

# Is Public Reason a Normalization Project? Deep Diversity and the Open Society

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## 1 RAWLS AND THE MOVE FROM SHALLOW TO DEEPER DIVERSITY

The publication of John Rawls's great *Theory of Justice* in 1971 marked the birth of the contemporary public reason project.<sup>1</sup> Some (including me) might wish to nominate 1958, with the publication of "Justice as Fairness," as the moment of conception, but only with *Theory* did political philosophy become centrally focused on questions of rational disagreement, and how a system of justice might respect such disagreement while nevertheless providing a shared framework for social cooperation. The initial phase of this contemporary, post-*Theory*, public reason project focused on rational disagreement about the good, seeking to establish that those who disagree about their conceptions of the good life could freely endorse the same principles of justice (principles about "the right"). This led to a rather long discussion, from the 1980s until the first decade of this century, about the concept of "neutrality" — whether a conception of justice could be justified without appealing to controversial conceptions of the good.<sup>2</sup> For some, such as Jonathon Quong, this is still the heart of liberal public reason: liberal principles must be justified to free and equal persons without appeal to controversial conceptions of the good.<sup>3</sup>

In my view Rawls's "political liberalism" project was critical is moving the debate to a second phase, in which the problem of diversity became deeper, involving reasonable disagreements about justice, not only the good. Indeed, the term "public reason" enters into Rawlsian thought as a way to discuss our disagreements about justice. "For an agreement on the principles of justice to be effective, and to support a basis of justification, there must be a companion agreement on the guidelines for public inquiry and on the criteria as to what kinds of information and knowledge is relevant in discussing political questions, at least

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<sup>1</sup> I stress "contemporary," as the public reason project goes back much further. See my "Public Reason Liberalism," in *The Cambridge Companion to Liberalism*, edited by Steve Wall and Chandran Kukathas (Cambridge: Cambridge University Press, forthcoming).

<sup>2</sup> By no means was I above the fray, as evidenced by my essay "The Moral Foundations of Liberal Neutrality" in *Debates in Contemporary Political Philosophy*, edited by Thomas Christiano and John Christman (Oxford: Blackwell, 2009): 81-98.

<sup>3</sup> See Quong's *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011). Quong's objection to Raz's perfectionism is precisely its appeal to a controversial notion of the good; Quong's argument is addressed to liberals, who do not have "foundational" disputes about the principles of right. I criticize this circumscribed understanding of the disagreements that matter in "Sectarianism Without Perfection? Quong's Political Liberalism," *Philosophy and Public Issues*, vol. 2, No. 2 (Fall 2012): pp. 7-15.

when these involve the constitutional essentials and questions of basic justice.”<sup>4</sup> At least on one version of this idea, public reason thus constitutes a companion agreement to the selection of specific principles of justice, providing interpretative and argumentative guidelines for justification in terms of the principles. This supposes that we have agreed upon a conception of justice (e.g., justice as fairness), and then require guidelines to justify matters of constitutional essentials and basic justice in terms of it. Call this the first, interpretive, phase of disagreement about the right.<sup>5</sup>

In the preface to the 1993 edition of *Political Liberalism* Rawls’s discussion of reasonable pluralism focused on the diversity of comprehensive conceptions, but this does not seem to radically affect agreement the about political conception; “the political conception is shared by everyone while the reasonable doctrines are not....”<sup>6</sup> However, in the preface to the 1996 paperback edition Rawls stresses that reasonable pluralism and the burdens of judgment apply to the political conception as well:

In addition to conflicting comprehensive doctrines, PL does recognize that in any actual political society a number of differing liberal political conceptions of justice compete with one another in society’s political debate.... This leads to another aim of PL: saying how a well-ordered liberal society is to be formulated given not only reasonable pluralism [of comprehensive conceptions] but a family of reasonable liberal conceptions of justice.<sup>7</sup>

Rawls thus observes: “The burdens [of judgment] have a double role in PL: they are part of the basis for liberty of conscience and freedom of thought founded on the idea of the reasonable.... And they lead us to recognize that there are different and incompatible liberal political conceptions.”<sup>8</sup> This is a second, considerably deeper, phase of disagreement about the right, for reasonable citizens no longer need agree about the principles of justice themselves (they may, for example, reject justice as fairness).

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<sup>4</sup> Rawls, *Justice as Fairness: A Restatement*, edited by Erin Kelly (Cambridge: Harvard University Press, 2001), p. 89.

<sup>5</sup> At other points Rawls insists the content of public reason cannot be restricted to justice as fairness. “Rather, its content — the principles, ideals, and standards that may be appealed to — are those of a family of reasonable political conceptions of justice....” Rawls, *Political Liberalism*, paperback edition (New York: Columbia University Press, 1996), pp. lii-liii. The idea of public reason itself is altered as Rawls explores deeper levels of diversity. I consider some of the issues in “The Turn to a Political Liberalism” in *The Blackwell Companion to Rawls*, edited by David Reidy and Jon Mandle (New York: Wiley-Blackwell, 2014): 235-50.

<sup>6</sup> Rawls, *Political Liberalism*, p. xxi.

<sup>7</sup> *Ibid.*, p. xlvi. Burton Dreben thought that the 1996 paperback edition should be considered a second edition of *Political Liberalism*. “On Rawls on Political Liberalism” in *The Cambridge Companion to Rawls*, edited by Samuel Freeman (Cambridge: Cambridge University Press, 2003): 316-46.

<sup>8</sup> Rawls, *Political Liberalism*, p. xlix.

2 FROM FULL TO PARTIAL NORMALIZATION

*2.1 Normalization and the Definite Social Contract*

In his *Lectures on the History of Political Philosophy* Rawls tells us that “a normalization of interests attributed to the parties” is “common to social contract doctrines.”<sup>9</sup> The supposition was that if we normalize the choosers by designating a shared evaluative point of view, we can arrive at a determinate social contract. From the 1960s through the 1980s, philosophical inquiry into justice was largely dominated by the pursuit of an Archimedean point: a description of an impartial, normalized, chooser such that his choice would identify *the* correct principles of justice. As David Gauthier pointed out:

...Archimedes supposed that given a sufficiently long lever and a place to stand, he could move the earth. We may then think of an Archimedean point as one from which a single individual may exert the force required to move or affect some object. In moral theory, the Archimedean point is that position one must occupy, if one’s own decisions are to possess the moral force to govern the moral realm. From the Archimedean point one has the moral capacity to shape society.<sup>10</sup>

This normalized chooser was to identify a determinate ranking of social states. Indeed, Rawls explicitly justifies the introduction of the veil of ignorance and maximin reasoning as a way to overcome what he saw as a gross deficiency in his 1958 “Justice as Fairness.” In that first social contract, the second principle of justice was simply a strong Pareto condition that required inequalities fall on the Pareto frontier of mutual benefit. The principle, however, did not say anything about *where* on the Pareto frontier society must settle. By the time Rawls wrote “Distributive Justice,” he was convinced that this indeterminacy was a serious problem.

There are many such [Pareto-optimal] distributions, since there are many ways of allocating commodities so that no further mutually beneficial exchange is possible. Hence the Pareto criterion, as important as it is, admittedly does not identify the best distribution, but rather a class of optimal, or efficient distributions.... The criterion is at best an incomplete principle for ordering distributions.<sup>11</sup>

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<sup>9</sup> John Rawls, *Lectures on the History of Political Philosophy*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 2007), p. 226

<sup>10</sup> David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), p. 233. Compare Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), p. 511. John Tharsher and I consider this matter in far more depth in “Rational Choice and the Original Position: The (Many) Models of Rawls and Harsanyi” in *The Original Position*, edited by Timothy Hinton (Cambridge: Cambridge University Press, forthcoming); see also the insightful analysis of Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of a Theory of Justice* (Princeton: Princeton University Press, 1977), Part Two.

<sup>11</sup> Rawls, “Distributive Justice” in *Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, [1967], 1999), pp. 130-53 at p. 135. Compare *Theory of Justice*, p. 121.

Rawls's work leading up to *Theory*, which shaped much of contemporary political philosophy, was to identify a normalized choice perspective that provided a theory of justice ("justice as fairness"), specific enough to give authoritative, determinate, rankings of social states and/or institutions. By *Political Liberalism*, this project is abandoned.

The view I have called "justice as fairness" is but one example of a liberal political conception; its specific content is not definitive of such a view.

The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood. This means that each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us. We must have some test we are ready to state as to when this condition is met. I have elsewhere suggested as a criterion the values expressed by the principles and guidelines that would be agreed to in the original position. *Many will prefer another criterion.*<sup>12</sup>

Those who wish to minimize the fundamental importance of this shift content themselves with saying that a "family" of liberal views is still justified. Two observations are in order.

(i) In 1958's "Justice as Fairness" a "family" of distributive views was justified, and Rawls saw this as a core weakness in a theory of justice, which aimed at a well-ordered society that could agree on a determinate ranking of claims. We have no shared conception of justice to resolve these disputes. As Samuel Freeman notes, it is anything but clear that a robust ideal of a well-ordered society survives the last developments of political liberalism.<sup>13</sup> This surely is a fundamental change.

(ii) Secondly, it is not as if Rawls identifies a single original position with a single normalized perspective, that yields a "family" (i.e., set) of conceptions.<sup>14</sup> Rather, Rawls suggests that different versions of the original position, employing different plausible normalizations of the choosers, will arrive at different conceptions. So at the end we seem to be left with multiple normalizations, or we might say, a set of *partial normalizations*: choosers are not fully normalized across all original positions, since they differ in various reasonable original position set ups. In an interesting, yet puzzling way, we are confronted with a set of liberal theories of justice.

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<sup>12</sup> Rawls, *Political Liberalism*, pp. 226-27, emphasis added.

<sup>13</sup> Samuel Freeman, *Justice and the Social Contract* (New York: Oxford University Press, 2007), pp. 255-56.

<sup>14</sup> To do this would require fundamental changes in the nature of argument from the original position, as it would introduce basic disagreement about justice into the choice situation. For an attempt to model such an original position see Ryan Muldoon et al., "Disagreement In and Out of The Veil of Ignorance," *Philosophical Studies* (forthcoming).

One has to be an especially devout disciple of Rawls not to conclude that by the close of his political liberalism project, the theory of justice was in disarray.<sup>15</sup> A theory of justice is characterized by the choice from a certain normalized perspective, but there are multiple partial normalized perspectives that yield different principles. Now if one acknowledges that there are other reasonable normalizations that yield opposing answers, in what sense can one plausibly claim that one has identified *the* principles of justice for the definitive ordering of social claims based on your preferred normalization? To be sure, one can conjecture that, say, justice as fairness is the most reasonable,<sup>16</sup> but in all our reasonable disputes one believes that one's own views are the most reasonable — that is, after all, is why one holds them over competing views. But if “citizens will of course differ as to which conceptions of political justice they think the most reasonable,”<sup>17</sup> on what grounds can we insist that others, who uphold differing reasonable conceptions, must conform to ours? Of course we can hope that “an orderly contest between them over time is a reliable way to find which one, if any, is most reasonable,”<sup>18</sup> but that does not tell me what to do, here and now, when faced with reasonable disputes about justice. “Go ahead and impose your own” does not seem especially attractive for a public reason view, even if one employs majoritarian methods or the Supreme Court were to do so.

## *2.2 Sen's Unified Partial Normalization Theory*

Although philosophers have been dismissive, if not downright contemptuous, of Amartya Sen's analysis in *The Idea of Justice*, it is one of the most important advances in the post-Rawlsian public reason project. It is an insightful proposal, developing a coherent view of justice, based on the insight that there is no singular, normalized perspective, from which to reason about justice. This, I take it, is one of the lessons to be derived from Sen's parable of three children and the flute.<sup>19</sup> Three children are quarrelling about who is to get a flute. If we consider only claims based on who can best use the flute, it goes to Anne who alone can play it; if we consider only claims of

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<sup>15</sup> Some might argue that political liberalism is concerned with legitimacy, not justice. Even if so, this would not show that a coherent account of justice remains. A theory of legitimacy is supposed to analyze a citizen's attitudes and obligations towards a state that is not fully just; but that very idea supposes that she has a coherent view of what social justice is in a society in which reasonable citizens disagree, as well as supposing that she has some grounds to seek to legislate her favored view over the reasonable objections of others. “It's only about legitimacy” is not a magic phrase that can make these issues disappear. What *is* justice?

<sup>16</sup> Rawls, *Political Liberalism*, p. 381.

<sup>17</sup> John Rawls, “The Idea of Public Reason Revisited” in *Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 573-615, at p. 578

<sup>18</sup> Rawls, *Political Liberalism*, p. 227.

<sup>19</sup> Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), pp. 12-15.

need, it goes to Bob who is so impoverished that he has no other toys;<sup>20</sup> if we consider only claims to desert and self-ownership, it goes to Carla, who made the flute. We can construct a choice situation in which all will agree with any of the three distributions if we filter out information about other relevant distributional criteria — that is, if we normalize the evaluative perspective such that only one criterion matters. But all of the three qualify as reasonable impartial principles of justice. “At the heart of the particular problem of a unique impartial resolution of the perfectly just society is the possible *sustainability of plural and competing reasons of justice, all of which have claims to impartiality and which nevertheless differ from — and rival — each other.*”<sup>21</sup> Unless we invoke highly a controversial normalization procedure (for example, simply excluding information relating to desert), rational and impartial free and equal persons will rank the alternatives differently, disagreeing on the optimal element.

So the basic idea is that, even after we have done our best to identify impartial spectators (i.e., those holding eligible normalized perspectives) who base their judgments on considerations acceptable to all, and who are free from bias and parochialism, we will be left with multiple impartial spectators. We have multiple normalized perspectives. Even if we suppose that each impartial spectator could give a complete justice-based ranking of feasible alternatives,<sup>22</sup> their rankings will only partially overlap. “There will, of course, be considerable divergence between different impartial views...[and] this would yield an incomplete social ranking, based on congruently ranked pairs, and this incomplete ranking could be seen as being shared by all.”<sup>23</sup> Display 1 provides a drastically simplified stylized example of three impartial spectators ranking five alternatives.

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<sup>20</sup> Though what he will do with a flute he cannot play isn’t obvious. Sen says the flute “will give him something to play with,” rather suggesting that he will use it as fancy stick or like a party favor that can make a loud noise. If he learns to play it, then Anne’s case is weakened. If he does not learn to play it, it is unlikely to satisfy his needs for long.

<sup>21</sup> Sen, *The Idea of Justice*, p. 12. Emphasis added.

<sup>22</sup> This is a simplification; Sen’s solution does not require that each spectator can give a complete ordering. Drawing on Sen, I have shown how such incompleteness can be addressed in *The Order of Public Reason*, pp. 303-10.

<sup>23</sup> Sen, *The Idea of Justice*, p. 135.

Spectator 1	Spectator 2	Spectator 3
<i>a</i>	<i>c</i>	<i>d</i>
<i>b</i>	<i>a</i>	<i>a</i>
<i>c</i>	<i>d</i>	<i>b</i>
<i>e</i>	<i>b</i>	<i>e</i>
<i>d</i>	<i>e</i>	<i>c</i>

DISPLAY IV-1

Here the ordering shared by our three impartial spectators (or, we might say, partially normalized perspectives) is  $aPb$ ,<sup>24</sup>  $bPe$  (so, by transitivity,  $aPe$ ). Notice that this is to apply a Paretean rule over impartial spectators: if for all spectators  $aPb$ , then according to the full theory of justice,  $a$  is more just than  $b$ . Notice that while each impartial spectator can rank  $c$  and  $d$ , we might say that “reasonable conceptions of justice” disagree (for Spectators 1 and 2,  $cPd$ , but for 3,  $dPc$ ). On Sen’s view the full theory of justice cannot order  $c$  and  $d$  (or the pairs  $\{c,e\}$ ,  $\{d,e\}$ ) as there is reasonable disagreement about their relative justice.

Much of Sen’s most innovative work has been on rational choice from incomplete orderings (see §6.1 below). He thus sees a way out of Rawls’s conundrum: even though we have multiple, inconsistent, partially normalized perspectives, if we allow our theory of justice to be incomplete, we can still give unequivocal pairwise overall judgments of justice, and this still will allow rational choice based on justice in a wide range of situations. The public reason project can flourish with partial normalization — an important conclusion indeed.

### 2.3 A Worry About the Limits of Sen’s Solution

If, employing Sen’s idea of impartial spectators, we end up with a small group of eligible normalized perspectives, it seems plausible that the Pareto rule will generate an interestingly large class of pairwise comparisons, so that our theory of justice, while incomplete, will not be empty. But as we increase the set of possible normalized perspectives so that the number of impartial spectators becomes large, we might worry that the Pareto rule will not be of much help. As soon as a single spectator deems  $yPx$ , it cannot be that, according to justice,  $xPy$ . The reply by a proponent of Sen’s view appears straightforward: plausible normalized perspectives about justice can disagree about a lot, but so too must they agree a lot. Any normalization, a defender of Sen might say, partial though it might be, necessarily restricts the domain of possible orderings of the feasible set. Famine and human rights violations are not admissibly preferable to the protection of rights and

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<sup>24</sup> Read “ $a$  is preferred to (or ranked above)  $b$ .”

sufficient food by any plausible perspective on justice.

While all this is true as far as it goes, it leads us right back to the core of Rawls's insight concerning the diversity of reasonable views about the right or justice: how deep and wide are these differences? Rawls insisted that the family of partially normalized views that resulted were all versions of egalitarian liberalism,<sup>25</sup> but there is no sustained argument for this conclusion; if there are many political values that can be weighed in many ways, we have *prima facie* grounds for thinking that the set of eligible perspectives on justice may be rather larger than Rawls or Sen intimated. And if we are confronted with a large set of eligible perspectives on justice, then Sen's Paretean rule may, after all, turn out to be radically incomplete. It thus seems that Sen's approach works well for the sort of limited diversity of eligible perspectives that Rawls had in mind, but falters if we cannot make considerable progress in identifying a rather small set of appropriately normalized perspectives.

### 3 THE DEEPER WORRY ABOUT SEN'S THEORY OF JUSTICE

#### *3.1 The Social Choice Perspective*

Sen makes much of the fact that his account is based on a social choice perspective, which evaluates societies, states of affairs or, we might say, social worlds, rather than, directly, rules or institutions. Drawing on Indian thought, Sen makes much of the contrast between *niti* —which seems a severe, rule-based approach to justice related to deontology, and *nyaya*, according to which “justice is not just a matter of judging institutions and rules, but of judging societies themselves.”<sup>26</sup> The idea of *nyaya* is a broadly consequentialist idea that the focus of evaluation should be the state of affairs that constitutes a society: we are judging a society, not a system of rules. “Justice is ultimately connected with the way people's lives go, and not *merely* with the nature of the institutions surrounding them.”<sup>27</sup> Thus we focus on evaluating the justice of entire states of affairs. “Even though the possibility of describing any state of affairs ‘in its entirety’ is not credible (we can always add some more detail) the basic idea of a state of affairs can be informationally rich, *and take note of all the features that we see as important.*”<sup>28</sup>

The raises a subtle but fundamental problem: Sen's account supposes a full normalization in how the eligible perspectives characterize the feasible alternative social worlds. An identification of  $x$  as a social world is to determine the features of a social world, call these  $\{f_1, f_2, f_3\}$ . An impartial spectator who identifies  $x$  as the social

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<sup>25</sup> Rawls, *Political Liberalism*, pp. 6, 7n.

<sup>26</sup> Sen, *The Idea of Justice*, pp. 20-1, 210.

<sup>27</sup> *Ibid.*, p. x, emphasis added; see also p. 410

<sup>28</sup> *Ibid.*, p. 214. Emphasis added.

world to be evaluated has made a set of judgments about the features of  $x$  — about its social ontology, the things that comprise  $x$  that “we see as important.” Sen’s analysis requires that spectators agree on the description of the feasible set and how to delineate the options within it. When Spectator 1 ranks  $xPy$ , the  $x$  (and the  $y$ ) must designate the same set of feature that they do in the other spectators’ orderings, if we are to conclude the spectators truly and meaningfully concur that  $xPy$ . Obviously, if Spectator 1 uses “ $x$ ” to specify  $\{f_1, f_2, f_3\}$  while Spectator 2 is taking “ $x$ ” as a way of classifying the world  $\{f_1, f_2, f_4\}$ , they are using the label “ $x$ ” to refer to different worlds, so they do not truly agree in their rankings.<sup>29</sup> Unless we can partition the social worlds into smaller social worlds that do have the identical set of features for all spectators (the features are fully normalized), we have no grounds for application of the Paretean rule.

### *3.2 The Deep Diversity of Social Worlds*

Recall that, referring to the “intractable” struggles in our history of religious conflict, Rawls proclaims that, “Political liberalism starts by taking to heart *the absolute depth of that irreconcilable latent conflict.*”<sup>30</sup> A fundamental reason why these struggles are so deep and wide is not simply (perhaps not even at all) because various religious perspectives and secular world views have radically different understandings of justice, but because they have fundamentally different understandings of the social world that principles of justice are intended to regulate.<sup>31</sup> A Catholic has a very different understanding of the social world — its real, underlying features — than does, say, a secular Darwinist philosopher. The social world that a Catholic occupies is one where sin and sanctity are features of states of affairs; they are not merely values or preferences, but basic features of the ontology of the world that determine the circumstances of social life. These features simply do not exist in the social world of the secular Darwinist — as he sees it, they are illusions or fantasies. He has no categories that correspond to them. If he is being generous and “liberal-minded,” he may admit that Catholics have preferences to continue with Catholic practices, and since preferences are indeed real, they count, but the underlying social world simply does not have the fantastic entities that the Catholic assumes. There is only one world, and it is the secular world revealed by science. This is the normalized world that all theories of justice must presuppose.

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<sup>29</sup> We can conceptualize the spectator’s perspectives as being based on different categorizations of the world. This idea has been employed with great subtlety by Scott E. Page, *The Difference* (Princeton: Princeton University Press, 2007), chap. 1.

<sup>30</sup> Rawls, *Political Liberalism*, p. xxviii, 4. Emphasis added.

<sup>31</sup> *Ibid.*, p. 17.

This seems to be Sen's view. It is revealing that nowhere in *The Idea of Justice* do we confront a serious discussion of religious perspectives, and the nature of a religious person's social world — important matters in many, perhaps most, societies today. Sen defends freedom of religion as a sort of freedom to participate in one's ancestral culture,<sup>32</sup> but it is clearly supposed that any eligible impartial spectator will have a normalized secular, naturalistic, social ontology. They have different evaluations, but they categorize the social world in the same way. However, we do not even begin to understand the problem of reasonable pluralism about justice if we translate the Catholic's claim that she has a duty to obey the word of God as a claim to a right to engage in a cultural practice. We see no hint in Sen's work of the worry that consumed Rawls's later work — whether liberal justice can be endorsed from a variety of comprehensive views that interpret the world and the universe in fundamentally different ways. And that is not because of any oversight of Sen. Unless he strictly normalizes what constitutes the social worlds to be evaluated, his Paretean solution to the problem of diversity of views about justice cannot possibly work.

It is important to stress that disagreements about the nature of the social worlds in which we live are not peripheral sorts of dispute that can be redescribed as value or preferential disputes. Consider how some of our deepest and most intractable disputes are not about values or principles of justice, but about the world to which these principles apply.

The most obvious case is the long-standing and persistent struggle concerning abortion rights. Advocates of such rights see the case as decisively about fundamental rights of personal autonomy; opponents of abortion rights are depicted as having little sensitivity to a woman's claim to control her own body.<sup>33</sup> But this by no means follows, and often is not the case; opponents of abortion can be deeply devoted to such autonomy, but not in cases where it entails overriding another's right to life. And, of course, in the abstract, almost any advocate of abortion rights would also draw back in such situations. The dispute is centrally about the social world to which the principles of autonomy and the right to life apply: the two social worlds do not have the same set of persons, and so even perfect agreement about abstract principles of justice would not resolve the dispute. It is only because so many moral philosophers agree with Sen that there is only a single, fully normalized, secular, social world that, misleadingly, the dispute has to be misdescribed as one about values or abstract principles of justice.

A similar problem has plagued discussions of the harm principle. Recall a classic objection by Robert Paul Wolff, who notes that according to Mill's harm principle,

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<sup>32</sup> Sen, *The Idea of Justice*, p. 237.

<sup>33</sup> See Rawls, *Political Liberalism*, pp. 243n-4n.

I am liable to others when I affect their “interests.” Society may interfere only in those areas of my life in which it has, or takes, an interest. Now this distinction between those aspects of my life which affect the interest of others, and those aspects in which they do not take an interest, is extremely tenuous, not to say unreal, and Mill does nothing to strengthen it. Mill takes it as beyond dispute that when Smith hits Jones, or steals his purse, or accuses him in court, or sells him a horse, he is in some way affecting Jones’ interests. But Mill also seems to think it is obvious that when Smith practices the Roman faith, or reads philosophy, or eats meat, or engages in homosexual practices, he is not affecting Jones’ interests. Now suppose that Jones is a devout Calvinist or a principled vegetarian. The very presence in his community of a Catholic or a meat-eater may cause him fully as much pain as a blow in the face or the theft of his purse. Indeed, to a truly devout Christian a physical blow counts for much less than the blasphemy of heretic. After all, a physical blow affects my interests by causing me pain or stopping me from doing something I want to do. If the existence of ungodly persons in my community tortures my soul and destroys my sleep, who is to say that my interests are not affected?<sup>34</sup>

Proponents of the harm principle, if they are interested at all in accommodating such “harms,” typically seek to depict them as psychological harms or offensive actions.<sup>35</sup> No one *truly* has a basic interest in living in a society without homosexuality, or one free of ungodly rituals, since such Christian worldviews are inadmissible in the normalized world of the harm principle. However, if people get really upset, *that* at least is real, and perhaps something can be done about that. This may be enough for the secular, normalized, view, but it misses the point of the religious complaint.<sup>36</sup> The complaint is not that one is getting upset; whether or not one knew about it, one’s interests would be set back by such behavior.<sup>37</sup> Perhaps one of the most striking ways in which debates involving religious categorizations have been normalized (and in Foucault’s more sinister sense) in much contemporary liberal discourse is the way in which opposition to homosexuality has been redescribed as a disease, homophobia.<sup>38</sup>

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<sup>34</sup> Robert Paul Wolff, *The Poverty of Liberalism* (Boston: Beacon Press, 1968), pp. 23-4.

<sup>35</sup> I am criticizing myself here. See my *Social Philosophy* (Armonk, NY: M.E. Sharpe, 1999), chap. 8.

<sup>36</sup> Note that even Wolff appeals to both torturing the soul, which certainly depends on a religious categorization, and destroying sleep, which does not.

<sup>37</sup> For a fascinating analysis of harms that presuppose controversial views of the social world, see Ryan Muldoon, “Harms that Require Recognition.” Working paper, <http://www.sas.upenn.edu/~rmuldoon/papers/harms.pdf>

<sup>38</sup> Similarly, those who reject feminist claims or, more generally, feminist perspectives, are very often labeled “misogynistic,” normalizing feminism such that only a pathological emotional state could explain opposition. Normalization of one’s position via rendering opposing perspectives as pathological is becoming something of a fashion; witness John Tomasi’s (idiosyncratic) labeling of classical libertarians, who believe social justice is normatively objectionable, or presupposes an erroneous view of the social world, as suffering from “Social Justicitis” (by which he means “Social Justice-phobia”). *Free Market Fairness* (Princeton: Princeton University Press, 2012), chap.

Many of the same points apply to environmentalism and various forms of support for animal rights. Again, some of the claims of environmentalists and animal rights advocates can be translated into, say, a standard western normalized world, where humans are the sole persons, but pain to all sentient creatures is bad. But many cannot. Those who see nature as an entity to be respected, or who hold that ecosystems have basic rights, do not live in this normalized world. Other examples abound. Even those who embrace almost all the details of the Rawlsian analysis of justice fundamentally disagree on its application to international or global justice, and surely one of the important reasons for this is a fundamental dispute whether “peoples” are entities with moral status.<sup>39</sup> Here we have a stark reminder that agreeing on a theory of justice, without agreeing about the social world to which it applies, by no means guarantees agreement.<sup>40</sup>

None of this is to say that in a society where there is great disagreement about the social world we inhabit, any perspective may legitimately insist that its social world be imposed on others. That in your social world ecosystems are persons, that God forbids homosexuality, or that jokes about sex are not funny,<sup>41</sup> does not itself tell me anything about what I am to do, or how I am to live with you. It is to insist, however, that, unless our thinking about diversity takes seriously these extraordinarily deep disagreements about the nature of the social world, we will fail to understand what is required to live in a free and open society grounded in public reason.

#### 4 MULDOON’S NORMALIZATION-FREE SOCIAL CONTRACT

##### *4.1 When Different Worlds Overlap*

The most innovative and sophisticated work rethinking political philosophy in light of deep perspectival differences is that of Ryan Muldoon, who proposes a social contract free of normalization assumptions. The key insight of Muldoon is that, even if your and my social worlds do not categorize objects in the same way, we may still have common “objects” or, we might say, partial projections of objects, about which we can negotiate. Taking our cue from Muldoon, let us start with a

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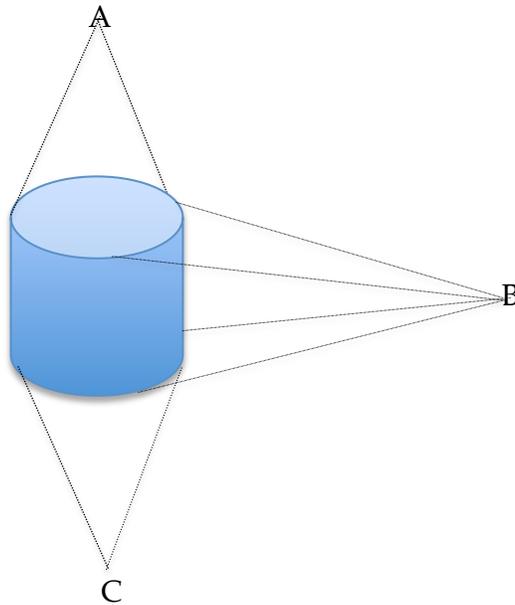
5. I have heard libertarians respond that it is *current political philosophy* that truly suffers from “justicitis,” an inflammation of justice. While this has the virtue of making sense, it is still a worrying continuation of the trend.

<sup>39</sup> “Liberal peoples have three basic features: a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by what Mill called “common sympathies”; and finally, a moral nature.” John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 23.

<sup>40</sup> I am grateful to Sameer Baja for this last point.

<sup>41</sup> They are not aptly categorized as jokes at all; they are not jokes in that social world, but forms of domination.

simple case,<sup>42</sup> as in Display 2.



DISPLAY 2

A, B and C are three perspectives on the same object; all can see the world in three-dimensional space. On A's perspective it is a two-dimensional circle, as it is C's, though on C's perspective it is a different circle (it does not share the same spatial location as the one A sees). B sees the shape as a cylinder, but not as a closed one. Compare: to a research scientist, a fetus may be a source of stem cells; to a Catholic, a person with a soul; to a natural rights philosopher, a fetus may be a trespasser violating the rights of the owner. That there is no normalized characterization of the real object that all must endorse does not imply that these non-normalized perspectives share nothing; they share partial characterizations of the object (or, we might say, they see different projections of the object). That, after all, is why the three can argue about the proper treatment of "the fetus" even though they ascribe very different properties to it — and so in a fundamental sense do not have the same object in mind at all.

The core of Muldoon's important and insightful proposal is that we can model social contracts as bargains about who has rights over the "object" while simultaneously acknowledging that the parties do not agree precisely about the

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<sup>42</sup> Ryan Muldoon, *Beyond Tolerance: Re-Imagining Social Contract Theory for a Diverse World* (manuscript), chap. 3.

nature of the object over which they are bargaining. Writes Muldoon:

If two agents have different categorizations, this means that they will not divide state space up in the same way. This is simply because they categorize the world differently, and so they have different conceptions of salience.... they are seeing the same thing, but just interpret it differently. As there is no neutral [or normalized] representation of the state space, we cannot take one partition as better than another, and so we cannot just pick one and require everyone to use it. This much is clear. But we also cannot just take the union of everyone's partition sets and expect everyone to share this larger partition set. This is because there is no assurance that people can *see* the distinctions that are in other perspectives if they do not themselves hold them. So just as we do not have the same accounts of value (and hence utility functions), we do not have the same partition sets. But even though we cannot expect that individuals can adopt this union of all partition sets, we can describe the overall bargain by making reference to this union set, so long as we do not assume that the agents in the bargain themselves are aware of it.<sup>43</sup>

The overall bargain really concerns the *union* of the A, B, and C perspectives, for depending on how the bargain comes out, it will affect, as it were, the way the entire closed cylinder is used; but A, B and C cannot see a closed cylinder, so they will not think the bargain is about that (it will, from their individual perspectives, be a bargain about who has rights over some circle, or who has rights over an open cylinder).

Muldoon's non-normalized social contract, then, is a *n*-person bargain over the allocation of rights that, in one respect, is about rights over overlapping bits of the world, yet determines rights over the "full objects" in each perspective (when these full objects include the bits that are jointly seen). Recall the different perspectives on the fetus: although our Catholic, scientist and philosopher radically disagree about the properties of the fetus. They all see some features, but the outcome of the social contract will, for all three, determine who has rights over the entire fetus as they conceive if it. Note that this contract does not require that anyone abstracts to a shared, normalized, point of view about the correct nature of the social world. Yet the allocation of rights applies to each, non-normalized social world and — if we accept the Nash bargaining solution on which he relies — each perspective can endorse the overall, social, distribution of rights.<sup>44</sup>

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<sup>43</sup> *Ibid.*, chap. 4.

<sup>44</sup> There is considerable debate about the appropriateness of the Nash bargaining solution to moral justification. Ken Binmore explains and defends it in *Natural Justice* (Oxford: Oxford University Press, 2005). For a short period David Gauthier endorsed the Nash solution, before abandoning the idea that moral contractarianism should be modeled on bargains. See his "Twenty-Five On," *Ethics*, vol. 123 (July 2013): 601-24. For Rawls's criticism, see "Justice as Fairness," in *Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 47-72 at 58n. Rawls worried, as have many others, about the way that the Nash bargaining solution is sensitive to threat advantage: "To each according to his threat advantage is hardly the principle of fairness." Although Muldoon relies on the Nash solution he is "not

#### *4.2 Dynamism and the Open Society*

Muldoon insists that his understanding of the social contract is dynamic, stressing constant adaptation. As new perspectives enter and old ones die away, the social contract must change.<sup>45</sup> Muldoon is a great fan of John Stuart Mill's emphasis on experiments in living, and the ongoing discovery of better ways to live together.<sup>46</sup> In a similar vein, he is especially critical of Rawls's claim that, in modeling a social contract, we should suppose the parties will be bound through an unpredictable future, and cannot renegotiate as they proceed.<sup>47</sup> Constant changes in the perspectives of the population (for example, the immigration of Muslim groups), changes in environmental conditions, and discovery of better ways of living together, all require that we view the social contract as dynamic, evolving, bargains for mutual benefit, not a set of principles fixed "once and for all." Because there is no normalized, fixed, perspective from which to reason about fixed principles, the social contract is necessarily tightly coupled to the perspectives presently populating a society.

In an important sense Muldoon is absolutely right: a sustainable, publicly justified, order must build in resources to adapt to drastically changing conditions, both internally and externally. I turn very briefly to this important point in section 6.3. However, resources for adaptability are not to be equated with a social contract that is tightly coupled with the set of current perspectives. We can distinguish two competing desiderata for any "social contract," or system of rules for living together.

- (I) At any given time  $t$ , in society  $S$ , the system of rules should be optimal, or tending towards optimality, for  $S$  at  $t$ .

Of course just what constitutes "optimization" for  $S$  at  $t$  is itself a fundamental question. Although Muldoon is appreciative of the deep perspectival diversity of contemporary societies, he also seems to have a faith in social and moral progress, in which these various perspectives are working towards solving fundamental human

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adverse to alternative solution mechanisms so long as they respect the equality of the participants," Muldoon, *Beyond Tolerance*, chap. 6. The question is whether Nash solutions really do respect equality in the appropriate way.

<sup>45</sup> Muldoon, *Beyond Tolerance*, chap. 6.

<sup>46</sup> *Ibid.*, chap. 2.

<sup>47</sup> See Rawls, "Justice as Fairness," where uncertainty about the future is fundamental to the choice of the principles. Rawls insists that modeling the agreement as non-revisable is fundamental to the contractual nature of the project. See his "Reply to Alexander and Musgrave," in *Collected Papers*, pp. 232-53, at p. 249.

problems, or will be judged in relation to their ability to do so.<sup>48</sup> However, even without any commitment to moral progress, we can understand optimization in terms of bargains that meet the Nash bargaining criterion, given the array of perspectives in *S* at *t*. The model of such systems is the dynamic efficiency of a well-functioning market, which is constantly adjusting to new conditions, self-equilibrating towards optimality.

An alternative desideratum is (roughly speaking):

(II) The justification of a system of rules *R* should be highly stable in the sense that the justification of *R* should not be tightly coupled to the specific array of perspectives in society *S* at any given time *t*. Over a large number of possible states (and perspectives), *R* will continue to be justified (the social contract will continue to be endorsed).<sup>49</sup>

While Muldoon's dynamic contract seeks to meet desideratum (I), there is a strong case for (II), the sort of "fixed" contract of which he is so critical. Hayek, for example, insists that *just because* we want a market order that is dynamic and constantly adjusting to new conditions, we need relatively stable social and moral rules.<sup>50</sup> The basic moral rules of society, and the basic norms governing the political sphere, provide the background for social and economic experimentation. Unless this background sets relatively fixed parameters as to, say, what claims of property are to be respected and what personal rights are to be guaranteed, economic innovators have insufficient fixed points from which to plan. Innovation is not a planless, random, activity; it is based on decentralized individual plans, and these plans and their coordination require important fixed parameters.<sup>51</sup>

To be somewhat less abstract, contrast Muldoon's view of the open society to Hayek's. On Muldoon's view, which stresses the first desideratum, in an open society "the process of generating social contracts is one of continual revision,"<sup>52</sup> so

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<sup>48</sup> The tie between stressing Millian experiments in living and a belief in moral progress is, I think, a rather close one. The whole point of engaging in experiments is to get us closer to the right answer. This tie is especially clear in Philip Kitcher, *The Ethical Project* (Cambridge, MA: Harvard University Press, 2011).

<sup>49</sup> Muldoon acknowledges that (I) may lead to some rules, such as freedom of speech, that meet (II), but that is a matter for discovery; the core desideratum continues to be (I). Muldoon, *Beyond Tolerance*, chap. 6.

<sup>50</sup> See F.A. Hayek, *Rules and Order* (Chicago: University Of Chicago Press, 1973), esp. chaps. 2 and 3.

<sup>51</sup> On the importance of individual planning, see Hayek, "The Use of Knowledge in Society," *The American Economic Review*, vol. 35 (September 1945): 519-30.

<sup>52</sup> Muldoon, *Beyond Tolerance*, chap. 6. Muldoon recognizes that "the challenge of this [i.e., his] kind of approach is that we have far fewer fixed points. We do not have many stable principles we can rely on." He hopes, however, that his account provides for "periods of stability."

the basic allocation of rights is being revised as new groups (with new perspectives) enter. But note that this can entail a high cost for current groups. While Muldoon rightly stresses that through the division of labor I can benefit from new groups and perspectives, it also is the case that on his proposal I do not know the rules on which I shall interact with these new perspectives, as the social contract will be renegotiated as they enter. So it will be harder to anticipate the costs and benefits. Supposing also, as seems to be the case, that most people are conventionalists and so endorse most of the rules they live under, they will certainly see one clear and significant cost in allowing immigration of culturally-different groups: it is apt to overturn the current contract. A worry about the nature of religious accommodation as it was negotiated in some western European countries is that it was rather close to Muldoon's model, with a bargain between different Christian sects, who all got their share of state influence and funding. Enter Muslim populations, and this basic bargain has to be renegotiated, and now with groups whose perspectives appear both less similar and less familiar, so it is harder for the current Christian population to anticipate the new social contract that might arise. The result is apt to be great reluctance to admit and then accommodate Muslim groups.<sup>53</sup> In contrast, if our rules fulfill the second desideratum, while current residents will anticipate new interactions (some welcomed, some not), the basic allocation of rights and duties will not change. And because the rules of the game will be stable, there will be both a greater ability to plan how to interact with the newly arrived groups, and far less cost — new arrivals do not mean new social contracts.

## 5 A PUBLIC SOCIAL WORLD

### *5.1 An Impasse?*

We seem to have arrived at an impasse. We started out by noting the great advance that Rawls made in the public reason project by recognizing that there is no single normalized (what I have called a "fully normalized") perspective from which to reason about basic principles and rules of justice. However, this led to a lacuna in Rawls's account: there was no coherent way to unify these various perspectives into an overall account of justified principles of justice, or a basic framework for moral and social interaction. Sen, I have suggested, proposed one of the first systematic accounts of justice that built on the recognition that there is no single fully normalized perspective from which to make judgments of justice. However, then we reached an even deeper issue of normalization and diversity: Sen's partially normalized theory of justice depends on a full normalization of the social worlds

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<sup>53</sup> Muldoon argues that, should the different perspectives interact in mutually beneficially ways according to a new contract, empathy and mutual understanding may well develop. But that supposes that that the problems discussed here have been overcome.

being evaluated. We might disagree on the justice of world  $x$ , but on Sen's analysis we agree about the defining features of  $x$ . However, a fundamental feature of our widest and deepest disputes is that we do not agree about the social ontology of the social world we inhabit; we cannot avoid the problem posed by controversial perspectives by supposing a fully normalized description of the social world as it truly is.

Thus the great interest of Muldoon's non-normalized contract: on his proposal, evaluative standards and conceptions of the social world are all features of a perspective; the perspectives bargain about the common features of their social world (though this bargain determines rights over the union of those features). Muldoon's proposal, we might say, is the limiting case of anti-normalization. Muldoon's account of the social contract is resolutely dynamic; the contract is constantly adjusting as new perspectives enter and old ones leave.<sup>54</sup> The worry is that, rather than being a blueprint for a free, open, and dynamic social order, it is a recipe either for chaos, in which there is always a new shuffle of the cards,<sup>55</sup> or else a closed society, as current perspectives seek to solidify the current allocation of rights by excluding new viewpoints. To avoid this result, we seem to require a relatively stable moral framework, and that in turn requires a relatively stable, normalized, conception of the social world that is being regulated. But that seems to land us back where we started — normalization.

## *5.2 On Creating a Public Social World*

Although it is seldom noted, Rawls's later works are rife with references to the idea of social worlds. He employs the idea in various ways, two of which are of importance for the current discussion. On the one hand, Rawls refers to social worlds in ways that suggest that they are broadly sectarian: when we are alienated, Rawls, says, "we grow distant from political society and retreat into our social world."<sup>56</sup> On the other hand, Rawls stresses that from the perspective of the original position "[t]he parties in effect try to fashion a certain kind of social world; they regard the social world not as given by history, but, at least in part, as up to them."<sup>57</sup> Or, as he says in *Political Liberalism*, "insofar as we are reasonable, we are ready to work out the framework for the *public* social world."<sup>58</sup>

Let us interpret this distinction as one between the social world that characterizes

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<sup>54</sup> And as their threat points change?

<sup>55</sup> Which, as Hobbes pointed out, can be gamed. *Leviathan*, Edwin Curley (Indianapolis: Hackett, 1994), p. 58 (chap. xi, ¶4).

<sup>56</sup> Rawls, *Justice as Fairness*, p. 128.

<sup>57</sup> *Ibid.*, p. 118.

<sup>58</sup> Rawls, *Political Liberalism*, p. 53. Emphasis added.

one's "comprehensive perspective" and the "public social world" of rules and institutions that is collectively created by members of a society. In this latter sense, but not in the former, principles of justice and basic institutions *are* a public social world — they comprise it.<sup>59</sup> We can think of the public social world of rules and institutions as an artificial social world, one whose existence is a feature of the coordinated mental states of its members.<sup>60</sup> The critical point is that in a diverse, liberal society, the normalized social world does not reflect a basic choice between the competing social worlds of the different perspectives. It does not have deep ontological commitments: it is our social world because these are the rules and institutions that we, collectively, conceive of, and act upon. As Rawls says, we can "fashion a certain kind of social world" through our joint choices and beliefs.

Should Rawls's talk of social worlds seem too alien, we can put much the same point in terms of developing a "public moral constitution" for our society.<sup>61</sup> Our shared public social world simply is a stable, shared moral and political framework for living together. Its institutional structure provides common categories, and common sources of interpreting those categories, which allow us to share cooperative ventures with just social relations.<sup>62</sup> Nevertheless, it is an institutional structure of our own collective creation.<sup>63</sup>

Such a public social world is required for an open society, for it provides relatively settled public categories, rules, and interpretations, which provide the necessary fixed points to allow for individual planning and dynamic changes. Just as markets are dynamic only because the rules of property and contract are not constantly being renegotiated, a dynamic and open society has a relatively stable public social world. But this is not a normalized social world, on which we *base* our theory of public reason. It is a common world that arises *out of* public reason: it is our

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<sup>59</sup> *Ibid.*, pp. 41, 77.

<sup>60</sup> There are a number of different ways of theorizing about these coordinated mental states; different accounts can underwrite the claims made in the text. See the essays by John Searle, Margaret Gilbert, and Eerik Lagerspatz in *On the Nature of Social and Institutional Reality*, edited by Eerik Lagerspatz, Heikki Ihäheimo, and Jussi Kotkavirta (Jyväskylä, Finland: University of Jyväskylä Printing House, 2001).

<sup>61</sup> Rawls, "Kantian Constructivism in Moral Theory," in *John Rawls: Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), p. 326. See further my essay, "On the Appropriate Mode of Justifying a Public Moral Constitution," *The Harvard Review of Philosophy*, vol. 19 (2013): 4-22.

<sup>62</sup> This is why it was deeply mistaken for Sen to accuse of Rawls of "institutional fundamentalism" (*The Idea of Justice*, p. 82). It is only through institutions that those with deeply divergent perspectives can share a common, public, social world. See further my "Social Contract and Social Choice," *Rutgers Law Journal*, vol. 43 (Spring/Summer 2012): 243-76.

<sup>63</sup> For a careful and insightful analysis of the importance of institutional structures, see Chad Van Schoelandt, "Rawlsian Functionalism and the Problem of Coordination," Working Paper, Philosophy Department, University of Arizona.

collective creation.

### *5.3 How Limited is the Liberal Public Social World?*

Rawls observes:

No society can include within itself all ways of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the inevitable effects of our culture and social structure. As Isaiah Berlin long maintained (it was one of his fundamental themes), there is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values. The nature of its culture and institutions proves too uncongenial.<sup>64</sup>

Rawls (and Berlin) are certainly correct, but in a rather more qualified way than he intimates. In one respect, the public social institutional world does not preclude any comprehensive social world in the sense that the one is strictly inconsistent with the other. The public social world creates public categories and duties, but these are artificial: there is no assumption that they represent any deep ontological insights about the basic features of our world. It is not, for example, a fact about the real social world that people are free and equal; it is a supposition of our moral constitution that we take people as such, and that our shared practices presuppose the appropriateness of taking them as such. It is a public, artificial category, not an observation about the deep nature of personhood. But should a doctrine deny this — should its adherents think that people are graded into freemen and natural slaves, those with grace and those who are damned, or Blue State and Red State voters, the public liberal public social world does not enter into dispute with them. Or at least it should not, and only does so if the liberal is mistakenly compelled to ground the liberal public social world in the social world as it *really is*, for then she must insist that it is the correct, normalized, world on which all must build. Other worlds are in principle inconsistent with a liberal order.<sup>65</sup>

That said, Rawls and Berlin are of course correct that the artificial public world does change the social world, for we create rules and institutions that often require that we do not relate to each other in terms of our deep beliefs about the real social world, and some who hold certain views of the social world may find very little room to act in accordance with the way they believe the world truly is. And the public culture based on the public social world may produce dissonance in those

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<sup>64</sup> Rawls, *Justice as Fairness*, p. 154. The passage also occurs in *Political Liberalism*, p. 197.

<sup>65</sup> Think of the many who insist that the liberal order is based on the true, secular and scientific, understanding of the world; on such “liberalisms” to be a liberal is to adopt the correct view of the world. The drawbacks of a liberalism that requires conversion to secularism are becoming manifest, in Europe as well as the United States.

who hold clashing views about appropriate behavior and social positions. It is in this sense that the space of the public social world is limited, even in a free and open society.<sup>66</sup>

## 6 CONVERGING ON A PUBLIC SOCIAL WORLD

### 6.1 *How Sen Rescues the Contractual Project*

Our core question is how are we to construct a public social world that takes seriously our deep diversity. What is to be the theory of justice that defines this public social world? Recall the problem with which we began. Rawls seemed unable to build his insight into the deep diversity of views about justice into his contractual model. A contractual model that yields no unique rational result may seem one that simply ends in a deadlock, and a deadlock is of no help at all in deciding what is just. In *A Theory of Justice* Rawls advocated a pairwise ranking proposal in the original position: the parties are to rank the various competing conceptions of justice in pairwise comparisons.<sup>67</sup> But the choice depends on unanimity: if in your ranking you hold that  $x$  is preferred to  $y$ , and in my ranking  $y$  is preferred to  $x$ , the social contract's unanimity requirement appears to be a "straightjacket" that leaves us unable to make any choice at all.<sup>68</sup> Rawls's response appeared to be to allow multiple original positions that would yield multiple conclusions, but this leaves us without a conclusion about what justice is. At the end of a fifty-year quest, we have no coherent *theory* of justice.<sup>69</sup>

Ironically enough, it is Sen's work on maximal sets that helps rescue the contractual project from this specter of deadlock through indeterminacy. Suppose we devise a unified contractual situation composed of all partially normalized evaluative points of view; we can leave open for the present how to characterize these but, of course, some such characterization is implicit in Rawls's supposition that reasonable people may weigh the relevant political values differently. Now, *ex hypothesi*, our partially normalized representatives in this "unified original position" will not agree on their pairwise rankings of rules or principles of justice (contra Rawls's supposition in *Theory*). To simplify, suppose that three liberal conceptions remain,  $\{a,b,c\}$ . The parties will disagree in their ranking of this set yet, as Rawls so often stressed, they require a public moral constitution — a public social world. It will not do for some to say that  $\{a\}$  is the correct conception of justice; given that

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<sup>66</sup> It is interesting to reflect on the extent that Muldoon's no-normalization contract avoids limiting the space for some perspectives. Although every perspective can bargain based upon its understanding of the social world and gains from cooperation, if the relevant perspective  $P$  has little to offer others, or if others are wary because  $P$ 's minimal demands pose a threat to potential partners,  $P$  may find the resulting contract provides it with little space.

<sup>67</sup> Rawls, *A Theory of Justice*, p. 106.

<sup>68</sup> Sen, *The Idea of Justice*, p. 135.

<sup>69</sup> And of what use is an incoherent one?

other equally well-placed reasonable persons hold that  $bPa$ , how can a proponent of {a} assert that {a} is uniquely correct? As Sen recognized it is preferred from one partially normalized perspective but, since that is not the uniquely correct perspective, its conclusions are not determinative for other partially normalized perspectives. The parties need to devise a public social world, but they do not agree about what is best.

Our parties are in a position similar to “Buridan’s ass,” the donkey who was precisely midway between two haystacks and could not decide whether to turn right ( $x$ ) to eat from one or left ( $y$ ) to eat from others, and ended up dying of starvation ( $z$ ). Sen writes:

The less interesting, but more common, interpretation is that the ass was indifferent between the two haystacks, and could not find any reason to choose one haystack over the other. But since there is no possibility of a loss from choosing either haystack in the case of indifference, there is no deep dilemma here either from the point of view of maximization or that of optimization. The second — more interesting — interpretation is that the ass could not rank the two haystacks and had an incomplete preference over this pair. It did not, therefore, have any optimal alternative, but both  $x$  and  $y$  were maximal — neither known to be worse than any of the other alternatives. In fact, since each was also decidedly better for the donkey than its dying of starvation  $z$ , the case for a maximal choice is strong.<sup>70</sup>

Our unified original position is in the same position. If  $z$  is  $\{-a, -b, -c\}$ , and all concur that  $aPz$ ,  $bPz$  and  $cPz$ ,  $a$ ,  $b$ , and  $c$  are maximal elements in the set  $\{a,b,c,z\}$ ; they are all ranked higher than  $z$ , but there is no unanimous ranking of  $\{a,b,c\}$ . However, if the parties do not choose from the maximal set they know they end up with  $z$ , their last choice. Theirs is Buridan’s ass’s predicament: at this stage of their deliberation they cannot select  $a$ ,  $b$ , or  $c$ , but if they do not choose they end up with  $z$ . And, as Sen suggests, only an ass would do that. Thus the unified choice situation *does* have an outcome — a maximal set from which all the contractors have reason to endorse a choice. The important thing is not to get stuck with  $z$ .

That a contract yields a maximal set with no optimal element does not tell us how to choose from the maximal set, *only that we have reason to make a choice*. But it does tell us that part of justifying a specific conception of justice is that we have coordinated on it as a member of the maximal set, even though some believe it is not the best conception of justice. This is a fundamental revision in our thinking about public reason and justice, which has not been appreciated (indeed, it has not been glimpsed) by most of those who are content with justifying a “family” of liberal conceptions. The justification of a rule of justice depends not simply on the reasons of the parties for specific conceptions, but a reason to coordinate on a maximal element, even though in the eyes of some partially normalized perspectives it will

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<sup>70</sup> Sen, “Maximization and the Act of Choice,” p. 184.

not be the optimal element (rule of justice). Part of the justification of a conception of justice, {a}, is that it is in the maximal set *and* we have been able to coordinate on {a}. *Coordination is part of justification.*<sup>71</sup>

### *6.2 Minimal Normalization as the Basis of a Public Social World “All Can Live With”*

Rawls tells us that the aim of his account is to arrive at a public moral constitution — or, as I have been saying here, a public social world — that “that all can live with.”<sup>72</sup> If that is truly our goal, then we should seek to minimize the extent to which the argument for the rules of justice is based on normalized perspectives. If we allow only minor variations in what constitutes an eligible, normalized, perspective in our unified choice situation, those whose social worlds and fundamental values are excluded by the normalization will not be able to live with, in the sense of being anything approaching “wholehearted members” of, the public social world.<sup>73</sup> They will be alienated from the public social world, taking refuge in the social world of their comprehensive conception. This is no mere philosophical fancy, but a fundamental problem in our contemporary liberal societies. A great advantage of Muldoon’s important work is that no perspectives are normalized away; he avoids the specter of a liberalism designed just for those with liberal perspectives.<sup>74</sup> But a plausible public reason liberalism need not be intent on normalization: a great variety of perspectives can be included in a deliberative model.<sup>75</sup> Notice that on the maximal set interpretation of the unified “original position,” we need not worry (as we did with Sen’s own social choice model; §2.3) that as we expand the admissible perspectives, the principle of unanimity gets no grip, and we will have a radically incomplete theory of justice. Disagreement in rankings is at the heart of the maximal set model. As long as there is a maximal set that all perspectives can live with, we can create a truly common public social world. In this way, public reason liberalism is shown not to be, at least in its fundamental impulse, a normalization project, for its aim is to create a public social world that the widest possible range of perspectives — with their own understandings of what the social world is *truly like* — can live with. We might call this commonality without normalization, and was the aim of *The Order of Public Reason*.

### *6.3 A Note on a Benefit of Maximal Sets*

To many of us raised on *A Theory of Justice* this all might seem like an admission of

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<sup>71</sup> This is a fundamental claim of *The Order of Public Reason*, chap. VII.

<sup>72</sup> Rawls, “Kantian Constructivism,” p. 306.

<sup>73</sup> Rawls, *Political Liberalism*, p. xl.

<sup>74</sup> Which, alas, is precisely the aim of Quong’s *Liberalism Without Perfection*.

<sup>75</sup> As I have tried to show in *The Order of Public Reason*, chap. V.

defeat, or making the best of a bad job. As I pointed out (§2.1), Rawls explicitly sought a definite, determinate, conception of justice, which would provide a foundation for a well-ordered society. On the maximal set interpretation of the choice model, we can, at most, achieve what might be called a “quasi-well ordered” society. Although we have converged on a member of the maximal set, and so have coordinated on a common public social world, some reasonable perspectives are convinced that this is a suboptimal public world. It is not, from their perspective, the best public social world, even though they can live with it.

Recall Muldoon’s insight that no set of rules and principles is just, once and for all (§4.2). Societies are dynamic, their environments can drastically alter, their populations can radically change. To believe what we have hit upon as our current conception of justice is the last word in justice, for all situations, surely would be hubris. We do require that our principles have significant stability — what I have called a “large justificatory basin of attraction,” — but public reason views simply do not allow for the idea that there is a conception of justice that is justified come what may. I have argued elsewhere that a society that is well-ordered in the sense that all agree that there is one and only one acceptable conception of justice — that which we all see as optimal — has few resources to adapt in the face of radical change.<sup>76</sup> If not *this* conception, we would ask, then what *could* justice be? In contrast, if we continue to disagree on the optimal public rules — if our society is characterized by ideological and philosophical dispute focused on the maximal set — alternative public social worlds are always close at hand, and indeed proponents seek to convince us to alter the moral constitution in their favored direction. As in so many spheres, diversity of possible responses can ensure a system’s survival in the face of the extreme and unexpected.

#### 7 PUBLIC REASON AFTER NORMALIZATION

As we saw (§2.1), at one point Rawls thought that “a normalization of interests attributed to the parties” is “common to social contract doctrines.” Normalization has a great appeal: once we specify the normalized perspective, we can generate strong and definite principles of justice. Those who do not reason from the normalized assumptions are to be dismissed as unreasonable, unjust, or illiberal.<sup>77</sup> This can be especially gratifying if the normalized conclusions happen to correspond to our own comprehensive understanding of the social world. However the cost of

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<sup>76</sup> “The Role of Conservatism in Securing and Maintaining Just Moral Constitutions: Toward a Theory of Complex Normative Systems,” in *NOMOS: Conservatism* (New York: New York University Press, forthcoming).

<sup>77</sup> These terms are used aggressively by Quong to dismiss objections to Rawls’s two principles of justice. *Liberalism Without Perfection*, pp. 167ff.

such specificity is high indeed. Rather than helping us devise a public social world all can live with, we valorize the social world of some as *the* social world. In response, those excluded either oppose public reason liberalism as a sectarian project, or draw back, alienated, into their own social worlds. The promise of public reason as providing a common world in the midst of diversity goes unfulfilled. More than that: it becomes a screen for the dominance of a controversial secular social world, focusing on a restricted set of eligible moral categorizations.<sup>78</sup> In the end, such public reason views are very similar to traditional moral theories, which are based on claims to correctly understand the moral realm and social world as they truly are.<sup>79</sup>

The public reason project is at critical juncture. One impulse is to look back, to defend the work and the substantive conclusions Rawls. Those who take this route seek to devise new defenses of normalization, to circle the wagons around Rawls's cherished two principles. In their own way, those who follow this path are true to a strand of Rawls' legacy. Throughout so many changes in the interpretation of the theory, the stability of his advocacy of the two principles of justice is striking. That almost all the features of the analysis fundamentally changed — except the conclusions — remains a curious feature of Rawls's corpus. Yet, on a deeper level this response does not truly do justice to Rawls's great integrity, his ceaseless inquiry into width and depth of our disagreements, and how public reason liberalism is an attempt to forge a public social world that all can live with. Thus the alternative path, which is wide open, and faces us with new problems rather than the defenses of old positions: what is justice in a world where we refuse to restrict eligible perspectives to a small set? Can we devise a stable public social world without strong normalization assumptions? Here, and in various works, I have suggested the sorts of approaches I believe are promising for a defense of an open and publicly justified society, but these are deep questions with which we have barely begun to grapple. It is my hope that tackling these problems will be the direction in which we travel.

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<sup>78</sup> See Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (New York: Pantheon, 2012), chap. 5.

<sup>79</sup> On this point see Chad Van Schoelandt's analysis of Quong's view in "Justification, Coercion, and the Place of Public Reason," *Philosophical Studies*, DOI 10.1007/s11098-014-0336-6.