair reading, but we can perhaps speculate that because he talks so casually about "the law," and because he is so deeply skeptical of the possibility of objective meaning, Derrida must understand the law – to some extent – as a matter of deference to convention, or to an interpretive community. Of course, Derrida does not follow Schmitt in proposing deference to convention as an adequate approximation of legal justice in the midst of legal indeterminacy, but I don't think he would follow Kennedy either, who is surely just a little too quick to dismiss the real value of convention as a way of sacrificing oneself and one's personal, partisan interests in the name of one's community (as Other).

In the end, then, Derrida resides in a tragic space between law (as convention) and its abandonment in the name of a "justice-beyond-law." However, and quite crucially, this "justice-beyond-law" is not yet equivalent to what Derrida ultimately calls "justice," justice as deconstruction. On the contrary, the justice of deconstruction, as Derrida makes clear, is "impossible." It is not something that a judge can "do"[275] with regard to a particular case, but rather refers to a certain ideal: namely, the ideal of a moment that would interrupt the inescapable logic of sovereignty in which every legal decision is trapped.

To explain this point: remember that Derrida's ethics is anchored in a conception of hospitality that requires that one simultaneously embrace and relinquish one's claims to sovereignty. For example, if I welcome a stranger into my home, I may put others (e.g. family members) at risk, thereby acting inhospitably towards them. Even more fundamentally, if I welcome the stranger at all (as hospitality surely requires), I will have placed myself above them, and imposed my sovereignty on them by claiming a right to extend that welcome, a right that marks them as "other" in "my" space. Of course, Derrida never frames legal judgment in quite this way, but it is clear, I think, that his "aporias" in "Force of Law" involve the same predicament. With the first aporia: the judge must simultaneously defer his sovereignty to the authority of a preexisiting rule, and affirm it by exceeding that rule. With the second: he must both surrender his sovereignty to an experience of undecidability that renders its exercise unthinkable, and seize it by deciding ("only a decision is just"[276]). And, with the third: the judge must try to legitimate his decision (deferring his sovereignty to a set of explanatory reasons), and act expediently, without final legitimacy.

[275] See *Force of Law* – at 961-963. "[There]… is never a moment that we can say in the present that a decision is just… or that someone is a just man."
[276] Ibid at 963.

At this point, the reader may cast his/her mind back to the first chapter of this study, and, more specifically, to my concluding comments in that chapter on Mattias Kumm's suggestion that modern Europeans have replaced sovereignty, traditionally understood as the "foundation of law,"[277] with a notion of human dignity that is directly opposed to it. The problem, though, is that Kumm's suggestion is only relevant to the law, which has surely taken a symbolic turn against sovereignty in modern day Europe, without saying anything, and without the ability to say anything, about sovereignty as political reality. Indeed, this was surely Derrida's point when he remarked that there has never been a "principled" or "philosophical"[278] critique of the death penalty, 1) because the death penalty is intimately entwined with the concept of sovereignty, and 2) because there has never been and indeed never can be a principled or philosophical critique of sovereignty, at least not where sovereignty is understood as the liberty to act, to take a decision, and to place one's life effectively above the life of another.

Human dignity as presented by Kumm does not challenge this concept of sovereignty, but rather insists that such sovereignty is somehow reinvested in the individual, the autonomous human being whose life can flourish only where he/she is free to develop his/her "own personality."[279] At the risk of oversimplifying, Derrida's work on the concept of hospitality (and on the ethics of adjudication in "Force of Law") embraces this move, but disagrees vehemently with scholars like Kumm, who are ready to state, naively and simply, that sovereignty has now been overridden by the ideal of human dignity. By contrast, for Derrida, the need for an "I" – the state, for example – to affirm the sovereignty of the individual leads to paradox, because, as Derrida's discussion of hospitality makes clear, it means that the sovereignty of the individual can only be guaranteed and ensured by a gesture that destroys it, i.e. an affirmation of *state* sovereignty. This is what Derrida's ethics of adjudication tells us: namely, that even as the sovereignty of a judge threatens the sovereignty of the individual before him (although of course, there is always more than one), it is also essential to it – hence how we end up in a tragic disjoint between 1) the need for the judge to defer his sovereignty to a law or community apart from himself, and 2) the alternative but equally insistent need for him to seize it, to act, to *decide*.

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[277] See Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review* – at 32.
[278] Once again, see JACQUES DERRIDA AND ELIZABETH ROUDINESCO, FOR WHAT TOMORROW? – at 146.
[279] This is a reference to Article 2(1) of the German *Grundgesetz* (see chapter one).

If it isn't yet clear, then I should state clearly now that what I have located in Derrida's work is precisely the same tension that I attributed to Rawls's work in the second chapter, namely, the tension between a politics of zeal, and a politics of abandonment. In light of everything that I have just said about Derrida, this tension may be recast as a tension that one should perhaps feel, as a liberal, in exercising a power of decision – a localized position of sovereignty – over another. On the one hand, one may be tempted to relinquish one's sovereignty, and to defer to some other authority out of fear that one's decision will – as a sovereign decision – destroy the sovereignty of its recipient(s), zealously imposing itself on them, whether as a loving but still oppressive paternalism (at best), or as an expression of dictatorial control (at worst). On the other hand, one may be tempted to embrace sovereignty, and to take responsibility for the other, in the knowledge that a failure to do so will merely subject the other to a potentially irresponsible sovereignty (a sovereignty that, politically, could be that of an economic elite, or a legislative majority, or an overzealous executive) that will appear elsewhere (since, as Derrida stressed, sovereignty cannot be destroyed, but only deferred, shifted, redirected, etc.).

This, for me, is what a post-Schmittian conception of human dignity might look like: not a naïve commitment to the rejection of sovereignty, but, rather, an insistence on a particular relationship to one's own sovereignty vis-à-vis the other, an insistence that when applied to politics requires institutional actors to walk a fine line between heroic intervention and "responsible"[280] deference, or, as I put it earlier, between zeal (heroic intervention) and abandonment ("responsible" deference). As Agamben put it, it is like:

> "the entire universe of law… [is] a field of forces traversed by… an essential ambiguity: on the one hand, a normative tendency in the strict sense, which aims at crystallizing itself in a rigid system of norms whose connection to life is, however, problematic if not impossible (the perfect state of law, in which everything is regulated by norms); and, on the other hand, an anomic tendency that leads to the state of exception or the idea of the sovereign as living law, in which a force of law that is without norm acts as the pure inclusion of life."[281]

[280] By "responsible" deference I mean deference to some particular, trusted other – not deference to "whatever happens," but deference to an actor or institution that is seemingly better placed (compared to oneself) to deal with a given situation (e.g. by reason of democratic legitimacy, or specialist expertise).
[281] GIORGIO AGAMBEN, STATE OF EXCEPTION – at 73.

Conclusion: From Political to Poetical Liberalism?

In conclusion, my argument in this chapter has been that the only way to effectively oppose political violence, and to remain *liberal* (where a "liberal" is someone who opposes individual coercion/un-freedom/objectification), is to take "responsibility" for one's embroilment and complicity in political violence. What Kennedy and Derrida provide, in this regard, is an intensive "philosophy of responsibility,"[282] a philosophy which, for Kennedy, requires judges to understand 1) that political actions and legal decisions will always fall somewhere on a spectrum that runs from individualist to altruist (or welfarist) conceptions of political morality, and 2) that each of these conceptions of morality will, when acted on, imply a different form of political violence (or a different logic of coercion/un-freedom/objectification) that judges must reckon with and "own."[283] As I suggested earlier, quoting Johan van der Walt, this makes legal decision-making akin to treating a patient who is "lethally allergic to oxygen."[284] Either we expose individuals to what Van der Walt calls a "Wild West"[285] scenario (a legally-constructed state of nature), or we expose them to the moralistic voice of the state itself. There is no in-between: only responsible preferences for one or the other in different cases and spheres of life.

Where does this leave Rawls's theory of political liberalism? Must we throw the baby out with the bathwater, and dismiss Rawls's work as an irresponsible rationalization of (or apology for) a particular form of political violence? I think not. On the contrary, we have already looked, briefly, at Richard Rorty's support for political liberalism, and this points to an important affinity between Rawls (Rorty's "public" philosopher of choice), and Derrida (one of Rorty's favorite "private" thinkers). In a nutshell, Rorty's interest in both Rawls and Derrida comes down to the fact that they both – in their respective realms of interest – set themselves against zealous "truth-seeking." Of course, from here, Rawls moves to *reconstructive* theory, and Derrida to *deconstructive* theory, but for Rorty, this merely belies their distinct identities as public (Rawls) and private (Derrida) thinkers.

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[282] See, for example, Drucilla Cornell, *Time, Deconstruction, and the Challenge to Legal Postivism: The Call for Judicial Responsibility*. See also Jacques Derrida, *Hospitality, Justice, and Responsibility: A Dialogue with Jacques Derrida*.

[283] By which I mean, as per the footnote above, that judges must take *responsibility* for the forms of violence that they choose to inflict on their communities (rather than passing the buck of responsibility to "the law," or the legislators and judges who shaped "the law" that they now encounter).

[284] See Johan van der Walt, *Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence* – at 172 (referencing Louis Seidman, *The State Action Paradox*).

[285] Ibid at 164.

Although Rorty is surely right to notice the very different trajectories that Rawls and Derrida take in their opposition to zealous "truth-seeking," he is wrong, I think, to suggest that one (Rawls) moves in a properly public and the other (Derrida) in a non-public or publicly useless direction. There are a number of reasons why Rorty might take this position. Perhaps it is because he encountered Derrida too early, before the political relevance of his work was fully expressed in texts like "Force of Law." Or perhaps it is because he views justice "pragmatically,"[286] as a matter of "whatever works,"[287] and of whatever institutional arrangements can yield political stability despite the fact of reasonable pluralism (can deconstruction really have anything to do with stability?). At any rate, Rorty errs in his dismissal of Derrida, because he fails to see what is truly and ethically *constructive* in *de*-construction: namely, its capacity alert us to "events"[288] – and more specifically, modes of political violence – which are invisible or at least tolerable from the normal, normative perspective of a political situation.

Interestingly, few thinkers have been clearer on this than John Dewey, one of Rorty's foremost philosophical heroes. In his famous text, *Liberalism and Social Action*, Dewey suggests that early, Lockean liberalism should be lauded for performing a particular, historically-necessary function: namely, the symbolic "emancipation of individuals"[289] from their "inherited type[s] of social organization"[290] – inherited types of organization that drastically limited their capacity for even basic, human flourishing. The problem, for Dewey, was that these early, Lockean liberals (and, to an even greater degree, their American successors) presented their own, "special interpretations of liberty"[291] as "immutable truths,"[292] thereby repeating the very gesture of social sedimentation/stagnation that they had initially fought to overcome. As Dewey writes:

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[286] Like the American Legal Realists (mentioned earlier in the chapter), Rorty is a follower of American Pragmatism, a philosophical tradition associated with the work of thinkers like Charles Pierce, John Dewey and, in law, Oliver Wendell Holmes Jr. At the risk of blunt oversimplification, the basic thought that animates Pragmatism is that philosophy should be directed toward the world, as an attempt to cope with the particular, practical problems we face at a given moment in time (as opposed to a loftier attempt to gain knowledge of the world, or whatever). For Rorty's version of Pragmatic philosophy, see RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE.

[287] See, for example, Richard Rorty, *Pragmatism and Law: A Response to David Luban* (a relatively clear, short expression on Rorty's views on this point).

[288] Again, consider Derrida's definition of deconstruction in terms of "the event." See Jacques Derrida, *Law, Justice and Philosophy: An Interview with Jacques Derrida* – at 280.

[289] See John Dewey, *Liberalism and Social Action*, the quoted excerpts of which are available here: https://online.hillsdale.edu/document.doc?id=277.

[290] Ibid.

[291] Ibid.

[292] Ibid.

> "If the early liberals had put forth their special interpretation of liberty as something subject to historic relativity they would not have frozen it into a doctrine to be applied at all times under all social circumstances. Specifically, they would have recognized that effective liberty is a function of the social conditions existing at any time. If they had done this, they would have known that as economic relations became dominantly controlling forces in setting the pattern of human relations, the necessity of liberty for individuals which they proclaimed will require social control of economic forces in the interest of the great mass of individuals. Because liberals failed to make a distinction between purely formal or legal liberty and effective liberty of thought and action, the history of the last one hundred years… [has been]… the history of non-fulfillment of their predictions."[293]

For Dewey, then, the history of liberalism will be a disappointing "history of non-fulfillment" where its proponents fail to prioritize its radical, emancipatory spirit over particular attempts to "capture" that spirit in social policy. More provocatively, one could suggest that what Dewey is calling for here is *deconstruction*, where deconstruction is taken not as an exclusively Derridean method, but as a typically, timelessly utopian resolve to think beyond present arrangements in the name of a fairer, more just society, a "justice to come."[294]

To clarify, I do not think that Rorty is opposed to this thought in principle (he is surely not), but merely that he misses the exemplarity of Derrida's work as an expression of it. Indeed, in my view, Rawls and Derrida compliment one another perfectly. On the one hand, Rawls's principle of public reason is as good a candidate as any for what Derrida labels a "least bad"[295] rule of hospitality, because it requires public actors to (at least) try and appeal to one another, rather than to their own, individual conceptions of morality. On the other hand, depending on its precise specification, and as we have seen already, such a rule will ultimately lead either to the legitimation of illiberal policies dressed-up in "reasonable" language, or the legitimation of a comprehensive liberal morality at the expense of plausibly reasonable dissenters. In other words: one way or another, political liberalism will be implicated in political violence, and fixing it as a rule will accordingly be to trade one's liberal opposition to violence for a *hierarchization of violence*, which erases or downplays the violence of certain, preferred practices ("legitimate" practices).

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[293] Ibid (Dewey).
[294] See, for example, JOHN D. CAPUTO, THE PRAYERS AND TEARS OF JACQUES DERRIDA – at 81 (and frequently throughout the text). See also JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP – for example, at 287-288 (on the idea of a friendship "to come").
[295] Again, see Derrida, *The Principle of Hospitality* – at 6.

Remember how I put this in chapter two? Political liberalism is doomed, I said then, to choose between a politics of zeal and a politics of abandonment. In chapter three, this turned into a choice between moralism (zeal) and historicism (abandonment). And in this chapter, it was presented via Kennedy, as a choice between altruism (zeal/moralism) and individualism (historicism/abandonment), and via Derrida, as a choice between singular (zeal/moralism) and legal (historicism/abandonment) forms of justice. The unifying theme between these three chapters – and these three presentations of what Kennedy calls "the fundamental contradiction"[296] – has been the idea that liberalism, as a commitment to individual dignity (or an aversion to political coercion/violence) has no option but to situate itself "responsibly"[297] between these poles. To be sure, this is not the only option for political theory *in general*. But it is the only way, I am arguing, to fully and faithfully honor a commitment to human dignity that we – we modern, liberal citizens – find front and center in the bills of rights and international conventions that bind our exercises of public power, today.

In concluding, it is important to note that this is not a critique of Rawls so much as it is a critique of his *language*. To explain: as we have seen, Rawls is not consistent in his fidelity to the democratic, historicist spirit of public reason, since he frequently tries to present particular, controversial constitutional rights – e.g. to first trimester abortion, or a social minimum, *inter alia* – as "natural" or "neutral" applications of public reason. The implication of this inconsistency, I think, is that Rawls at least *feels* the tension between zeal and abandonment in his work, and at least feels the pull of a justice that is *unreasonable*, contra the "reasonable" justice of political liberalism. If this is true, then Rawls's work is already an example of a "responsible" liberalism, one that exceptionally opens back onto its own fundamental promise, captured so iconically and indeed so beautifully in the opening pages of Rawls's first book, *A Theory of Justice*:

> "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not follow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by the many."[298]

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[296] See Duncan Kennedy, *The Structure of Blackstone's Commentaries* – at 211-212.
[297] See *Force of Law* – especially at 961-969 (on the three aporias of legal justice).
[298] See JOHN RAWLS, A THEORY OF JUSTICE – at 3.

In light of this observation, I suggest that we stamp a different name on Rawls's liberalism, by swapping the "political" label for the intentionally similar, if slightly clumsy, "poetical." To explain: Rawls's liberalism is clearly meant to be "political," and to withdraw from moral controversy, but Rawls evidently cannot abide by his own call for "politicality,"[299] and one may take this as a reflection of his awareness (demonstrated, if not consciously felt) that there is some piece of the liberal dream – the dream of a society that respects the "inviolability" of each person – that is inadequately represented if not positively denied by political liberalism. This places Rawls – to some extent – with the figure of the poet, a figure that, ironically, he excludes from his "realistic utopia"[300] (as I noted in chapter two). The similarity is that the poet also chases moments of experience (or moments of justice, in Rawls's case) that exceed the bounds of conventional language (or conventional morals), moments of experience that can only be alluded to by pushing language in a non-conventional direction. To be sure, there is nothing "poetic" or "poetical" about Rawls's *rationalization* of these moments – i.e. in his presentation of these moments as requirements of public reason – but my interest is purely in the moments themselves (pre-rationalization): when Rawls refuses to "settle" for a more disinterested application of public reason (and its principle of toleration), and insists on striving further, in search of a "more just" conception of a liberal community.

In calling these moments "poetic" (or "poetical"), I draw loosely on the work of Johan van der Walt, who has suggested – very much in the vein of Agamben's comments on the tension between law and anomie – that our responses to the world always run on a spectrum from law to poetry (or from the "legal" to the "utopian"[301]). On the one hand, we may withdraw from the world, and from the mystery of its "event,"[302] via law, where law represents a provisionally fixed structure that defers our confrontation with the event in order to foster a sense of commonality, however artificial. On the other hand, though, we may equally be tempted to return to "the event," in all its mystery, and to take up a poetic concern with the world that is no longer about "communication," or the maintenance of "stability," but about pushing precisely beyond the closure that these things require in the name of an experience or a justice beyond law, and beyond settlement.

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[299] As a reminder, "politicality" in Rawls's work refers to the way that his later brand of liberalism refrains from addressing comprehensive and controversial questions of moral, philosophical or religious truth, confining itself instead to the questions that one must answer for a political settlement to function effectively.
[300] See in particular, JOHN RAWLS, THE LAW OF PEOPLES – for example, at 11.
[301] See Johan van der Walt, *Law, Utopia, Event: A Constellation of Two Trajectories.* See also Johan van der Walt, *Agaat's Law: Reflections on Law and Literature with Reference to Marlene van Niekerk's Novel Agaat.*
[302] Ibid (*Law, Utopia, Event*).

The idea here – and the reason I use the term "poetical" rather than the more intuitive, aesthetically pleasing, "poetic" – is not to switch a legal response to the world for a poetic one, but, rather, to "tweak" the legal response that is implied by political liberalism by insisting that it must remain open to a certain sense of "poetic" justice as well, a justice that cannot be reduced to a matter of compliance with public reason, but would instead involve revisiting and reopening the mystery of the law's inaugural event. What, though, is "the law's inaugural event?" In this case, it is the normative foundation of the liberal legal order, namely, the promise of human dignity, which is to say that a poetical liberalism would be one that is willing to reconsider whether present arrangements and laws are really worthy of human dignity, i.e. whether they are a worthy response to the promise of human dignity on which Western legal order now rests. Of course, the irony is that such a move also implies a moment of strong sovereignty, a moment that in that sense contradicts human dignity in its very essence, as an opposition to the logic of objectification that always inheres in an expression of sovereignty. And so: poetical liberalism must remain suspended between the legal and the poetic (or the legal and the literary, or the legal and the utopian) – ready to think the possibility of a sovereign imposition, but equally aware of the way that such a moment would contradict (at least in some sense) the very foundation that it seeks to capture.

CHAPTER FIVE

Poetical Liberal Practice: "Dialogic" Constitutionalism as a "Baseline"

Introductory Quote:

"How should the government settle… reasonable disagreements… [concerning constitutional interpretation]…? Judicial review still seems to be the best way… [but]… if the courts have the last word, as with strong-form review, the people run the risk of losing their ability to govern themselves by regulating fundamental rights pursuant to *their* reasonable interpretation of the constitution's constraints on self-governance.

Weak-form… [or "dialogic"]… review offers a solution to this problem. Courts are given the opportunity to explain why a challenged statute is unconstitutional. Having done so, they step aside and let the legislature respond. To the extent that the courts have some advantage over legislatures in constitutional interpretation, and that legislators recognize the existence of such an advantage, the legislative deliberations will be informed but not controlled by what the courts have said. But, in the end, if enough legislators believe that the court's constitutional interpretation is not as good as their own, weak-form review allows the legislators to have their way… [at least in the "short term"]."

Mark Tushnet, Weak-Form Judicial Review and "Core" Civil Liberties

Introduction

At this stage, it is worth offering a quick survey of the ground covered so far. Firstly, I have defined liberalism in terms of a basic commitment to human dignity, where human dignity is understood to require that governance is somehow "consent-worthy," at least from the perspective of an affected individual. Secondly, I have suggested that such a commitment – if taken seriously – places contradictory demands on public actors (and on all of us insofar as we all have a capacity for public action) in a liberal, democratic society. On the one hand, it pressures us to set aside our own "comprehensive doctrines" when we engage in public/political action, since we know, due to Rawls's fact of reasonable pluralism, that such doctrines will not command the consent of all "reasonable" members of a democratic society. On the other hand, if we set our comprehensive doctrines aside, and retreat to seemingly "neutral" ground, we effectively sacrifice our ability to combat forms of "real"[1] suffering that a majority of our fellow citizens oppose on formally or facially "neutral" terms.

In the second chapter, we saw how Rawls attempts to avoid this problem by defining the core duty of public reason "thickly,"[2] as a duty to present one's political arguments in terms of principles that would or could emerge in an original position, behind a "veil of ignorance." The consequence of this "thick" conception of public reason is that Rawls can claim, without significant inconsistency, that opposition to first-trimester abortion rights (as well as rights to a social minimum, and the public financing of elections) is unreasonable, despite the fact that decent and well-meaning people support such opposition. This produces a disjoint in Rawls's work, between real, well-meaning people, to whom the liberal state apparently owes nothing, and the "reasonable and rational" persons to whom the liberal state must appeal for its legitimacy. In effect, this locks many decent, well-meaning people out of Rawls's realistic utopia (at least on particular issues), and, to make matters worse, presents this locking out as a *non-event*, i.e. as a non-problematic, non-violent consequence of a moral scheme that all persons should accept, as reasonable and rational.

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[1] I take it somewhat for granted here that "real" suffering is identifiable, but this is of course not the case. How, for example, can one distinguish cleanly between meaningful and frivolous suffering? *Must* one distinguish between meaningful and frivolous suffering? Or is the world-shattering hardship that a spoilt teenager experiences when denied access to a luxury item, like a car, really no different from the world-shattering hardship of abject poverty? Clearly there is a moral difference, but how do we describe and explain it?

[2] As I explained in the second chapter, the tension between thick and thin understandings of what is politically reasonable – or between more and less comprehensive public standards – can be solved only with the embrace of a politics of zeal or a politics of abandonment, and it would therefore have been appropriate, I think, if Rawls's work had left public reason "incompletely theorized," as Cass Sunstein might put it. See Cass Sunstein, *Forward, The Supreme Court, 1995 Term: Leaving Things Undecided*.

For Carl Schmitt, as we saw in chapter three, such moves expose the reality and, more bluntly, the hypocrisy of liberalism. To explain: according to Schmitt, although liberalism attempts to stage itself as a non-violent/neutral philosophy of humanity, it is doomed to repeat the violence to which it is opposed, regardless of whether it adopts a pacifistic/passive approach to governance, or a more robust, interventionist one. In *The Concept of the Political*, Schmitt explains this point with respect to liberal foreign policy, suggesting, on the one hand, that a liberal-pacifist state is an enemy to its own people, since it abandons them in the face of real enmity, and, on the other hand, that a liberal-interventionist state is apocalyptic, since it turns its enemies from mere competitors into inhumane and even inhuman monsters – enemies not merely of the state but of *all humanity*, and all "civilization."[3]

Domestically, we encounter the same problem. On the one hand, a liberal state may oppose violence by taking a "laissez-faire" approach to lawmaking, which embraces the right of individuals to self-regulate, whether in the political realm, via majoritarian voting, or the economic realm, via the facilitative rules of the free market. On the other hand, and insofar as such an approach risks abandoning individuals to the adverse effects of de- or under-regulation, a liberal state may simultaneously wish to insist that there are moral or "constitutional" limits on individual self-governance, with the challenge then being to explain why these limits are *still* a matter of individual self-governance, despite acting as a brake on the will of real people, expressing themselves democratically, or economically.

So: liberals believe in individual self-governance, but such self-governance is blocked by both strong and weak conceptions of state sovereignty, with a strong, moralistic state treating the dissent of decent citizens as irrelevant, and a weak, anti-moralistic state abandoning its citizens to the vagaries of political and economic power. In this sense, liberalism seems unable to deliver what it promises – i.e. individual self-governance – but instead seems doomed 1) to "shuttle back and forth" between interventionism and non-interventionism, and 2) to present this shuttling, for the sake of its own legitimacy, as somehow tied to a logic of individual self-governance, a logic which, in Rawls's work, is linked to the device of the "reasonable and rational" person: a person who is apparently derivable from liberal-democratic culture, but whose decisions will often cut against the grain of *real* culture, and the real wishes of decent, well-meaning people.

[3] One of the best accounts that I have seen of this gesture in modern politics is Wendy Brown's analysis of the Bush Administration's post-9/11 discourse in WENDY BROWN, REGULATING AVERSION: TOLERANCE IN AN AGE OF IDENTITY AND EMPIRE (at 1-24). For an example of a de-humanizing liberal discourse (also targeted by Brown), see Samuel Huntington, *The Clash of Civilizations*.

With these observations in mind, I moved in the last chapter to consider what a post-Schmittian or "Schmittified" liberalism might look like, i.e. a liberalism that accepts Schmitt's critique, but remains opposed to his normative solutions. As a response, I suggested that the work of Duncan Kennedy and Jacques Derrida offers some appropriate guidance, specifically insofar as it presents something like an "immanent critique" of liberalism: a critique that accepts the normative foundations of liberalism, but questions the capacity of liberal theory and practice to deliver on (or remain faithful to) those foundations. In this regard, the common ground that Kennedy and Derrida share is their rejection of liberalism's normative closure. To be sure, theoretical consistency (or closure) is not completely unimportant, but what Kennedy and Derrida suggest is that we buy such consistency only at the expense of a faithful commitment to liberalism's core value, which can be variously defined as human dignity, the negation of sovereignty, hospitality (Derrida), or "the goal of individual freedom" (a la Kennedy) – all amounting to the same thing.

In an article on civil disobedience and political liberalism, I presented a similar idea in more polemical, emotive terms. Liberalism, I said, loses its "soul"[4] when it places normative closure before the possibility of a radical reengagement with its normative foundations, because normative closure is in a certain sense precisely what those foundations oppose, at least insofar as they are understood in terms of a certain, dignitarian opposition to *objectification*. The point, to appropriate the terminology of Ronald Dworkin, is that liberalism cannot become too neatly wed to a particular "conception"[5] of human dignity when the "concept"[6] of human dignity itself is suspicious of all conceptions of justice, and all resolutions of the standards by which we ought to live. To be sure, this "anti-conceptionism" is not the only logic that one finds at work in the concept of human dignity in Western law today, but it is on my reading its innermost ideal, just like "pure hospitality" is for Derrida *the* law of hospitality against which all other "laws (plural)"[7] must be assessed.

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[4] See Richard Mailey, *Political Liberalism and Civil Disobedience: The Morgentaler Affair, Revisited* – at 282. As I explained there, when liberalism refuses to reengage with its normative foundations, it "loses its soul; the flicker of authentic concern that connects it to the material world, and to the material reality of human suffering." See also the introductory chapter of this thesis.
[5] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY – especially at chapter five, "Constitutional Cases," where Dworkin explains his distinction between concepts and conceptions.
[6] Ibid.
[7] JACQUES DERRIDA, OF HOSPITALITY – at 77.

Here, I sense an objection, though. Because if "anti-conceptionism" – and more generally, an opposition to objectification – is the innermost ideal implied by liberalism's commitment to human dignity, then don't we lose the ability to say that any political decision, or any institutional arrangement, is better than any other? To borrow Scott Veitch's phrasing, do "postmodern"[8] approaches to legal theory, like Kennedy's mpm leftism, and Derrida's deconstruction, end up in a situation of "serious fence-sitting,"[9] bluntly incapable of telling us anything about how to order our constitutional community, how to conduct ourselves within it, or how to respond to tensions between law and social need (amongst other things)? Does Derridean "undecidability" not imply that all of these questions are quite simply undecidable? Or is there – despite appearances to the contrary – some way to link Derrida's emphases on undecidability and the impossibility of justice to a more concrete set of institutional and political prescriptions: a set of prescriptions that could at least function as a "baseline" from which institutional actors (like judges) could begin their work (even if such work should always include an understanding of baselines as provisional, specifically insofar as they can never dampen the call of another, more insistent "justice," a justice that is imperfectly captured or even thwarted by precisely those baselines).

In this chapter, I try to present an affirmative answer to this last question by assessing what I am calling the "poetical" liberal credentials of constitutional jurisprudence in three, quite different jurisdictions: Canada, South Africa and the United States. The aim, very simply, will be to show that a "poetical" liberal assessment of constitutional decision-making does not render all things equal, or reduce all forms of politics to indistinguishable violence (as some have claimed vis-à-vis Kennedy and Derrida). To be sure, one of the principal aims of my "poetical" liberalism is to remain attentive to the violence that will inhere in every political/legal decision, but, as the reader may recall, it also carries a preference for a particular, political attitude: namely, a sense of ambivalence with respect to one's own sovereignty, an ambivalence that, to state my hypothesis up front (and briefly), I associate with the "dialogic constitutionalism"[10] of the modern Canadian system.

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[8] See Scott Veitch, *Law and "Other" Problems* – at 97. For a comprehensive review of "postmodern" approaches to legal theory, see COSTAS DOUZINAS AND ADAM GEAREY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE.

[9] Ibid (Veitch) at 97.

[10] The paper that is often credited with "discovering" the link between the Canadian system and a certain idea of "democratic dialogue" (or "dialogic constitutionalism") is Peter Hogg and Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights isn't Such a Bad Thing After All).* The most comprehensive study, though, is arguably Stephen Gardbaum's book, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM.

With this in mind, the chapter will proceed in five sections. The first section will look at a number of landmark cases decided by the US Supreme Court – most notably *Lochner v. New York* (1905) and *Roe v. Wade* (1973) – and will criticize these cases as archetypical representations of a "juristocratic"[11] system of law, i.e. a system of law in which the judiciary embraces a politics of zeal, and uncritically embraces its own role as the final arbiter on constitutional meaning. In the second section, this "juristocratic" situation in the US will be contrasted, starkly, with the legal situation in Canada, which mixes a justiciable, fully constitutional bill of rights with an internationally novel "notwithstanding clause," allowing legislatures to explicitly opt-out of rights commitments that they don't like, including commitments placed on them by a court of law. After providing a brief overview of the Canadian system, section two will ultimately focus its attention on the Canadian Supreme Court's version of the American *Roe* decision, *R v. Morgentaler*. On this front, my key claim will be that the Canadian Supreme Court comes much closer than the American one to poetical liberalism, specifically insofar as it walks a careful line between 1) the imperative of preventing preventable suffering, and 2) the imperative of giving elected officials (as representatives of the wider public) room to carve out their own moral trajectory. This approach, coupled with the structural features of the Canadian Constitution mentioned above, makes Canada a plausible candidate for a poetical liberal system, at least in the sense that it reflects a basic attentiveness to the tension between zeal and abandonment.

In sections three and four, I then turn my attention to the problem of whether and how constitutional rights should be given horizontal effect (also known as the "state action" problem in the United States), with the aim of showing that a dialogic approach can again address many of the worries and tensions that led the American scholar, Charles Black, to call the horizontality question a "conceptual disaster area."[12] In section three, I begin again in America, with the USSC's efforts to wrestle with the horizontality question in its jurisprudence on racial equality. I then turn back, in section four, to Canada, and to the Canadian Supreme Court's clumsiness in trying to achieve a more balanced perspective than the USSC on the question of horizontal effect – a clumsiness that, I argue, was actually completely unnecessary in the context of Canada's dialogic system.

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[11] See RAN HIRSCHL, TOWARDS JURISTOCRACY. See also Ran Hirschl, *Juristocracy – Political, not Juridical* – presumably a play on Rawls's *Justice as Fairness: Political not Metaphysical*.

[12] See Charles Black, *The Supreme Court, 1966 Term, Forward: State Action, Equal Protection, and California's Proposition 14* – at 95.

This leads finally to section five, in which I look at how South Africa's Constitutional Court has dealt with socio-economic rights claims under its post-apartheid Constitution (1996). In short, the Court has responded to concerns over its lack of democratic legitimacy and economic expertise by adopting, more or less wholesale, a standard of review proposed by the late law professor, Etienne Mureinik. The essence of Mureinik's approach is that courts should not interfere with the economic priority-setting of elected government, except where that priority-setting is unreasonable in the sense that it can't be tied to any reasonable interpretation of the state's constitutional responsibilities (and more specifically, of the state's constitutional responsibility to provide socio-economic security to its citizens). Following this approach, the SACC has refused to interfere with a decision not to fund dialysis treatment in all cases where it is required to maintain life (*Soobramoney*), but has demanded that the government restructure a public housing plan that made no clear provision for people in desperate need of temporary shelter (*Grootboom*). On the one hand, the nuance and balance of the Court's approach in these cases is admirable, but, on the other hand, it has often been quite fairly accused of descending into deference, or "deference-lite,"[13] with the Court giving too much leeway to elected government even where it has done a poor job of fulfilling the most dire, urgent socio-economic needs that one could imagine.

In the end, although the main idea behind all five of these sections is to suggest that a poetical liberal perspective does not render all forms of political violence equal, I have another, more presentational motive: namely, to provide a foothold in my thesis for readers with little knowledge of legal theory as a distinct discipline. To be sure, the theoretical density of my thesis so far is something that I make no apology for, but, by the same token, there is surely something wrong with a theory that doesn't comply with an at least modest standard of inclusivity, so that anyone with a decent knowledge of "the field" (of legal practice, in this case) can follow it. Indeed, is this not especially the case here, in a thesis that accuses liberalism of an elitist withdrawal from the concerns and experiences of real people? Granted, no discourse can bring everyone into the fold, but does it follow from this impossibility that one can stop trying, and relinquish one's sense of responsibility to "the other?" One may surely guess how a Derridean might respond to this question, but for now, let us leave aside such speculation, and proceed to the first section of the chapter, below.

[13] I borrow this phrase from the title of Dennis Davis's paper, *Adjudicating the Socio-economic Rights in the South African Constitution: Towards Deference Lite?*

I. *Roe v. Wade* and the Ghost of *Lochner*

Before we consider the US Supreme Court's infamous *Roe* decision, I should briefly mention two key moments in the Court's (and the nation's) history that "haunt"[14] and inform contemporary debates over the practice of judicial review. The first, glaringly obvious moment is the Court's decision in *Marbury v. Madison*, which created "strong-form judicial review"[15] in the US – i.e. the capacity of the US Supreme Court to strike down pieces of ordinary legislation that conflict with the Constitution, as interpreted by the Court. To be sure, this does not "technically" mean that the USSC is the final arbiter on questions of constitutional meaning, since the Constitution provides for its own, popular amendment in Article V. However, and crucially, the raised majorities required by Article V for the Constitution's formal amendment make it unlikely that *divisive* Supreme Court decisions will be reversed, except where the Court itself changes tack, either due to political pressure (as with its famous "switch in time"[16] in the late 1930s), or shifts in ideology due to new Presidential appointments to the Court.

This is the first key point: that USSC decisions on constitutional questions are often *final*, in effect if not quite as a matter of law. The second point, then, as promised above, involves a period of US constitutional history known as the "Lochner era." Although I referred to the Lochner era briefly in the last chapter, we can/should go into more detail now, since the shadow of *Lochner* looms large not only over US constitutional law generally, but also and more specifically over the USSC's decision in *Roe*. According to Sujit Choudry, the Lochner era began in 1897, with the case of *Allgeyer v. Louisiana*, in which the USSC held that the Due Process Clause of the Constitution's Fourteenth Amendment – which declares that no "State" shall "deprive any person of life, liberty, or property without due process of law"[17] – protects an individual's contractual liberty, and empowers courts to invalidate "unreasonable"[18] deprivations of that liberty (a form of review that is typically referred to as "substantive" due process review).

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[14] Numerous law review articles refer to *Lochner v. New York*, discussed below, as a case that "haunts" American law. See, for example, Bruce Ackerman, *A Generation of Betrayal* (at 1523), or Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*.

[15] See, for example, Mark Tushnet, *Alternative Forms of Judicial Review* – especially at 2782.

[16] For a full account of the Court's so called "switch in time," see BRUCE ACKERMAN, WE THE PEOPLE, VOLUME II: TRANSFORMATIONS. For a more concise account, see Ackerman, *A Generation of Betrayal* – especially at 1531-1536.

[17] The full text of this provision is available here: https://www.law.cornell.edu/constitution/amendmentxiv.

[18] See *Allgeyer v. Louisiana* 165 US 578 (1897).

Eight years later, this approach received its most famous and canonical formulation in the case of *Lochner v. New York*, the evident namesake of the ensuing "era." *Lochner* concerned the constitutionality of a New York statute that limited the working hours of bakers to sixty a week, and ten in a day. Writing for the majority, Justice Peckham – who also wrote the majority opinion in *Allgeyer v. Louisiana* – claimed not only that New York's law violated the individual's contractual liberty, as protected by the Fourteenth Amendment via the *Allgeyer* decision, but also that it exceeded the bounds of substantive *rationality*, regardless of whether it was understood as a "labor law or a health law"[19] (or, indeed, as any other kind of law). Here is an illustrative quote from Peckham's opinion:

> "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State."[20]

From a separation of powers perspective, this looks like a clear usurpation of legislative authority, with Peckham inserting his own judgment of the New York law's merits for that of the New York legislature. Of course, this does not, in itself, render Peckham's decision unwarranted, since the US is a "dualist democracy,"[21] in which ordinary legislation is vulnerable to constitutional critique. The problem, though, is that Peckham's opinion is hard to present as a *constitutional* critique – i.e. as a critique rooted in the text of the US Constitution. On the contrary, the Constitution says nothing to suggest that contractual liberty is the effectively *unassailable* good that it seems to be for Peckham, even if other provisions of the Constitution – most notably Article 1's "Contracts Clause"[22] – mark it out for some kind of special protection.

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[19] This phrase is taken from Cass Sunstein's summary of *Lochner* in his paper, *Second Amendment Minimalism: Heller as Griswold* (at 254). For the original passages to which Sunstein is referring, see *Lochner v. New York* 198 US 45 (1905) – especially at 54-64.

[20] *Lochner v. New York* 198 US 45 (1905) at 57.

[21] I have already used this term in relation to Rawls's theory of political liberalism (see chapter two), but it is worth noting that Rawls borrows it from Bruce Ackerman. See, for example, Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*.

[22] The full text of this provision is available here: https://www.law.cornell.edu/constitution/articlei#section10.

Given this silence, the silence of the Constitution, one may evidently wonder why and how Justice Peckham came to denounce New York's working time law as unconstitutional. The answer, quite simply, is that Peckham (and his six judicial supporters) failed to see any "ambiguity" in the Constitution's highly abstract commitment to "liberty." In this regard, Peckham essentially "de-hermeneuticized"[23] the Constitution's commitment to liberty, which is to say that he naturalized a particular conception of liberty, namely, an *individualistic* conception of *economic* liberty, as the only reasonable/rational interpretation available. Today, this type of thinking – this type of constitutional *fundamentalism*, to put it frankly and pointedly – is viewed by most as constitutional anathema in the United States. Ronald Dworkin, for example, describes *Lochner* as the "whipping boy of American constitutional law,"[24] and Cass Sunstein notes the widespread agreement "that *Lochner* was a mistake and even a disgrace"[25] – a stain on the tapestry of American legal history, which has quite rightly served as "negative"[26] precedent since it was finally invalidated in *West Coast Hotel v. Parrish*, some forty, long years after the USSC's initial protection of contractual liberty in *Allgeyer v. Louisiana*.

There is much to say about the Court's eventual invalidation of *Lochner* – its "switch in time that saved nine"[27] – but now is not the time for a history lesson. Instead, let's ask a question that is more relevant to the present thesis: namely, the question of how *Lochner's* legacy appears from a political liberal perspective. Rawls only mentions *Lochner* once in *Political Liberalism*, but this one reference makes it clear that he subscribes fully to *Lochner's* conventional dismissal as a "mistake." More specifically, Rawls associates *Lochner* (as does Sunstein) with the USSC's 1976 invalidation of Federal campaign donation and expenditure limits in *Buckley v. Valeo* – a decision that loudly echoes *Lochner's* insistence on an individualistic, economically-libertarian reading of the Constitution, this time focusing on the First Amendment's protection of free speech.[28]

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[23] I borrow this phrase from a recently published piece by Johan van der Walt, entitled *When One Religious Extremism Unmasks Another: Reflections on Europe's States of Emergency as a Legacy of Ordo-Liberal Dehermeneuticization*. Van der Walt uses the phrase "dehermeneuticization," essentially, to denote a failure to accept what Rawls calls the "burdens of judgment" (see chapter two of this thesis).

[24] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION – at 82.

[25] Cass Sunstein, *Second Amendment Minimalims: Heller as Griswold* – at 254.

[26] See Sujit Choudry, *The Lochner Era and Comparative Constitutionalism* – at 3 ("the Lochner era serves as a negative guide to constitutionalism").

[27] See KENT ROACH: THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE? – at 19.

[28] See *Buckley v. Valeo* 424 US 1 (1976). See also *Citizens United v. FEC* 558 US 310 (2010).

The reason that Rawls links *Lochner* with *Buckley*, and disavows them both, is simple: because *Lochner* and *Buckley* are not decisions that protect liberty over some other, more minor social good, but are rather decisions that decisively shut down *reasonable*, democratic dialogue over the meaning and value of liberty. Crucially, one does not have to be politically opposed to *Lochner* or *Buckley* to feel this way. On the contrary, Oliver Wendell Holmes Jr, whose dissent in *Lochner* is perhaps the most important in USSC history, was a stony social Darwinist (see his now horrifying opinion in *Buck v. Bell*, which affirmed the constitutionality of forced sterilizations), but nonetheless opposed Justice Peckham's *constitutionalization* of an essentially Darwinian opposition to maximum working time laws. In this regard, if Peckham's decision served to "de-hermeneuticize"[29] the Constitution's commitment to liberty, Holmes's dissent marks an immediate attempt to *re-hermeneuticize* that same commitment, i.e. to remind readers that liberty is an abstract value, subject to interpretation:

> "[A]… Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[30]

In chapter one, I suggested that Holmes's political theory is anti-liberal, but this quote finds him remarkably close to Rawls (although further consideration reveals that both his reasoning and his approach to constitutionalism are quite distinct from Rawls's). "A Constitution," Holmes says, is "made for people of fundamentally differing views," and we should be accordingly wary of reading our own views into it, however "natural and familiar" they are to us. Can this not been seen as a rather exacting application of Rawls's principle of public reason, in the specific context of constitutional theory?

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[29] Again, see Johan van der Walt, *When One Religious Extremism Unmasks Another: Reflections on Europe's States of Emergency as a Legacy of Ordo-Liberal Dehermeneuticization*. To quote: "My resort to the word "dehermeneuticization" takes its cue from… [a] profound address given by Navid Kermani… [in which]… Kermani describes the way in which Islamic cultures in many Arabic states have hardened into non-interpretative modernist fundamentalisms that break away from the interpretative traditions of cultural, aesthetic and textual engagement with the Koran that informed earlier Islamic cultures." (see part two of Van der Walt's article).

[30] Again, see *Lochner v. New York* – at 75-76. See also GE White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent.*

To be a little more precise, Holmes thought that the Constitution should not be used to strike down pieces of democratic legislation except in cases of extreme and clear violation: hence his famous suggestion of a "puke test"[31] for a law's constitutionality ("Does the law make you puke? *Then* you can strike it down!"). This has been a rather popular idea in the history of American legal scholarship (similar positions appear in the work of James Bradley Thayer, from whom Holmes took direct inspiration, and Alexander Bickel), but it is an idea that would lead, as Sunstein notes – and as Rawls would surely have agreed – to "the abandonment of constitutionalism itself,"[32] specifically insofar as it would insulate the vast majority of laws from constitutional critique.

Of course, avoiding constitutional critique was not a problem for Holmes, because, as noted earlier, *Holmes was not a liberal*, according to my definition. On the contrary, Holmes was a social Darwinist who favored legislative responses to social problems not because he saw any "dignity"[33] in democratic legislation (or alternatively, because he saw democratic legislation as having a special capacity to protect individual rights), but rather because he saw legislation as a "litmus test for the balance of political power in a society,"[34] and because he thought that society would prosper when power was able to flow and adapt freely, without the moralistic impediments of a "thick" or substantively overstuffed constitution.

This "abandonment of constitutionalism" is a textbook example of what I have been routinely calling a "politics of abandonment" – a politics which asks judges (and citizens) to tolerate injustice, and violations of human dignity, as a rule (or rather, as far as one can without puking, in Holmes's terms). According to the argument that I have been making, this cannot be the basis of a liberal theory of law, since it will yield and legitimize results that fly in the face of human dignity, the first principle of liberalism as defined here. Perhaps obviously, this raises the question of whether *Lochner* can be defended, despite its zeal, and its failure to comply with public reason, as an attempt to embody and deliver a sense of (dignitarian) justice that exceeds the bounds of public reason. Does *Lochner* represent the pursuit of a singular justice beyond law, and, more specifically, beyond the apparent fairness of democratic legislation?

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[31] I take this reference to Holmes from Richard Posner, *Pragmatic Adjudication* – at 2. See also RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION – at 341.
[32] "The Holmesian position, reflected in some traditional thinking about Lochner, would amount to an abandonment of constitutionalism itself." See Cass Sunstein, *Lochner's Legacy* – at 906. For a fuller account of Sunstein's views on constitutionalism, see CASS SUNSTEIN, THE PARTIAL CONSTITUTION.
[33] See JEREMY WALDRON, LAW AND DISAGREEMENT – especially at 19-146.
[34] Richard Posner, *The Rise and Fall of Judicial Self-Restraint* – at 526.

Such a thought is hard to defend, for several reasons. Firstly, and as already noted, the US Supreme Court's constitutional decisions tend to carry an air of finality (due to the *Marbury* decision, as well as the extreme difficulty of passing Article V amendments), and this means that they often shut down political/democratic conversations on justice, and render the Court's favored conceptions of justice practically if not legally incontestable. Secondly, it is hard to conceive of *Lochner* as bearing any relation to human dignity, even if it squares with a certain conception of individual (and especially *individualistic*) autonomy. The key question, in this regard, is the question of who benefits from decisions like *Lochner* or *Buckley*. And the answer, I think, is quite simple: far from favoring "discrete and insular minorities"[35] – i.e. vulnerable, disempowered individuals/groups – decisions like *Lochner* and *Buckley* reinforce, precisely, patterns of economic domination and inequality that make a mockery of the American state's commitment to human dignity. Indeed, one may wonder whether the existence of decisions like *Lochner* and *Buckley* in the American canon exposes the material falsity of what I claimed, ambitiously, in chapter one: namely, that the United States counts as a dignitarian legal order alongside the likes of Germany, or South Africa. To be sure, *Lochner* may have been overruled, and fixed as a "negative"[36] precedent, but the sitting Roberts Court has now expanded *Buckley* with its infamous *Citizens United* decision, and it is unlikely – given that Donald Trump and a Republican Senate are responsible for filling the late Justice Scalia's seat on the Supreme Court – that this decision will be reversed anytime soon. Is this just an aberration? Or does it tell us something deeper, something less fleeting, about the American psyche?

These are interesting questions. But we must leave them to one side. The important point that we can take from the preceding pages is that *Lochner* is hard to view as a dignitarian/liberal break with public reason, because it is simultaneously too final, and too complicit in a politics of socio-economic abandonment. Can a *Lochner*-esque break with public reason avoid these traps? I believe that it can, but as we will now see, such avoidance becomes tricky where serious moral controversies are at stake.

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[35] As scholars of US constitutional law will know, this phrase is drawn from Justice Stone's infamous "footnote four" in *US v. Carolene Products*. Although not binding in itself, footnote four went on to have a tremendous influence on the development of constitutional jurisprudence, with the USSC eventually taking up its suggestion that higher standards of judicial scrutiny "may" (and I stress: the original note only says "may") be necessary where democratic processes are not functioning, or where "discrete and insular minorities" – society's permanent losers – are under attack. The former claim became the focal point of John Hart Ely's renowned book, DEMOCRACY AND DISTRUST, and the influence of the latter claim is described in Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*.

[36] See Sujit Choudry, *The Lochner Era and Comparative Constitutionalism* – at 3.

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Lochner-esque activism had died, and was quite well buried, by the time of the Second World War. However, its "ghost" would rise again quickly, first in the USSC's jurisprudence on racial equality (see *Brown v. Board of Education*), and then, more directly, in a series of decisions that followed the Lochner Court in assessing the *substance* of legal restrictions on individual liberty, as protected by the Fourteenth Amendment's Due Process Clause. This time, the liberty at stake was not economic, but personal/private. In 1965's *Griswold v. Connecticut*, for example, the USSC struck down a state law prohibiting the use and sale of contraception, on the grounds that it intruded upon an implicitly protected "zone of privacy created by several fundamental constitutional guarantees,"[37] including the First Amendment's protection of free association, and the Fourth Amendment's prohibition of "unreasonable searches and seizures."[38] For Justice Douglas (author of the somewhat clunky, majority opinion), the latter provision was effectively, if not explicitly, key, since criminalizing contraception would run the risk of allowing "police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives."[39]

Seven years later, in *Eisenstadt v. Baird*, the physical space that Douglas sought to protect in *Griswold* – the "sacred precincts of marital bedrooms" – was refashioned as a space of decisional, mental autonomy. Writing for the majority, Justice Brennan observed that the right of privacy invoked in *Griswold* could only take on a distinct meaning if it was viewed as the "right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[40] Aside from shifting focus from the sanctity of the bedroom to the sanctity of "reproductive autonomy,"[41] this move also dropped Douglas's insinuation, in *Griswold*, that there was something especially sacrosanct about *marital* relations. In a sense, then, Brennan completed the merely incremental first steps of *Griswold*, translating its somewhat clumsy insinuations into a more rounded, *individual* right of privacy.

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[37] *Griswold v. Connecticut* 381 US 479 (1965) at 485.
[38] Ibid at 484. For a helpful discussion of *Griswold*, and the evolution the "right to privacy" that it announced, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW – at 921-934. One important development in this area that Tribe's study doesn't cover (because it was written before it took place) is the USSC's eventual recognition that the right to privacy, proposed in *Griswold*, covers an individual's right to engage in consensual sex with a same-sex partner. See *Lawrence v. Texas* 539 US 558 (2003).
[39] *Griswold v. Connecticut* – at 485.
[40] *Eisenstadt v. Baird* 405 US 438 (1972) at 453 (Justice Brennan).
[41] See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW – at 922.

According to the Harvard-law scholar Cass Sunstein, this is how constitutional change *should* take place: incrementally, and cautiously. For Sunstein, *Griswold* is – despite its contested reliance on an "unenumerated"[42] right to privacy – a classic example of such an approach, for several reasons. For example, drawing on Alexander Bickel's notion of "desuetude,"[43] Sunstein suggests that the old age and scant enforcement of Connecticut's anti-contraception law reflected how "wildly out of step… [it was]… with prevailing social norms,"[44] to the point where its democratic legitimacy may be taken to have "lapsed."[45] Alternatively, following Richard Posner, Sunstein suggests that the *Griswold* Court may have been taking out the trash, and taking reasonable action against a law that was basically a moral "outlier,"[46] "fatally out of step with the national consensus"[47] of the day. Either way, Sunstein's point is surely well summarized by Charles Black, who wrote that:

> "[Griswold]… is not so much a case that the law tests as a case that tests the law. If our constitutional law could permit such a thing to happen… [i.e. the criminalization of contraception]… then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material."[48]

From the perspective of the present study, and from the perspective of what I have called "poetical" liberalism, Black's statement can be taken as a reminder that liberal constitutionalism becomes redundant when it courts a politics of abandonment, i.e. when it tolerates all but the most obvious violations of *clear* constitutional norms. The only proviso – as Sunstein stresses – is that Supreme and Constitutional Courts must be persistently mindful of the opposite vice, the vice of exhibiting a "zeal for… truth" in spite of national disagreement. And unfortunately, the USSC lacked such mindfulness when it continued to extend its privacy jurisprudence in 1973, one year after *Eisenstadt*.

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[42] For a discussion of "unenumerated" rights (rights lacking explicit recognition in a legal text) and their legitimacy, see either Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, or Frank Michelman, *Unenumerated Rights Under Popular Constitutionalism*.
[43] See Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold* – at 261.
[44] Ibid.
[45] Ibid.
[46] Ibid
[47] Ibid. I find myself wondering whether this rationale is really so different from Sunstein's first rationale, on the law's "desuetude." I suppose the difference is that the key aspect of the first rationale is the law's disuse, while the latter, Posnerian rationale focuses on the need for laws are not *too* contrary to communal values.
[48] Ibid.

The offending case, of course, was *Roe v. Wade*, and the result is well known. In short, the *Roe* Court affirmed a woman's constitutional right to abortion, and held that there are no "compelling state interests"[49] – including the protection of fetal life – that would warrant legal limits on this right in the first trimester. Unlike *Griswold* and *Eisenstadt*, which affirmed the generally uncontroversial and then widespread use of *pre-conception* contraception, *Roe* waded into a thick, hot-button moral dispute over a practice that many Americans abhorred, especially in states like Texas and Georgia, whose laws were at issue in *Roe* and its companion case, *Doe v. Bolton*. Remarkably, the USSC actually noted the depth of this disagreement in the opening pages of its decision, before it eventually trampled over one of its poles. To quote Justice Blackmun's majority opinion:

> "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."[50]

A few lines after this concession, Blackmun offers a nod of approval to the passage that I quoted earlier from Holmes's dissent in *Lochner* – the passage which insists that a "Constitution is made for people of fundamentally differing views." In essence, then, the Court begins by noting that the country is fundamentally divided on the question of abortion, and by agreeing with Holmes that the Constitution is made for – and must speak to – both sides of this division. Astonishingly, this nod to Holmes then gradually gives way to Peckham-esque fundamentalism, with the Court declaring that the fetus is not a "constitutional"[51] person, and that it is therefore appropriate to decide the case purely in terms of a woman's right to decide for herself "whether to bear or beget a child."

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[49] See *Roe v. Wade* 410 US 113 (1973). The specific reference here is to the USSC's "strict scrutiny" test, which is used to assess the constitutionality of laws involving violations of fundamental rights, or "race-based classifications" (gender-based and other classifications do not allow for strict scrutiny), and which allows for violations or classifications if they 1) serve a "compelling state interest," and 2) are "narrowly tailored" to achieving the realization of that interest.

[50] Ibid (Justice Blackmun's opinion) at 116.

[51] Ibid at 156-162. See also RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION – at 46-50.

Never mind, I suppose, that the "personality" or "personhood" of the fetus was (and is) one of the key points of contention in the abortion controversy. The Court apparently thought that it could rise above the abortion controversy by confining itself to constitutional interpretation ("Is the fetus a *constitutional* person?"[52] as opposed to "Is the fetus a *moral* person?"). Really? To be sure, many of the Constitution's provisions make little or no sense when applied to the unborn, but the Constitution does not – on my understanding – insist on its own moral "integrity,"[53] or on the kind of holistic approach to constitutional understanding that would make this inconsistency decisive. On the contrary, one can surely claim that the Constitution's failure to *explicitly* define personhood, and its failure to *explicitly* rule out the "constitutional" personhood of fetal life, is enough to render the Court's decision rather overzealous and presumptive (*especially* since a large block of the American "People" believed and still believe, sincerely, that their national identity requires respect for fetal personhood – that abortion is a case, to quote Charles Black again, "that tests the law," i.e. the legitimacy of the Constitution).

A defender of *Roe* might shoot back here: to affirm the constitutional personhood of the fetus is not only to thwart the protection of a woman's right to reproductive autonomy, but also and more troublingly to tilt the balance towards an overzealous constitutional *requirement* that abortion be criminalized in some circumstances (as the German Constitutional Court argued a few years after *Roe*, in its *Erste Abtreibung* decision). Why, though, would this "tilt the balance" the other way? On the contrary, would abortion not then become a constitutionally insoluble clash of life and liberty, a clash that, due to its constitutional insolubility, could only really be resolved on a state-by-state basis?

I leave this question open. Suffice it to stress that there is a rather *Lochner*-esque depth to *Roe*, even before it actually starts balancing the state's "interest" in regulating fetal life with a woman's "fundamental right" to reproductive autonomy. The point is that this way of framing the issue – as a clash between a "fundamental right" and a mere "state interest" – is already to wish away and repress the very basic dispute that abortion raises vis-à-vis American, constitutional identity. More bluntly, if half the country thinks that the fetus *must* be a constitutional person, then dismissing that claim on the basis of the Constitution's *insinuations* to the contrary is a little tricky, to say the least.

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[52] See my references to Frank Michelman's "two proceduralizations" of constitutional law in chapter one, taken from Frank Michelman, *Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests* – at 194-197.

[53] Ronald Dworkin, of course, would disagree with this claim. See DWORKIN, LAW'S EMPIRE.

This is not to say, of course, that the Court should have recognized the constitutional personhood of the unborn. Quite the opposite, actually, since such a declaration would have been a zealous move against the *other* half of the country (although it would not necessarily, as suggested, require the criminalization of abortion, since it would produce a clash of fundamental rights that the Constitution's text doesn't cleanly or clearly resolve). My only point is that the Court errs when it claims to offer a "neutral" interpretation of constitutional personhood, since the reality is that this "neutral" interpretation makes it hard for many decent, well-meaning Americans to identify with a Constitution – or rather, a body of binding, constitutional law – which is meant to be (and presents itself as) "theirs."[54] To quote Holmes again, a "Constitution is made for people of fundamentally differing views,"[55] and its legitimacy will accordingly become more and more strained where it begins to reflect one set/block of these "fundamentally differing views" too clearly.

That being said, I have already criticized Holmes's theory of constitutional review for essentially immunizing the flow of political power from constitutional critique, bar in the most extreme cases. A "poetical" liberalism, as I have already noted, cannot abide by a normative theory like Holmes's: a theory that preaches and necessitates a judicial presumption in favor of political abandonment. With this in mind, the clear question that presents itself is whether *Roe* can be justified as a sincere attempt to avoid this vice – i.e. the vice of political abandonment – despite its Peckham-esque zealousness.

Here, the *Roe* Court is a long, long way from *Lochner*. To explain: as the reader will recall, Peckham's decision in *Lochner* is hard to present as anything but a decision which reinforces the abandonment of vulnerable citizens – i.e. workers (and more specifically, overworked bakers) – to the potentially abusive demands of economically advantaged, under-regulated employers. By contrast, *Roe* is undeniably a decision that at least strives to avoid such abandonment, i.e. the abandonment of women desperate to end their unwanted pregnancies. It is well worth quoting a lengthy passage from Ronald Dworkin, one of *Roe's* most vociferous defenders, on this point:

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[54] The point that I am making here comes very close to John Hart Ely's critique of *Roe* in his paper, *The Wages of Crying Wolf: A Comment on Roe v. Wade*. As the reader may know, Ely is most famous for his book, DEMOCRACY AND DISTRUST, which argues that judicial intervention is only legitimate under the US Constitution when it is "representation-reinforcing," i.e. where it improves the functioning of majoritarian democracy, perhaps by invalidating laws that restrict a particular group's ability to vote (recent voter ID laws in the US seem like a good example). As should be clear, *Roe* is very hard to see this way, since it serves to overrule a product of the democratic process, with no clear, *democratic* reason for doing so.

[55] Again, see *Lochner v. New York* 198 US 45 (1905).

> "A woman who is forced by her community to bear a child she does not want is no longer in charge of her own body. It has been taken over for purposes she does not share. This is a partial enslavement, a deprivation of liberty vastly more serious than any disadvantage citizens must bear to protect cultural treasures or to save troubled species. The partial enslavement of a forced pregnancy is, moreover, only the beginning of the price a woman denied an abortion pays. Bearing a child destroys many women's lives, because they will no longer be able to work or study or live as they believe they should, or because they will be unable to support that child. Adoption, even when available, may not reduce the injury. Many women would find it intolerable to turn their child over to others to raise and love. Of course, these different kinds of injury are intensified if the pregnancy began in rape or incest, or if a child is born with grave physical or mental handicaps. Many women regard these as not simply undesirable but terrible consequences, and would do almost anything to avoid them. We must never forget that a great many abortions took place, before *Roe v. Wade*, in states that prohibited abortion. These were illegal abortions, and many of them were very dangerous. If a woman desperate for an abortion defies the criminal law, she may risk her life. If she bows to it, her life might be destroyed, and her self-respect compromised."[56]

It is hard to fathom how anybody who cares remotely about protecting individual liberty, or about the abatement of human suffering, could deny the force of this passage. "Enslavement" is just the start of it, says Dworkin, just the first shot in a cocktail of horrors that awaits women desperate for abortions in so-called "pro-life" states. Of course, even if they agreed with this claim, devout pro-lifers may counter that this cocktail of horrors does not outweigh the horror of abortion, which they see as a callous taking not only of life, but of the most innocent, vulnerable materialization of human life imaginable. A liberal may double back: I hear you, loud and clear, but given that we disagree on that count, and assuming that we agree about the very severe suffering that abortion laws inflict on (especially poorer) women, is it not appropriate that our Constitution reflects and requires a "reasonable balance"[57] (as Rawls puts it) of the political values at stake – a reasonable balance that, following the decision in *Roe*, provides women with a "duly qualified"[58] right to early term abortion, and permits regulation and eventually criminalization as the pregnancy progresses?

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[56] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION – at 98. I assume here, hopefully not too abruptly, that even pro-lifers will accept much of Dworkin's analysis in this passage, even if they ultimately disagree about the appropriate societal response.
[57] JOHN RAWLS, POLITICAL LIBERALISM – at 243 (Rawls's abortion footnote, discussed earlier).
[58] Ibid.

My critique of Rawls's footnote on abortion already summed up my position on this question. Put simply, if this is your line, as a liberal, then I understand, and I applaud your readiness to take such a stand. However, as should now be clear, a "poetical" or "deconstructive" liberalism will deny you the right to find any final solace in your stand, or to claim it as non-violent, i.e. as anything less than a *stand*. On the contrary, your stand may have moved admirably against the abandonment of vulnerable women, but only at the cost of abandoning a block of citizens who find a different gesture of abandonment precisely in your own move against abandonment. Worse still, if your claim is that women have a *constitutional* right to abortion, however qualified, then you will have claimed your Constitution for yourself, which is to say that you will have endorsed a gap (on one issue at least) between the Constitution and (some of) its "subjects." The same cannot be said of *Griswold*, which overruled a nationally unpopular and out of date law, a law that could be explained only as an attempt to control civic morality, and to impose a particular "comprehensive doctrine" on a whole population. To be sure, strict abortion laws do this as well, but they are also (and I set aside some cynicism when I say this) sincere attempts to protect what we may call a "discrete and insular minority,"[59] a *literally* voiceless minority, i.e. the unborn, that is all the more vulnerable in its effective invisibility.

To conclude, then, I am not saying that *Roe* was *wrongly* decided, but that it was *not rightly* decided (spot the difference). The obvious question that arises with this remark is whether *Roe* could have been better decided from a "poetical" liberal perspective, or whether the abortion question was/is always going to come down to a tragic choice, ultimately, between a politics of zeal and a politics of abandonment. To sketch out an answer this question, we can now shift our focus up North, to Canada, which laid out its own, unique response to the abortion problem just six years after its now globally renowned Charter of Rights and Freedoms came into force in 1982. As we will see, there are important structural and methodological differences between Canadian and American constitutional law that promise a step beyond the zeal-or-abandonment, all-or-nothing character of the American experience. However, whether these structural and methodological differences offer a meaningful/practical break with the American dilemma is another question, and should be borne in mind, carefully, as we consider the Canadian experience below.

[59] This is a reference to Justice Stone's famous "footnote four" in the USSC's *Carolene Products* case, mentioned in an earlier footnote of this chapter. To explain again, then, footnote four suggests that heightened judicial scrutiny may be appropriate in cases of "prejudice against discrete and insular minorities." (quote at 153 of *United States v. Carolene Products* 304 US 144).

II. A Canadian Corrective? The Case of *R v. Morgentaler*

Like the USSC's post-1937 jurisprudence, Canada's enactment of the Canadian Charter of Rights and Freedoms in 1982 was haunted, unmistakably, by the negative precedent of the Lochner era. This is so in a number of respects. Firstly, when one looks at the Canadian equivalent of the US Constitution's Due Process Clause (section 7 of the Charter), two differences are immediately evident: 1) the American phrase "life, liberty, or property" becomes "life, liberty and *security of the person*"[60] in the Charter, and 2) the American phrase "without due process of law" is replaced with the phrase "except in accordance with the *principles of fundamental justice*"[61] in the Charter. As Sujit Choudry points out, numerous statements made in white papers and during parliamentary debates in the years leading up to the Charter's enactment indicate that both of these changes – and especially the omission of the term, "property" – reflected "an awareness of the Lochner era"[62] and a "fear"[63] that it could reoccur in Canada. Prime Minister Pierre Trudeau, for example, referred disapprovingly to the USSC's invalidation of "minimum wage legislation, laws against child labour, and hours-of-work statutes"[64] in an early white paper, and Walter Tarnopolsky, a "leading constitutional scholar"[65] in Canada, told a special parliamentary joint committee in 1978 that there had been "continuing fear"[66] over the possibility that:

> "[The]… Supreme Court… [of Canada would rely on]… the substantive due process interpretation which the American Supreme Court did. A large number of both academic opinion and other provincial officials who have opposed a written bill of rights have pointed to this as a great danger. [So]… this is one of the reasons why I think the property clause was separated from the life and liberty clause with respect to due process of law."[67]

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[60] See Section 7 of Canada's *Constitution Act*, 1982 (my emphasis on "security of the person"), available in full at http://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38. Note: part 1 of the Constitution Act comprises the Canadian Charter of Rights and Freedoms – Canada's first, fully *constitutional* bill of rights.
[61] Ibid (my emphasis).
[62] See Sujit Choudry, *The Lochner Era and Comparative Constitutionalism* – at 16.
[63] Ibid at 20. To quote: "The fear seemed to be that the Supreme Court would become activist and conservative like the US Supreme Court from 1890 to 1937" (see Choudry at footnote 90).
[64] Ibid at 16 (quoting Prime Minister Pierre Trudeau on his disdain for the Lochner era in America).
[65] Ibid at 20.
[66] Ibid (quoting Tarnopolsky's testimony before a special joint committee on the Constitution of Canada).
[67] Ibid.

Tarnopolsky's statement explains why the word "property" was omitted: namely, to lessen the prospect of an "economic" reading of section 7, although one will recall that *Lochner* (along with many of the other key decisions of the Lochner era, such as *Coppage v Kansas* and *Adkins v. Childrens Hospital*) was actually decided in relation to the Fourteenth Amendment's protection of liberty, not property. Initially, it was thought – by Trudeau, and others – that this one change would be enough to keep the ghost of *Lochner* out of Canadian law, but other figures in the debate, like Tarnopolsky, were less sure, specifically insofar as they saw *Lochner's* danger not only in its economic libertarianism, but also in its indulgence in substantive review, or substantive due process. In the end (and as noted above), the Charter's framers chose to replace the apparently tainted phrase "due process of law" – which appeared in earlier drafts of section 7 – with a reference to "principles of fundamental justice." Of course, one cannot miss the "irony"[68] in this new phrase, which, if understood colloquially, or non-legally, seems even more susceptible to a substantive reading than the specific reference to "process" in the American text. However, in the common law world, "fundamental justice" (or "natural"[69] justice) has a very specific, *legal* meaning, encompassing purely procedural requirements like the "rule against bias" and the right to a fair hearing – hence it's inclusion over and above "due process of law," which had by the 1970s become synonymous with the notion of substantive review.

This brings me to the second, somewhat more significant way in which the Charter is haunted by the American experience with judicial review, namely, in its clear resolve to avoid a *general*, American-style system of judicial supremacy. In this regard, two provisions of the Charter are particularly significant: section 1 (which "subjects" Charter rights to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,"[70] and which now represents a standard proportionality test as laid out by the Supreme Court of Canada in *R v. Oakes*) and section 33 (which enables the Federal and provincial legislatures to "insert an express notwithstanding clause"[71] into statutes which do not comply or are not intended to comply with the guarantees laid down in section 2 and sections 7-15 of the Charter).

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[68] Ibid at 21. As Choudry puts it, fundamental justice is a "phrase that, ironically, makes no explicit reference to procedure," thereby offering no additional safeguards (on the surface) against substantive review.
[69] See any textbook on British constitutional law, e.g. AW BRADLEY & KD EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW.
[70] See Section 1 of the Canadian *Constitution Act*, 1982.
[71] Peter Hogg and Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)* – at 83.

The combined effect of these provisions is that although the Supreme Court of Canada has the power, like the US Supreme Court, to strike down legislation that contravenes the Charter, Federal and provincial legislatures are given a wide berth to justify apparent contraventions in open court under the SCC's *Oakes* test (as per section 1 of the Charter). If the SCC accepts the government's justification, then, of course, the legislation stands. But if it refuses to accept the government's justification, the government can still 1) reenact the legislation in a way that no longer falls foul of the *Oakes* test, as applied by the SCC, or 2) reenact the legislation *unchanged*, with an express "notwithstanding clause" inserted, renewable every five years (as per section 33 of the Charter).

Understandably, these arrangements have led some commentators – for example, Peter Hogg and Allison Bushell, in their article, "The Charter Dialogue Between Courts and Legislatures" – to claim that Canadians have essentially carved out a "third" approach to constitutionalism and judicial review, somewhere between the legal constitutionalism of the US system, and the political constitutionalism of the UK system, at least before the UK Human Rights Act came into force in 2000. Hogg and Bushell (and now a range of others) refer to this "third way" as an attempt to foster "democratic dialogue,"[72] or as a "dialogic"[73] approach to constitutionalism. Stephen Gardbaum, on the other hand, calls it a "New Commonwealth"[74] model of constitutionalism, since it has influenced similar changes in New Zealand and the UK. Put simply, the main idea is that courts are empowered to assess the constitutionality of democratic legislation, but final say on whether to accept a legal declaration of unconstitutionality rests with an offending legislature, thereby curbing the so-called "counter-majoritarian difficulty"[75] of judicial review. To quote Mark Tushnet:

> "The mark of weak-form review is not that the scope of judicial review is narrow. [Rather]… the mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run."[76]

[72] Ibid (Hogg and Bushell on democratic dialogue). See also Jennifer Nedelsky and Craig Scott, *Constitutional Dialogue*, or Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?*
[73] See, for example, Mark Tushnet, *Dialogic Judicial Review*.
[74] See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*.
[75] This phrase is taken from Alexander Bickel's classic text, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS.
[76] Mark Tushnet, *Alternative Forms of Judicial Review* – at 2786.

"In the short run" is surely the key phrase here. Because while there is no limit on how many times a legislature can renew a section 33 notwithstanding clause under the Canadian Charter, there is a fair assumption that, as the Charter becomes more and more entrenched in the constitutional imagination of the Canadian "People," the political costs of such derogations will rise, thereby discouraging not only repeated renewals of a particular notwithstanding clause, but also (potentially) reliance on notwithstanding clauses in general. Indeed, this may already be the case, with the notable exception of the blanket notwithstanding clause that Quebec enacted as an initial protest to the Charter, which was passed without its provincial consent. For example, despite popular outrage, Alberta refused to invoke section 33 when the Canadian Supreme Court insisted on including "sexual orientation as a prohibited basis of discrimination"[77] in the Alberta human rights code, in the case of *Vriend v. Alberta*. To be sure, Alberta *did* "subsequently use the… [section 33] override preemptively"[78] when it banned same-sex marriage, but the saga surrounding the *Vriend* case still shows how much political pressure an authoritative court decision can exert on a provincial legislature, regardless of its vehement disagreement with such a decision.

This raises the question: has section 33 made a difference, in practice? There is heavy disagreement on this point, and I can hardly hope to do justice to the debate here. Suffice it to say that, on the one hand, section 33 has now settled into a period of relative "dormancy,"[79] but that, on the other hand, this dormancy is not necessarily or at least not only due to a perception of section 33 invocations as politically untenable. I say this for at least three reasons: 1) because section 33 is still used, from time to time (as in Alberta's preemptive strike on gay marriage), 2) because the SCC has been rather less "activist" than its US counterpart (and hence less susceptible to or worthy of section 33 challenges), and 3) because section 1 will often be an easier, less controversial route for legislatures seeking to address SCC decisions against them – a route which allows them to "tinker" with offending legislation so that it passes the Court's application of the *Oakes* test, even if it still involves an interference with Charter rights.

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[77] Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, accessed as html: http://icon.oxfordjournals.org/content/8/2/167.full (quote from section 4.1). See also *Vriend v. Alberta* (1998) 1 SCR 493.
[78] Ibid (Gardbaum at 4.1).
[79] Ibid.

With that said, and with all of these differences between the American and Canadian systems highlighted, let's look now at how the SCC sought to respect/maintain the "dialogic," democratic spirit of the Charter (as described above) when it issued its version of America's *Roe* decision – *R v. Morgentaler* – in 1988. By then, the Morgentaler "saga"[80] had already been rolling for some time, and it is well worth going into a little bit of detail on this front. To explain: Henry Morgentaler was a physician who had been running unaccredited, illegal abortion clinics in Canada since the late 1960s. Remarkably, he started doing this at a time when the rules on abortion were being markedly *liberalized* in Canada by the government of Pierre Trudeau, the same Prime Minister who eventually spearheaded the adoption of the Charter. In 1969, Trudeau's government amended Canada's Criminal Code to allow abortions under certain, clearly defined circumstances. On the one hand, there was a substantive requirement that the mental or physical well-being of the mother would be risked by the continuation of the pregnancy, and, on the other hand, there was a procedural requirement that the first, substantive requirement be assessed by a special, three-doctor committee (a "therapeutic" abortion committee, or TUC for short) which could be (but were not required to be) set up by an "accredited" hospital.

As one may have predicted, some accredited hospitals refused to use their legal powers to create TUCs, and many TUCs, when they were established, were hesitant to declare that the Criminal Code's substantive requirement had been met. Morgentaler's response to this vacuum was to come out as a public opponent of Canada's apparently "liberalized" abortion law, and to open up an unaccredited and hence illegal abortion clinic in Montreal. This led to a lengthy legal battle with the Quebec government, which Morgentaler ultimately won when – after Morgentaler was acquitted by jury trial for a third and final time, despite his flagrant disregard for the law – the Quebec government announced its intent to cease prosecution. The battle then relocated, with Morgentaler opening new clinics in Ontario and Manitoba, and it culminated, finally, with Morgentaler's second appearance before the Supreme Court of Canada in 1988 (he lost his first case before the SCC in 1975), just six years after the Canadian Charter's enactment empowered the SCC to set aside laws that violated constitutional rights.

[80] For a much fuller account of the Morgentaler saga, see my article, *Political Liberalism and Civil Disobedience: The Morgentaler Affair, Revisisted.* Much of my account there is drawn from Morgentaler's obituary in the Toronto Globe and Mail, at http://www.theglobeandmail.com/news/national/abortion-rights-crusader-henry-morgentaler-revered-and-hated-dead-at-90/article12221564/?page=all. See also Bernard M. Dickens, *The Morgentaler Case: Criminal Process and Abortion Law*.

Although there were a number of questions before the Court, including the question of whether Canada's abortion rules were "*ultra vires* the Canadian Parliament,"[81] Chief Justice Dickson, writing for the majority, confined himself to just one: the question of whether Canada's abortion rules amounted to a legally unjustifiable breach of the Charter's section 7, the analogue of the US Constitution's Due Process Clause. Naturally, this implies a level of proximity between *Morgenatler* and *Roe*, but CJ Dickson was quick to minimize the link, suggesting that the appellants' "American"[82] line of argument should be immediately rejected. As Dickson explained:

> "In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the Charter. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that… [s. 7 encompasses]… a wide ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.
>
> In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a *narrower* [my emphasis] analysis… [since]… I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of Charter interpretation."[83]

At one level, Dickson is embracing something like Cass Sunstein's idea of "incrementalist" or "minimalist" review here, but he is also quite decisively rejecting a line of argument that Sunstein seems to support: namely, the *Griswold-Eisenstadt* position, which emphasizes a "right to privacy" as a fundamental component of a democratic regime, to be fleshed out cautiously – and in line with mainstream public opinion – over time. That this would be a step too far for Dickson shows just how averse the SCC was/is to American-style review, even though, ironically, the Charter's "notwithstanding clause" (section 33) means that this aversion is perhaps less necessary in Canada than in the "juristocratic"[84] US.

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[81] See *R v. Morgentaler* (1988) 1 SCR 30 (at 30). For a detailed critique of the Morgentaler judgment, see Lorraine Weinrib, *The Morgentaler Judgment: Constitutional Rights, Legislative Intention and Institutional Design*. See also KENT ROACH, THE SUPREME COURT ON TRIAL – especially at 19-23.
[82] Ibid (*R v. Morgentaler*) at 51.
[83] Ibid.
[84] The reference here is once again to RAN HIRSCL, TOWARDS JURISTOCRACY (describing systems in which judges often have final say on "mega-political" questions concerning national values).

So: what was Dickson's alternative to a full, American-style interpretation of section 7? The first step was to eschew section 7's broad commitment to liberty in favor of its somewhat more specific guarantee of "security of the person." By the time *Morgentaler* was decided, the SCC had already issued some key rulings on the meaning of this phrase, most notably in the case of *Mills v. The Queen*. Although *Mills* was decided under section 11 of the Charter, it included some important remarks from Justice Lamer, who suggested that section 7's guarantee of security of the person "is not restricted to physical integrity,"[85] but also "encompasses protection against"[86] avoidable and "serious state-imposed psychological stress,"[87] including stress arising from state-sanctioned disruptions of one's private and family life. Crucially, and despite its reference to "privacy," this is not the same as an *Eisenstadt* or *Roe*-style right to decisional autonomy, but is closer, I think, to the ECHR's prohibition of "degrading treatment."[88] The rationale here is surely that while there is quite some disagreement over whether individuals ought to have a general (even if limitable) right to decisional autonomy, most people can agree that "serious," state-sponsored suffering, humiliation, and "stigmatization"[89] is socially undesirable.

Curiously, having strained to avoid the specter of *Roe*, Dickson then proceeded to find a breach of section 7 in the way that the Criminal Code's abortion rules made access to legal terminations conditional on whether a pregnant woman met "criteria entirely unrelated to her own priorities and aspirations."[90] Is this not equivalent to the *Roe* Court's reference to Holmes's dissent in *Lochner*? To explain: as you may recall, Holmes's insistence on the Constitution's capacity to appeal to diverse groups was cited in *Roe*, but ignored. Similarly, what Dickson does here is to double back on his promise to shirk an American, right-to-privacy jurisprudence: because what else can a reference to the primacy of a woman's own "priorities and aspirations" mean, except that she has an effective right to decisional autonomy, a la *Roe*? To be sure, Dickson does reference additional ways in which *specific* aspects of the Criminal Code's abortion framework – for example, its tendency to prevent or delay access to "legally necessary" abortions – may yield mental anguish, but his initial emphasis on "priorities and aspirations" remains strange.

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[85] *Mills v. The Queen* (1986) 1 SCR 863 (at 919). The excerpts from *Mills* on this page are lifted from CJ Dickson's opinion in *Morgentaler* (at 55).
[86] Ibid.
[87] *R v. Morgentaler* (CJ Dickson's opinion) at 56.
[88] See Article 3 of the ECHR, at http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[89] *Mills v. The Queen* (Lamer's opinion) at 920.
[90] *R v. Morgentaler* (CJ Dickson's opinion) at 56.

Despite this potential inconsistency, though, Dickson's second step against a *Roe*-style analysis ensures that comparisons between *Morgentaler* and *Roe* will still ultimately fail. To explain: even if one assumes a preference for decisional autonomy in Dickson's opinion, and even if one assumes that Canada's pre-*Morgentaler* abortion laws amounted to a denial of decisional autonomy, this would not yet constitute a violation of section 7, which allows for breaches of security of the person (however we understand that phrase) that are "in accordance with the principles of fundamental justice."[91]

Now, on the one hand, the SCC had already ignored Parliament's opposition to a *Roe*-style, substantive reading of this provision in its *BC Motor Vehicle* decision, but, on the other hand, CJ Dickson deliberately refused to rely on such a reading, despite affirming its legitimacy, in *Morgentaler*. On the contrary, rather than reviewing the substantive merits of Parliament's abortion law, or ruling on the constitutionality of abortion bans more generally, Dickson focused, exclusively, on the procedural adequacy of the 1969 framework alone. In this regard, his line was as follows. In enacting its 1969 law, Parliament had created a new criminal defense, and one of the "basic tenets"[92] of criminal justice is that "when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory."[93] In essence, this is a version of the need for "congruence"[94] between law and its administration, a procedural requirement so basic that Lon Fuller made it one of his eight preconditions of law, which is to say that a legislated rule that flunks this requirement may not constitute "law"[95] at all. In Fuller's words:

> "A total failure… [to ensure congruence between laws and their application]… does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[96]

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[91] Again, see Section 7 of Canada's *Constitution Act*, 1982, available at http://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38.
[92] See *R v. Morgentaler* (CJ Dickson's opinion) at 70.
[93] Ibid.
[94] See LON FULLER, THE MORALITY OF LAW – especially at 81-91, but all of chapter 2 is relevant.
[95] Ibid at 33-94. Fuller's book was published twenty years after the Second World War, and its core preoccupation is accordingly and understandably with how/whether the rule of law in liberal-democratic regimes can be decisively distinguished from the façade of law that existed in Nazi Germany. In America, this question was especially high on the agenda because of the Legal Realist movement (see chapter four of this thesis), which had defined law as little more than an instrument of authority, thereby leaving little ground, in principle, for distinguishing between Nazi authoritarianism and liberal law.
[96] Ibid at 39.

In applying this "principle of fundamental justice" to the 1969 framework, Dickson honed in on the same problems of accessibility that I mentioned before. Firstly, the decision-making of TAC's was routinely slow, which meant that by the time that some women would receive official/legal clearance for their termination, the risk (and stress) associated with the procedure would have increased drastically (due in part to the use of different, more risk-laden methods for later term abortions). Secondly, the discretionary nature of the powers vested in hospitals to establish TAC's left women in particular areas with no access to abortion, thereby placing extra emotional and financial burdens (not to mention extra risks to their physical and/or mental health) on women depending on where they lived, and depending on whether they could afford to travel to other cities or provinces for abortions.

By what is basically the same line of reasoning, Dickson also refused to save the law under the Charter's section 1. His opinion is a little hazy here, but suffice it to say that he understood the law to already fall at the first hurdle (and indeed, at the second and third hurdles) of the Court's now standard proportionality or *Oakes* test, which is to say that he found it lacking a rational connection to its own, stated aim of protecting the life and health of the mother. Of course, this says nothing about the state's interest in protecting fetal life, but this is because Parliament had, actually, already shown a clear intention to subordinate that interest to its interest in protecting maternal health when it was at risk. In this light, the problem for Dickson was accordingly that Parliament had failed to establish an effective, "non-arbitrary"[97] procedure for assessing when maternal health was at risk, thereby failing on its own terms (rather than in terms of any independent moral standard, constitutional or otherwise). As the Canadian constitutional scholar, Kent Roach, explains:

> "The requirement of committee approval offended the principles of fundamental justice not on the basis of some abstract view of perfect justice, but because it made it impossible for women to secure the legal abortions that Parliament, not the courts, had promised them… [and because of the law's failure]… to live up to the balance between women and the fetus that Parliament, not a judge, had established."[98]

[97] *R v. Morgentaler* (CJ Dickson's opinion) at 76. To quote: "[There]… can be no escaping the fact that Parliament has failed to establish either a standard or procedure whereby any such interests… [e.g. the interests of the fetus]… might prevail over those of the woman in a fair and non-arbitrary fashion."

[98] See KENT ROACH, THE SUPREME COURT ON TRIAL – at 121. And to quote CJ Dickson: the "life and health of the pregnant woman" is the "value that Parliament itself has established as paramount." See *R v. Morgentaler* (CJ Dickson's opinion) at 76.

As Roach's explanation makes clear, Chief Justice Dickson's opinion in *Morgentaler* is really a textbook example of "Sunsteinian" minimalism – an approach that implores judges to "leave things undecided"[99] as far as possible, but without abdicating their duty to engage in meaningful, constitutional review of ordinary legislation (as Holmes's theory of judicial review seems to do). To explain: whereas the USSC insisted in *Roe* that the balance between reproductive autonomy and fetal life be struck in a particular, "comprehensively"[100] liberal way, Dickson's opinion in *Morgentaler* refused to look beyond the Federal Parliament's own balance, thereby leaving the ultimate question – the question of whether a woman has a *constitutional* right to abortion under the Charter – "undecided." Of course, like the USSC in *Roe*, Dickson's decision *did* strike down a piece of democratic legislation, but, in contrast to *Roe*, it did so in a way that only took one, very specific response out of the Canadian Parliament's reach: namely, the re-enactment of the 1969 abortion framework without the insertion of a "notwithstanding" clause, as required by section 33 of the Charter.

Legally, then, the "dialogic" structure of the Charter and the minimalistic reasoning of the SCC left Parliament fully able to enact *any* criminal restrictions on abortion, including, technically, the criminal restrictions struck down in *Morgentaler*. However, despite this "legal" reserve of parliamentary sovereignty, no Parliament since *Morgentaler* has been either able or willing to pass a replacement for the 1969 framework, which is to say that, as a consequence of the *Morgentaler* decision, abortion is now completely de-criminalized in Canada. To be sure, provincial legislatures can still (and have often sought to) limit access to abortion, but the federal division of powers under Canada's Constitution means that they cannot rely on the criminal law to do so.

Naturally enough, this raises the question: is Canada's system of "dialogic" or "weak-form" constitutionalism, really so different from (or that much weaker than) its US counterpart? And more specifically, does the failure of successive Parliaments to replace the pre-*Morgentaler* abortion framework mean that women in Canada now have something like a *de facto* right to abortion, in spite of the carefully-crafted minimalism of Chief Justice Dickson's opinion, and in spite of the fact that many people in Canada find such a right hard to square with their own understandings of what is right?

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[99] Again, see Cass Sunstein, *The Supreme Court, 1995 Term, Forward: Leaving Things Undecided*.

[100] This is a reference back to the terminology of my second chapter, which relates to John Rawls's claim that liberalism should avoid anchoring itself in a "comprehensive moral doctrine" – one that speaks too deeply on the nature of morality and humanity. See JOHN RAWLS, POLITICAL LIBERALISM – at xl, and elsewhere (Rawls only uses the full phrase, "comprehensive *moral* doctrine" in the book's "Introduction").

I hesitate to answer this question. Suffice it to say here that in every political dispute, someone (or some institution) will always have final say, as a matter of political reality. Bearing this point in mind, the most that we can hope for is surely that the final say will rarely be *too* final, by which I mean that dialogues between legal and political branches of government can still, technically, continue, even if present political realities/pressures are such that those dialogues with remain one-sided for some time. Of course, sometimes we *do* want the dialogue to stop (is that not the whole point of constitutionalism?), namely, where one side of the dialogue seems to defend forms of suffering that we find indefensible, and out of step with our constitution's most basic purpose. In effect, the SCC's decision in *Morgentaler* is an exemplary effort to tread a thin line between these two impulses: 1) the impulse to keep democratic dialogue open, and 2) the impulse to take serious suffering off the political cards. More precisely, the SCC's decision tries to prevent one, particularly serious form of suffering, without legally and finally foreclosing the ongoing, political dialogue on whether similar forms of state-sanctioned suffering – i.e. other attempts to criminalize abortion in certain circumstances – can be defended under the Charter, as many decent and well-meaning people believe that they can.

To put this in terms of the poetical liberalism that I am defending here, the *Morgentaler* decision walks a tightrope between the key, liberal aversions to a politics of zeal and a politics of abandonment. On the one hand, CJ Dickson's opinion refuses to hijack the Canadian Charter, and to identify it zealously with a pro-choice morality that many citizens do not share. On the other hand, it refuses abandon pregnant women to a criminal law that fails them, and leads them, potentially, to abject suffering.

Admittedly, this type of tightrope walking may leave both sides of the abortion debate unsatisfied, and concerned. But then, poetical liberalism is not about satisfaction, or the reduction of concern. On the contrary, poetical liberalism, as I have framed it via the work of Kennedy and Derrida, is about realizing that a liberal commitment to human dignity will become facile when it is identified too wholly with either an opposition to zeal, or an opposition to abandonment. This is what the SCC does particularly well in *Morgentaler*. And, as we will see in the next two sections of this chapter, it is what the SCC tries but ultimately fails to do in its key "state action" decision, *RWDSU v. Dolphin Delivery*.

III. The State Action Doctrine in America: From 1883 to 1948

As it turns out, the controversy over abortion rights is the least of our concerns in this chapter. To understand why, let us suppose that we can set aside our concerns over the USSC's decision in *Roe*, and accept a woman's right to first trimester abortion as binding, constitutional law. Now, having accepted this right, consider the following scenario. Shortly after *Roe*, a man goes to court to request an injunction against his thirty-year old wife, who is in the first trimester of an unplanned pregnancy, and has informed her husband that she wants an abortion. In court, the man produces a seemingly "legal" document, signed by his wife, which stipulates that she will carry to term any pregnancies occurring, within marriage, before she turns thirty-five. His wife concedes that she signed the document, and that she was not under duress/undue influence when she did so. Her only contention is that she has since changed her mind, and that a decision in her husband's favor would violate her constitutional right to first trimester abortion, established in *Roe*. Is she right? And whether she is legally right or not, *should* her constitutional right to abortion apply, and forbid the injunction?

This is perhaps a somewhat farfetched example, but it serves the important function of bringing a pair of key, connected questions into frame: 1) the question of how far constitutional law ought to reach, and 2) the more fundamental question of what constitutional law is actually for. Traditionally, the answer to these questions is summed up in what Americans have long called the "state action doctrine."[101] The basic idea here is that constitutional law should (and traditionally does) only regulate the relationship between the state and the individual, *not* relationships between private individuals. As the American constitutional scholar, Erwin Chemerinsky, explains:

> "[The American]… Constitution does not prohibit private deprivations of constitutional rights. Private behavior need comply with the Constitution only if the state is so intimately involved in the conduct – that is, if the nexus to the state is so great – that the state can be held responsible for the activity. Therefore, courts are powerless to halt private infringements of even the most basic constitutional values."[102]

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[101] The textual origin of the state action doctrine lies in the specific wording of the US Constitution's Fourteenth Amendment, which declares that "No State shall" act in particular ways towards particular persons (e.g. No State shall "deny to any person within its jurisdiction the equal protection of the laws"). See here: https://www.law.cornell.edu/constitution/overview.

[102] Erwin Chemerinsky, *Rethinking State Action* – at 508.

As Chemerinsky rightly points out, one may quite legitimately feel that the private identity of an injurer does not render their victim's injury any less severe, especially where that injury constitutes a deprivation of apparently fundamental rights (and especially given the vast and even state-like power that "corporations" and other "private" actors often possess). That said, the obvious question is surely why private violations of constitutional rights should "be tolerated"[103] in constitutional law, and for Chemerinsky, the "historical"[104] answer to this question is that when the American Constitution was written, there was a widespread belief that individuals "possessed natural rights"[105] that were "completely"[106] protected by pre-constitutional common law, so that the only thing that the Constitution's Bill of Rights could/need do was to render this common law settlement's application to government (*as well as* private persons) *explicit*. In this sense, the Constitution was presumed to be co-extensive with (and protective of) the morally unimpeachable "background rules"[107] of the common law – hence why the Supreme Court in *Lochner* could move quite sincerely against democratic legislation that interfered with contractual liberty (a core, common law value).

Of course, today, few serious scholars think that the American Constitution safeguards the protections of the common law, or that these protections apply to areas of "natural" liberty. However, the state action doctrine continues to have both moral and legal force, at least partly because Western liberalism remains attracted to the individualistic ideal of an untouchable private realm, even if it is no longer a slave to the "common law baselines"[108] of years gone by. From this perspective, the problem with applying constitutional scrutiny to private action is that it seems to bring the moral/political choices of Supreme and Constitutional Courts to bear on individuals in ways that are not necessarily related to "their own priorities and aspirations."[109] To be sure, democratic legislation that regulates private action may do this as well, but at least then, one may suppose, there is a more obvious trace of consent, specifically insofar as affected individuals have had an opportunity to vote for the schemes of government (as outlined in electoral manifestos) under which they live.

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[103] Ibid at 505.
[104] Ibid at 511 ("The historical answer is straightforward").
[105] Ibid.
[106] Ibid at 513 ("At the time the Constitution was written, it was thought that the common law *completely*… [my emphasis]… safeguarded personal liberties from private infringements.")
[107] A common phrase in relation to the common law, but my usage stems from Mark Tushnet's book, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (e.g. in his essay, *The State Action Doctrine and Social and Economic Rights* – at 167-172).
[108] See Cass Sunstein, *Lochner's Legacy* – for example, at 875.
[109] This is a reference again to Justice Dickson's opinion in the Canadian *Morgentaler* case (at 32).

Fair enough, you may think, but the question remains: is this aspirational commitment to *a* (but not *the*) private realm really enough to warrant constitutional law's abandonment of individuals to private harms that are unbarred by ordinary legislation? In the context of my *Roe*-related example, one may find moral plausibility in both an affirmative and a negative response to this question. On the one hand, the man is relying on a contract that was entered into freely (as his wife concedes), and that, we may assume, is not voided or made voidable by any clear, pre-existing rule of law. On the other hand, though, legal recognition of this apparently "valid" contract will inflict a serious harm – and indeed, an experience of "enslavement" – on the man's wife, a harm that is surely comparable if not utterly identical to the harm that states inflict on women when they criminalize abortion too zealously.

In a nutshell, then, what we have here once again is a conflict between our two sins of zeal and abandonment: between the sin of zealously interfering in an otherwise valid, private agreement, on the one hand, and the sin of abandoning a woman to what we might call the "private zeal" of her husband, on the other. For many years now, constitutional lawyers and scholars around the world have wrestled with this tension, and in making my own contribution to the debate, I will look presently at the defining, American experience, which can be presented aptly in terms of just two cases: *The Civil Rights Cases* (1883) and *Shelley v. Kraemer* (1948). Let us begin with the former, directly below.

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The USSC's decision in *The Civil Rights Cases*[110] (or the CRC for short) of 1883 is typically cited as one of the first recognitions of the state action doctrine in American law, and it is therefore appropriate that it serves as our starting point here. In essence, the CRC turned on the question of whether the Fourteenth Amendment, passed shortly after the US Civil War, empowered Congress to legislate against private, racial discrimination, as it tried to do in passing the Civil Rights Act of 1875. The historical context here is crucial, because although slavery was formally, constitutionally abolished in America after the Civil War (see the Thirteenth Amendment of the US Constitution), this did little to abate the racial prejudice infecting many parts of the country, thereby leaving a gap between Reconstruction's promise, and the lived, material inequality of African-American citizens.

[110] *The Civil Rights Cases* 109 US 3 (1883). For additional information on the social context surrounding *The Civil Rights Cases*, see here: http://www.pbs.org/wnet/jimcrow/stories_events_uncivil.html.

Understandably, Congress sought to close this gap by prohibiting various forms of private, racial discrimination, but Congressional authority in the US is confined by law to that which is *constitutionally* allocated, with all residual, non-allocated authority left to the individual states. This is where the CRC came in. According to the government, the Fourteenth Amendment was passed as a response to concerns over the social efficacy of the Thirteenth Amendment's abolition of slavery, and it could/should accordingly be seen as empowering Congress to legislate not only against state denials of racial equality, but also against the various "badges and incidents of slavery"[111] that survived Reconstruction. Despite the apparent good sense of this position, Justice Bradley's majority opinion in the CRC claimed – in a breathtaking display of socially oblivious "legalism"[112] – that such an interpretation was precluded by the first words of the Fourteenth Amendment, which specifies only that "*No state*… [my emphasis] shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States… nor deny to any person within its jurisdiction the equal protection of the laws."[113]

Bradley's thinking was that, given this very explicit reference to "states," the Fourteenth Amendment could only be fairly understood as enabling – i.e. as constitutionally authorizing – Federal laws against state-imposed discrimination, or state-imposed abridgements of the "privileges and immunities" associated with US citizenship. Going further, Bradley claimed that this was the "seminal and fundamental wrong which was intended to be remedied"[114] by the Fourteenth Amendment, and, even more tellingly, that an individual's capacity to "injure" will give rise to what is "simply a private wrong,"[115] not a denial of constitutional rights. Of course, on one level, this is a conceptual argument: *by definition*, the individual can't destroy or deny "rights." However, one may wonder, is there something significant in Bradley's phrasing, when he describes a non-state injury as "*simply* a private wrong," and a state inflicted one as a matter of "*seminal and fundamental* wrong?" Does this not imply, arguably, that Bradley also finds private action less severe – less "threatening to liberty,"[116] overall – than state action?

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[111] Ibid (Justice Bradley's opinion) at 20. See also Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, which offers a detailed history of this term's usage.
[112] See JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 89.
[113] The Fourteenth Amendment of the US Constitution, at https://www.law.cornell.edu/constitution/overview.
[114] *The Civil Rights Cases* (Bradley's opinion) at 18.
[115] Ibid at 17.
[116] See MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – at 177 (describing the fear of state action as more "threatening to liberty" than non-state action as a particularly "American" attitude).

If there is a hint of this position in Bradley's otherwise conceptual argument, then one may ask: how could Bradley have underestimated the capacity of private wrongs – and especially the widespread, private racism at stake in the CRC – to sting just as much as state-sponsored ones? For Chemerinsky, the answer to this question is that Bradley didn't *underestimate* anything, but rather *overestimated* the extent to which state common law would penalize and remedy private racism. This is why state action appears to be worse, for Bradley, than private action: not because private action can't sting just as much as state action, but because a private wrong, unsponsored by state power, "would presumably be vindicated by resort to the laws of the state for redress."[117] Interestingly, this already alludes to something that Bradley made clear in his private correspondence, namely, that state *inaction* may constitute state action under the Fourteenth Amendment. To quote:

> "[The Fourteenth Amendment]… not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying all persons within its jurisdiction the equal protection of the laws…
>
> Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."[118]

Once again, this is breathtakingly legalistic reasoning, but this time it expands the reach of the Fourteenth Amendment in a way that many, especially conservative jurists would be unwilling to accept (see Justice Rehnquist's opinion in the infamous *DeShaney* case, although it focuses on the perhaps more intuitively "negative" bar on "deprivations"[119] of life, liberty and property that appears in the Fourteenth Amendment's Due Process Clause). This raises the question: if state *inaction* on private discrimination could violate the Fourteenth Amendment, then why on earth would Bradley not uphold the Civil Rights Act's ban on private discrimination as a mere restatement of what was already constitutionally required of state governments? According to Louis Seidman, the curious answer is that Bradley just didn't think that any *specific* rules on private discrimination could come from the Federal government. The states were constitutionally required to ban private discrimination, sure. But Congress lacked the constitutional authority to do this on their behalf.[120]

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[117] *The Civil Rights Cases* (Bradley's opinion) at 17.
[118] Quote taken from Louis Seidman, *The State Action Paradox* – at 395. The reference used by Seidman is to *Bell v. Maryland* 378 US 226 – a USSC case in which Bradley's correspondence was quoted.
[119] See *DeShaney v. Winnebago County Department of Social Services* 489 US 189 (1989).
[120] See Louis Seidman, *The State Action Paradox* – at 395.

Whether it was his intent or not, the practical consequences of this holding were much the same as the practical consequences of *Lochner*. To explain: just as *Lochner* abandoned vulnerable workers to common law "baselines"[121] and norms that made their lives harder, so the CRC abandoned African-Americans to common law courts in their respective states that were unwilling, for reasons of pure bigotry, to "vindicate"[122] the grievous and surely contra-constitutional wrongs committed against them by private persons. When understood in this way, one can surely see why Charles Black once referred to the state action doctrine as "one of the last unexpunged clauses of America's gentleman's agreement on racism."[123] Put simply, the state action doctrine, as framed by Justice Bradley, sidelined one of the most significant players – the United States Congress – in the fight to eradicate the "badges and incidents of slavery" after the Civil War, leaving many, still newly free Americans to "languish… in the corners of American society"[124] for years to come.

That being said, though, Justice Bradley's understanding of state action was not actually as regressive as it could have been. Indeed, aside from recognizing the capacity of state *inaction* to constitute state action in his private correspondence, Bradley also laid down a key and subsequently decisive dictum in the CRC, suggesting that state action would be present where "the wrongful acts of individuals… [were]… supported by State authority in the shape of laws, customs, or judicial or executive proceedings."[125]

The question that this dictum raises is simple: can private wrongs ever be legally visible, but "unsupported by State authority in the shape of laws, customs, or judicial… proceedings?" This is the question that we must turn to now, and we can do so by engaging with one of the most significant (and legally problematic) state action cases since the CRC, *Shelley v Kraemer* – a 1948 case assessing the constitutionality of judicial decisions that upheld "racially restrictive covenants, which are or were provisions in deeds of sale of housing that purported to bar any person buying the house from reselling it (ever) to a person of a specified race."[126]

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[121] Again, see Cass Sunstein, *Lochner's Legacy* – phrase used frequently throughout, for example, at 875.
[122] *The Civil Rights Cases* (Bradley's opinion) at 17.
[123] See Charles Black, *The Supreme Court, 1966 Term, Forward: State Action, Equal Protection, and California's Proposition 14* – at 97.
[124] Quote from Martin Luther King Jr's famous "I Have a Dream" speech, the full text of which is available here: https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom. Note that King directly references "the chains of discrimination" (along with the "manacles of segregation") as a principal cause of this "languishing."
[125] *The Civil Rights Cases* (Bradley's opinion) at 17.
[126] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – at 165.

The Shelleys were a black couple who bought a house that was subject to a restrictive covenant, which barred properties in a small, St Louis neighborhood from being sold to "members of the Negro or Mongolian race."[127] The owner (who was white) was happy to sell, but other property owners in the neighborhood went to court to have the covenant enforced, and to request an injunction against the Shelleys' occupation of the already purchased property. Although the Circuit Court of St Louis found the covenant legally invalid (on a technicality, not because of its overt racism!), the Supreme Court of Missouri reversed, and insisted that the covenant be enforced. This led the Shelleys – who had by then already moved into their new house – to petition the USSC, claiming that the Supreme Court of Missouri's order 1) constituted "state action" for the purposes of the Fourteenth Amendment, and 2) violated the Equal Protection Clause of the Fourteenth Amendment (No state shall "deny to any person within its jurisdiction the equal protection of the laws").

Now, by the time the USSC heard *Shelley*, it had already and only recently confirmed that "common law constitutes state action"[128] in its 1941 decision, *AFL v. Swing*. With this ruling in mind, one possibility for the Court in *Shelley* would surely have been to ask: 1) which common law or "background"[129] rule had been applied by the Supreme Court of Missouri, and 2) whether the common law or background rule in question *itself* constituted an unconstitutional denial of equal protection. As fruitful as this line might appear, given the holding in *Swing*, it is actually quite easy to frame the common law rule at stake in *Shelley* neutrally, so that it has little trouble passing constitutional muster. To explain: As Mark Tushnet has noted, there is a standard, longstanding rule, under US property law, that restrictive covenants (and I stress: the rule applies to *all* restrictive covenants, regardless of their substantive content) are permissible and enforceable where they do "not restrict the market for housing too substantially."[130] Framed in this way, the Supreme Court of Missouri's ruling could be presented as a facially neutral declaration that the covenant at issue "does not limit the class of buyers too severely,"[131] and is therefore fully enforceable, as per well-established rules of property law.

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[127] See *Shelley v. Kraemer* 334 US 1 (1948). Although I only discuss the Shelleys' experience here, since they were the named plaintiff in the case, *Shelley* actually involved two complaints: one from the Shelleys in Missouri, and another, almost identical complaint from the McGhee family in Detroit, Michigan.
[128] See *American Federation of Labor v. Swing* 312 US 321 (1941). The quote here is taken from Johan van der Walt's brief description of *Swing* in his book, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 98.
[129] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – especially chapters 6 and 7 (on state action).
[130] Ibid at 166.
[131] Ibid.

If Tushnet is correct, and this is the common law rule at stake, then one can surely see that the issue in *Shelley* is less with the common law and more with the Missouri court's *application* of the common law, which was wrong at best (*surely* racially restrictive covenants will place quite severe limits on the class of potential buyers), and racist at worst. This raises the question: if the common law constitutes state action, as per the Court's decision in *Swing*, can *judicial applications* of the common law (or more generally, mere judicial decisions) also constitute state action? Chief Justice Vinson's majority opinion in *Shelley* declared rather boldly that they can, and it did so by explicitly referencing Justice Bradley's claim, in the CRC, that the fact that a private act is "supported by State authority in the shape of… judicial or executive proceedings"[132] will suffice to fulfill the Fourteenth Amendment's state action requirement. In this regard, the Missouri Supreme Court's decision, as a clear example of "judicial proceedings," was deemed sufficient to bring the Constitution into play, even though the racist covenant that it enforced was a private agreement that, as such, bore no constitutional significance. As Vinson wrote:

> "We conclude… that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to the petitioners by the Fourteenth Amendment. As long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.
>
> But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements… [And that] the action of state courts and judicial officers in there official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment… is a proposition which has long been established by the decisions of this Court."[133]

[132] See *The Civil Rights Cases* (Justice Bradley's opinion) at 17.

[133] See *Shelley v. Kraemer* (CJ Vinson opinion) at 13. For illuminating analyses of this passage, see Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, and JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLTUION AND THE QUESTION OF SOVEREIGNTY (at 94-98). In the next section, we will see how the Canadian Supreme Court wrestled indirectly with the practical implications of this passage (or rather, the approach taken in this passage) in its *Dolphin Delivery* decision. For now, suffice it to say that the *Dolphin* Court, despite conceding the accuracy of Vinson's position from a "political science" perspective, was unwilling to give it recognition in Canadian law for pragmatic reasons.

As Herbert Wechsler wrote, a decade after *Shelley*, it is "entirely obvious"[134] that Vinson is technically right here: "the action of… [a] state court is action of the state,"[135] i.e. "state action." However, Wechsler's concern, shared by many in the academic community, was that conceding this technical point – which, remember, actually comes from Justice Bradley's decision in the CRC – constitutes nothing less than the destruction of private law as a distinct legal category, and the destruction of the private realm as a legally protected refuge from the state. To explain: according to the holding in *Shelley*, one can violate constitutional rights as much as one wants in private, but these violations will be *legally indefensible*, and therefore grossly unwise. As Laurence Tribe puts it, while *Shelley* does not formally apply constitutional norms to private conduct (or as modern constitutional lawyers would say, does not formally impose a doctrine of direct horizontal effect on the American Constitution), it can be seen as doing this *in effect*, since it "requires individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement."[136]

The concern here, I suppose, is anchored in a particular, individualistic conception of liberalism, and in a related sense of what constitutional law should do. To simplify, this conception assumes that constitutional laws (or more accurately, the courts that are typically charged with their interpretation and enforcement) impose relatively steep demands on the state, and that these relatively steep demands are legitimate because they protect the individual's capacity to self-govern: to think and speak freely, and to pursue his/her own conception of "the good." Naturally, then, if an individual's freedom from "steep demands" – i.e. to pursue his/her own conception of "the good" – is precisely what constitutional law is supposed to protect, it is somewhat counter-intuitive to permit constitutional review of private law adjudication, since, as explained above, this will make it prudential for individuals to conform all of their private interactions to the "steep demands" of the Constitution, lest they end up with a constitutionally-influenced court judgment against them.

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[134] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law* – at 29. In an illuminating article on the importance of Ronald Dworkin in civil rights era legal theory, Rebecca Brown criticizes Wechsler for his position on the USSC's later, school desegregation case, *Brown v. Board of Education* (also in Wechsler's *Neutral Principles* article). The problem with Wechsler's criticisms is aptly summed up by Robert Cover's suggestion that although judicial activism in the service of minority rights may be anti-majoritarian or otherwise politically problematic, "one must always ask compared to what." See Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities* (at 1314), and Rebecca Brown, *How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin* (at 44-45 for criticisms of Wechsler).

[135] Again, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law* – at 29.

[136] See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW – at 1156.

Of course, not everyone is against such "constitutionalizations"[137] of private law, and with good reason. After all, if one is committed to an individuals' capacity for self-governance, then it is hard not to sympathize with the Shelleys' plight. Imagine that you buy a house, with a view to starting a new chapter of your life, and a group of strangers – backed eventually by the "full panoply of state power"[138] – tell you, without reason (racism is not a reason), that they don't like your plan, and will block it however they can. No sensible person will deny that this would be a momentous deprivation of your right to self-governance (or individual privacy, or whatever). And, if individual self-governance is what constitutional law is all about, as per the rationale above, then no sensible person will deny that it should give you *some* ability to fight back, even if the source of the affront you are fighting back against is a bunch of private racists rather than a bunch of racist legislators.

Why, then, has there been so much resistance to the decision in *Shelley*? Mark Tushnet provides an interesting answer to this question when he notes that the state action doctrine should be understood less as a way of regulating the public/private distinction, and more as a way of maintaining the separation of powers between courts and legislatures. To explain: for Tushnet, the key question at stake in state action cases is not (or should not be) whether a constitutionally suspect act amounts to state action – as *Shelley* makes clear, there is technically *always* state action, at least from the moment that one side of a dispute seeks anchorage in the law – but whether ad-hoc court decisions (and especially the ad-hoc decisions of Supreme and Constitutional Courts) are the best way of infusing private law with so-called "constitutional values"[139] (or of ensuring that constitutional values "radiate"[140] through private law, to use the German rhetoric). The problem with *Shelley*, from this perspective, is therefore not that it brought the Constitution to bear on private law decision-making, but rather that it empowers courts 1) to rewrite even tried and tested rules of private law, and 2) to turn all private litigation into an occasion for the unpredictable and highly political "balancing" of constitutional rights/values. What does this do to legal certainty, and precision – the apparent cornerstones of private law?

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[137] For example, Mattias Kumm, mentioned at the end of chapter one, has vigorously defended what he calls the idea of a *total constitution*, where all private disputes are potentially translatable into constitutional appeals for the state to frame its private law in a particular way, i.e. so as to better reflect constitutional values (or less typically, so as to better respect the constitutional rights of individuals). See Kumm's article, *Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law.*

[138] See *Shelley v. Kraemer* (CJ Vinson opinion) at 19.

[139] See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS – especially at 88-110.

[140] Ibid at 352-254.

In this light, one can no doubt understand some of the academic ambivalence that has long lingered around *Shelley.* To explain: the problem is not that *Shelley* gets the balance wrong, and mistakenly favors a constitutional right to equal protection over what is effectively a private law right to discriminate. On the contrary, one can fully agree with the result in *Shelley*, but worry about the consequences that that result may have for private litigation, and for the capacity of individuals to rely on private law rights without the unpredictable, ad-hoc influence of constitutional law. For this reason, some commentators have sought to reframe *Shelley* in a way that protects its result *and* the general integrity of private law, which means adding extra conditions to the state action requirement proposed by Vinson/Bradley. For example, Laurence Tribe claims that the *Shelley* decision can be reconstructed in terms a rule that private discrimination becomes state action when supported by a judicial decision (as per traditional readings of Vinson's opinion), *and* when it perpetuates the social "subjugation"[141] of the victim. Tribe's "point"[142] is that subjugation increases what could be called the "public relevance" of legally enforced discrimination, thereby turning a purely private wrong into a public one.

Noble as this may be, though, there are two problems (at the very least) with Tribe's attempt to rescue *Shelley*. The first is that it may set the bar too high, enabling courts to dismiss and even demean particular instances of private discrimination by marking them as publicly irrelevant. The second problem, more worryingly, is that Tribe's subjugation test doesn't apply outside the equal protection/discrimination context. This raises the question: are individuals whose other constitutional rights (aside from equal protection) are violated by private persons just to be abandoned? Perhaps one could argue that in the American context and in light of American history there should be heightened protection against private acts that contribute to racial subjugation (see the famous *Carolene Products* footnote four, with its suggestion of heightened judicial scrutiny where "discrete and insular minorities"[143] are subject to contra-constitutional treatment), but surely other forms of private harm deserve *some* protection, too. After all, what is a constitution worth if it tolerates many of the acts that it declares intolerable, just because of where they come from?

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[141] See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW. For a short analysis of Tribe's position, see JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 177-180.

[142] Again, see JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 179.

[143] See Justice Stone's opinion in *United States v. Carolene Products* 304 US 144 (1938), at footnote four.

IV. Another Canadian Corrective? *RWDSU v. Dolphin Delivery*

To sum up the preceding pages: there can be little doubt that *Shelley* was a grand and morally admirable gesture against the abandonment of a vulnerable minority, but it was (and still is) viewed as a deeply problematic decision. As I have just suggested, via Mark Tushnet, the decisive, liberal problem is not that *Shelley* implies a move towards "total"[144] constitutionalism, i.e. the constitutionalization of private law, but rather that it implies a move towards *total legal* (as opposed to *political*) constitutionalism. To explain: although legal and political theory have now moved some way beyond the idea of a "pre-political"[145] private sphere, this does not mean that private law should be subjected too readily to the moralistic, ad-hoc interventions of judges applying constitutional law. On the contrary, where private interests are stake, it is surely not so unreasonable to remain *cautiously* committed to a *minimally* "Hayekian"[146] notion of the rule of law, a notion that emphasizes the value of legal certainty and consistency as important aspects of private law's liberal legitimacy.

My point here is similar to one that Frank Michelman makes when he wrestles with the problem of how and indeed whether legal systems should separate "ordinary and constitutional jurisdiction."[147] As Michelman points out, there is nothing inconsistent about claiming, simultaneously, 1) that constitutional law trumps ordinary law, and 2) that there should be a level of "acoustic separation"[148] between constitutional and ordinary law, so that courts exercising constitutional jurisdiction interfere as little as possible with the work of courts exercising ordinary jurisdiction, and vice versa. There are a number of reasons that may stand behind the latter position, but two especially decisive ones are 1) that constitutional and ordinary adjudication seem to require vastly "differing… talents and skills"[149] and 2) that "the continuing, doctrinal autonomy and integrity of the established body… of ordinary law"[150] will be messed up by *overhasty* infusions of constitutional law.

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[144] See Matthias Kumm, *Who's Afraid of the Total Constitution?* See also Stephen Gardbaum, *The Place of Constitutional Law in the Legal System.*

[145] The extent to which liberalism has really moved (and indeed, *can* move) beyond such a notion is questioned in Allan Hutchinson and Andrew Petter, *Private Rights/Public Wrongs: The Liberal Lie of the Charter*. In turn, David Dyzenhaus criticizes Hutchinson and Petter's position in his paper, *The New Positivists.*

[146] See, for example, FRIEDRICH HAYEK, THE ROAD TO SERFDOM: "[Government] in all its action is bound by rules announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge" (at 75-76). See also Joseph Raz, *The Rule of Law and its Virtue*.

[147] See Frank Michelman, *The Interplay of Constitutional and Ordinary Jurisdiction*.

[148] Ibid at 279.

[149] Ibid at 280.

[150] Ibid.

I emphasize the word "overhasty" here for a very important reason: namely, because nothing that I have said is meant to preclude decidedly less hasty, *legislative* moves to constitutionalize ordinary law, i.e. to infuse ordinary law with constitutional values. Indeed, one could imagine a rule whereby courts exercising constitutional jurisdiction could "notify" Parliament/Congress that a settled rule of private law is likely unconstitutional, and could then sanction Parliament/Congress (and intervene) if it fails to act within, let's say, a five year period. The idea here would be that such a rule would shift the burden from unelected judges to an elected legislature, which could, presumably, engage in a more careful, open and democratically legitimate act of value "balancing" than an ordinary court. Of course, the lingering problem with such an approach is that five years of inaction means five years of "neglecting the victim"[151] – five years of recognizably contra-constitutional harm that could have been prevented, more promptly, by a judicial rewriting of the law. This raises the insistent question: even if *Shelley* was doctrinally problematic, can a liberal really claim, in full sincerity, that it should have been decided otherwise?

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This is the awkward question that courts always face when they grapple with the state action question, and it is the awkward question that the Supreme Court of Canada faced when it decided its first state action case under the Charter, *RWDSU v. Dolphin Delivery*, in 1986. The facts of the case are as follows. RWDSU was a trade union involved in an industrial dispute with an Ontario-based courier company, Purolator. In the midst of this dispute, RWDSU threatened to picket the premises of a second company, Dolphin Delivery, which was "suspected to be acting as a business ally of Purolator"[152] in British Columbia. In response, Dolphin sought an injunction from the Supreme Court of British Columbia, and the injunction was granted on the grounds that such "secondary picketing" under the circumstances "comprised the common law tort of inducing breach of contract between Dolphin and its employees."[153]

[151] See Robert Leckey, *The Harms of Remedial Discretion* – at 591. In this recent ICON article, Leckey argues cogently that judicial exercises of "remedial discretion" in constitutional law – i.e. where judges delay striking down apparently contra-constitutional rules so as to enable a more democratically legitimate, legislative response – are often unjust, since they perpetuate (or at least permit) suffering in the interim.
[152] This quote is taken from Allan Hutchinson and Andrew Petter, *Private Rights/Public Wrongs: The Liberal Lie of the Charter* (at 281). See also *RWDSU v. Dolphin Delivery* (1986) 2 SCR 573.
[153] Ibid (Hutchinson and Petter).

The question that the SCC then faced, on appeal, was whether the BC court's decision, or the common law rule that it applied, was susceptible to constitutional critique under the Charter – specifically via section 2(b) of the Charter, which guarantees "fundamental freedoms" to "thought, belief, opinion and *expression*"[154] (my emphasis). As the Court noted, a legislative prohibition on peaceful, secondary picketing would constitute an interference with freedom of expression, as protected by section 2(b), and would accordingly require a section 1 justification from the state. However, in *Dolphin*, as in *Shelley*, the prohibition in question came in the form of a judicial application of a common law rule, rather than an Act of Parliament, and it therefore presented the SCC with the *Shelley* problem of whether (or to what extent) the Charter should apply 1) to a judicial decision, and 2) to the so-called "background," common law rules regulating private relations.

With regard to the first question, the Court's answer was unambiguous: the ruling in *Shelley* – that court orders constitute state action capable of violating fundamental rights – should not be repeated in Canada. In support of this claim, Justice MacIntyre, writing for the majority, relied essentially on two arguments: one interpretive, and one pragmatic. The interpretive argument was based on section 32 of the Charter, which declares that the Charter applies to the "Parliament and government"[155] of Canada (section 32a), and the "Parliament and government" of each Canadian province (section 32b). Not unreasonably, MacIntyre suggests that the word "government" here should be taken to "mean… only the executive branch of government."[156] This is a reasonable view, surely, because the explicit reference to "Parliament" would seem to preclude a wider interpretation of the word "government" as a reference to Parliament, the executive and the judiciary combined, specifically insofar as such a "wider" interpretation would make section 32 read, "Parliament, the executive, the judiciary, *and Parliament*."[157]

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[154] See Section 2 of Canada's Constitution Act, 1982, available at http://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38.
[155] Ibid at Section 32.
[156] See Peter Hogg, *The Dolphin Delivery Case: The Application of the Charter to Private Action* – at 275. See also *Dolphin Delivery* (Justice MacIntyre's opinion) at 598.
[157] I note, though, that Peter Hogg has argued cogently that other sections of the Charter make little sense if judicial action is excluded from the reach of the Charter. As he writes: "Several provisions of the *Charter* imply that the courts are bound by the *Charter*, for example, most of s11 (rights of a person charged with an offence), s12 (cruel and unusual treatment or punishment), s13 (self-incrimination), s14 (interpreter), s19 (language in court proceedings). [Indeed]… one of these provisions has already been applied by the Supreme Court of Canada itself in a fashion which seems to entail that courts are bound by the *Charter*." See Peter Hogg, *The Dolphin Delivery Case* – at 275. To be sure, I lack the expertise in Canadian constitutional law to assess whether Hogg's interpretation is more sensible than the one offered by Justice MacIntyre, but it seems clear enough to me that, on a semantic level, MacIntyre's interpretation is a very reasonable one, as explained above.

This brings us to the pragmatic argument, which finds MacIntyre wrestling implicitly with the specter of *Shelley*. To explain: although *Shelley* goes un-cited in MacIntyre's opinion, it appears nonetheless as a nameless shadow when MacIntyre refers to the opinion of Peter Hogg, one of the leading constitutional scholars in Canada. Hogg's opinion was expressed in the second edition of his renowned textbook on Canadian constitutional law, and amounts to a direct endorsement of the ruling in *Shelley* – i.e. that constitutional law "will apply to preclude"[158] any court order that unjustifiably violates a fundamental right. In *Dolphin*, this claim quite understandably catches MacIntyre's attention, but in the wrong way, being quickly dismissed – like Wechsler and Tribe's treatments of *Shelley* – as a "troublesome"[159] doctrine that would expand "the scope of Charter application to virtually all private litigation."[160] To quote the key passage of MacIntyre's judgment:

> "While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order, and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely defined connection between the element of government action and the claim advanced must be present before the Charter applies."[161]

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[158] See PETER HOGG, CONSTITUTIONAL LAW OF CANADA (2nd edition). Note that although the SCC makes no reference to *Shelley* or the USSC in *Dolphin*, Professor Hogg does cite *Shelley* directly in his commentary on the *Dolphin* decision, thereby suggesting that his original comment, in his textbook on Canadian constitutional law, was made with the American experience (and *Shelley* in particular) in mind. See Peter Hogg, *The Dolphin Delivery Case* – at 275-276.
[159] See *Dolphin Delivery* (Justice MacIntyre's opinion) at 600.
[160] Ibid.
[161] Ibid at 600-601.

For me, this passage runs remarkably close to Wechsler's critique of *Shelley*, which, you may recall, turned on two thoughts: 1) that on a technical level, court orders are obviously examples of state action, and 2) that despite the self-evidence of this "technical" point, the importance of a reliable and relatively precise body of private law makes it necessary to ignore it. Although the terminology is a little different in MacIntyre's opinion, it ultimately involves the same argument: 1) that court orders may constitute state action "from a political science" perspective, and 2) that, inasmuch as recognizing this would undermine the capacity of judges to act as "neutral arbiters" (since it would turn every instance of "ordinary" litigation, potentially, into a more open-ended, constitutional dispute), the law cannot adopt such a "political science" perspective, however "technically" plausible.

Thus far, the Court's position seems both simple and coherent: constitutional law (and more precisely, courts exercising constitutional jurisdiction) should respect the integrity of private law, and the ruling in *Shelley* must accordingly be kept out of Canadian law. The problem with this line, of course, is that it risks leaving a potentially vast amount of contra-constitutional suffering unaddressed, and it is perhaps an appreciation of this problem that influenced the Court's response to the second, key question at issue in *Dolphin*, the question of how or indeed whether the Charter applies to the common law, i.e. to the background rules on which court orders are often based (as opposed to the orders themselves).

To simplify, MacIntyre's response to this question encompasses three points. Firstly, under section 52(1) of the Constitution Act 1982, the Constitution of Canada (of which the Charter is a part) is "supreme law,"[162] with which all other laws must comply, *including* the common law.[163] Secondly, although the Charter applies to the common law, it can do so "only in so far as the common law is the basis of some governmental act which it is alleged infringes a guaranteed right or freedom."[164] And thirdly, "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution,"[165] thereby making the Charter "far from irrelevant to private litigants whose disputes fall to be decided at common law"[166] (despite the limitation mentioned in point two).

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[162] *Dolphin Delivery* (Justice MacIntyre opinion) at 593 (quoting the Canadian Constitution).
[163] Ibid. Here, MacIntyre writes that "there can be no doubt" that the Charter applies to the common law, although as we will see, he later qualifies the extent of this application quite significantly.
[164] Ibid at 599.
[165] Ibid at 603.
[166] Ibid.

It is hard to disagree with Peter Hogg that the combination of these three propositions amounts to an "imperfect knitting together of two different opinions, one asserting and the other denying that the Charter applies to the common law."[167] On the one hand, MacIntyre refuses to accept that the Charter can apply to common law rules in private litigation (as it did, for example, in American cases such as *Labor v. Swing*, and *New York Times v. Sullivan*), presumably because this would still come too close to the rule in *Shelley*, and the ruin of private-law integrity. However, on the other hand, MacIntyre also insists that the Charter must apply to "all law,"[168] via section 52(1) of the Constitution, and that all law – including common law rules that regulate the relationships between purely private persons – "ought"[169] to be "consistent with the fundamental values enshrined in the Constitution."[170]

Are these two claims inconsistent, as Hogg seems to suggest? Not necessarily. To explain: as the SCC has subsequently clarified, most notably in *Hill v. Church of Scientology*, although Charter *rights* are never applicable to common law rules in private litigation, Charter *values* can (and indeed, must) be taken into account, thereby ensuring consistency with the Constitution's promise that the Charter applies (somehow) to "all law."[171]

This distinction between Charter rights and Charter values may sound effusive, but it has become something of a commonplace in modern constitutional law, originating with the German doctrine of *Drittwirkung* that emerged in the Constitutional Court's famous *Luth* decision (1948).[172] The idea is that, apart from creating a system of "subjective" rights on which individual's can rely, constitutions also create systems of "objective values"[173] which "speak to the organization of the state and society as a whole."[174] In both cases, the state is under a duty to do something, but the difference lies in the nature of the duty. With a fundamental right, the duty is to the individual, but with a fundamental value, the duty is to "create and maintain"[175] a particular kind of moral "environment"[176] – i.e. one that adequately reflects the value or values in question.

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[167] Peter Hogg, *The Dolphin Delivery Case: The Application of the Charter to Private Action* – at 279.
[168] See *Dolphin Delivery* (Justice MacIntyre opinion) at 593.
[169] Ibid at 603.
[170] Ibid.
[171] See *Hill v. Church of Scientology* (1995) 2 SCR 1130.
[172] See BVerfGE 7, 198 (Luth), an English translation of which is available here: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369.
[173] See DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY – at 60. See also ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS – for example, at 92-100.
[174] Ibid (KOMMERS at 60).
[175] Ibid.
[176] Ibid.

Now, on its own, there is surely nothing weak about the idea of valued-based judicial scrutiny. On the contrary, one can surely imagine a value-based approach being among the strongest forms of scrutiny imaginable, since it effectively asks judges to unearth the basic, moral principles at work in their legal order, and to decide whether some particular, legal arrangement constitutes an adequate reflection of those principles. Indeed, in Germany, where the idea first came to fruition, the Constitutional Court has now arranged the state's constitutional values in a hierarchical order, thereby "de-hermeneuticizing"[177] the *Grundgesetz*, and, potentially, limiting the capacity of different groups – groups that hold different comprehensive doctrines – to identify fully with their constitutional order (a capacity that, as Rawls points out, is an absolute necessity in liberal-democratic societies marked/tainted by the fact of reasonable pluralism).

Why, then, if it wants to limit judicial scrutiny of private law, would the SCC turn to a doctrine of constitutional values? Does this not expose private law to more significant and moralistic changes than a presumably narrower, rights-based analysis? One possible way of responding to these questions is to emphasize the relative modesty of the Canadian doctrine of values (especially compared with the "hierarchization" of values at issue in German jurisprudence). To explain, then: although the Canadian Court's use of value-based review may seem to pave the way for judicial moralism vis-à-vis private law, it is weakened by at least three provisos. Firstly, where constitutional values are at stake, the SCC applies a much weaker standard of justification than its usual proportionality (or *Oakes*) test – one that requires merely that the common law rule under scrutiny reflects a reasonable "balance"[178] of Charter and common law values. Secondly, whereas the state normally bears the onus of justifying violations of fundamental rights, the onus will be solely on the plaintiff where fundamental values are at stake, requiring that they prove "both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified."[179] And thirdly (and finally), an affirmative answer to the second of these questions does not authorize courts to create new causes of action, but merely to "develop and apply" the common law in a way that better reflects the Charter value at stake.

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[177] See Johan van der Walt, *When One Religious Extremism Unmasks Another: Reflections on Europe's States of Emergency as a Legacy of Ordo-Liberal Dehermeneuticization*.

[178] Much has been written about the strategy of judicial balancing that has become so prominent in modern constitutional law, and much of what has been written has been highly critical, suspecting that balancing grossly undermines the separation of powers. See for example, JACCO BORNHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE.

[179] Again, see *Hill v. Church of Scientology* – at 1171.

On this reading, what is at stake in the SCC's turn to value-based review would not be a "de-hermeneuticization"[180] of the Constitution (as one may argue is the case with Germany's "hierarchization" of constitutional values), but merely an insistence on judicial incrementalism, and Sunsteinian minimalism, as a way of balancing the promise of effective rights protection with the promise of relative legal certainty and consistency in private litigation. Once again, then, like in Justice Dickson's *Morgentaler* opinion, the SCC appears to be walking (or rather, *trying* to walk) a middle path between zeal and abandonment: between the need to leave the Constitution at least "partially untheorized"[181] (open to further interpretation), and the need to prevent contra-constitutional suffering, where possible.

On this level, and in this sense, the legacy of *Dolphin* squares nicely with a poetical or deconstructive liberalism – i.e. one that accepts neither zeal nor abandonment – but a significant problem remains: namely, that it still seems to rest on an arbitrary, outdated sanctification of the common law. To explain: if the weaker standard of review that emerges from *Dolphin* (and gets clarified in *Hill*) is about protecting private-law integrity, then one would assume that it would apply where any private law rule is at stake. However, as we have just seen, the focus in *Dolphin* is only on the common law, with private law legislation remaining subject to the same standard of review as any other kind of law.

Bearing this in mind, one must wonder whether Justice MacIntyre's opinion retains a connection to the same, now outmoded thinking that shaped the American state action doctrine in its infancy. As noted already, this thinking turns on at least two beliefs: 1) that the basic function of government is to protect individual liberty, and 2) that a set of facilitative, purportedly non-moralistic background rules – located in the common law by the so-called "Classical" jurisprudence of the late 1800s – is a key aspect of this protection, since it allows individuals to make (and have legal security in) their own economic choices. The consequence of this is that, from the perspective of "Classical" theory, if I want to exclude black people from my restaurant, or bar my employees from unionizing, or whatever, then the law should support me, and enforce my choice (with the idea being that enforcement doesn't equal endorsement of my choice, but merely of my *right* to choose).

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[180] Once again, see Johan van der Walt, *When One Religious Extremism Unmasks Another: Reflections on Europe's States of Emergency as a Legacy of Ordo-Liberal Dehermeneuticization*.
[181] Again, see Cass Sunstein, *The Supreme Court, 1995 Term, Forward: Leaving Things Undecided*. See also CASS SUNSTEIN, THE PARTIAL CONSTITUTION, and CASS SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS AND MUTES.

As the reader may notice, or recall, this was the thinking that was working overtime in the US Supreme Court's *Lochner* decision, which treated the Classical, common law environment as a "baseline,"[182] and assessed the constitutionality of New York's labor law in terms of how far it deviated from that baseline. Put differently, and perhaps more clearly, *Lochner* can be understood as resting on two propositions: 1) that "governmental intervention… [is]… constitutionally troublesome,"[183] and 2) that, inasmuch as the common law protects a sphere of natural liberty, governmental intervention should be defined not just as the act of a governmental organ, but, more specifically, as an act that "alter[s]… the common law distribution of entitlements,"[184] i.e. the *natural* distribution of entitlements.

Of course, the problem with this is that it obscures the liberty that is destroyed by or at least under the common law, and the severe hardship that was locked in place, during the Lochner era, for economically disadvantaged groups and classes. Sometimes this problem is described as a tendency to define freedom as "freedom *from*" and not "freedom *to*"[185] (the latter of which relates closely to what Amartya Sen and Martha Nussbaum call a "capabilities approach"[186] to questions of distributive justice). Alternatively, it can be seen, within a purely "freedom from" perspective, as an exaggeration of the *state's* threat to freedom, and a concealment of the threat posed to freedom by supposedly "private" actors (and especially powerful corporations) when the state takes a lax or purportedly "non-moralistic" approach to the regulation of its economy.

Whichever perspective we take, the US evidently sought to address the deficiencies of *Lochner* under FDR, and the US Supreme Court eventually followed suit in 1937, with its *West Coast Hotel* decision. However, as Louis Seidman points out, the fear of state intervention – and the attachment to an unregulated, "private sphere" – was by then so deeply ingrained in the American "psyche"[187] that it didn't die, but rather coexisted uncomfortably with the vast expansion of state power that was ushered in by the New Deal, and its landmark statutes (The Wagner Act, The Fair Labor Standards Act, etc.). To quote Seidman:

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[182] See Cass Sunstein, *Lochner's Legacy* (arguing that *Lochner's* principal error lies in its insinuation that departures from "common law baselines" are inherently, constitutionally suspect).
[183] Ibid at 874.
[184] Ibid.
[185] Perhaps the clearest and best known invocation of this distinction is Isaiah Berlin's. See Isaiah Berlin, *Two Concepts of Liberty*.
[186] For a simple introduction, see Martha Nussbaum, *Capabilities and Human Rights*. See also AMARTYA SEN, THE IDEA OF JUSTICE – especially at 253-268.
[187] Admittedly, Seidman doesn't use this term, but it is hard not to read something like it into his article (perhaps the American "constitutional imagination" would be more appropriate). See Louis Michael Seidman, *The State Action Paradox*.

> "The 1937 Revolution… [the demise of Lochner, and the victory of FDR's New Deal]… has left us unable to believe in the naturalness of the public/private distinction, yet also unable to reconceive a system of individual rights without it. We want to repudiate state action rhetoric… [and the "pre-1937 Lochner ideology"]… because we know that it blinds us to human suffering that the state might otherwise ameliorate. Yet we also want to embrace the concept of a private sphere because we know that it preserves a space for individual flourishing that the state might otherwise destroy."[188]

The legal philosopher Jennifer Nedelsky makes a similar point when she notes that America has today "accepted the New Deal"[189] while remaining suspicious of "its conceptual underpinnings."[190] Can one perhaps detect this same, awkward attitude in *Dolphin*? If it is there, then it is not only a vague suspicion of state regulation that is there, but also a *Lochnerian* attachment to (and valorization of) the common law as a form of *non-regulatory regulation*. Why else would MacIntyre single out the common law for special protection, and weaker scrutiny, if not because of a lingering sense – perhaps not so rare in the legal profession, even if it is rare in contemporary legal theory – that it protects weak individuals against the moralistic arms of a much stronger state?

We can (and must, for lack of evidence) leave this question open. Suffice it to say that, if MacIntyre's opinion does imply a "Lochnerian" attachment to the common law, then it does so in a very modern, "post-1937" way, since it accepts that the common law cannot avoid Charter scrutiny completely, and cannot allow *too much* contra-constitutional suffering. In a sense, then, *Dolphin* can be seen as tracing a middle path between *Lochner* and *Shelley*, but it does so only by indulging in the fundamental fiction of the Lochner era: namely, the idea that less state moralism (as represented by the common law's emphasis on market freedom) equals less state action. On the contrary, *the state has always already acted*, because it is always the presumptive author of a regulatory framework that permits some acts at the expense of others. This is what Frank Michelman calls a "simple, Hohfeldian point."[191] There is always state action. It is just a question of when we want to admit it.

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[188] Ibid at 401. See also JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY – at 181-190 (offering a critique of Seidman's article).
[189] See JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY – at 3. For a shorter presentation of Nedelsky's argument in this book, see Jennifer Nedelsky, *Private Property, Civic Republicanism, and the Madisonian Constitution*.
[190] Ibid.
[191] See Frank Michelman, *W(h)ither the Constitution?* – at 1076. See also *Joseph Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*.

Another way to make this point is perhaps to present economic deregulation as a form of devolution, a standard process by which a sovereign delegates power over a particular sphere of life to an otherwise non-sovereign body. On this view, economic deregulation would involve making private actors sovereign over a particular sphere of economic activity, for example, the activity of controlling a specific piece of property. The crucial point here would be that, although private actors would then be holders of sovereignty, they would only hold this sovereignty (or more simply, this power) at the behest of the state – *the* sovereign, we might say – in much the same way that the Scottish Parliament in the UK remains a "creature of statute,"[192] susceptible to abolition, legally speaking, where the central, Westminster Parliament repeals the Act that created it (The Scotland Act, 1998). This comes very close to an argument that the legal realist Robert Hale made in 1922, and that Cass Sunstein summarizes in his book, *The Second Bill of Rights.* To quote Sunstein:

> "In a remarkable step, Hale argued that property rights were in effect a delegation of public power – to private people by government. In so arguing, Hale did not argue against property rights. Instead he sought to draw attention to the fact that property owners are, in effect, given a set of powers by law. If you have property, you have "sovereignty," a kind of official power, vindicated by government, over that property."[193]

For Hale, then, the liberal state is always "present" at both the beginning and end of private action: at the beginning because it authors a legal framework that siphons off sovereign authority to certain private people, and at the end because, when such "private sovereignty" is challenged, it is ready to reenter the picture, and to enforce or "vindicate" the right of private sovereigns to act as they wish. At first glance, this position may seem like a clear endorsement of the rule in *Shelley*, i.e. that judicial enforcement orders constitute state action, but a second glance is perhaps a little less conclusive. To explain: although Hale's position quite rightly flags the state's *responsibility* for exercises of private power, it does not necessarily follow that *courts* should be in charge of imposing constitutional corrections on existing distributions of private power. Consider, for example, the following arguments against such judicial empowerment:

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[192] See any textbook on UK public or constitutional law, e.g. HORNE, DREWRY & OLIVER, PARLIAMENT AND THE LAW – at 201.

[193] See Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution – and Why we Need it More Than Ever* – at 23. See also Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*.

1. Like it or not, judges in Western democracies are constrained, in some way, by the fact that a "market economy"[194] is one aspect of their society's basic structure, and by the fact that a key requirement of a market economy is a relatively clear, stable body of private law. Crucially, this is not a demand for neoliberal or "Lochnerian" economic policy, but is rather and merely a demand for relative stability in whichever economic policies the state chooses to pursue. In other words: a state's body of private law may be "individualistic" or "altruistic,"[195] and it may be democratically moved in either direction. But, insofar as private actors rely rather heavily on the relative stability and clarity of private law, it should not change too abruptly, as it may when exposed fully to the reaches of judicial review on the grounds of constitutionality (since constitutional norms are too abstract – and too subject to interpretive disagreement – to stabilize private expectations). By contrast, legislative change is comparatively slow, public, and contestable, thereby offering private actors plenty of warning when change does come, at least in theory.
2. Speaking of which, if constitutional norms are subject to interpretive disagreement, is it not better that their application is worked out by elected, accountable branches of government than by unelected, unaccountable judges? To be sure, this is a problem with judicial review in general, but as Jeff King points out, it is arguably "amplified"[196] when it comes to economic policy, 1) because a state's economic policy "implicates the interests of nearly everyone,"[197] 2) because economic policy has a more direct, "everyday"[198] impact on most people's lives/interests than other policy areas (e.g. criminal justice), and 3) because economic policy is surely one of the most hotly contested, controversial areas of law (at least partly due to points one and two). Are these not good reasons for ensuring that decisions on economic policy are a product of democratic voting, which enables each person's (or each representative's) voice to count for one, and no more? Is this not fairer than placing such contestable and significant choices in the hands of judges?

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[194] Cass Sunstein relies on something like this argument with respect to post-communist constitutions in Eastern Europe, many of which contain far stronger socio-economic guarantees than, for example, the American Constitution. Sunstein's argument, put simply, is that the Eastern Bloc's shift toward market liberalism would be significantly hampered if judges were invited to "oversee labor markets… [too] closely," as the Hungarian Constitution implied they might by enshrining the right to "an income conforming with the quantity and quality of work performed." See Sunstein, *Against Positive Rights* – at 36. See also Dennis Davis, *Socioeconomic Rights: Do They Deliver the Goods?*
[195] See again, Duncan Kennedy, *Form and Substance in Private Law Adjudication* (as discussed in chapter four).
[196] See JEFF KING, JUDGING SOCIAL RIGHTS – at 5.
[197] Ibid.
[198] My point here is that crime is not part of daily life for *most* people, whereas shifts in economic policy can change the affordability of daily living for everyone (although of course, not everyone will feel the sting of this change to the same extent).

3. Economic policy is notoriously complex and "polycentric,"[199] and if it falls foul of a constitution's moral promise, it will often not be because of poor judgment or inadequacy, but because regulation involves choices between "necessarily compromised offerings and damaged goods."[200] To use a well-worn, simple example, a hike in the minimum wage may look good on paper, i.e. as a matter of law, but, since it lowers the affordability of job creation, it may lead to a net rise in unemployment,[201] thereby shifting the burden from one vulnerable group (low-wage workers) to another one (the unemployed). The point is that, aside from involving controversial questions over resource allocation, economic policy will often also involve complex estimates of regulatory *consequences* – estimates which courts are normally presumed to be bad at because they 1) lack economic expertise, 2) lack comprehensive access to such expertise (compared to legislatures), and 3) "lack the tools of bureaucracy," i.e. the capacity to "create government programs" which would adequately address social needs/interests.

Now, we could of course spend a lot of time unpacking these arguments in detail, but instead, I suggest that we move somewhat quicker, and ask: can any of these concerns really justify removing private law from *full* constitutional scrutiny? Even if one is hesitant to answer unequivocally in the negative, one may feel differently if we add "in Canada" to the end of the question, and reframe it as a question of what is necessary. *Must* one, then, remove private law from *full* constitutional scrutiny, *in Canada*? The reason that I recast the question in this way is to emphasize the fact that the Canadian Constitution already has a way of compensating for any perceived illegitimacy in the practice of constitutional review, namely, the section 33 notwithstanding clause described in the second section of this chapter. Does this not take care of the problem of the judiciary's questionable legitimacy? Or, more precisely, if a Canadian Parliament can immediately overturn an apparently overzealous court decision (on most Charter rights), must the courts really tie their own hands as well, by applying lower levels of scrutiny to private law (especially considering that section 52 of the Canadian Constitution insists that the Constitution applies to "all law," with no indication that different forms or areas of law require different standards of review).

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[199] See Jeff King, *The Pervasiveness of Polycentricity*, and JEFF KING, JUDGING SOCIAL RIGHTS – at 189-210. King's work on polycentricity draws closely on the related work of Lon Fuller, especially his paper, *The Forms and Limits of Adjudication*.

[200] This is a reference once again to FRANK MICHELMAN, BRENNAN AND DEMOCRACY – at 8.

[201] My own lack of economic expertise prohibits me from making any judgment on the merits of this argument.

On this point, it would surely be worth considering more carefully whether section 33 is a viable option for legislators in practice, or whether the political stigma that has become attached to its invocation renders it effectively bankrupt. Many scholars[202] have already addressed this question, and the more or less standard answer is that section 33 is at least not as effective as its initial proponents may have hoped, since its invocation is 1) rare, in practice, and 2) taken by many as a black mark against legislators (as opposed to a symbol of their legitimate, democratic disagreement with the courts on matters of constitutional interpretation). At the same time, though, one can hardly dismiss the role that section 1 plays in section 33's dormancy, since "tweaking" invalidated legislation to remedy a court's findings of disproportionality will generally be a politically "cleaner"[203] route to take, given a choice between the two. Moreover, one could plausibly read the effective dormancy of section 33 not as a sign of its failure, but rather, of its success. After all, frequent invocations of section 33 would surely leave one wondering whether the Charter had established *any* effective, legal constraints on state action, or whether it was just a veil of legitimacy to drape over the same, Westminster-style system of parliamentary sovereignty that the Charter was supposed to mark a transition away from.

With these points in mind – and in lieu of a more thorough engagement with the existing scholarship on section 33's effectiveness – I suggest that the SCC in *Dolphin* could have met its own, apparent objective (of balancing aversions of zeal and abandonment) if it had 1) accepted the logic of the USSC in *Shelley* (*of course* private law and judicial applications of private law are state action!), and 2) explained that the "dialogic" structure of the Canadian Constitution could be relied on to allay any concerns that this logic would be likely to yield the destruction of private-law integrity. In the end, to reason otherwise, as concerned as one may be with private-law integrity, is to accept a potentially fatal disjoint between the Constitution's morality, and its effect. Because if the Constitution (as it is interpreted by the courts) regards some particular form of suffering as anathema at the same time that it endorses such suffering as the product of a private person's right to act, then does the Constitution not lose its force as a moral charter – i.e. as something more than law, something that citizens can identify with and affirm, morally?

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[202] The best example I have found of such an article is Ming-Sung Kuo's paper, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape*.

[203] Why would legislators disobey a court ruling – and so openly, at that – when a court's section 1 analysis will usually give them leeway to implement a new, fully compliant law that fulfils most if not all of their original moral and social objectives?

With this question hanging, we should pause here to summarize what has been a very lengthy exposition. More precisely, we should ask: how does the preceding analysis of horizontal effect jurisprudence in the US and Canada relate to the deconstruction (or immanent critique) of Western law's prioritization of human dignity that has been the main subject of this thesis? To answer this question, let us recall the paradox that is at the heart of a prioritization of human dignity. As I noted via Mattias Kumm in chapter one, there is a not uncommon perception amongst some more mainstream liberals that human dignity has "replaced… sovereignty"[204] – and is somehow opposed to sovereignty – as the foundation of Western law, especially in postwar Europe. The problem, though, as Schmitt points out, is that liberalism never really avoids sovereignty, but either privatizes the sovereign functions of the state, or falsely presents them as the unfolding of a meaningfully neutral or "consent-worthy" (and hence non-violent) rationality – a presentation that is aided where judges perform key, sovereign functions under the guise of "interpreting the law."

While this problem leads Schmitt to dismiss liberalism, it has led others – e.g. Duncan Kennedy and Jacques Derrida – to reframe it as a philosophy that first and foremost requires one to adopt a particular ambivalence with regard to one's own power of decision (either as a citizen, or, more pertinently, as an institutional actor). In essence, this means that a commitment to human dignity for such thinkers (and for the "poetical liberalism" that I fashion from their insights) requires that we remain simultaneously committed and opposed to our own sovereignty, i.e. our own capacity to be "he who decides on the exception"[205] (perhaps as a constitutional judge interpreting his/her Constitution, or as a citizen deciding whether it is time to break with the law, and engage in civil disobedience). And while one can surely see an attempt to embrace this attitude in the SCC's *Dolphin* decision, it is an incoherent and anyway unnecessary attempt: incoherent because it apparently relies on the kind of common law protectionism that was a work in the USSC's infamous *Lochner* decision, and unnecessary because the Canadian Constitution is already structured in a way that ensures as far as possible that a judicial seizure of sovereignty can be *challenged*. Can we really ask for more, given the "conceptual disaster area"[206] that one wades into when one attempts to use state action requirements to secure private-law integrity?

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[204] See Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review* – at 32.
[205] See again, CARL SCHMITT, POLITICAL THEOLOGY – at 5.
[206] See Charles Black, *The Supreme Court, 1966 Term, Forward: State Action, Equal Protection, and California's Proposition 14* – at 95.

V. Etienne Mureinik, and Socio-Economic Rights in South Africa

Suppose, now, that we move beyond the Canadian context, and the comfort of the section 33 clause as a way of promoting inter-institutional dialogue. Where does this leave us in our attempts to bypass the problematic implications of horizontal effect that I listed a few pages ago? In this section, I want consider this question by turning to the path-breaking approach that the South African Constitutional Court has taken to the enforcement of "socio-economic rights"[207] under its post-apartheid Constitution (1996). Of course, the question of socio-economic rights is not completely synonymous with the question of horizontal effect, but they are very closely related, since doctrines of horizontal effect alter the range of permissible ways in which a state can regulate its economy, and, by derivation, the distribution of rights and entitlements that defines its social and economic system. In *Shelley*, for example, the USSC essentially decided that states could no longer take a laissez-faire, freedom of contract approach to economic activity where the effect of that activity would be to exclude persons of a certain race from buying and occupying property that they would otherwise be legally capable of buying and occupying.

Understood in this way, as those rights that emerge from the way that a state regulates economic activity, socio-economic rights (and judicial enforcements of socio-economic rights) are hardly anything new. However, when one encounters the phrase "socio-economic rights"[208] today, it is usually in the context of articles questioning whether judicial enforcement is a good idea, with the reason being that the term "socio-economic rights" stands now, more precisely, for a genuinely new kind of *constitutional* right to have certain fundamental, material needs (e.g. to food, shelter, health care, etc.) fulfilled by the state. The key differences between such rights and the socio-economic rights at stake in ordinary, private law – the differences that have led many scholars to question the appropriateness of judicially enforcing the former – are that the former are 1) weightier than, and capable of trumping, ordinary law, and 2) less susceptible to change by a simple, political majority (because of the raised majorities that are required to pass constitutional amendments in the majority of Western/Westernized states).

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[207] The key sections of the South African Constitution (1996) in this regard are section 26 (on the right to housing), section 27 (on the rights to health care, food, water and social security), and section 28 (on the rights of children, including socio-economic rights).

[208] See, for example, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW.

As Mark Tushnet has noted, these differences point us toward the most significant (but potentially quite soluble) problem with granting constitutional, justiciable status to socio-economic rights. Contrary to popular opinion, the problem, for Tushnet, is not simply that such rights involve judges in questions of public expenditure, or distributive justice, since such questions crop up all the time in ordinary private law, and indeed, in the enforcement of classical, "first generation"[209] rights like the right to a fair trial (consider the money we'd save if we didn't have to "pay the salaries of judges, prosecutors,"[210] etc.) and the right to vote. Rather, the worry is that such rights may enable judges to rely on vague, abstract legal norms – like the right to housing, or health care, or whatever – in order "to coerce the political branches into making substantial changes in background rules, typically by large programs of social provision that require significant alterations in the distribution of wealth."[211] In other words: the worry is that unelected, unaccountable, inexpert judges will take on a key sovereign function of the state, specifically by having final say on macro-level (or morally basic) questions of public expenditure and distributive justice.

There are a number of reasons why judges are perhaps not well placed to take on this role, some of which were mentioned in the preceding section, and the most important of which are implicit in my description of judges as "unelected, unaccountable [and]... inexpert." Simply put, judges lack the democratic legitimacy of the elected branches of government, and they lack the expertise of "civil servants,"[212] and the many other advisors that shape government policy. To be sure, when judges interpret ordinary law, these deficiencies are also applicable, but they are less problematic than in a constitutional context, 1) because an ordinary legislative majority can nullify ordinary, judicial precedent, and 2) because ordinary law is typically (but of course not always) less abstract – and less subject to differing interpretations – than constitutional law, meaning that judges exercising ordinary jurisdiction are more bounded by legislative language, and, tacitly, by the expert opinions that the legislature relied on in the drafting process.

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[209] For the original distinction between first, second and third generation rights see Karel Vasak, *A Thirty Year Struggle*. For a sceptical take on the value of this distinction, see Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*. I will discuss Mureinik's article in some detail over the course of this section, specifically due to its apparent influence on the language of the South African Constitution, and on its eventual interpretation by the South African Constitutional Court.

[210] Again, see Etienne Mureinik, *Beyond a Charter of Luxuries* – at 466.

[211] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – at 227. In making this claim, Tushnet pits himself explicitly against the position taken by Frank Cross in his article, *The Error of Positive Rights*.

[212] Ibid (Tushnet) at 465-466.

We can return to Tushnet here, because for him, while the arguments above are quite fair, they rely on an unnecessary assumption: namely, "the assumption that judicial enforcement of social and economic rights must take the form of coercive orders to the political branches of government."[213] This assumption is unnecessary, for Tushnet, because experiences with "weak-form judicial review"[214] in countries like Canada, New Zealand, and the UK, *inter alia*, have shown that constitutional review can involve inter-institutional conversation or "democratic dialogue,"[215] as opposed to blunt coercion, which is to say that it can be robust and meaningful without American-style finality. In this regard, we can point again to the Canadian Constitution – especially its section 33 "notwithstanding" clause – as a leading light, but other systems have developed their own solutions to the problem of coerciveness in judicial review, despite lacking the in-built checks of the Canadian model.

This brings us to the South African system, the subject of this section. On paper, South Africa's 1996 Constitution is amongst the most demanding in the world, containing a catalogue of socio-economic rights (as well as making provision for the *direct* horizontal effect of constitutional rights) that would make a hard-nosed, Ron Swanson-type libertarian weep with anger.[216] However, when the first Constitutional Court of South Africa, the Chaskalson Court, came to interpret and apply the socio-economic clauses of the Constitution, it did so in a way that was non-coercive, dialogic, and "deferential."[217] For this reason, it is worth taking a closer look below at two of the Court's earliest socio-economic rights decisions – *Soobramoney* and *Grootboom* – with the idea being, as before, to look at how the Court balanced aversions to my two vices of liberalism: 1) zeal, i.e. the zeal of instating itself as a sovereign authority on state spending and distributive justice, and 2) abandonment, i.e. the abandonment of individuals to suffering, and to the vagaries of a market economy that fails to meet their most basic, material needs.

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[213] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – at 228.
[214] Ibid. See also Mark Tushnet, *The Rise of Weak-Form Judicial Review*.
[215] See section two of the present chapter, as well as Peter Hogg and Allison Bushell's article, *The Charter Dialogue Between Courts and Legislatures.*
[216] Ron Swanson is a character in *Parks and Recreation*, a TV show satirizing small town life and local government in the United States. Much of the comedy surrounding Swanson's character comes from the fact that he is both an employee of the government's parks department, and an anti-government libertarian bent on disrupting the effective operation of his own department.
[217] I take this specific accusation from Danie Brand, *Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa*.

Before proceeding to *Soobramoney* and *Grootboom*, a few words of context are surely useful. In this regard, the first point worth noting is that when negotiations over South Africa's transition from apartheid began, in 1991, the question of whether to include socio-economic rights in a new constitution was a point of contention not only between the ruling National Party and the rising ANC, but also within circles sympathetic to the ANC and to the interests of the black majority that the ANC represented. On the one hand, the National Party feared constitutionalizing socio-economic rights insofar as this risked producing "dramatic change in the economic status quo,"[218] which was skewed heavily in favor of South Africa's white minority (many of whom were NP supporters). On the other hand, while the ANC leadership saw such rights as a "near-requirement"[219] given the link between black poverty and apartheid, not all of their supporters were so sure. For example, in 1992, a year before the first, "Interim"[220] Constitution came into force, Dennis Davis wrote an article warning against the inclusion of socio-economic rights as anything more than "directive"[221] or advisory principles in the new Constitution, referencing many of the problems of justiciability listed in the previous section of this chapter. To quote Davis:

> "Lest there be any doubt, I am not suggesting that substantive equality is not crucial to the democratic enterprise. In a society like South Africa, the simultaneous provision of civil liberties and the disregard of social and economic equality would render the democratic enterprise extremely problematic, if not nugatory… [hence] the significance of social and economic demands in the form of directive principles, which can assist in the construction of a concept of equality… which blends substantive concerns into the traditional concept of formal equality… [However, where]… a bill of rights strives to do more, it can destroy autonomy and remove… politics to the court room. To overemphasize the importance of rights by introducing a specific battery of social and economic demands in a constitution is to place far too much power in the hands of the judiciary, which however appointed or elected is never as accountable to the population as is the legislature or an executive."[222]

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[218] See Eric Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court* – at 333.
[219] Ibid at 330.
[220] The full text of the Interim Constitution is available here: http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.
[221] See Dennis Davis, *The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles*.
[222] Ibid at 489.

Davis's concerns are plainly worlds away from those of the National Party. As he makes very clear, he has no bones of contention with the ANC's resolve to wage war on material (substantive) inequality in South Africa – an especially potent, despicable legacy of apartheid – but takes issue instead with the ANC leadership's *strategy*, and, more precisely, with the notion that judges could/would play an effective role in the fight for material equality. Elsewhere in his paper, Davis links these concerns with the problem of "polycentricity"[223] mentioned in the previous section. Put simply, this refers to the fact that there is more than one way to do justice to (or respect) a given socio-economic commitment, all of which – given the scarcity of economic resources and the unpredictability of market actors (not to mention the undeniable dependence of economic resources on international trade and investment) – will involve sacrificing some interests in favor of others. Why, Davis calls us to ask, should judges make these trade-offs? And more specifically, why, given that they lack democratic legitimacy as well as economic expertise, would their balance be preferable to that of an elected and more directly accountable legislature?

This is far from an unreasonable question, but it is also not unanswerable. In the same issue of the journal that published Davis's paper – the *South African Journal on Human Rights* – "Wits"[224] law professor Etienne Mureinik wrote an influential article, "Beyond a Charter of Luxuries,"[225] in which he addressed the concerns of Davis and others. At its simplest, Mureinik's position is a mild variation of Mark Tushnet's argument, mentioned above. To explain: for Mureinik, as for Tushnet, the judiciary's lack of democratic accountability and expertise are not problems to be balked at, especially when it comes to the judiciary's involvement in macro-level questions of social and economic justice. However, and again, like Tushnet, Mureinik suggests that these problems lose their sting quite significantly if we stop thinking of judicial review as an all-or-nothing enterprise, i.e. one akin to the comprehensive, substantive due process approach that was propagated by the US Supreme Court in decisions like *Lochner* and *Roe*.

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[223] Ibid at 477-478. The classic article on the problem of polycentricity in adjudication is Lon Fuller, *The Form and Limits of Adjudication*. For analyses of polycentricity vis-à-vis the adjudication of socio-economic rights, see JEFF KING, JUDGING SOCIAL RIGHTS (at 189-210) and Jeff King, *The Pervasiveness of Polycentricity* (as referenced at the end of the previous section).

[224] Shorthand for the University of Witwatersrand in South Africa. See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 – at 269.

[225] For another example of an early article advocating the inclusion of socio-economic guarantees in the South African Constitution, see Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution*.

What, then, is the alternative? Put simply, Mureinik's claim was that judicial review at its best will stop well short of comprehensive, constitutional interpretation, and will focus instead on the more negative, moderate task of asking whether a suspect law or policy is rationally defensible, "given"[226] that the Constitution promises x, y and z. Where an economic right is at stake – a right to housing, for example – this would mean asking not what policies the government must pursue and implement to fulfill its constitutional duty to those without housing, but merely whether the policies that it *has* chosen to pursue constitute a sincere, "rational"[227] attempt to fulfill its constitutional duty, an attempt that shows cognizance of (and a basic commitment to) the Constitution's promise vis-à-vis housing. In other words: the appropriate, judicial question, for Mureinik, is not whether Parliament (and other government officials) have interpreted the Constitution correctly, but whether they can be seen as having interpreted the Constitution *at all*, i.e. whether a challenged law or policy can be explained in terms of a sincere and rational interpretation of the Constitution, regardless of the extent to which that interpretation differs from the court's own understanding.

Of course, this may be how judges *should* engage in constitutional review, ideally, but the history of constitutional review proves that courts can dress up fairly extreme, controversial usurpations of sovereignty as demands for merely "rational" legislation (*Lochner* is the classic example of such subterfuge, with the USSC insisting not simply that contractual freedom was protected by the Fourteenth Amendment, but, more importantly, that New York's working time laws couldn't be justified as a minimally rational exercise of the state's "police powers"[228]). The question, then, is whether the modest empowerment of judges to set aside "dishonest or irrational means"[229] of addressing socio-economic needs is worth the risk that judges will – in some if not many cases – end up reading their own visions of socio-economic justice into the Constitution, thereby depriving elected government of a capacity for democratic experimentation, and popular self-definition. Can this worry be met with more than a feeble shrug of one's shoulders?

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[226] See Etienne Mureinik, *Beyond a Charter of Luxuries* (at 472). To quote: "The question for the court would always be this: given the constitutional commitment to these rights – to eradicating starvation, to supplying primary education, to delivering basic health care, to ensuring sanitation, can this government programme be justified?"

[227] Ibid at 472. Mureinik's position here comes very close to the style of judicial review that is advocated by Mattias Kumm in his paper, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*.

[228] I sense that this is sometimes forgotten about *Lochner*. To clarify, the USSC would have upheld the New York law under scrutiny if it had found a "rational" connection between it and a legitimate, state objective, but it insisted that it lacked such a connection to any of the state's proposed justifications.

[229] Etienne Mureinik, *Beyond a Charter of Luxuries* – at 474.

Mureinik's answer to this question – which I'll come to in a moment – was essentially undergirded by two thoughts. The first one, which appears upfront in the title of his paper, "Beyond a Charter of Luxuries," was that a Constitution's survival (and flourishing, as a part of a cultural imagination) depends on its capacity to find traction in the "mind of the majority."[230] To explain: in post-apartheid South Africa, the everyday concerns of ordinary citizens surely have little to do with the purportedly "negative,"[231] classical liberties described by thinkers like Locke, or the founders of the American Republic: freedom of speech, religion, etc. On the contrary, the most pressing, everyday problems that especially black South Africans faced and still face, as victims of apartheid, were/are problems of material need, and Mureinik accordingly reasoned that a Constitution – to find traction in the "mind of the majority" – must contain a meaningful commitment to the eradication of material need (however hard it would be to follow through on this commitment). In other words: a Constitution must be more than a "charter of luxuries,"[232] lest it take on a hollow ring, as an empty and even disingenuous enterprise.

The second thought, on the other hand, has deeper roots in Mureinik's work, going all the way back to his criticisms of apartheid-era adjudication in the 1980s. To put it simply, Mureinik was a longstanding critic of the South African judiciary's hesitance to review apartheid law, which he viewed as symptomatic of a more pervasive and sinister "culture of authority"[233] that allowed apartheid to "flourish."[234] To quote:

> "Apartheid flourished because it was impossible to ask parliament to justify its laws; the Population Registration Act could not have survived an inquiry into its rationality. Conversely, it will be impossible fully to undo apartheid without a legal order which makes every law, every government decision, indeed every decision having governmental effect, amenable to scrutiny; one which empowers… judges to demand to know the reasons for a law, or the decision."[235]

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[230] Ibid at 465. "In the mind of the majority, it would make the bill of rights a charter of luxuries" if it contained only "first-generation" rights.
[231] For an approach that leans heavily on the distinction between negative and positive rights, see Frank Cross, *The Error of Positive Rights*. To somewhat oversimplify, the difference is that negative rights (are traditionally thought to) require governments to refrain from particular forms of action, whereas positive rights require governments to engage in particular forms of (potentially time-consuming, or expensive) action.
[232] See Etienne Mureinik, *Beyond a Charter of Luxuries*.
[233] See David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture* – at 32-33.
[234] Etienne Mureinik, *Beyond a Charter of Luxuries* – at 471.
[235] Ibid.

In sum, then, the two thoughts on which Mureinik's approach rests are 1) that a Constitution without social rights coverage would lack the wide, intimate appeal needed to ensure its legitimacy and sustainability, and 2) that the weakness of judicial review during apartheid – and more precisely, the refusal of judges to ask the government to justify even its most abhorrent policies – was one of the reasons that apartheid survived for so long. In turn, these thoughts spawn a quite understandable answer to the question posed a few pages back, the question of why we shouldn't fear a weak-form model of judicial review acting as a cover for (or a gateway to) what is in fact strong-form judicial review of the state's economic policies (and of the elected government's interpretations of the Constitution). In light of the two thoughts mentioned above, Mureinik's answer is simple: that's the chance we take, the chance that we *must* take to ensure the legitimacy of a new Constitution (point one), and the final burial of apartheid, not to mention the culture of authority that sustained it (point two). In this regard, Frank Michelman's description of Mureinik's stance is apt:

> "Mureinik's humanitarianism evidently could not accept the moral paralysis implied by this institutional dilemma… [i.e. the dilemma associated with traditional thinking on the justiciability of social rights]… His progressive political thought told him that freedom and democracy are shibboleths without due provision for people's basic material needs. It told him that, whatever might be said elsewhere about the superiority of the market as an engine of provision for such needs, a constitution of South Africa, supposedly marking the transition from apartheid to freedom while imposing no duty on the state to see to the matter of relief from the privations of gross historical injustice, would be a travesty. Thinking hard about the matter under these promptings of political morality, Mureinik came to find the institutional dilemma… [see above]… to be a false one. Constitutional provisions for social rights, he concluded, can… give rise to properly justiciable questions [depending]… on how the drafters of the provisions conveyed and the courts understood their intentions."[236]

[236] Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik* – at 500. In his own work on American constitutional law, Michelman has frequently displayed a "humanitarian" streak that is very much akin to the one he attributes to Mureinik. In particular, Michelman's early law review articles attempt to reconstruct American constitutional doctrine – which is traditionally seen as hostile to social rights coverage, bar a few subsequently underdeveloped decisions of the Warren Court (*Goldberg v. Kelly*, *Gideon v. Wainwright*, etc.) – so that it would be capable of "protecting the poor" in various ways (although he goes in a very different and more sceptical direction in his later work). See, for example, Frank Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor through the Fourteenth Amendment*, and Frank Michelman, *Welfare Rights in a Constitutional Democracy*.

To take Michelman's reading a step further, I wonder whether Mureinik's insistence on *some* judicial involvement in questions of socio-economic justice is something like what I have been calling a "poetical" liberal approach to the enforcement of social rights. To explain: for Mureinik, constitutional review in the new South Africa would fall flat – to the point of "travesty," as Michelman puts it – without a judiciary empowered to sweep up any remnants of apartheid untended or "unswept" by the political branches of government. Moreover, Mureinik supposed (quite rightly, I think) that the most significant and morally problematic remnants of apartheid would be those forms of abject, socio-economic deprivation that apartheid had inflicted on South Africa's black community, and he therefore assumed that the legitimacy of a post-apartheid system would turn, in part, on its capacity to respond to such deprivation, even or perhaps especially where "majoritarian processes are subject to… blockages"[237] ("burdens of inertia,"[238] to quote Rosalind Dixon), or where they fail to deliver what they promise (perhaps due to poor planning, or unforeseen consequences).

Why is this a poetical liberal approach to the problem of social rights adjudication? Well, remember what poetical liberalism is all about. In a nutshell, poetical liberalism is about remaining mindful of (and sensitive to) the tension between zeal and abandonment, which Mureinik's approach does by ensuring or trying to ensure 1) that judges can intervene effectively where serious suffering is taking place (especially since so many of South Africa's social problems are a direct legacy of apartheid), and 2) that the people themselves – via their elected government – remain the primary decision-makers when it comes to resource allocation under conditions of scarcity, and, in particular, when it comes to accommodating the two needs that are surely fundamental to a country's economic health: the need for market freedom as a means of attracting investment, and the need for market interventions that protect the well-being and effective autonomy of the "least advantaged" (or more generally, of the economically disadvantaged).

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[237] Rosalind Dixon, *Creating Dialogue about Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited* – at 402.

[238] Ibid. A clear example of such a "burden of inertia" is the inability of the Federal Congress in the US to enact basic gun control legislation (e.g. legislation requiring background checks on firearms purchased online or at gun shows) despite massive public support. Most media outlets agree that the reason for this blockage is the power and influence of the National Rifle Association, which can effectively discourage senators and congressmen/women from voting for even modest restrictions on firearm sales by threatening withdrawal of campaign funds or the provision of funds for a rival candidate. See here: http://www.cnn.com/2016/06/20/politics/senate-gun-votes-congress/.

Keeping Mureinik's theory in mind, we can pick up the story again in 1994, when the ANC's "resounding"[239] electoral win bolstered its bargaining power in the negotiations over what became the new, full Constitution of South Africa, in 1996. As noted already, the inclusion of socio-economic rights in a post-apartheid constitution was high up on the ANC's political wish list, and it is therefore unsurprising, given the ANC's mandate, that the 1996 Constitution is endowed with an unprecedented array of socio-economic rights: to housing, sustenance, and health care, *inter alia*. This brings us back, promptly, to Mureinik. Because while Mureinik had no influence on the ANC's preference for social rights coverage in the new constitution, the *manner* in which this coverage was provided has his fingerprints all over it, perhaps due to his role as an advisor to the Democratic Party during the constitutional negotiating process. To illustrate this point, consider the right to housing under section 26 of the Constitution, which limits an initially unqualified insistence on each person's right to "adequate housing"[240] (section 26.1) by issuing two provisos in section 26.2, 1) that the state need only take "reasonable legislative and other measures… to achieve the progressive realization"[241] of the individual's right to housing, and 2) that it need only take such measures "within its available resources."[242]

The "Mureinikian" implication here is that the state cannot be held responsible for failing to provide adequate housing to a particular person, but only for failing to take "*reasonable*… measures" to ensure that the *general* promise of section 26.1 is "progressively realized" within the state's "available resources." Less than a year after this provision came into force (on the 4th of February, 1997), the Constitutional Court took a similarly "Mureinikian" tack in its first social rights case, *Soobramoney v. Minister of Health (Kwazulu-Natal)*. Mr. Soobramoney couldn't afford the dialysis treatments needed to prolong his life, and the question before the Court (or rather, the question that it chose to answer) was whether the state was obliged to pay on his behalf, lest it violate his constitutional rights to life (section 11 of the Constitution), health care (sections 27.1 and 27.2) or emergency medical treatment (section 27.3). Could the state abandon Mr Soobramoney to die, given its constitutional commitments to human life and health care provision?

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[239] See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 – at 126-127.
[240] See section 26.1 of the Constitution of the Republic of South Africa, available here http://www.gov.za/documents/constitution-republic-south-africa-1996.
[241] Ibid at section 26.2.
[242] Ibid.

As "painful"[243] and "wrenching"[244] as it must have been, the Court could really only give one answer to this question. True, the South African Constitution guarantees the aforementioned rights to life, health care and emergency treatment, but such promises can only ever be stacked atop a much colder reality, in which the scarcity of resources condemns some if not many lives to an ultimately fatal, state neglect. To simplify the Court's opinion, delivered by Chaskalson P (President of the Court), there can be no doubting that the Constitution's commitment to making health care nationally accessible requires decisive enforcement, lest it take on a "hollow ring,"[245] but there can also be no doubting that decisive enforcement can't mean *absolute* enforcement, because the "literal provision of equal access"[246] to health care – even in the most prosperous countries of the first world – "would raise the level of spending to a point which would preclude"[247] meaningful and even constitutionally-necessary investment in other, key fields (education, criminal justice, etc.).

The result of this is that, to use Chaskalson's term again, a constitutional commitment to socio-economic rights will always have a slightly "hollow ring," and will always stand at odds with some aspects of social reality. This raises the question: if a constitution's commitment to social rights will always have a hollow ring, then what does it mean, and what is it worth? The Court's "Mureinikian" answer to this question was that – despite the impossibility of fulfilling everyone's social rights – individuals may at least be entitled to a rational explanation for un-fulfillment, and to a legal remedy where such an explanation is either missing, or is constitutionally "irrational."[248] In *Soobramoney*, unfortunately, the court found nothing lacking in this regard, which is to say that Mr. Soobramoney was effectively condemned to death, *abandoned to death*. The sad fact, as Justice Albie Sachs put it in his concurring opinion, is that "resources… [aren't] coextensive with compassion."[249] Not everyone can be saved, and there is typically "no reason"[250] to suppose that courts are better than legislators or government ministers at deciding where the line should lie between the lucky/saved and the unlucky/abandoned.

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[243] See ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW – at 174.
[244] See Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik* – at 499.
[245] *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) – at para. 8.
[246] *Soobramoney* (Justice Sachs opinion) at para. 53 (quoting a UNESCO report).
[247] Ibid.
[248] See Etienne Mureinik, *Beyond a Charter of Luxuries* – at 474. Note once again that "constitutionally irrational" does not mean "irrational per se," but merely inappropriate or ineffective as a means of pursuing the ends prioritized by the Constitution. (There is nothing irrational "per se" about drinking coffee, but it becomes irrational if you drink it because you're trying to lower your caffeine intake).
[249] *Soobramoney* (Justice Sachs opinion) at para. 59.
[250] Ibid.

As I remarked earlier, this was really the only response that the Court could give, and one may accordingly ask: why, if Mr. Soobramoney was doomed to lose, did the Court 1) choose to hear the case, and 2) go so deep into the problem of how social rights are best enforced? Although there is no clear, demonstrable answer to this question, Theunis Roux has understandably speculated that the Court may have been using *Soobramoney*, a "politically uncontroversial"[251] case, to lay down some bold, jurisprudential foundations – foundations that would lend weight to and undergird more controversial decisions in future cases. Whether this was true or not, *Soobramoney* ended up performing precisely this function, when, three years later, the Court followed its *Soobramoney* approach in the now infamous case, *Government of the Republic of South Africa v. Grootboom and Others*.

Like *Soobramoney*, and indeed, like a great many cases in which socio-economic rights are at stake, the facts of *Grootboom* are heartbreaking, to put it mildly. As Cass Sunstein points out, the story of *Grootboom* began during apartheid, when the government of the Western Cape implemented a "freeze"[252] on housing provision for black people, leaving many, who had moved to the area for work, with little choice but to move into "informal settlements"[253] – "shacks and the like"[254] – to survive. One such settlement was Wallacedene, near Cape Town. The residents of Wallacedene lived "under intolerable conditions,"[255] "without water, sewage, or refuse removal services."[256] Having waited for years for low-cost housing to be provided, the residents eventually had enough, and moved onto unoccupied private land: land that was actually "earmarked for formal low-cost housing."[257] A short time later, the residents were legally evicted from the land, but they refused to leave. The government responded by destroying their homes (and many of their possessions), leaving the residents with nothing, and forcing them to camp out on a local sports field under "plastic sheets."[258] This was when the residents filed suit, claiming, unsurprisingly, that their right to housing under section 26 of the Constitution had been violated.

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[251] See THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 – at 276.
[252] See Cass Sunstein, *Social and Economic Rights? Lessons from South Africa* – at 6. Here, Sunstein takes a more nuanced approach than he did in an earlier article on post-communist constitutionalism, in which he derided the constitutional protection of social rights as a "disaster" (although I suppose that the specificity of the post-communist situation may warrant concerns that constitutionalizing social rights would slide into a deeper, root-and-branch resistance to free market liberalism). See Cass Sunstein, *Against Positive Rights* – at 35.
[253] See Cass Sunstein, *Social and Economic Rights? Lessons from South Africa* – at 6.
[254] Ibid.
[255] See Dennis Davis, *Socioeconomic Rights: Do they Deliver the Goods?* – at 693.
[256] See Cass Sunstein, *Social and Economic Rights? Lessons from South Africa* – at 6.
[257] Ibid at 7.
[258] Ibid.

At first instance, the High Court of the Western Cape held that there was no violation of section 26, because the government "had produced clear evidence"[259] that, despite their failure to provide the Wallacedene residents with housing, they had nonetheless fulfilled their constitutional duty, as described in *Soobramoney*, to implement a "rational"[260] plan for the provision of low-cost housing. The Court went on, though: because although section 26 apparently entitled the residents to little more than rationality and good faith, section 28 of the Constitution, on the rights of children, is a different story. The difference is that, whereas section 26.2 seems to qualify the individual's 26.1 right to housing, and to require little more than "reasonable" efforts within the state's "available resources,"[261] section 28 insists more bluntly – i.e. without qualifying language – that "every child has the right… to shelter"[262] (as well as to a host of other amenities and standards of treatment). For the Court, a faithful rendering of this provision would accordingly demand more than mere reasonableness for the 510 children among the Wallacedene residents (and, by derivative necessity, for their parents). More specifically, in the opinion of the Court, a faithful rendering would require that "tents, portable latrines, and a regular supply of water"[263] be supplied to the Wallacedene residents as the "bare minimum"[264] that the state owed to the children among them.

As Sandra Liebenberg puts it, the High Court was accordingly prepared, through a very literal reading of section 28's rights of the child, "to impose a direct duty on government"[265] – a duty that far exceeded the "Mureinikian" approach to social rights proposed by the Constitutional Court in *Soobramoney*. On appeal, though, the Constitutional Court took a different tack. Writing for the majority, Justice Yacoob proposed an "exceedingly narrow"[266] reading of section 28, suggesting that, despite indications to the contrary, section 28 must be read as creating "no independent socio-economic rights"[267] for children, since this would make children "stepping stones"[268] to extra protection, thereby discriminating unfairly between homeless people with and without children.

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[259] See Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?* – at 9. I note that Liebenberg is referencing the language used in Dennis Davis's High Court opinion in *Grootboom v. Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) at 286 H-I.
[260] Ibid.
[261] The Constitution of the Republic of South Africa, Section 26.2.
[262] Ibid at Section 28.1(c).
[263] *Grootboom v. Oostenberg Municipality and Others* (Judge Davis opinion) at 293 A.
[264] Ibid.
[265] Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-economic Rights* – at 10.
[266] Cass Sunstein, *Social and Economic Rights? Lessons from South Africa* – at 10. See also *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 – especially at paras 70-79.
[267] Ibid (Sunstein).
[268] Ibid at 11.

In effect, this makes the Constitutional Court's response to the Cape High Court a lot like the SCC's aversion to *Shelley* in *Dolphin*, which was similarly driven by "pragmatic considerations"[269] as opposed to interpretive fidelity. In *Dolphin*, remember, the SCC refused to endorse *Shelley's* treatment of the judiciary as a constitutionally responsible organ of government, because it supposed that this would widen the scope of judicial review to an unsustainable degree. Similarly, in *Grootboom*, the Court noted that the High Court's "literal" reading of section 28 would demand significant, judicial interference in the "reasonable priority-setting"[270] of government, thereby undermining the generally "Mureinikian" spirit of the Constitution's provisions on socio-economic rights – a spirit that turns on the idea that economic priority-setting should be a "popular" activity, subject to the influence of the people. This raises the question, though: are such "pragmatic considerations" really enough to justify ignoring what any liberal will surely see as severe injustice, the injustice of dire, state-constructed, racially-disparate poverty? Justice Yacoob recognizes this when he notes that the Constitution would be worth "infinitely less than the paper it is written on"[271] if it can't respond to such injustice, but why, if this is the case, would the Court shut down the textually-faithful avenue opened up by the High Court?

The simple answer is that it had a different avenue in mind: namely, the section 26 avenue that was closed by the High Court. To explain: without reversing or indeed modifying its position in *Soobramoney*, the Court in *Grootboom* pointed out that, although the government had a "rational plan" for housing provision, as noted by the High Court, this plan made "no express provision to facilitate access to temporary relief for people who have no access to land… [and] no roof over their heads."[272] In the Court's opinion, this lack rendered the government's housing scheme *constitutionally* unreasonable under *Soobramoney*, not because the government had left "urgent needs"[273] untended, which was accepted as occasionally inevitable in *Soobramoney*, but because it made no express commitment to *try* and fulfill such needs. In other words (and as Ronald Dworkin may have put it): the government failed in its duty to show "concern and respect"[274] for those in dire need, in a situation of abject and urgent dependence.

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[269] Ibid at 10.
[270] Ibid at 11.
[271] *Grootboom* (Constitutional Court decision, Justice Yacoob opinion) at paragraph 83.
[272] Ibid at paragraph 52.
[273] Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?* – at 17.
[274] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY. In *Grootboom*, Justice Yacoob frames this slightly differently, as a duty to show "care and concern" for all lives (at paragraph 44).

Clearly enough, this aspect of the Court's ruling marks a stark aversion to what I have been calling a politics of abandonment: a politics that writes off some lives as necessary sacrifices on the way to a common good, or a maximization of social utility, or whatever. The problem, of course, is that a shift away from such a politics is also and always a shift towards a politics of zeal, since it will entail an express/implied stand on what is "right" or "just" in particular circumstances. Put differently, avoiding (or rather, moving away from) a politics of abandonment means exerting a strong form of sovereignty, one that, according to the argument I have been presenting, is zealous by definition, specifically insofar as it eschews channels of democratic deliberation, i.e. procedural fairness in light of reasonable disagreement, in favor of decisive action, i.e. substantive justice in light of material suffering, or indignity. To put it in terms used by Derrida, and as noted in the previous chapter, sovereignty is essentially a "pharmakon,"[275] a poison and a cure. On the one hand, sovereignty undermines liberty, especially where the existence of reasonable disagreement inhibits anything like unanimity on the justice of particular decisions. On the other hand, though, sovereignty is also essential to liberty, since it can remedy forms of suffering that would otherwise flourish, either because legislative channels are blocked/unresponsive (see the gun control situation in the United States), or because the unpopularity of the sufferers makes aid politically unprofitable (see the case of prisoner's voting rights in the UK).

I will come, in a moment, to the *Grootboom* Court's management of this tension, but first, it is useful to quote Albie Sachs – one of the first Justices of the South African Constitutional Court – on how he and his colleagues viewed this tension in *Grootboom*. As Sachs would write ten years later, in *The Strange Alchemy of Life and Law*, his Court's unanimous judgment in *Grootboom* sought:

> "…to express the need both to remind the state of its duty to protect the fundamental dignity of human beings, and to recognize the fact that it was the role of government… [in the *Dolphin* sense, as the executive and legislative branches only]… to determine the priorities, texture and detail of the manner in which it should fulfill its responsibilities."[276]

[275] See Jacques Derrida, *Plato's Pharmacy*, available in JACQUES DERRIDA, DISSEMINATION.
[276] ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW – at 179.

Significantly, Sachs's words here echo those of the Canadian Supreme Court in *Morgentaler* (and to a lesser extent, in *Dolphin*). To explain: as in Canada, Sachs's emphasis is on the necessity of a middle ground (or balance) between judicial deference and activism, a middle ground that is often located in the originally Canadian idea of "dialogic"[277] review. How, though, did the Court in *Grootboom* maintain a commitment to inter-institutional dialogue, given the clarity of its aversion to a politics of abandonment? The answer lies 1) in the Court's refusal to offer specific (or even moderate) guidance on how government could/should remedy its abandonment of those in dire need of temporary housing, and 2) in the Court's refusal to exercise "supervisory jurisdiction,"[278] which would have made the government's response to its initial ruling subject to further, judicial scrutiny.

The first point, I think, is readily compatible with the Canadian idea of constitutional dialogue, but what about the second one? If the Court's intention was to become a dialogic partner in the state's "peeling back" of apartheid, then it evidently wanted to keep the conversation short, laying down the law and then leaving the government to police itself (at least vis-à-vis the Wallacedene crisis). In effect, this meant that the Court, while taking a symbolic stand against a politics of abandonment (see above), also took a step towards such a politics. The result was that, years after the ruling, the government had still (on some reports) not implemented the Court's decision "effectively,"[279] and less than ten years down the line, the named plaintiff in the original case, Irene Grootboom, was dead, "homeless and penniless."[280] With this in mind, it is not hard to see why some commentators have seen the Court's decision as a failure. As Danie Brand has suggested, issues of institutional competence and legitimacy are surely important, but the South African Constitution is hard to read as a document that is preoccupied with such issues. On the contrary, as Karl Klare suggested in a well-known article, the South African Constitution is in significant respects "post-liberal"[281] (or post-American, to be more blunt), since many of its provisions focus on the individual's democratic "empowerment"[282] as opposed to the disempowerment of government (the latter being a major preoccupation of the American founders).

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[277] See, for example, Mark Tushnet, *Dialogic Judicial Review*. See also the second section of this chapter, on the Canadian Constitution and the *Morgentaler* case.
[278] For a pointed critique of the Court on this point, see Dennis Davis, *Do Socioeconomic Rights Deliver the Goods?* – at 701.
[279] Ibid. See also (as referenced by Davis) Kameshni Pillay, *Implementing Grootboom: Supervision Needed*.
[280] See here: http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless.
[281] See Karl Klare, *Legal Culture and Transformative Constitutionalism* – especially at 150-153.
[282] See Danie Brand, *Judicial Deference and Democracy in Socioeconomic Rights Cases in South Africa* – at 621-624 (discussing Klare's notion of post-liberal or "transformative" constitutionalism).

In this sense, my key criticism of the *Grootboom* Court would be that it withdrew too quickly from the dialogue over the Wallacedene situation, thereby reneging on its basic, constitutional duty to "progressively realize" a state of individual empowerment. To be sure, the Court may have had good, "strategic"[283] reasons for this withdrawal, as Theunis Roux suggests. For example, perhaps the Court was wary of confronting the government too fully at such an early stage in its institutional life, especially since the ANC looked set to be in power for quite some time. I wonder, though: would an exercise of supervisory jurisdiction really have appeared as confrontation? I leave this question for the political scientists. Suffice it to say here that, while this chapter has been consistent in its aversion to American-style juristocracy, it is equally unacceptable for this aversion to slip into "deference,"[284] the judicial philosophy that most plainly reflects a politics of abandonment. On the contrary, whether it always works or not, my poetical liberal preference is for a form of dialogic review, a form of review in which the judiciary is neither a final arbiter, nor a rudderless rubber stamper.

What, then, should a judiciary aspire to be as a constitutional actor? Personally, I find promise in Bruce Ackerman's notion of the judiciary as an exceptional sender of "constitutional signals"[285] – signals issued, in light of national upheaval, so as to facilitate rather than foreclose processes of "reasoned deliberation" over national/constitutional identity. To be sure, there are a lot of questions raised by this idea (When will a citizenry's deliberation be sufficiently reasoned? Does this mean that *any* outcome of sufficiently reasoned deliberation will be liberally legitimate?), but it at least captures the necessity of a balance between the two sins of liberalism, zeal and abandonment. This is what (and perhaps all that) poetical liberalism demands: a willingness to walk the wire between zeal and abandonment, or between the poisonous and curative implications of a blunt, sovereign decision. And although I have located hints of this willingness in Canadian and South African jurisprudence, poetical liberalism, in true, Derridean fashion, is not equivalent to this jurisprudence, but rather rejects the security of a prescribed approach, even as it relies on prescribed approaches – like Rawls's rule of public reason – as unavoidable equivocations of justice. *This* is poetical liberalism. It offers a dilemma as an answer, where the question is what human dignity means when it comes first.

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[283] THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT – at 276-279.
[284] See Danie Brand, *Judicial Deference and Democracy in Socioeconomic Rights Cases in South Africa.*
[285] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 48 (and at other points in the same text).

Conclusion: The Twisted Fork in the Road

With all of this said, let us now reflect on the last seventy pages. I began, in the first section, with an examination of "strong-form"[286] judicial review, as exemplified by the American Supreme Court's decisions in *Lochner v. New York* and *Roe v. Wade*. At its strongest, as in *Lochner* and *Roe*, the USSC has elected to make a single, markedly comprehensive interpretation of the US Constitution nationally binding, and the high bar of the Article V amendment rules has left the American people – divided as they often are – unable to respond, except via the election of Presidents who will appoint "their kind" of Justices to the Supreme Court (although even then, a hostile Senate can block nominations for no good reason, as with President Obama's nomination of Merrick Garland in 2016).

In the second section, the excesses of the American model were contrasted, sharply, with the situation under the Canadian Constitution since 1982. Unlike its American counterpart, the Canadian Constitution lets the country's national and provincial Parliaments reject a Supreme Court ruling made under certain sections of its Charter of Rights and Freedoms (specifically, section 2, and sections 7 to 15). Remarkably, although this arrangement would potentially allow the Canadian Supreme Court to take on a more active role without producing "juristocracy," the Justices have in practice gone the other way, as evidenced by the SCC's version of the *Roe* decision, *R v. Morgentaler*. In this regard, the key features of CJ Dickson's opinion in *Morgentaler* are surely 1) its reliance on purely procedural review, and 2) its hesitance to offer conclusive comments on the status of abortion rights under the Charter. Although his opinion can still be criticized as too zealous or too inconsequential (depending on one's politics), it at least shows the Court wrestling with the right dilemma, between zeal and abandonment. I accordingly held up *Morgentaler* as an example of "poetical liberal" decision-making in action – not because I think that it got the abortion question "right" under Canadian law, but because it displayed liberally appropriate resistances to both zeal and abandonment, 1) by refusing to answer more constitutional questions than necessary, and 2) by nonetheless taking firm action to prevent the suffering of women under the country's abortion rules.

[286] I don't know exactly where the term "strong-form judicial review" originated, but it is most prominently used in the work of Mark Tushnet. See, for example, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS, as well as Mark Tushnet, *Alternative Forms of Judicial Review*, and Rosalind Dixon, *Creating Dialogue about Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited.*

In section three, I then moved from the abortion problem to the problem of state action in the United States. As Johan van der Walt has noted, the importance of the state action problem in modern constitutional theory, and modern political theory, lies in its connection to a certain "question of sovereignty."[287] On the one hand, a narrow understanding of the state action requirement – one that, for example, finds no state action in the so-called "background rules" of the common law – assumes that there are forms of private action that the state just can't/shouldn't touch, i.e. spheres of life in which the individual is rightfully sovereign rather than the state. On the other hand, a more expansive understanding of the state action requirement – which counts both background rules and their judicial enforcement as instances of state action – assumes a theory of basically unlimited, arguably "totalitarian"[288] sovereignty, a theory that holds the state responsible for all instances of "contra-constitutional suffering" within its jurisdiction, at least where the arms of the law get involved.

In its infancy, the state action doctrine in America was presented in the latter way (see *The Civil Rights Cases*), but with no acknowledgement and apparently no understanding that this expansive presentation implied an equally expansive, "total"[289] conception of sovereignty, a conception that would have run very much against the grain of the laissez-faire, "Wild West"[290] mentality that was then rife in the US. In its *Shelley* decision, the USSC finally embraced this conception of sovereignty in full, making the US government responsible for harm resulting from its arbitration of "private" disputes. However, given America's lingering attachment to "negative" liberty even after the New Deal, many commentators (Wechsler, Tribe, etc.) were hesitant to accept such an expansion of sovereignty, with Justice Rehnquist's opinion in *DeShaney v. Winnebago County* marking a high water mark in the kick back against *Shelley*. The problem, though, as even Herbert Wechsler pointed out, was that the state plainly *was* responsible for (or at least deeply implicated in) the discriminatory practices at issue in *Shelley* (see Michelman's "Hohfeldian point"), which is to say that *Shelley* does not extend the sovereignty of the state, but rather recognizes it's already total reach – a recognition that radically challenges the standard public/private distinction that is so dear to American minds.

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[287] The reference here is to JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY.
[288] Again, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS – at 196.
[289] The reference here is to Mattias Kumm's article, *Who's Afraid of the Total Constitution?*
[290] See Johan van der Walt, *Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence* – at 162 (using the Wild West as a symbol for a state of lawlessness – a *stateless* state).

This led me to the fourth section of the chapter, in which I examined the way in which the Canadian Supreme Court clumsily and indeed incoherently addressed the state action problem in its *Dolphin Delivery* decision. Admirably, the SCC again (as in its *Morgentaler* judgment) sought a middle ground between activism/zeal and deference/abandonment, but the problem is that it did so by relying on a problematic, Lochner-esque valorization of the common law – perhaps as a source of natural liberty, or perhaps more modestly as a fund of tried and tested "background rules" that should be disrupted with great caution. Having argued against such an antiquated understanding of the common law, I saw only two alternatives: either expand the common law protectionism of *Dolphin* to *all* private law, or drop it completely. And, in the end, the logic of abandonment that inheres in the former option pushed me to embrace the latter one, which I defended by noting the capacity of the Canadian system's "dialogic" features to constrain a more zealous judiciary, thereby reducing the likelihood that the full, constitutional review of private law will inhibit democratic experimentalism in the field of economic regulation (or the ability of private actors to order their affairs in line with the law's likely enforcement).

Finally, in section five, I turned to the problem of socio-economic rights enforcement in South Africa, which I identified, via Mark Tushnet, as a close relative of the state action problem, the problem of how far the sovereignty of constitutional values – *as interpreted by especially Supreme and Constitutional Courts* – should reach. At the beginning of the section, I focused on the early literature on social rights in South Africa, and, in particular, on the proposals of the late Etienne Mureinik, who laid out a theory of rational review that would leave constitutional interpretation and policy-setting largely to elected officials. As it turned out, both the 1996 Constitution and the first Constitutional Court of South Africa followed Mureinik's proposals to a tee, but the Court went wrong, I argued, in failing to couple Mureinik's theory with an understanding of itself as a long-term, conversational partner to the elected branches. In this sense, I suggested that the Constitutional Court's *Grootboom* decision represents an inversion of the US Supreme Court's decision in *Roe*, with the Canadian Court's abortion decision serving as a kind of golden mean between the two. Of course, that doesn't mean that the Canadian Court's decision is beyond critique. On the contrary, my point is simply that it represents a particular attentiveness to the tension between zeal and abandonment, the operative tension at the heart of my liberalism.

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The point of this chapter has been simple. I have tried to show how the tension between zeal and abandonment has become manifest in modern, constitutional jurisprudence, and I have offered a normative commentary on the attempts made by courts in Canada, South Africa and the United States – key jurisdictions in the field of comparative constitutional law, today – to manage this tension. As legal philosopher Jennifer Nedelsky points out (and to hark back again to Rawls), one of the reasons that this tension has become so clear today is surely that we are now more ready than ever to acknowledge the persistence of reasonable, moral disagreement under conditions of freedom, leaving old understandings of constitutional rights – as codifications of "natural" liberty, or as legitimate "trumps"[291] on government policy – unfit for purpose. We accept this (or many of us do): and yet, we also accept, now more than ever, that effective, enforceable constitutional rights are essential to a healthy democracy, as evidenced by the vast proliferation of constitutional bills of rights in the wake of WWII, and then in response to local ruptures across the globe – the decline of communism in Eastern Europe, for example, or the end of apartheid in South Africa, etc.

This is the dilemma of modern liberalism. We agree that constitutional/human rights are vital, and that they should be effectively enforced. But we disagree about what constitutional and human rights we should have, which yields the question: how can rights be both *effectively* and *legitimately* protected, democratically speaking, when constitutional rights disputes arise precisely because a majority of political representatives (or a representative executive) has evidently decided, expressly or by implication, that some particular "interest" is unworthy of protection as a right? Are we doomed to choose in such cases between effectiveness and legitimacy? My answer has been "yes, but," with the "but" being that this choice can at least be made contestable at every stage, with multiple institutions capable of contributing to what the Canadians call a "democratic dialogue."[292] Of course, at some point, one side of such a dialogue will win the day, but in a healthy democracy, victory will often come for a good (but of course not absolutely or categorically good) reason: because the winning side has generated enough popular support to render ulterior positions untenable (an *unhealthy* democracy would be one in which popular support has no impact the tenability of government positions).

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[291] See Jennifer Nedelsky, *Reconceiving Rights and Constitutionalism* – at 139. For more on Nedelsky's understanding of constitutionalism, see Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism* (on Ackerman's theory of constitutional change).

[292] See Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*.

The unavoidable consequence of this is that our own visions of justice will sometimes be vanquished, which is to say that suffering will sometimes be allowed so as to produce social gains that just don't seem worth the pain. However, as the South African Constitutional Court pointed out in its *Soobramoney* decision, suffering is part of life, and even the best laid plans of the most caring of governments will involve choices *between* schemes of suffering, choices on whose interests are to be sacrificed, and whose protected. As the Court's President noted, this will sometimes give liberal constitutions a "hollow ring,"[293] but this hollowness can be reduced, surely, if we see our government working sincerely towards the "progressive"[294] but impossible realization of human dignity for all – a target that courts can push elected officials towards when they occasionally stray.

At the same time, though, sometimes this will not be enough, by which I mean that dialogue and comity will sometimes seem an *intolerable* response to the existence of real suffering. Where this is the case, or where this seems to be the case, Supreme and Constitutional Courts may choose to engage in what Ackerman, referring to *Brown v. Board of Education*, called "judicial leadership"[295] (or judicial "heroism"[296] in Cass Sunstein's terms). This will always be a risky choice, and it may remain unclear for some time after a "heroic" decision whether it will pay off – e.g. whether its social consequences will be positive, whether it will gain popular and inter-institutional support, etc. However, as the British constitutional theorist Aileen Kavanagh notes (and I finish with this point), sometimes a meaningful commitment to human dignity will mean taking a stand: not just balancing aversions to zeal and abandonment, *but choosing decisively between them*. To quote Kavanagh, although judicial caution is frequently "warranted,"[297] sometimes liberalism:

> "requires judicial courage, and in a case where judges have the expertise to make the decision, and the justice of the case so demands and they are confident that their decision is correct, it is a weak and timid court which capitulates."[298]

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[293] *Soobramoney* (CJ Chaskalson opinion) at para. 8.
[294] Section 26.2 of the Constitution of the Republic of South Africa.
[295] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – for example, at 49.
[296] Reference to CASS SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS AND MUTES.
[297] AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT – at 209. It is worth noting that the UK Human Rights Act – the subject of Kavanagh's book – is remarkably similar to the Canadian Charter in terms of how it structures the relationship between the legislature and the judiciary.
[298] Ibid.

Poetical liberalism is with Kavanagh here, but for one point: it rejects the idea of confidence in a decision's correctness. On the contrary, poetical liberalism offers no hope of such confidence in the "rightness"[299] of one's judgment, because confidence in "rightness" means embracing a politics of zeal, *and* abandonment, since every conception or theory of "right" will accept some forms of suffering and hardship as definitively justifiable (depending on context, proportionality, etc.). This makes poetical liberalism an adventure, but not a pleasant one. Indeed, as Derrida wrote in "Force of Law," the "instant of decision" in poetical liberalism "is a madness,"[300] a twisted fork in the road where one must choose between the imperative of addressing suffering, and the imperative of respecting the "reasonable priority-setting" of an elected government. Poetical liberalism asks for cognizance of this choice in each case, and for sincerity in making it. That is all it asks for, but it of course dreams of more – specifically, of a society (an impossible society, as Derrida stressed) no longer tainted by the violence of sovereignty (centralized *or* dispersed), in which all can flourish, without imposition, according to their own sense of what it means to live well.

[299] Think back to Duncan Kennedy's "mpm leftism" (discussed in chapter four). See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION – at 339-342, for example.
[300] See Jacques Derrida, *Force of Law* – at 967 (paraphrasing Kierkegaard: "The instant of decision is a madness").

CONCLUSION

What Dignity Demands: Liberal Heroism in Climates of Intense and Persistent Social Division

Introductory Quote:

"I've done my best to live the right way,
I get up every morning, and go to work each day.
But your eyes go blind, and your blood runs cold,
Sometimes you feel so weak, you just want to explode…
Explode, and tear this whole town apart,
Take a knife, and cut this pain from my heart,
And find somebody itching for something to start…
Well, the dogs on Main Street howl, because they understand,
If I could take one moment into my hands…
Mister, I ain't a boy, no I'm a man,
And I believe… in a promised land."

Bruce Springsteen, The Promised Land (Darkness on the Edge of Town)

I. *Brown v. Board of Education*, and the Two Functions of Liberal Constitutions

In 1954, as is well known (and as I mentioned briefly in chapter three), the Supreme Court of the United States handed down its ruling in *Brown v. Board of Education*, a decision that would define American liberalism for a generation by rendering racial segregation in public schools illegal. Of course, the most obvious relevance of *Brown* in this regard was its instigating role in the "Second Reconstruction"[1] of US constitutional law, but my interest here is more in the way that it reposed a moral/philosophical problem for liberals that remains as pertinent and pressing today as it did then: namely, that while liberalism is opposed to meaningfully coercive acts of governance, such acts are often the only available way of reducing serious human suffering and indignity. In other words (and to draw again on something that I mentioned in chapter three): liberals often have reasons for simultaneously celebrating and denouncing moments of *institutional heroism* – moments in which institutional actors exceed their legal authority (or the social expectations that surround their authority, and determine how far they can generally "stretch"[2] it) in the name of human dignity, or more precisely, in the name of an aspect of human dignity that is not yet recognized or affirmed by their community.

In her article, "How Constitutional Theory Found its Soul," Rebecca Brown notes that this problem left many American academics deeply unsure of themselves in the wake of *Brown*. For example, Herbert Wechsler, the renowned opponent of *Shelley* discussed in the previous chapter, worried that the Warren Court in *Brown* had ceded to an "understandable… desire to produce specific results"[3] without asking, sincerely, whether those results were supported by a "defensible rationale of interpretation."[4] There are a number of viable explanations for Wechsler's concerns on this point, and in relation to decisions like *Shelley*. In a purely national context, for example, Wechsler and others like him (e.g. Alexander Bickel) may have been wrestling very openly with how to definitively disavow the legacy of the aforementioned Lochner era. In Wechsler's own words:

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[1] As noted earlier (chapter three), this phrase appears in BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 1, 2, 5, etc.

[2] The reference here is to Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* (discussed extensively in chapter four).

[3] Norman Silber and Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler* – at 924. Although Silber and Miller are credited as the authors of this piece, the quoted words are from an interview with Wechsler, and their "article" is a compilation of such interviews rather than a piece of original research.

[4] Ibid.

> "Having learned through that experience of the consequences of judicial excess… [during the Lochner era]… we became highly sensitive to it, and on the whole, I would say, eager to develop the type of critique that would contribute to avoiding it."[5]

At the same time, American scholars were under pressure, internationally, to distinguish their own, "liberal" system from the systems of authority that had produced such unimaginable suffering in other countries. In this regard, American scholars like Wechsler and Fuller clung to the romantic idea that Americans were not subject to the rule of men, government, or authority, but to the rule of law, i.e. the rule of rules knowable in advance. The problem, of course, is that seemingly novel and explicitly anti-majoritarian decisions like *Brown*, if embraced in full, give the romantic ideal of the rule of law a hollow feel, since they suggest that the rule of law offers only the meagre constraint of requiring that judicial creativity (and more bluntly, the sovereign whim of an unelected, judicial elite) be expressed in legal language (and more worryingly, in the abstract language of constitutional rights).

This is the first side of the coin: that the Lochner era, and the tremendous violence of Nazi authoritarianism, had raised the apparent urgency of presenting the rule of law as something *real*, constraining, etc. The other side of the coin, conversely, was that decisions like *Brown* and *Shelley* were – even as they implied a certain moment of judicial authoritarianism, and a break with legality as formal consistency – attempts to subvert what was effectively Nazi ideology in America ("Hitler's creed,"[6] as Justice Hugo Black reportedly called it in pre-*Brown* meetings with his colleagues). To explain: even if long-settled interpretations of the US Constitution (and of the Equal Protection Clause as a guarantee of "separate but equal"[7] treatment) saw no wrong in segregation, an increasingly large percentage Americans saw it not only as wrong, but as the defining and most intolerable wrong of their generation, one that *significantly* narrowed the gap between American liberalism and fascism. From such a perspective, the question, understandably, was what American liberalism was really worth if it lacked the resources to eradicate the worst forms of social degradation: if it forced even the most powerful officials to acquiesce in such degradation so as to optimize governmental structure.

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[5] Ibid. The Rebecca Brown article mentioned on the previous page – *How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin* – also refers to this sensitivity (at 44-45).
[6] See Jack Balkin, *What Brown Teaches us about Constitutional Theory* – at 1540.
[7] As noted earlier, the so-called "separate but equal" doctrine was the legacy of the USSC itself, established in *Plessy v. Ferguson* 163 US 537 (1896).

With these concerns in mind, we can go back to Brown's article ("How Constitutional Theory Found its Soul"). Put simply, for Brown, the "schizophrenia"[8] of academics like Wechsler (as well as Bickel, Learned Hand, and Hannah Arendt in her "Reflections on Little Rock"[9]) was an unacceptable response to decisions like *Brown*, and she goes on to celebrate Ronald Dworkin as the thinker who saved liberalism's soul, since he offered a way of reconciling the rule of law with the supposedly "unprincipled"[10] novelty of decisions like *Brown*. The problem, though, is that theories like Dworkin's (or indeed, Rawls's) only achieve such reconciliation by the repression of *experience*: 1) in the sense that they repress the tensions that liberals of the postwar period experienced between the liberal and illiberal implications *Brown's* activism, and 2) in the sense that many (especially but not only Southern) Americans experienced *Brown* as an affront to their key freedoms of belief and association, i.e. their freedom to hold racist beliefs and to live in segregated communities that reflected such beliefs. Even if we suspend, for a moment, any implication that the repression of racism in America is liberally suspect (as hinted above), one can at least note that sociologically, the repressed elements of a social system will likely return ("the return of the repressed"[11]) and indeed, *have* now returned with the election of Trump and the popularity of "Alt-Right" media. To borrow a term from James C. Scott, one may say in this regard that the dominant narratives of American constitutional law cannot touch the "hidden transcripts"[12] that continue to exist in particular pockets of American society, and that commemorate feelings of repression by "national elites."[13] Indeed: where a dominant narrative refuses to recognize an experience of repression, that experience is surely much more likely to become part of a repressed community's transcript, or self-understanding (consider, for example, how the apparently justified internment of terror suspects in Northern Ireland expanded membership of the IRA by promoting a narrative of British repression[14]).

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[8] Rebecca Brown, *How Constitutional Theory Found its Soul: The Contributions of Ronald Dworkin* – at 45.
[9] Arendt's piece is available in HANNAH ARENDT, THE PORTABLE HANNAH ARENDT – at 231-246.
[10] See Rebecca Brown, *How Constitutional Theory Found its Soul* – at 45.
[11] For the classic account of this phenomenon, see SIGMUND FREUD, THE INTERPRETATION OF DREAMS. See also SLAVOJ ZIZEK, THE SUBLIME OBJECT OF IDEOLOGY – at 11-16.
[12] See JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS.
[13] According to Jack Balkin, constitutional law in the US is not necessarily anti-majoritarian, but it does tend to bend to the will of national elites at the expense of rural and regional communities. See Jack Balkin, *What Brown Teaches us about Constitutional Theory* – at 1538-1546.
[14] See, for example, Lafree, Dugan and Korte, *The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models* – at 34. To quote: "The hazard of subsequent attacks increased significantly after internment." Of course, this is not universally accepted, but it is not hard to find research supporting the idea that more openly repressive and morally questionable governmental strategies increase the likelihood of what the authors above call social "backlash."

If this leaves the reader with a sense that I am criticizing Chief Justice Warren's stand in *Brown*, then I should offer a key clarification. To explain, then: despite any hints to the contrary, my issue with *Brown* is not with the decision itself, but rather with the after-the-fact project of legitimating it in full (a la Dworkin), so that it appears not as a fragile, daring, violent moment of institutional heroism, but, rather, as a decision that was ok'd in advance by either liberal morality, or the "true" meaning of the American Constitution. By contrast, my approach, sketched out in the last chapter, is to theorize liberal constitutionalism as a project divided, tragically, between two fundamental functions. On the one hand, we want liberal constitutions to be *reflective*, which is to say that we want them to be morally "thin"[15] enough to attain support from a range of social actors holding a range of moral viewpoints ("comprehensive doctrines"[16] in Rawls-speak). And, on the other hand, we want liberal constitutions to be *protective*, which is to say that we want them to be morally "thick" enough to provide more vulnerable individuals with legal (or perhaps simply political) recourse against state-sponsored abuse and indignity.

Perhaps more simply, we expect "our" constitutions be "ours" in two senses: 1) in the sense that we can see them as charters of *our* values (*reflection*), and 2) in the sense that we can rely on them, especially when we are at are at our most vulnerable – e.g. when, for whatever reason, our community has come to see us as a threat, or as otherwise unworthy of dignified treatment (*protection*). When these expectations clash, as they inevitably and perhaps even frequently will, all that this thesis asks of liberalism is *acknowledgement*, and all that it asks of liberal institutions is a sincere attempt to navigate the clash *as a real clash*, i.e. *not* as a rhetorically or theoretically surmountable problem. The alternative, I have argued, is to conceal moments of violence that are deeply illiberal, since they are, precisely, moments where the key expectations of a liberal community – expectations associated with human dignity as a promise of consent-worthy treatment – will have gone unmet. As Carl Schmitt claimed, quite rightly, there is no avoiding such violence, but liberalism can still mean something, I have argued, if it remains *perceptive* of violence, however inevitable, and if it remains committed to the critical, Derridean *ideal* of a "lesser violence."[17]

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[15] I draw here on the distinction that Rawls makes in A THEORY OF JUSTICE between thick and thin theories of the good, referring to the level of comprehensiveness with which such theories are framed.
[16] See JOHN RAWLS, POLITICAL LIBERALISM – for example, at 12.
[17] See William Sokoloff, *Between Justice and Legality: Derrida on Decision*, or Martin Hagglund, *The Necessity of Discrimination: Disjoining Derrida and Levinas*. See also my discussion of Derrida's work in chapter four of this thesis (especially my analysis of "Force of Law").

The success of such a venture will be partly dependent, of course, on how social actors and institutions behave, and on how willing they are to consider and weigh the two functions of liberal constitutionalism described above. However, as the last chapter suggested, it is also dependent, in part, on constitutional structure, and on how readily the elected, publicly accountable institutions of government can challenge the constitutional interpretations of Supreme and Constitutional Courts. To clarify, this does mean that the elected, publicly accountable institutions are entitled – by reason of their "democratic" character – to have final say on issues of constitutional interpretation, but rather and merely that, in a world where morality and justice are plural, decisions on constitutional morality and justice should be the subject of a *conversation*, even if, as a matter of fact, one side of this conversation will inevitably monopolize it on a given issue, and have an effectively "final" say.

This takes us back to *Brown*. As Bruce Ackerman has stressed repeatedly, the formal amendment procedures contained in Article V of the US Constitution set the bar for legal change pretty high, to the point where, as the country gets more and more divided (and hence more and more incapable of passing constitutional amendments), the Constitution becomes less plausible as a statement of "We the People," in the here and now, and more an outmoded but problematically binding relic of the past. For this reason, Ackerman suggests that the American Constitution has been – and should be seen as being – supplemented by exceptional "moments"[18] of informal amendment, when an initially divided country, provoked by moments of institutional "leadership"[19] or "heroism,"[20] gradually unifies around a new self-understanding expressed in electoral decisions over a "generation."[21] Granted, this is rosy, overly sentimental stuff, but it has at least one, key advantage over other liberal accounts of *Brown*, namely, that it casts *Brown* as a moment of illiberal violence when it was a decided, a moment of violence that could be (and was) redeemed only in the court of history, i.e. by earning the long-standing approval of all three branches of government and, more importantly, of "ordinary Americans."[22]

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[18] See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*.
[19] See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION.
[20] This is Cass Sunstein's term, which I take to be more or less equivalent to what Ackerman calls institutional "leadership." See CASS SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS AND MUTES.
[21] See Bruce Ackerman, *A Generation of Betrayal* – at 1519. "For most judges, the basic unit of the Constitution is The Clause; for most law professors, the basic unit is The Theory, the one that lurks behind the Clauses and the cases and puts them in their best light. For me… [though]… the basic unit is The Generation. Constitutional meaning is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental political understandings."
[22] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME III: THE CIVIL RIGHTS REVOLUTION – at 31.

Why, you may ask, is this any better? I mean, the communities that were repressed by *Brown* – or, to avoid any implied endorsement their racism, the communities that "felt" repressed by *Brown* – will surely still feel repressed when we tell them that a law professor from Yale has finally (and let's face it, condescendingly) explained why they can stop feeling so hard done by. Maybe so (*surely* so), but I still maintain: Ackerman's theory does these communities a great service by at least *acknowledging* their frustration/repression, and by not asking them to set aside their frustration until "their fellow Americans" have (or appear to have) spoken. In other words: at its most historicist/non-moralistic (and I concede, as noted in chapter three, that Ackerman's work is not necessarily so historicist/non-moralistic in its specifics), Ackerman's theory tells us not that we have to cede to elitist versions of liberal truth, or be "reasonable,"[23] but merely that, when a public truth becomes so much bigger and more popular than our own alternative, it's probably time to "grow up," and stop complaining. Is this *really* too much to ask?

II. Trump's Election and *Poetical Liberalism*

Rather than answer this question, I prefer to leave it hanging, and to conclude, instead, with a recent example of the tension between zeal and abandonment in America. At the time of writing, Donald Trump has only recently been elected as US President, but 1) he lost the "popular vote" to Hilary Clinton by almost three million votes, and 2) he must still be elected, in an archaic twist, by a group of "electoral college" voters whose role is to cast votes on behalf of their states (and in light of the way that their states voted). In nearly half the states, the law – *state law* – requires that the college voters set aside any personal concerns they have re: the President-elect, and vote for the candidate who won the most votes in their state. However, Lawrence Lessig, a Harvard law professor who ran briefly for the democratic nomination (eventually won by Clinton), has suggested that these laws are trumped by the law of the Federal Constitution, which not only imposes no such requirements on the college voters, but arguably *requires* – if one considers the constitutional principle of "one person, one vote"[24] – that college voters on this occasion vote against the college winner.

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[23] Once again, the reference here is to Rawls. See JOHN RAWLS, POLITICAL LIBERALISM – at 48-54.

[24] See here for Lessig's argument: https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0_story.html?utm_term=.49ce4aeb2345. For a blow by blow account of Lessig's crusade to mobilize the electoral college, see his Twitter feed: https://twitter.com/lessig?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

Lessig's argument here is far from unreasonable, but it has already drawn a lot of ire. On the 10th of December, for example, Lessig retweeted a comment from an angry twitter user calling for him to be "punished with death"[25] for his attempts to "interfere with Trump."[26] The level of such discourse, of course, is abysmal (not to mention criminal), but it surely conceals a very legitimate concern: namely, that Lessig is asking an elite group – electoral college voters – to amplify a gap that many Americans perceive between their system and their own wishes and interests. To explain: if the electoral college were to try and thwart Trump's election, which took place in accordance with electoral rules known and agreed to in advance, it would in effect be telling the 46.2% who voted for Trump that their views and wishes are not compatible with their own system, i.e. that the system is theirs only in name, and that they cannot have a role in governance, even if they (and their preferred candidates) comply with electoral rules known in advance.

In principle, poetical liberalism – my theory – is deeply opposed to such a "taking,"[27] unless it can be explained as an attempt to sidestep the opposite vice of abandoning vulnerable individuals to suffering. The question, then, is whether Trump's prospective appointment as President can be so explained, and there are several ways in which we might try to do this. For example, we could adopt the "one person, one vote" tack suggested by Lessig, perhaps arguing that more Americans will suffer feelings of *voicelessness* – against a clear, constitutional rule, no less – if Trump becomes President than if he doesn't. Alternatively, we could focus on the more abhorrent and illiberal promises that Trump made during the campaign, from his promise to ban Muslims from entering the United States ("until… [we] figure out what is going on"[28]), to his promise to murder the families of suspected terrorists overseas (a clear "war crime"[29]). Is the prevention of the suffering that these policies would inflict not reason enough, liberally speaking, to keep Trump out of office? Or does the fact that they were only campaign promises (is there a form of promise more regularly broken?) render premature any attempt to take them seriously?

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[25] Again, see Lessig's Twitter feed (response to Beau Graham on the 10th of December): https://twitter.com/lessig?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.
[26] Ibid.
[27] On this front, consider again Oliver Wendell Holmes's remark in *Lochner v. New York* (see chapter five): "A Constitution is not intended to embody a particular… theory. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." See *Lochner v. New York* 198 US 45 (1905).
[28] See here: https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.42cdb631f26d.
[29] See here: https://www.theguardian.com/commentisfree/2016/jul/01/donald-trump-anti-terror-policies-war-crimes-waterboarding-torture.

Perhaps surprisingly, I don't think we need to answer these questions. On the contrary, all we need to note is that there are enough severe concerns over Trump's election, liberally speaking, to warrant a college vote against him. The reader may object, of course, that this goes against everything that I just said about the questionable character of Lessig's campaign, but such inconsistency may dissipate when we add to the mix one, key piece of information that I've been withholding, thus far. To come clean, then: if enough college voters (37, to be precise) abstain, Trump's election will likely be postponed rather than prevented, because then, the decision goes to the Republican House of Representatives, which will be expected to put Trump into office anyway. Why, then, should college voters abstain, or vote against Trump? The answer is simple: because it costs little (since it won't actually impose an unwanted administration on Trump voters) while contributing significantly to a continuous (although admittedly now quite uncivil and blunt) conversation in America over national and constitutional values. The idea, then, is not to effect change, but rather, to force a *response* from the House of Representatives. Then, if they still want Trump (and still want to honour those who voted for him), they will have to defend their decision, and explain why, given the opportunity, they've decided to elect a candidate who promised such suffering, and whose election violates the constitutional rule of "one person, one vote."

In case it sounds like it, I don't mean this vindictively ("on their heads be it!"), but more in the way that Etienne Mureinik seemed to mean it when he argued for justiciable rights to housing, water, etc. The point is that those who wield power should be kept accountable, and one of the principal reasons why institutional actors should act "heroically," apart from in the hope of preventing preventable suffering, is to "tighten the screws"[30] on those who wield power, to force them into speaking up so that we can all listen, carefully, to what they have to say. This is what government can be at its best, even if it is an ugly and frustratingly imperfect business. You speak, and I listen. Then I speak, and you listen. Then one of us gets our way, because one of us has to. But something more will have arguably happened in the meantime, something more than an imposition, or an act of force. And in the end, there's perhaps little more that we can ask for in a pluralistic world, a world that has "eaten from the tree of knowledge."[31]

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[30] See Johan van der Walt, *Delegitimation by Constitution? Liberal Democratic Experimentalism and the Question of Socioeconomic Rights* – for example, at 326. See also *Frank Michelman, Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests*.

[31] MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES – at 57.

Bibliography

Ackerman, Bruce. "A Generation of Betrayal?" *Fordham Law Review* 65 (1997 1996): 1519.

———. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. Yale University Press, 2007.

———. "Constitutional Politics/Constitutional Law." *The Yale Law Journal* 99, no. 3 (1989): 453.

———. "Dignity Is a Constitutional Principle." *The New York Times* – March 29, 2014. http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html.

———. *Social Justice in the Liberal State*. Yale University Press, 1981.

———. *The Decline and Fall of the American Republic*. Harvard University Press, 2010.

———. "The New Separation of Powers." *Harvard Law Review* 113, no. 3 (2000): 633.

———. "The Storrs Lectures: Discovering the Constitution." *The Yale Law Journal* 93, no. 6 (1984): 1013.

———. *We the People, Volume 1: Foundations*. Harvard University Press, 1993.

———. *We the People, Volume 2: Transformations*. Harvard University Press, 2000.

———. *We the People, Volume 3: The Civil Rights Revolution*. Harvard University Press, 2014.

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Stanford University Press, 1998.

———. *State of Exception*. University of Chicago Press, 2008.

———. *The Highest Poverty: Monastic Rules and Form-of-Life*. Stanford University Press, 2013.

———. *The Sacrament of Language*. Polity Press, 2011.

Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford University Press, 2002.

Antonio, Robert J. "Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought." *The British Journal of Sociology* 32, no. 3 (1981): 330.

Arato, Andrew. "Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States." *Cardozo Law Review* 21 (2000 1999): 1739.

Arendt, Hannah. *On Revolution*. Penguin, 1990.

———. "Reflections on Little Rock." In *The Portable Hannah Arendt*. Penguin, 2003.

———. *The Human Condition*. University of Chicago Press, 2013.

Badiou, Alain. *Being and Event*. Translated by Oliver Feltham. Continuum, 2007.

———. *Philosophy and the Event*. Wiley, 2013.

Balakrishnan, Gopal. *The Enemy: An Intellectual Portrait of Carl Schmitt*. Verso, 2000.

Balke, Friedrich. "Derrida and Foucault on Sovereignty." *German Law Journal* 6 (2005): 71.

Balkin, Jack. M. "Tradition, Betrayal, and the Politics of Deconstruction." *Cardozo Law Review* 11 (1990 1989): 1613.

———. "What 'Brown' Teaches Us about Constitutional Theory." *Virginia Law Review* 90, no. 6 (2004): 1537.

Barak, Aharon. *Human Dignity: The Constitutional Value and the Constitutional Right*. Cambridge University Press, 2015.

Barbaro, Michael, and Steve Eder. "Former Trump University Workers Call the School a 'Lie' and a 'Scheme' in Testimony." *The New York Times* – May 31, 2016. https://www.nytimes.com/2016/06/01/us/politics/donald-trump-university.html.

Barroso, Luis Roberto. "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse." *Boston College International and Comparative Law Review* 35 (2012): 331.

Benjamin, Walter. "Critique of Violence." In *One-Way Street and Other Writings*. Penguin, 2009.

Bennington, Geoffrey. "Rigor, Or, Stupid Uselessness." *The Southern Journal of Philosophy* 50 (2012): 20.

Bennington, Geoffrey, and Jacques Derrida. *Jacques Derrida*. University of Chicago Press, 1999.

Bensaid, Daniel. "Alain Badiou and the Miracle of the Event." In *Think Again: Alain Badiou and the Future of Philosophy*, by Peter Hallward. Continuum, 2004.

Berlin, Isaiah. "Two Concepts of Liberty." In *Four Essays on Liberty*. Oxford, 1969.

Bernstein, Richard. "One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy." *Political Theory* 15, no. 4 (1987): 538.

———. *Violence: Thinking without Banisters*. Polity Press, 2013.

Bickel, Alexander. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Yale University Press, 1986.

Black, Charles L. Jr. "The Supreme Court, 1966 Term, Foreword: State Action, Equal Protection, and California's Proposition 14." *Harvard Law Review* 81 (1968 1967): 69.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. Free Press, 1997.

Botha, Henk. "Human Dignity in Comparative Perspective." *Stellenbosch Law Review* 20 (2009): 171.

Bradley, AW, KD Ewing, and CJS Knight. *Constitutional and Administrative Law, Sixteenth Edition*. Pearson, 2013.

Brand, Danie. "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa." *Stellenbosch Law Review* 22 (2011): 614.

Brännström, Leila. “How I Learned to Stop Worrying and Use the Legal Argument – A Critique of Giorgio Agamben’s Notion of Law.” *No Foundations* 5 (2008).

Brown, Rebecca. “How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin.” In *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, by Scott Hershowitz. Oxford University Press, 2006.

Brown, Wendy. *Regulating Aversion: Tolerance in the Age of Identity and Empire*. Princeton University Press, 2009.

Cameron, David. “Full Text of David Cameron’s Speech (at the 2009 Conservative Party Conference).” *The Guardian* – October 8, 2009. At: https://www.theguardian.com/politics/2009/oct/08/david-cameron-speech-in-full.

Campos, Paul F. “Secular Fundamentalism.” *Columbia Law Review* 94, no. 6 (1994): 1814.

Caputo, John D. *The Prayers and Tears of Jacques Derrida: Religion Without Religion*. Indiana University Press, 1997.

———. “Without Sovereignty, Without Being: Unconditionality, the Coming God, and Derrida’s Democracy to Come.” *Journal for Cultural and Religious Theory* 4, no. 3 (2003): 9.

Carlson, David Gray. “Jurisprudence and Personality in the Work of John Rawls.” *Columbia Law Review* 94, no. 6 (1994): 1828.

Charlton, Angela. “Why Burkini Swimsuits Are Causing Controversy.” *The Times of Israel* – August 27, 2016. At: http://www.timesofisrael.com/why-burkini-swimsuits-are-causing-controversy/.

Chaskalson, Arthur. “The Third Bram Fischer Lecture – Human Dignity as a Foundational Value of Our Constitutional Order.” *South African Journal on Human Rights* 16 (2000): 193.

Chemerinsky, Erwin. “Rethinking State Action.” *Northwestern University Law Review* 80 (1986 1985): 503.

Choudhry, Sujit. “Ackerman’s Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures.” *International Journal of Constitutional Law* 6 (2008): 193.

———. “The Lochner Era and Comparative Constitutionalism.” *International Journal of Constitutional Law* 2 (2004): 1.

Christiansen, Eric C. “Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court.” *Columbia Human Rights Law Review* 38 (2007 2006): 321.

Christodoulidis, Emilios. “De-Politicising Poverty: Arendt in South Africa.” *Stellenbosch Law Review* 22 (2011): 501.

———. “End of History Jurisprudence: Dworkin in South Africa.” *Acta Juridica* 2004 (2004): 64.

———. “Strategies of Rupture.” *Law and Critique* 20, no. 1 (2009): 3.

———. “The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic.” *The Modern Law Review* 74, no. 6 (2011): 962.

Cohen, Felix. “The Ethical Basis of Legal Criticism.” *The Yale Law Journal* 41, no. 2 (1931): 201.

———. “Transcendental Nonsense and the Functional Approach.” *Columbia Law Review* 35, no. 6 (1935): 809.

Cohen, Nick. “Only True Liberalism Can Thwart the Demagogues.” *The Guardian* – September 24, 2016. At: https://www.theguardian.com/commentisfree/2016/sep/24/only-liberalism-can-thwart-demagogues.

Cornell, Drucilla. “Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation.” *University of Pennsylvania Law Review* 136, no. 4 (1988): 1135.

———. “The Violence of the Masquerade: Law Dressed up as Justice.” *Cardozo Law Review* 11 (1990 1989): 1047.

———. “Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility.” *Yale Journal of Law & the Humanities* 2 (1990): 267.

Cornell, Drucilla, Michel Rosenfeld, and David Gray Carlson, eds. *Deconstruction and the Possibility of Justice*. Routledge, 1992.

Cover, Robert M. “The Origins of Judicial Activism in the Protection of Minorities.” *Yale Law Journal* 91 (1982 1981): 1287.

———. “Violence and the Word.” *The Yale Law Journal* 95, no. 8 (1986): 1601.

Critchley, Simon. *Impossible Objects*. Edited by Carl Cederstrom and Todd Kesselman. Polity Press, 2013.

———. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*. Verso, 2014.

———. *The Faith of the Faithless: Experiments in Political Theology*. Verso, 2012.

Cross, Frank B. “The Error of Positive Rights.” *UCLA Law Review* 48 (2001 2000): 857.

Davis, Dennis M. “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite?” *South African Journal on Human Rights* 22, no. 2 (2006): 301.

———. “Adjudication and Transformation: Out of the Heart of Darkness.” *Cardozo Law Review* 22 (2001 2000): 817.

———. “Socioeconomic Rights: Do They Deliver the Goods?” *International Journal of Constitutional Law* 6, no. 3–4 (2008): 687.

———. “The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles.” *South African Journal on Human Rights* 8 (1992): 475.

De Been, Wouter. *Legal Realism Regained: Saving Realism from Critical Acclaim*. Stanford University Press, 2008.

Derrida, Jacques. *Acts of Religion*. Routledge, 2001.

———. "Force of Law: The Mystical Foundation of Authority." *Cardozo Law Review* 11 (1990 1989): 920.

———. "From Restricted to General Economy: A Hegelianism Without Reserve." In *Writing and Difference*, by Jacques Derrida. Routledge, 1978.

———. *Given Time: I. Counterfeit Money*. Translated by Peggy Kamuf. University of Chicago Press, 1994.

———. *Glas*. University of Nebraska Press, 1990.

———. "Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida." In *Questioning Ethics: Contemporary Debates in Philosophy*, by Richard Kearney and Mark Dooley. Routledge, 1999.

———. "Letter to a Japanese Friend." In *Derrida and Differance*, by David Wood and Robert Bernasconi. Northwestern University Press, 1988.

———. *Of Grammatology*. Translated by Gayatri Chakravorty Spivak. Johns Hopkins University Press, 1998.

———. *Of Hospitality*. Stanford University Press, 2000.

———. *On Cosmopolitanism and Forgiveness*. Routledge, 2001.

———. "Plato's Pharmacy." In *Dissemination*, by Jacques Derrida. University of Chicago Press, 1983.

———. *Positions*. Continuum, 2004.

———. *Rogues: Two Essays on Reason*. Stanford University Press, 2005.

———. *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*. Routledge, 2012.

———. "Structure, Sign and Play in the Discourse of the Human Sciences." In *Writing and Difference*, by Jacques Derrida. Routledge, 1978.

———. *The Beast and the Sovereign, Volume I*. Translated by Geoffrey Bennington. University of Chicago Press, 2011.

———. *The Death Penalty, Volume I*. University of Chicago Press, 2014.

———. *The Politics of Friendship*. Verso, 2005.

———. *The Post Card: From Socrates to Freud and Beyond*. University of Chicago Press, 1987.

———. "The Principle of Hospitality." *Parallax* 11, no. 1 (2005): 6.

———. *The Work of Mourning*. University of Chicago Press, 2003.

———. *Writing and Difference*. Routledge, 2001.

Derrida, Jacques, and Paul Cilliers. "Justice, Law and Philosophy – An Interview with Jacques Derrida." *South African Journal of Philosophy* 18, no. 3 (August 1, 1999): 279.

Derrida, Jacques, and Elisabeth Roudinesco. *For What Tomorrow... A Dialogue*. Translated by Jeff Fort. Stanford University Press, 2004.

Dewey, John. "Liberalism and Social Action," Abridged version accessed at: https://online.hillsdale.edu/file/constitution-courses-library/constitution-101/week-7/Liberalism-and-Social-Action.pdf.

Dicke, Klaus. "The Founding Function of Human Dignity in the Universal Declaration of Human Rights." In *The Concept of Dignity in Human Rights Discourse*, by David Kretzmer and Eckhart Klein. Springer, 2002.

Dickens, Bernard M. "The Morgentaler Case: Criminal Process and Abortion Law." *Osgoode Hall Law Journal* 14 (1976): 229.

Dixon, Rosalind. "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited." *International Journal of Constitutional Law* 5, no. 3 (2007): 391.

———. "The Supreme Court of Canada, Charter Dialogue, and Deference." *Osgoode Hall Law Journal* 47 (2009): 235.

Douzinas, Costas. "Violence, Justice, Deconstruction." *German Law Journal* 6 (2005): 171.

Douzinas, Costas, and Adam Gearey. *Critical Jurisprudence: The Political Philosophy of Justice*. Hart Publishing, 2005.

Dupré, Catherine. *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*. Hart, 2003.

———. *The Age of Dignity: Human Rights and Constitutionalism in Europe*. Bloomsbury, 2016.

Duxbury, Neil. *Patterns of American Jurisprudence*. Clarendon Press, 1995.

Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Oxford University Press, 1999.

———. *Justice in Robes*. Harvard University Press, 2008.

———. *Law's Empire*. Harvard University Press, 1986.

———. *Taking Rights Seriously*. Bloomsbury, 2013.

———. "Unenumerated Rights: Whether and How Roe Should Be Overruled." *University of Chicago Law Review* 59 (1992): 381.

Dyzenhaus, David. *Hard Cases in Wicked Legal Systems: Pathologies of Legality*. Oxford University Press, 2010.

———. “Holmes and Carl Schmitt: An Unlikely Pair?” *Brooklyn Law Review* 63 (1997): 165.

———. “Law as Justification: Etienne Mureinik’s Conception of Legal Culture.” *South African Journal on Human Rights* 14 (1998): 11.

———. “Legal Theory in the Collapse of Weimar: Contemporary Lessons?” *American Political Science Review* 91, no. 1 (1997): 121.

———. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*. Oxford University Press, 1999.

———. “Liberalism After the Fall: Schmitt, Rawls and the Problem of Justification.” *Philosophy & Social Criticism* 22, no. 3 (1996): 9.

———. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press, 2006.

———. “The Legitimacy of Legality.” *The University of Toronto Law Journal* 46, no. 1 (1996): 129.

———. “The New Positivists.” *The University of Toronto Law Journal* 39 (1989): 361.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Harvard University Press, 1980.

———. “The Wages of Crying Wolf: A Comment on Roe v. Wade.” *Yale Law Journal* 82 (1973 1972): 920.

Enders, Christoph. “A Right to Have Rights – The German Constitutional Concept of Human Dignity.” *NUJS Law Review* 3 (2010): 253.

Eskridge, William N. “Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics.” *The Yale Law Journal* 114, no. 6 (2005): 1279.

Esposito, Roberto. *Immunitas: The Protection and Negation of Life*. Polity, 2011.

Etxabe, Julen. *The Experience of Tragic Judgment*. Routledge, 2014.

Fabre, Cécile. *Social Rights Under the Constitution: Government and the Decent Life*. Oxford University Press, 2000.

Freud, Sigmund. *Civilization and Its Discontents*. Penguin, 2002.

Fukuyama, Francis. *The End of History and the Last Man*. Simon and Schuster, 2006.

Fuller, Lon. “The Forms and Limits of Adjudication.” *Harvard Law Review* 92 (1979 1978): 353.

———. *The Morality of Law*. Yale University Press, 1969.

Gabel, Peter. “Critical Legal Studies as a Spiritual Practice.” *Pepperdine Law Review* 36 (2009 2008): 515.

———. “Reification in Legal Reasoning.” *Research in Law and Sociology* 3, no. 1 (1980): 25.

Gabel, Peter, and Duncan Kennedy. “Roll Over Beethoven.” *Stanford Law Review* 36 (1984): 1.

Gardbaum, Stephen. “Reassessing the New Commonwealth Model of Constitutionalism.” *International Journal of Constitutional Law* 8 (2010): 167.

———. “The Horizontal Effect of Constitutional Rights.” *Michigan Law Review* 102 (2004 2003): 387.

———. “The New Commonwealth Model of Constitutionalism.” *American Journal of Comparative Law* 49 (2001): 707.

———. “The Place of Constitutional Law in the Legal System.” In *The Oxford Handbook of Comparative Constitutional Law*, by Michel Rosenfeld and Andras Sajo. Oxford University Press, 2012.

Garfield, Helen. “Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner.” *Washington Law Review* 61 (1986): 293.

George, Robert P. “Public Reason and Political Conflict: Abortion and Homosexuality.” *The Yale Law Journal* 106, no. 8 (1997): 2475.

Ghitis, Frida. “France Wrong on Burkini Ban.” *CNN* – August 26, 2016. At: http://www.cnn.com/2016/08/25/opinions/france-burkini-controversy-ghitis/index.html.

Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. Random House, 2002.

Gopnik, Adam. “Good Faith.” *The New Yorker* – June 21, 2013. At: http://www.newyorker.com/news/daily-comment/good-faith.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Polity Press, 1997.

———. “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism.” *The Journal of Philosophy* 92, no. 3 (1995): 109.

———. “The Concept of Human Dignity and the Realistic Utopia of Human Rights.” *Metaphilosophy* 41, no. 4 (2010): 464.

Hagglund, Martin. “The Necessity of Discrimination: Disjoining Derrida and Levinas.” *Diacritics* 34, no. 1 (2006): 40.

Hale, Robert L. “Coercion and Distribution in a Supposedly Non-Coercive State.” *Political Science Quarterly* 38, no. 3 (1923): 470.

Hallward, Peter. *Badiou: A Subject to Truth*. University of Minnesota Press, 2003.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. Oxford University Press, 2008.

Hart, H. L. A. *The Concept of Law*. Clarendon: Oxford University Press, 1961.

Hayek, Friedrich August. *The Road to Serfdom*. Routledge, 2001.

Hegel, G. W. F. *Phenomenology of Spirit*. Translated by A. V. Miller. Oxford University Press, 1976.

Heidegger, Martin. *Being and Time*. Translated by Joan Stambaugh. SUNY Press, 2010.

———. *Nietzsche, Volumes I and II: The Will to Power as Art*. Harper Collins, 1991.

Hirschl, Ran. "Juristocracy – Political, Not Juridical." *The Good Society* 13, no. 3 (2005): 6.

———. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2009.

Hobbes, Thomas. *Leviathan*. Edited by Richard Tuck. Cambridge University Press, 1996.

Hogg, Peter W. *Constitutional Law of Canada*. 2nd Edition. Toronto: Carswells, 1985.

———. "The Dolphin Delivery Case: The Application of the Charter to Private Action." *Saskatchewan Law Review* 51 (1987 1986): 273.

Hogg, Peter W., and Allison A. Bushell. "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)." *Osgoode Hall Law Journal* 35 (1997): 75.

Holmes, Oliver Wendell. *The Common Law*. Harvard University Press, 2009.

Horne, Alexander, Gavin Drewry, and Dawn Oliver, eds. *Parliament and the Law*. Bloomsbury, 2013.

Howse, Robert. "From Legitimacy to Dictatorship—and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt." *Canadian Journal of Law & Jurisprudence* 10, no. 1 (1997): 77.

Humphreys, Stephen. "Legalizing Lawlessness: On Giorgio Agamben's State of Exception." *European Journal of International Law* 17, no. 3 (2006): 677.

Huntington, Samuel P. "The Clash of Civilizations." *Foreign Affairs* 72 (1993 1992): 22.

Hutchinson, Allan, and Andrew Petter. "Private Rights/Public Wrongs: The Liberal Lie of the Charter." *University of Toronto Law Journal* 38 (1988): 278.

Ignatieff, Michael. *Human Rights as Politics and Idolatry*. Princeton University Press, 2003.

Jacobson, Arthur J. "Hegel's Legal Plenum." *Cardozo Law Review* 10 (1989 1988): 877.

———. "The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences." *Cardozo Law Review* 11 (1990 1989): 1079.

———. "The Other Path of the Law." *The Yale Law Journal* 103, no. 8 (1994): 2213.

Jamieson, Amber, Simon Jeffery, and Nicole Puglise. "A Timeline of Donald Trump's Alleged Sexual Misconduct." *The Guardian* – October 27, 2016. At: https://www.theguardian.com/us-news/2016/oct/13/list-of-donald-trump-sexual-misconduct-allegations.

Johnson, Boris. "I Cannot Stress Too Much That Britain Is Part of Europe – and Always Will Be." *The Daily Telegraph* – June 26, 2016. At: http://www.telegraph.co.uk/news/2016/06/26/i-cannot-stress-too-much-that-britain-is-part-of-europe--and-alw/.

Johnson, Jenna. "Trump calls for 'total and complete shutdown of Muslims entering the United States.'" *Washington Post* – December 7, 2015. At: https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

Jordan, Mary. "When Trump said that not paying taxes 'makes me smart,' undecided voters in N.C. gasped." *The Washington Post* – September 27, 2016. At: https://www.washingtonpost.com/politics/a-lean-toward-clinton-among-one-group-of-undecided-north-carolina-voters/2016/09/27/ff271b2e-8469-11e6-92c2-14b64f3d453f_story.html.

Kalman, Laura. *Legal Realism at Yale, 1927-1960*. University of North Carolina Press, 1986.

Kant, Immanuel. *Groundwork of the Metaphysics of Morals*. Cambridge University Press, 1998.

———. *To Perpetual Peace: A Philosophical Sketch*. Hackett Publishing, 2003.

Kavanagh, Aileen. *Constitutional Review under the UK Human Rights Act*. Cambridge University Press, 2009.

Kekes, John. "Cruelty and Liberalism." *Ethics* 106, no. 4 (1996): 834.

Kelman, Mark. *A Guide to Critical Legal Studies*. Harvard University Press, 1987.

Kelsen, Hans. "What Is the Pure Theory of Law?" *Tulane Law Review* 34 (1960 1959): 269.

Kelsen, Hans, and Carl Schmitt. *The Guardian of the Constitution*. Edited by Hans Vinx. Cambridge University Press, 2015.

Kennedy, Duncan. *A Critique of Adjudication [Fin de Siècle]*. Harvard University Press, 2009.

———. "A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation." *Kritische Justiz* 40, no. 3 (2007): 296.

———. "A Semiotics of Critique." *Cardozo Law Review* 22 (2001 2000): 1147.

———. "Form and Substance in Private Law Adjudication." *Harvard Law Review* 89, no. 8 (1976): 1685.

———. "Freedom and Constraint in Adjudication: A Critical Phenomenology." *Journal of Legal Education* 36 (1986): 518.

———. *Legal Reasoning: Collected Essays*. The Davies Group Publishers, 2008.

———. *The Rise and Fall of Classical Legal Thought*. Beard Books, 2006.

———. "The Structure of Blackstone's Commentaries." *Buffalo Law Review* 28 (1979 1978): 205.

Kennedy, Duncan, and Tor Krever. “Law on the Left: A Conversation with Duncan Kennedy.” *Unbound: Harvard Journal of the Legal Left* 10, no. 1 (2015).

King, Jeff. *Judging Social Rights*. Cambridge University Press, 2012.

———. “The Pervasiveness of Polycentricity.” *Public Law*, 2008, 101.

King, Martin Luther. “I Have a Dream.” In *I Have a Dream: Writings and Speeches That Changed the World*. Harper Collins, 1992.

Klare, Karl E. “Legal Culture and Transformative Constitutionalism.” *South African Journal on Human Rights* 14 (1998): 146.

Kojève, Alexandre. *Introduction to the Reading of Hegel*. Cornell University Press, 1980.

Kommers, Donald P. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, 2012.

Koncewicz, Tomasz Tadeusz. “‘Court-Packing’ in Warsaw: The Plot Thickens.” *Verfassungsblog*. At: http://verfassungsblog.de/court-packing-in-warsaw-the-plot-thickens/.

Kumm, Mattias. “Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review.” *European Journal of Legal Studies* 1 (2008 2007): 153.

———. “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review.” *Law & Ethics of Human Rights* 4, no. 2 (2010): 142.

———. “Who’s Afraid of the Total Constitution – Constitutional Rights as Principles and the Constitutionalization of Private Law.” *German Law Journal* 7 (2006): 341.

Kuo, Ming-Sung. “Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?” *Canadian Journal of Law and Jurisprudence* 26, no. 2 (2013): 341.

Lacan, Jacques. *Écrits*. Translated by Bruce Fink. W. W. Norton & Company, 2006.

LaCapra, Dominick. “Violence, Justice, and the Force of Law.” *Cardozo Law Review* 11 (1990 1989): 1065.

Lafree, Gary, Laura Dugan, and Raven Korte. “The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models.” *Criminology* 47, no. 1 (2009): 17.

Larmore, Charles. “Political Liberalism.” *Political Theory* 18, no. 3 (August 1, 1990): 339.

———. *The Autonomy of Morality*. Cambridge University Press, 2008.

———. “The Moral Basis of Political Liberalism.” *The Journal of Philosophy* 96, no. 12 (1999): 599.

Lassman, Peter. "Political Theory in an Age of Disenchantment: The Problem of Value Pluralism: Weber, Berlin, Rawls." *Max Weber Studies* 4, no. 2 (2004): 253.

Leckey, Robert. "The Harms of Remedial Discretion." *International Journal of Constitutional Law* 14, no. 3 (2016): 584.

Leiter, Brian. "Is There an American Jurisprudence?" *Oxford Journal of Legal Studies* 17, no. 2 (1997): 367.

Leonard, Gerald. "Civilizing Darwin: Holmes on Criminal Law." In *Modern Histories of Crime and Punishment*, by Lindsay Farmer and Marcus Dubber. Stanford University Press, 2007.

Lessig, Lawrence. "The Constitution Lets the Electoral College Choose the Winner. They Should Choose Clinton." *The Washington Post* – November 24, 2016. At: https://www.washingtonpost.com/opinions/the-constitution-lets-the-electoral-college-choose-the-winner-they-should-choose-clinton/2016/11/24/0f431828-b0f7-11e6-8616-52b15787add0_story.html?utm_term=.33188bf070f2.

Levinas, Emmanuel. *Totality and Infinity: An Essay on Exteriority*. Kluwer Academic Publishers, 1991.

Liebenberg, Sandra. "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty." *Law, Democracy and Development* 6 (2002): 159.

Lilla, Mark. *The Reckless Mind: Intellectuals in Politics*. New York Review of Books, 2016.

Lindahl, Hans. *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*. Oxford University Press, 2013.

Loughlin, Martin. "The Constitutional Imagination." *The Modern Law Review* 78, no. 1 (2015): 1.

MacCormick, Neil. "Reconstruction after Deconstruction: A Response to CLS." *Oxford Journal of Legal Studies* 10, no. 4 (1990): 539.

MacIntyre, Alasdair. *After Virtue*. Bloomsbury, 2013.

Mailey, Richard. "Deconstruction and Law." LL.M. archived at the University of Glasgow.

———. "Political Liberalism and Civil Disobedience: The Morgentaler Affair Revisited." *Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswissenschaft* 98, no. 3 (2015): 271.

Marcuse, Herbert. *Eros and Civilization*. Routledge, 1998.

Martin, Sandra. "Abortion Rights Crusader Henry Morgentaler, Revered and Hated, Dead at 90." *The Toronto Globe and Mail* – May 29, 2013.

Marx, Karl. *Capital, Volume I: A Critique of Political Economy*. Penguin, 1990.

Mbembé, Achille. "Necropolitics." *Public Culture* 15, no. 1 (2003): 11.

McAuley, James. “France’s Top Administrative Court Overturns Burkini Ban.” *The Washington Post* – August 26, 2016. At: https://www.washingtonpost.com/news/worldviews/wp/2016/08/26/frances-top-administrative-court-overturns-burkini-ban/.

McAward, Jennifer Mason. “Defining the Badges and Incidents of Slavery.” *University of Pennsylvania Journal of Constitutional Law* 14 (2012 2011): 561.

McCormick, John P. “Derrida on Law: Or, Poststructuralism Gets Serious.” *Political Theory* 29, no. 3 (2001): 395.

———. “Schmittian Positions on Law and Politics? CLS and Derrida.” *Cardozo Law Review* 21 (2000 1999): 1693.

McCrudden, Christopher. “Human Dignity and Judicial Interpretation of Human Rights.” *European Journal of International Law* 19, no. 4 (2008): 655.

Michelman, Frank. “Always Under Law.” *Constitutional Commentary* 12 (1995): 227.

———. *Brennan and Democracy*. Princeton University Press, 2005.

———. “Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism?” *Constellations* 2, no. 3 (1996): 293.

———. “Ida’s Way: Constructing the Respect-Worthy Governmental System.” *Fordham Law Review* 72 (2004 2003): 345.

———. “Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment.” *Fordham Law Review* 72 (2004 2003): 1407.

———. “Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism Suggests.” *Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswissenschaft* 98, no. 3 (2015): 183.

———. “Poverty in Liberalism: A Comment on the Constitutional Essentials.” *Drake Law Review* 60 (2012 2011): 1001.

———. “Socioeconomic Rights in Constitutional Law: Explaining America Away.” *International Journal of Constitutional Law* 6, no. 3–4 (July 1, 2008): 663.

———. “The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik.” *South African Journal on Human Rights* 14 (1998): 499.

———. “The Interplay of Constitutional and Ordinary Jurisdiction.” In *Comparative Constitutional Law*, by Tom Ginsburg and Rosalind Dixon. Edward Elgar Publishing, 2011.

———. “The Subject of Liberalism.” *Stanford Law Review* 46, no. 6 (1994): 1807.

———. “The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment.” *Harvard Law Review* 83 (1970 1969): 7.

———. “Unenumerated Rights under Popular Constitutionalism.” *University of Pennsylvania Journal of Constitutional Law* 9 (2007 2006): 121.

———. “Welfare Rights in a Constitutional Democracy.” *Washington University Law Quarterly* (1979): 659.

———. “W(h)ither the Constitution?” *Cardozo Law Review* 21 (2000 1999): 1063.

Minkkinen, Panu. “Hostility and Hospitality.” *No Foundations* 4 (2007): 53.

Möller, Kai. *The Global Model of Constitutional Rights*. Oxford University Press, 2012.

Mouffe, Chantal. “Political Liberalism: Neutrality and the Political.” *Ratio Juris* 7, no. 3 (1994): 314.

———. *The Democratic Paradox*. Verso, 2000.

———. “The Limits of John Rawls’s Pluralism.” *Politics, Philosophy & Economics* 4, no. 2 (2005): 221.

Mulhall, Stephen, and Adam Swift. *Liberals and Communitarians*. Blackwell, 1992.

Mureinik, Etienne. “Beyond a Charter of Luxuries: Economic Rights in the Constitution.” *South African Journal on Human Rights* 8 (1992): 464.

Nail, Brian. “Austerity and the Language of Sacrifice.” *Critical Religion Blog*, October 15, 2013. At: https://criticalreligion.org/2013/10/15/austerity-and-the-language-of-sacrifice/.

“Closing the Loop: ‘The Promise and Threat of the Sacred’ in Rian Johnson’s Looper.” *Journal of Religion & Film* 18, no. 1 (2014). At: http://digitalcommons.unomaha.edu/jrf/vol18/iss1/41.

Nancy, Jean-Luc. “Myth Interrupted.” In *The Inoperative Community*, by Jean-Luc Nancy. University of Minnesota Press, 1991.

Nedelsky, Jennifer. *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*. University of Chicago Press, 1994.

———. “Reconceiving Rights and Constitutionalism.” *Journal of Human Rights* 7, no. 2 (2008): 139.

———. “The Puzzle and Demands of Modern Constitutionalism.” *Ethics* 104, no. 3 (1994): 500.

Nedelsky, Jennifer, and Craig Scott. “Constitutional Dialogue.” In *Social Justice and the Constitution: Perspective on a Social Union for Canada*, by David Schneiderman and Joel Bakan. Carleton University Press, 1992.

Nietzsche, Friedrich. *Beyond Good and Evil*. Translated by R. J. Hollingdale. Penguin Classics, 2003.

Nussbaum, Martha. “Capabilities and Human Rights.” *Fordham Law Review* 66 (1998 1997): 273.

———. *Creating Capabilities: The Human Development Approach*. Harvard University Press, 2011.

———. “Equity and Mercy.” *Philosophy & Public Affairs* 22, no. 2 (1993): 83.

———. “Perfectionist Liberalism and Political Liberalism.” *Philosophy & Public Affairs* 39, no. 1 (2011): 3.

———. *Political Emotions: Why Love Matters for Justice*. Harvard University Press, 2013.

———. *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*. Cambridge University Press, 2001.

Plato. *The Last Days of Socrates*. Penguin, 2010.

———. *The Republic*. Translated by Tom Griffith. Cambridge University Press, 2000.

Poole, Thomas. “Losing Our Religion? Public Law and Brexit.” *The UK Constitutional Law Blog* – December 2, 2016. At: https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/.

Posner, Richard A. “Pragmatic Adjudication.” *Cardozo Law Review* 18 (1997 1996): 1.

———. “The Rise and Fall of Judicial Self-Restraint.” *California Law Review* 100, no. 3 (2012): 519.

Postema, Gerald J. “‘Protestant’ Interpretation and Social Practices.” *Law and Philosophy* 6, no. 3 (1987): 283.

Rawls, John. *A Theory of Justice*. Harvard University Press, 1999.

———. *Collected Papers*. Edited by Samuel Freeman. Harvard University Press, 1999.

———. “Justice as Fairness: Political Not Metaphysical.” *Philosophy & Public Affairs* 14, no. 3 (1985): 223.

———. “Kantian Constructivism in Moral Theory.” *The Journal of Philosophy* 77, no. 9 (1980): 515.

———. *Lectures on the History of Moral Philosophy*. Harvard University Press, 2000.

———. *Lectures on the History of Political Philosophy*. Harvard University Press, 2009.

———. *Political Liberalism*. Columbia University Press, 2005.

———. “Political Liberalism: Reply to Habermas.” *The Journal of Philosophy* 92, no. 3 (1995): 132.

———. “The Idea of Public Reason Revisited.” *The University of Chicago Law Review* 64, no. 3 (1997): 765.

———. “The Independence of Moral Theory.” *Proceedings and Addresses of the American Philosophical Association* 48 (1974): 5.

———. *The Law of Peoples*. Harvard University Press, 2001.

———. “Two Concepts of Rules.” *The Philosophical Review* 64, no. 1 (1955): 3.

Raz, Joseph. *The Morality of Freedom*. Clarendon Press, 1988.

———. “The Rule of Law and Its Virtue.” *Law Quarterly Review* 93 (1977): 195.

Roach, Kent. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Irwin Law, 2001.

Rorty, Richard. *Contingency, Irony, and Solidarity*. Cambridge University Press, 1989.

———. *Philosophy and the Mirror of Nature*. Princeton University Press, 2009.

———. “Pragmatism and Law: A Response to David Luban.” *Cardozo Law Review* 18 (1997 1996): 75.

———. “The Priority of Democracy to Philosophy.” In *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, by Merrill Peterson and Robert Vaughn. Cambridge University Press, 1988.

Roux, Theunis. *The Politics of Principle: The First South African Constitutional Court, 1995-2005*. Cambridge University Press, 2013.

Rucker, Philip. “Trump Slams McCain for Being Captured in Vietnam; Other Republicans Quickly Condemn Him.” *The Washington Post* – July 18, 2015. https://www.washingtonpost.com/news/post-politics/wp/2015/07/18/trump-slams-mccain-for-being-captured-in-vietnam/.

Sachs, Albie. *The Strange Alchemy of Life and Law*. Oxford University Press, 2011.

Sandel, Michael. *Liberalism and the Limits of Justice*. Cambridge University Press, 1998.

———. “Political Liberalism.” *Harvard Law Review* 107 (1994 1993): 1765.

———. “The Procedural Republic and the Unencumbered Self.” *Political Theory* 12, no. 1 (1984): 81.

Sartre, Jean-Paul. *Being and Nothingness*. Routledge, 2003.

———. “Existentialism Is a Humanism.” In *Philosophy: Key Texts*, by Julian Baggini. Palgrave Macmillan, UK, 2002.

———. *No Exit, and Three Other Plays*. Translated by Lionel Abel. Vintage, 1989.

Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law*. Princeton University Press, 1998.

Scheppele, Kim Lane. “The New Judicial Deference.” *Boston University Law Review* 92 (2012): 89.

Schlag, Pierre. “Politics and Denial.” *Cardozo Law Review* 22 (2001 2000): 1135.

Schmitt, Carl. *Constitutional Theory*. Duke University Press, 2008.

———. *Der Hüter der Verfassung*. Duncker & Humblot, 1996.

———. *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, 2010.

———. *Staat, Bewegung, Volk: die Dreigliederung der politischen Einheit*. Hanseatische Verlagsanstalt, 1933.

———. *The Concept of the Political*. University of Chicago Press, 2008.

Schultziner, Doron, and Guy Carmi. "Human Dignity in National Constitutions: Functions, Promises and Dangers." *The American Journal of Comparative Law* 62, no. 2 (2014).

Scott, Craig, and Patrick Macklem. "Constitutional Ropes of Sand or Justiciable Guarantees Social Rights in a New South African Constitution." *University of Pennsylvania Law Review* 141 (1993 1992): 1.

Scott, James C. *Domination and the Arts of Resistance: Hidden Transcripts*. Yale University Press, 1992.

Seidman, Louis Michael. "The State Action Paradox." *Constitutional Commentary* 10 (1993): 379.

Sen, Amartya. *The Idea of Justice*. Penguin, 2010.

Shaw, David M. "Justice and the Fetus: Rawls, Children, and Abortion." *Cambridge Quarterly of Healthcare Ethics* 20, no. 1 (2011): 93.

Shklar, Judith N. "Putting Cruelty First." *Daedalus* 111, no. 3 (1982): 17.

———. "The Liberalism of Fear." In *Political Liberalism: Variations on a Theme*, by Shaun P. Young. State University of New York Press, 2004.

Silber, Norman, and Geoffrey Miller. "Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler." *Columbia Law Review* 93, no. 4 (1993): 854.

Singer, Joseph William. "Catcher in the Rye Jurisprudence." *Rutgers Law Review* 35 (1983 1982): 275.

———. "Legal Realism Now." *California Law Review* 76, no. 2 (1988): 465.

———. "Subprime: Why a Free and Democratic Society Needs Law." *Harvard Civil Rights-Civil Liberties Law Review* 47 (2012): 141.

———. "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld." *Wisconsin Law Review* 1982 (1982): 975.

———. "The Player and the Cards: Nihilism and Legal Theory." *Yale Law Journal* 94 (1985 1984): 1.

Slack, James. "Enemies of the People." *The Daily Mail* – November 3, 2016. At: http://www.dailymail.co.uk/~/article-3903436/index.html.

Sokoloff, William W. "Between Justice and Legality: Derrida on Decision." *Political Research Quarterly* 58, no. 2 (2005): 341.

Strauss, Leo. "Notes on Carl Schmitt, The Concept of the Political." In *The Concept of the Political*, by Carl Schmitt. University of Chicago Press, 2008.

Stronks, Martijn. "Rereading Of Hospitality." *Amsterdam Law Forum*, 2008. At: http://amsterdamlawforum.org/article/view/49/64.

Sullivan, Roger. *An Introduction to Kant's Ethics*. Cambridge University Press, 1994.

Sunstein, Cass. "Against Positive Rights." *East European Constitutional Review* 2 (1993): 35.

———. *Constitutional Personae: Heroes, Soldiers, Minimalists, and Mutes*. Oxford University Press, 2015.

———. "Incompletely Theorized Agreements in Constitutional Law." *Social Research* 74, no. 1 (2007): 1.

———. "Lochner's Legacy." *Columbia Law Review* 87, no. 5 (1987): 873.

———. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Harvard University Press, 2001.

———. "Second Amendment Minimalism: Heller as Griswold." *Harvard Law Review* 122 (2009 2008): 246.

———. "Social and Economic Rights – Lessons from South Africa." Constitutional Forum 11 (2001 1999): 123.

———. *The Partial Constitution*. Harvard University Press, 1994.

———. *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever*. Basic Books, 2006.

———. "The Supreme Court, 1995 Term, Foreword: Leaving Things Undecided." *Harvard Law Review* 110 (1997 1996): 4.

Surya, Michel. *Georges Bataille: An Intellectual Biography*. Verso, 2002.

Taylor, Charles. *Sources of the Self: The Making of the Modern Identity*. Cambridge University Press, 1992.

Teubner, Gunther. "Self-Subversive Justice: Contingency or Transcendence Formula of Law?" *The Modern Law Review* 72, no. 1 (2009): 1.

Timm, Trevor. "Donald Trump's Anti-Terror Policies Sound a Lot like War Crimes." *The Guardian* – July 1, 2016. At: https://www.theguardian.com/commentisfree/2016/jul/01/donald-trump-anti-terror-policies-war-crimes-waterboarding-torture.

Tribe, Laurence. *American Constitutional Law: A Structure for Liberty*. Foundation Press, 1978.

Tushnet, Mark. "Alternative Forms of Judicial Review." *Michigan Law Review* 101, no. 8 (2003): 2781.

———. "Critical Legal Studies: A Political History." *Yale Law Journal* 100 (1991 1990): 1515.

———. "Dialogic Judicial Review." *Arkansas Law Review* 61 (2009): 205.

———. “Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power.” *International Journal of Constitutional Law* 13, no. 3 (2015): 639.

———. “Shelley v. Kraemer and Theories of Equality.” *New York Law School Law Review* 33 (1988): 383.

———. “State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations.” *Chicago Journal of International Law* 3 (2002): 435.

———. “The Rise of Weak-Form Judicial Review.” In *Comparative Constitutional Law*, by Tom Ginsburg and Rosalind Dixon. Edward Elgar Publishing, 2011.

———. “The State Action Doctrine and Social and Economic Rights.” In *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, by Mark Tushnet. Princeton University Press, 2009.

———. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press, 2009.

Valls, Manuel. “In France, Women Are Free.” *Huffington Post* – September 5, 2016. At: http://www.huffingtonpost.com/manuel-valls/in-france-women-are-free_b_11867242.html.

Van der Walt, Johan. “Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence.” In *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations*, by Tsvi Kahana and Anat Scolnicov. Cambridge University Press, 2016.

———. “Agaat’s Law: Reflections on Law and Literature with Reference to Marlene van Niekerk’s Novel Agaat.” South African Law Journal 126, no.4 (2009): 695.

———. “Delegitimation by Constitution? Liberal Democratic Experimentalism and the Question of Socio-Economic Rights.” *Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswissenschaft* 98, no. 3 (2015): 303.

———. “Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought.” In *Rights and Democracy in a Transformative Constitution*, by Johan Van der Walt, Andre Van der Walt, and Henk Botha. Sun Press, 2003.

———. “Law – That Which Is Gained in Translation.” *Unpublished draft on file with author.*

———. *Law and Sacrifice: Towards a Post Apartheid Theory of Law*. Birkbeck Law Press, 2006.

———. “Law and the Space of Appearance in Arendt’s Thought.” In *Hannah Arendt and the Law*, by Christopher McCorkindale and Marco Goldoni. Hart, 2012.

———. “Law, Utopia, Event.” In *Law and the Utopian Imagination*, by Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey. Stanford University Press, 2014.

———. “Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice.” *Constellations* 16, no. 1 (2009): 23.

———. *Tangible Mais Untouchable, La Loi Du Tact, La Loi de La Loi: The Future and Futurity of the Public-Private Distinction in the View of the Horizontal Application of Fundamental Rights*. Wolf Legal Publishers, 2002.

———. *The Horizontal Effect Revolution and the Question of Sovereignty*. De Gruyter, 2014.

———. “The Literary Exception: Reflections on Agamben’s ‘Liberal Democratic’ Political Theology and the Religious Destabilisation of the Political in Our Time.” *New Perspectives* 23, no. 1 (2015): 15.

———. “When One Religious Extremism Unmasks Another: Reflections on Europe’s States of Emergency as a Legacy of Ordo-Liberal Dehermeneuticization.” *New Perspectives: Interdisciplinary Journal of Central and Eastern European Politics and International Relations* 24, no.1 (2017): 79.

———. “When Time Gives: Reflections on Two Rivonia Renegades.” In *The Court Room as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial*, by Awol Allo. Ashgate, 2015.

Vasak, Karel. “Thirty Year Struggle.” *Unesco Courier*, 1977.

Veitch, Scott. *Law and Irresponsibility: On the Legitimation of Human Suffering*. Taylor & Francis, 2007.

———. “Law and ‘Other’ Problems.” *Law and Critique* 8, no. 1 (1997): 97.

———. “Ronald Dworkin and the Power of Ideas.” *Acta Juridica* 2004, no. 1 (2004): 44.

Waldron, Jeremy. “A Right-Based Critique of Constitutional Rights.” *Oxford Journal of Legal Studies* 13, no. 1 (1993): 18.

———. *Law and Disagreement*. Clarendon: Oxford University Press, 1999.

———. “The Core of the Case Against Judicial Review.” *The Yale Law Journal* 115, no. 6 (2006): 1346.

———. “‘Transcendental Nonsense’ and System in the Law.” *Columbia Law Review* 100, no. 1 (2000): 16.

Weber, Max. *Economy and Society: An Outline of Interpretive Sociology*. University of California Press, 1978.

———. “Science as a Vocation.” *Daedalus* 87, no. 1 (1958): 111.

Weber, Max. *Methodology of Social Sciences*. Edited by Henry A. Finch. Translated by Edward Shils. Transaction Publishers, 2011.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73, no. 1 (1959): 1.

Weinrib, Lorraine. "Human Dignity as a Rights-Protecting Principle." *National Journal of Constitutional Law* 17 (2004): 219.

Weinrib, Lorraine Eisenstat. "The Morgentaler Judgment: Constitutional Rights, Legislative Intention, and Institutional Design." *University of Toronto Law Journal* 42 (1992): 22.

Weithman, Paul. *Why Political Liberalism? On John Rawls's Political Turn*. Oxford University Press, 2011.

West, Robin. "Reconsidering Legalism." *Minnesota Law Review* 88 (2004 2003): 119.

Westerman, Pauline, and Duncan Kennedy. "Interview Met Duncan Kennedy." *Netherlands Journal of Legal Philosophy* (2004): 3.

Westmoreland, Robert. "Realizing Political Neutrality." *Law and Philosophy* 30, no. 5 (2011): 541.

White, G. Edward. "Revisiting Substantive Due Process and Holmes's Lochner Dissent." *Brooklyn Law Review* 63 (1997): 87.

Williams, Joan C. "What So Many People Don't Get About the US Working Class." *Harvard Business Review* – November 10, 2016. At: https://hbr.org/2016/11/what-so-many-people-dont-get-about-the-u-s-working-class.

WITW Staff. "French PM Comes out Swinging in Burqini Debate." *Women in the World in Association with The New York Times – WITW* – September 6, 2016. At: http://nytlive.nytimes.com/womenintheworld/2016/09/06/french-pm-comes-out-swinging-in-burqini-debate-it-is-a-provocation-of-radical-islam/.

Young, Katharine G. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." *Yale Journal of International Law* 33 (2008): 113.

Zizek, Slavoj. "Psychoanalysis and Post-Marxism: The Case of Alain Badiou." *The South Atlantic Quarterly* 97, no. 2 (1998).

———. *The Sublime Object of Ideology*. Verso Books, 1989.

List of Cases Cited, by Jurisdiction:

Canada

Gosselin v. Quebec (2002) 4 SCR 429
Hill v. Church of Scientology (1995) 2 SCR 1130
Law v. Canada (1999) 1 SCR 497
Mills v. The Queen (1986) 1 SCR 863
Morgentaler v. The Queen (1976) 1 SCR 616
R v. Butler (1992) 1 SCR 452
R v. Kapp (2008) 2 SCR 483
R v. Morgentaler (1988) 1 SCR 30
R v. Oakes (1986) 1 SCR 103
Reference Re: BC Motor Vehicle Act (1985) 2 SCR 486
RWDSU v. Dolphin Delivery (1986) 2 SCR 573
Vriend v. Alberta (1998) 1 SCR 493

European Court of Human Rights

Pretty v. United Kingdom (2346/02) 2002 ECHR 423
SW v. United Kingdom (20166/92) 1995 ECHR 52

France

Conseil d'Etat, 27 Oct. 1995 – req. Nos 136-720 (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Aix-en-Provence)

Germany

BVerfGE 39, 1 (1975) – *First Abortion Case*
BVerfGE 45, 187 (1977) – *Life Imprisonment Case*
BverfGE 64, 274 (1981) – *Peep Shows Case*
BVerfGE 115, 118 (2003) – *Aviation Security Case*

South Africa

Grootboom v. Oostenberg Municipality and Others 2000 (3) BCLR 277 (C)

Jordan v. The State 2002 (6) SA 642 (CC)

S v. Dodo (2001) 3 SA 382 (CC)

S v. Makwanyane 1995 3 SA 391 (CC)

Soobramoney v. Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC)

The Republic of South Africa and Others v. Grootboom and Others 2000 (11) BCLR 1169 (CC).

The United Kingdom

R (on the Application of Miller and De Santos) v. Secretary of State for Exiting the European Union

(decided January 24th 2017).

The United States

Adkins v. Children's Hospital 261 US 525 (1923)

Allgeyer v. Louisiana 165 US 578 (1897)

American Federation of Labor v. Swing 312 US 321 (1941)

Brown v. Board of Education 347 US 483 (1954)

Buckley v. Valeo 424 US 1 (1976)

Citizens United v. FEC 558 US 310 (2010)

Coppage v. Kansas 236 US 1 (1915)

DeShaney v. Winnebago County Department of Social Services 489 US 189 (1989)

Eisenstadt v. Baird 405 US 438 (1972)

Furman v. Georgia 408 US 238 (1972)

Gideon v. Wainwright 372 US 335 (1963)

Goldberg v. Kelly 397 US 254 (1970)

Gregg v. Georgia 428 US 153 (1976)

Griswold v. Connecticut 381 US 479 (1965)

Lawrence v. Texas 539 US 558 (2003)

Lochner v. New York 198 US 45 (1905)

Marbury v Madison 5 US 137 (1803)

New York Times v. Sullivan 376 US 254 (1964)

Obergefell v. Hodges 576 US ___ (2015)

Plessy v. Ferguson 163 US 537 (1896)

Roe v. Wade 410 US 113 (1973)

Shelley v. Kraemer 334 US 1 (1948)

Texas v. Johnson 491 US 397 (1989)

The Civil Rights Cases 109 US 3 (1883)

United States v. Carolene Products 304 US 144 (1938)

United States v. Windsor 133 S. Ct. 2675 (2013)

Virginia v. Black 538 US 343 (2003)

Texas v. Johnson 491 US 397 (1989)