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Reasonableness and Law



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scientists think to be so; or that agreement among scientists, far from coming about “by the free exercise of [their] powers of judgment” results from disparate factors, inclusive of propaganda, political interference, institutional influence, authoritarian pressure, lobbying, case-by-case negotiations,¹⁴ mere orthodoxy, and the backroom deals of “the mysterious anonymous class of referees”.¹⁵ Nor, finally, will reasonable people ever come to believe that “true” information often comes by highly specific, idiosyncratic, ad hoc processes leading to different, often conflicting conclusions¹⁶; or that, as the most crucial scientific debates show, there is more to scientists’ disagreement than “the burdens of judgment allow” (for example, fundamental disagreement among comprehensive views of the kind Rawls would like reasonable people to give up in the public sphere). All this talk about science is so plainly senseless that it will never induce reasonable people to realize that their good, solid science may turn out to be so disreputable.

5 Conclusion

Reasonable people cease to be fallibilist where common-sense views and science’s most well-established claims come into play, at which point they take up all the plain wisdom of the plain man: a combination of “mere matter-of-fact apprehension of reality” (Geertz 1983, 75); straightforward reliance on “the sheer actualities of experience” (ibid., 76); a preference for simple immediate facts and self-evident claims; a disregard for logic and an endorsement of popular views, habitual judgments, accepted beliefs, received ideas, and “widely shared” mistakes. At the same time, reasonable people are expected to have a distorting intellectual creed requiring them to believe in science’s universal applicability, strict objectivity, ideological purity, uncontroversial tenets, single method, all-embracing principles, indisputable facts, and other pious frauds, and also to accept as “well established and not controversial” anything falling under the rubric of “science” and “scientific.”¹⁷

¹⁴ See note 13 above.

¹⁵ Hoyle (1982), quoted in Feyerabend (1999, 149). Despite overwhelming evidence to this effect, philosophers remain unflaggingly attached to science as a model of rational agreement. Thus, for example, Rawls asks: “Why does not our conscientious attempt to reason with one another lead to reasonable agreement?” And he comments: “It seems to do so in natural science, at least in the long run” (Rawls 1996, 55). Maffettone elaborates on this point: “The burdens of judgments,” he says, “explain why reasonable disagreement persists, contrary to what takes place, on occasion, in the field of scientific research” (Maffettone 2004, 561). It may just be the case, however, that reasonable agreement of the Rawls-Maffettone type takes place in science, whether “in the long run” or “on occasion,” whenever science eases into a period of *stagnation*, through a combination of dogmatic sleep and a dearth of new fundamental ideas.

¹⁶ Notice that this is quite different from Rawls’s obvious contention that our experience is inevitably subjective and differs from person to person: idiosyncratic processes of the kind just referred to are *essential* in gaining information and do *not* pose a hindrance to “the way we assess evidence.”

¹⁷ A wicked effect of this creed is that even the most liberal and most tolerant attitude will cease to be so once it reaches the portal of science. A striking example is found in MacPherson and

But common sense is deceptive¹⁸ and science contains many things that reasonable people would find contemptible. So we are left with the following alternative: we can be reasonable in the way Rawls (and other sober writers) would have us be, thereby championing an unenlightened conformism deferential to the judgments of authority¹⁹; or we can follow open-minded, imaginative researchers in defending the most trite views or the most outlandish speculations, as the case may be, working out

Kelly (2001), who on the one hand take a remarkable inclusive view of the public forum—by arguing, against Rawls, that even the unreasonable among us should have a part in public reasoning—but at the same time they concede that “[r]estricting toleration [...] will sometimes be required when persons would make demands on public resources in order to promote unreasonable doctrines. *Creationists, for instance, cannot make a legitimate claim on public schools for time and materials to balance their teachings against the teaching of evolution in science classes*” (ibid., 45, italics added). Why not? Because of the overriding authority of science in liberal-democratic societies where, as Feyerabend wrote over thirty years ago (though the observation still applies today) “only those citizens count who were subjected to the pressures of scientific institutions (they have undergone a long process of education), who succumbed to these pressures (they have passed their examinations), and who are now firmly convinced of the truth of the fairy-tale” (Feyerabend 1978, 303–04). This “fairy-tale” is the reasonable person’s intellectual creed described in the text.

¹⁸ Take, for example, common-sense ideas “of ‘the normal and natural’” (Geertz 1983, 81). Common lawyers have bravely shown how discriminatory is the “reasonable person” standard—with its reference to an absolutely neutral character, devoid (like Rawls’ reasonable person) of gender, sex, class, race and other characteristics—when grounded in common-sense views of what is normal, and how these views are liable to fall short of a fair—“objective”—standard of reasonableness. See Moran’s (2003) very instructive book arguing that the reasonable-person standard needs to be revised. Other lawyers would like to give up it altogether: see, for example, Gordon 2007.

¹⁹ Establishment philosophers lay special emphasis on this aspect. The latitude of the reasonable, MacCormick writes: “is itself strongly persuasive in favour of establishing authorities charged with decision-making. Provided those holding authority are experienced and wise persons, and provided there is some way of controlling or checking their decisions (e.g., by appeal, or by answerability before some representative body, or the like), there seems to be no better way than this of dealing with the problem of the non-univocal character of the reasonable” (MacCormick 2005, 169). MacCormick is cryptic about the source of “those holding authority”’s authority as well as the nature of their experience and wisdom. In the absence of further details we are left to wonder about whether these charismatic persons are more like Aristotle’s men of good judgment and virtuous character, or more like Oakeshott’s men of genuine education and solid tradition (see Oakeshott 1962). However that may be, MacCormick insists on the need to restrict such enlightened authorities by “the use of proper procedures” and also of ensuring “the discursive and deliberative quality of the search for final decisions” by granting “authority [...] to a group, committee, assembly, or bench of several persons” in which case, he says, “there have to be voting procedures to make possible final decisions on finely balanced questions” (MacCormick 2005, 169). Notice that, while this undoubtedly recommends itself as a good method for deciding among different opinions, MacCormick wants it to apply only “within the range of reasonable opinions”, thus excluding opinions “so eccentric or idiosyncratic that they are not accepted as valid judgments at all” (ibid., 173). Fortunately this is not how it works when the free exercise of our powers of reason is involved. Scientists use no voting procedure (science is not democratic in that sense) but they have no presumption against any idea and are ready to submit to critical scrutiny even the most “eccentric or idiosyncratic” opinions. Moreover, they know and bear in mind that ideas “within the range of reasonable opinions” may be useless. As John Bell once said, commenting on the intellectual exchange between Einstein and Bohr, “it is a pity that Einstein’s idea does not work. The reasonable thing just does not work” (quoted in Bernstein 1991, 84).

their implications and supporting them with the most diverse and the most exquisite arguments that “a reason slave of the passions” can suggest.

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Part Ib
The Moral and Political Dimension
of Reasonableness

Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness

Giorgio Bongiovanni and Chiara Valentini

1 Premise

Part of the legacy that John Rawls has left with us in political and moral philosophy lies in his idea of reasonableness. This is an idea that grows increasingly important as we pass from *A Theory of Justice* (Rawls 1971) to *Political Liberalism* (Rawls 1993). Specifically, it plays a decisive role when it comes to reframing the theory of justice as fairness in light of a constructivist reading of Kant's moral philosophy (Rawls 1999a, 2000); likewise, the same idea subsequently figures centrally among the elements required for a stable liberal society (Rawls 1993, 140–44), in a context marked by multiple conceptions of the good, and reasonableness in these conceptions becomes the starting point for the possibility of an overlapping consensus.

The revised theory marks a shift in the role and status of the idea of reasonableness: initially, the idea is used to model an intersubjective account of Kant's categorical imperative (Habermas 1999a, 49); subsequently, it becomes a moral capacity and a component to be fit into individual conceptions of the good. These are two different formulations of the idea: on the one hand, reasonableness is being used to frame principles of justice, where it comes directly into play in the deontological foundation of morality by establishing the primacy of the right over the good; on the other hand, reasonableness is being used to justify a political conception, by delimiting the sphere of the political and separating it from that of morality at large (or metaphysics). In the first formulation, the idea of reasonableness issues from a constructivist reading of the Kantian foundation of morality: it proceeds from a conception of the person as an autonomous moral agent and works out the implications that follow from such a conception. In the second formulation, in which the constructivist account turns exclusively political (Rawls 1993, 89ff.), reasonableness gets used to define the conditions for a stable consensus on the principles of justice. What also seems to change from the first formulation to the second is that which reasonableness is predicated of. In the first formulation, reasonableness seems to

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be about the (reflective) constraints placed on the intersubjective procedure through which a conception of justice is founded: reasonableness accordingly describes here the metaethical objectivity of such a process (it describes its outcome as an objective one). In the second formulation, by contrast, reasonableness seems to come in as a precondition: it is what citizens and moral conceptions have to be *before* they can engage in a public debate and yield an acceptable outcome.

It is Jürgen Habermas who has called attention to this dual status of reasonableness in Rawls: Habermas has questioned whether the two formulations are compatible, and has in particular pointed out the limitations of the second formulation. To be sure, Habermas does say he accepts the basic essentials of Rawls's theory—for which reason he describes the exchange between them as a “family quarrel” (Habermas 1999a, 50)—but he nonetheless sees much in this theory that is open to question. The main problem is identified in the difficulty involved in making private autonomy compatible with public autonomy (*ibid.*, 67ff.), but the criticism goes further than that and touches many parts of the theory. In pointing out these weaknesses, Habermas offers his own idea of reasonableness, an idea that fits into a different view of the way law, morality, and politics come together and relate to one another.

In this essay, we will discuss the idea of reasonableness as it emerges from this debate, considering what this entails for the domain and criteria of reasonableness and in what way it all comes to bear on legal discourse. The specific question we will take up is whether or not it is admissible to balance goods and principles, since on this question hinges the whole legal-theoretical debate on reasonableness (see Alexy 2002a; Morrone 2001). We will attempt to show on this basis that as much as Rawls may base his theory on different foundations, the idea of reasonableness put forth in his theory is grounded in a unitary package of criteria and indirectly, at least, it admits of procedures for balancing goods and principles, this in contrast to Habermas's theory, which reduces the criteria of reasonableness to the single consideration of whether moral judgments are amenable to post-metaphysical justification, and which accordingly denies the possibility of any balancing procedures. But in order to make this argument, we will have to simplify the two views down to the core: we will argue that Rawls's theory proceeds on the basic assumption under which, despite all the foundational difficulties involved in developing a moral or political conception, the conception finally worked out invokes substantially unitary spheres and criteria of reasonableness, thereby suggesting, however indirectly, that we do need to balance different goods against one another, on the basis of rules establishing priorities among such goods; Habermas, by contrast, denies such a necessity and views reasonableness as merely an attribute of post-metaphysical objectivity in practical discourse.

Of course, in the attempt to single out the unitary traits of Rawls's idea of reasonableness, we will have to reckon with the fact that this idea “is so frustratingly difficult to define,” for it stretches across a vast array of subjects, applying as it does “to persons, judgments, institutions, conceptions of justice, religious and philosophical views, social conditions such as pluralism, and forms of agreement and disagreement” (Boettcher 2004, 597). Even so, we will argue that while Rawls does rest his

idea of reasonableness on different foundations, the moral and political requisites of reasonableness he sets out revolve around a single core, in that they find their basic field of application in the effort to balance the primary goods against one another on the basis of criteria by which to evaluate such goods and give them a ranking from highest to lowest.

2 Two Foundations of Reasonableness: A Moral One and a Political One

The dual role or status of reasonableness in Rawls descends directly from his effort to remedy the shortcomings of *A Theory of Justice*. As is known, Rawls came to realize that the first statement of his theory, called justice as fairness, could not adequately solve the problem of achieving a stable political consensus given the fact of pluralism in a liberal society. This made it necessary to work out a revised theory having two foundations, one for each of the two stages through which the theory develops (Rawls 1993, 140–41): the first stage is devoted to laying out the principles of justice that might be selected as a basis on which to frame a fair and stable society; the second stage is instead devoted to laying out the conditions subject to which the principles so chosen can become the focus of a consensus. At both of these stages, the theory brings to bear the idea of reasonableness: at the first stage, this idea serves as a criterion for the objectivity of a moral foundation having no need to rely on any form of moral realism (whether naturalistic or otherwise; Rawls 1999a, 306–07), whereas at the second stage it figures as a precondition that people and conceptions have to satisfy before any political conception of justice can be accepted.

The first use of reasonableness is for a constructivist foundation of morality that proceeds on an intersubjective reading of Kant's categorical imperative and so sets morality on a procedural foundation. Constructivism, as Rawls explains it, "specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice." The point, then, is to set up "a certain procedure of construction which answers to certain reasonable requirements" (ibid., 304). At the core of this construction we find a conception of the person as a moral agent, which serves as a basis for modelling an idea of moral autonomy and for framing a procedure responsive to that idea. In the outcome of this procedure we will have principles of justice that we can all share, and that can make sense within a well-ordered society. The constructivist way to go about specifying the distinctive features of moral personality consists in drawing on our total "experience of morality" (Bagnoli 2007, 264) through a process designed to achieve what Rawls calls a reflective equilibrium. The starting point, in other words, is not constructed from scratch, *in vacuo*: it rather derives from our reflection on what we understand to be our common moral experience (ibid., 264–66). Rawls specifies on this basis a conception of the person as a moral agent, characterizing such an agent as having two powers and three related interests. "The first power is a capacity for an effective sense of justice, that is, the capacity

to understand, to apply and to act from (and not merely in accordance with) the principles of justice. The second moral power is the capacity to form, to revise, and rationally to pursue a conception of the good” (Rawls 1999a, 312). Now, these moral powers would be inert without any accompanying moral interests, understood as motives of moral behaviour. So we have two highest-order interests in securing and realizing the exercise of the two moral powers, plus a third, higher-order interest implicit in the first two and further qualifying them: this is an interest of moral agents “in protecting and advancing their conception of the good as best they can, whatever it may be” (ibid., 313). These three interests correspond to a concept of moral autonomy that takes a “rational” form and a “full” one. And even though Rawls’s foundation may not flow linearly, the two forms of autonomy can be said to issue directly from the powers and interests of moral persons. Rational autonomy issues from a “desire of persons to realize and to exercise their moral powers and to secure the advancement of their conception of the good” (ibid., 316); full autonomy, for its part, takes this process to a higher level by making it a public and cooperative enterprise. These two forms of autonomy are largely entailed by the conception of the person as a moral agent: the moral capacity to pursue a conception of the good yields rational autonomy, so called because efficient with respect to an end, while the moral capacity for a sense of justice (even if only formal justice is understood), coupled with an interest in furthering the good being pursued, makes it so that moral persons should view it as a necessity to cooperate (through reciprocity) and so to make the process a public one. Reciprocity and publicity are thus two related conditions that follow directly from the sense of justice characterizing moral persons, who by virtue of that very power are free and equal: reciprocity means that “all who cooperate” will accept the outcome of a procedure only on condition that everyone “must benefit, or share in common burdens, in some appropriate fashion as judged by a suitable benchmark of comparison” (ibid., 316)¹; publicity means that such cooperation must proceed from an agreement among moral persons who as such will only accept an outcome publicly recognized by all as having a moral value, a condition ensuring that the outcome is autonomous, rather than heteronomous,² and making it possible for everyone involved to pursue whatever conception of the good is consistent with the terms of the agreement itself. These two conditions ensure the full autonomy of moral persons, and in order to model this autonomy, Rawls introduces limitations constraining the process by which the parties reach an agreement: these limitations—in the form of what Rawls calls a veil of ignorance—deprive the parties of any information that would enable them to gain an unfair advantage over one another. So we have here a device by which to express the “formal conditions implicit in the moral powers of the members of a well-ordered society” (ibid., 319),

¹ Habermas (1999a, 59) argues in this regard that the idea of fair cooperation rests on that of moral person.

² This means that the parties will not take any antecedent principles as their guide in deliberation. See Rawls 1999a, 315.

and modelling in particular what Rawls calls the reasonable, which encapsulates the full meaning and realization of moral personality.³

Clearly, Rawls is advancing here a Kantian conception of autonomy, central to which is the idea of moral persons as having a capacity to bind themselves to the rules of conduct which they establish through the exercise of their practical reasoning and which everyone understands to be just. What is distinctive about this concept is the intersubjective framework within which it is developed, and what determines it is a procedure of construction framed around certain limiting conditions expressed through the original position with its veil of ignorance, understood as a device by which to embody a conception of the person as an autonomous moral agent. Thus, moral personality is essentially defined in Rawls by the conditions subject to which free and equal moral agents set up terms of fair cooperation among themselves. If moral persons are to reach an agreement expressive of their moral personality, they must proceed under “pure” procedural constraints framing conditions that make such an agreement possible. These constraints model an idea of the reasonable: they do so by defining the circumstances subject to which the parties (symmetrically situated relatively to one another) are to proceed in carrying out their deliberations toward an agreement (*ibid.*, 316). As has been observed, the reasonable conditions, deriving from the ideas of moral autonomy and of a moral person, make it so that “the role of the categorical imperative is taken over by an intersubjective applied procedure which is embodied in participation conditions such as the equality of parties and in situational features such as the veil of ignorance” (Habermas 1999a, 57). “The Reasonable,” says Rawls, “presupposes and subordinates the Rational,” in that, on the one hand, “without conceptions of the good that move members of the group, there is no point to social cooperation” and, on the other hand, the reasonable “defines the fair terms of cooperation acceptable to all” (Rawls 1999a, 317).

We have, then, a construction in which moral autonomy is modelled as both rational and reasonable, and this explains several other essential features of Rawls’s theory of justice. First, justice is set on a “pure procedural” foundation (*ibid.*, 310–11), meaning that what is just is defined by the outcome of the very procedure by which the parties seek to understand what justice requires: the principles of justice are defined by a process of deliberation admitting of no “external” point of view. Second, the agreement reached by the parties replaces the attempt to seek out “moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine,” in such a way that “moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept” (*ibid.*, 306–07). Third, this agreement carries a moral force built directly into it: “The fairness of the circumstances under which agreement is reached transfers to the principles of justice agreed to” (*ibid.*, 310). Fourth, the purpose of the agreement (or its subject matter) is to establish principles on which basis to distribute so-called

³ This is typical of the constructivist procedure: as was mentioned earlier, this procedure is framed around restrictions deriving from our moral self-reflection and self-representation. See Bagnoli 2007.

primary goods, understood as what people necessarily need if they are “to realize and exercise their moral powers”—these goods therefore express the needs present in a society based on an idea of fair cooperation (ibid., 314). Finally, an agreement so framed makes it possible to establish two principles of justice—the first one realizing liberty and the second one equality—and in this way a basic design is framed for a well-ordered society, well ordered precisely because it sets up a system of cooperation among people who conceive themselves as free and equal moral agents⁴. Thus, through the constraining conditions delimiting the original position, Rawls models an idea of the reasonable that sets on a normative foundation the principles (or content) by which to shape a fair system of social cooperation.⁵

The second foundation of reasonableness is offered in *Political Liberalism* and, as was mentioned earlier, it derives from this work’s construction of justice as fairness in two stages. As Rawls explains, “in the first stage [justice as fairness] it is worked out as a freestanding political [...] conception for the basic structure of society. Only with this done and its contents—its principles of justice and ideals—provisionally on hand do we take up, in the second stage, the problem whether justice as fairness is sufficiently stable” (Rawls 1993, 141). This is now being framed as a “freestanding” political conception of justice,⁶ yet the main tool in this construction, the original position, is understood as a “device of representation.” The original position is now being used to model fair conditions that we would accept not as moral agents but as citizens: “It models what we regard—here and now—as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society; and [...] it also models what [...] we regard as acceptable restrictions on reasons available to the parties for favoring one political conception of justice over another” (ibid., 25–26).⁷ What also changes with respect to justice as fairness in its original formulation is a specific recognition that the principles obtained through this procedure may turn out to be incorrect or not accepted. As Rawls puts it: “That the principles so agreed to are indeed the most reasonable ones is a *conjecture*, since it may of

⁴ In this sense, Rawls (1999a, 319) understands that the principles of justice are “lexically prior in their application in a well-ordered society to claims of the good.”

⁵ The original position acts in this sense as a connective device, serving at the same time to model the reasonable and to extract from that idea the principles for a well-ordered society understood as a form of cooperation. See Rawls 1999a, 308.

⁶ A political conception of justice is understood by Rawls (1995, 134–35) as defined by three features: “(a) it applies in the first instance to the basic structure of society [...]. This structure consists of the main political, economic, and social institutions, and how they fit together as one unified system of social cooperation. (b) It can be formulated independently of any particular comprehensive doctrine, religious, philosophical, or moral. While we suppose that it may be derived from, or supported by, or otherwise related to one or more comprehensive doctrines [...], it is not presented as dependent upon, or presupposing, any such view. (c) Its fundamental ideas [...] all belongs to the category of the political and are familiar from the public political culture of a democratic society and its tradition.”

⁷ Rawls (1995, 139) describes the parties as “situated in reasonable conditions and constrained by these conditions absolutely [...], reaching agreement about these political principles under conditions that represent those citizens as both rational and reasonable.”

course be *incorrect*. We must check it against the fixed points of our considered judgments at different levels of generality. We also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection: that is, we may be led to revise our judgments” (Rawls 1995, 139; italics added).

Where does this new awareness come from? We have to simplify matters to a good extent here, but it can be said to have its root in two sources. The first one has to do with the constructivist procedure of the original position: for Rawls, “at the first stage, justice as fairness abstracts from the knowledge of citizens’ determinate conceptions of the good and proceeds from shared political conceptions of society and person that are required in applying the ideals and principles of practical reason” (Rawls 1993, 141–42). This reference to practical reason brings out an important aspect of the construction, which is to say that the original position is built proceeding from a self-representation rooted in our moral experience, and this means that the position itself and the principles issuing from it must be such that they “find support in our common experience” (Bagnoli 2007, 266). As Habermas (1999a, 61) has observed, this should prompt us to inquire whether “the central concept of the person on which the theory ultimately rests” is “sufficiently neutral to be acceptable from the interpretive perspectives of different worldviews.” The second reason why Rawls now views it as only a conjecture that the principles selected in the original position are the most reasonable choice has to do instead with what Rawls calls the “burdens of judgment,” which he brings into play to explain the fact of reasonable pluralism. The burdens of judgment, in other words, are “sources of reasonable disagreement,” accounting for “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life” (Rawls 1993, 55–56)—and a willingness to appreciate the difficulties involved in the public use of reason, and to accept the consequences this entails for such a use of reason, therefore accounts in part for what it means to be reasonable according to a political conception of justice. Indeed, these difficulties affect not only the use of “theoretical” reason but also, and more importantly, the use of practical reason: they affect us in our practical and moral capacities as rational and reasonable agents. As examples of such burdens, Rawls mentions the difficulties involved in arriving at “an overall assessment” of an issue because “there are normative considerations of different force on both sides” of the issue, or because we are “forced to select among cherished values,” or again because we have to figure out priorities and make adjustments among different values, restricting each based on what the others require (*ibid.*, 57).

Both of these considerations tie in with the fact of a pluralist society: the plural comprehensive conceptions in it are sources of reasonable disagreement (whence the need to keep them out of the original position) and so are the burdens of judgment (recognizing which is part of what makes us reasonable). This brings up the problem of how—given such a society, one whose pluralism is very real and concrete—we might come to accept the outcome of a construction framed, by contrast, on the basis of an abstraction, an ideal rendering of our common experience