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# Reasonableness and Law



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they are acting on a conception of themselves as liberal citizens bound by a sense of mutual respect, and the consensus they will attempt to reach will cover the basic liberties: these are viewed as indispensable to citizens exercising their capacity for a sense of justice and their capacity for a conception of the good under reasonable conditions of fair social cooperation, and the priority of the basic liberties (a priority understood as an enabling condition) therefore makes full sense and gets its final justification in light of the need to bring stability to a social arrangement so construed. This sets the basic liberties and their priority on a twofold foundation: on the one hand, we have here a way to enable people to realize their two moral powers as free and equal, rational and reasonable, members of a liberal society conceived as a fair scheme of cooperation among citizens who respect one another; on the other hand, by making this scheme with its embedded priorities the subject of an agreement, the citizens bring stability to their cooperation. In short, the primacy of the basic liberties has a dual foundation in a conception of the person as a reasonable member of a liberal society and in a need to make this a stable and feasible scheme of cooperation.

### 3.2.2 The Status and Application of the Basic Liberties

In the “political” account of justice as fairness, Rawls justifies the priority of the basic liberties by drawing on the two companion ideas of the person as “liberal” citizen and of social cooperation as based on a reasonable agreement.

In *Political Liberalism*, Rawls (1993, 294–99) ascribes a special status to the basic liberties and points out three features of their priority: first, they take priority as a family of liberties, and as such they carry absolute weight over the public good and over perfectionist values; second, none of these liberties can be limited except for the sake of other basic liberties; which brings in the third feature, namely, none of the basic liberties can be said to carry absolute weight with respect to any of the others, in the sense that if they should come into conflict, we should adjust them to one another until we achieve a coherent, adequate, scheme secured as such (as a scheme) for all citizens equally.

This last point is further clarified through the distinction between restricting the basic liberties and regulating them: only their restriction is ruled out; their regulation, by contrast, is permitted and indeed may even prove necessary in order to combine them into a coherent scheme or to make them practicable (as when a format is established for a public debate). The only sort of regulation that is disallowed is the kind that would undermine what Rawls refers to as the “central range of application” (*ibid.*, 297), understood as that core part of their application which enables citizens to adequately develop and fully exercise the two moral powers.

The basic liberties, then, get adjusted to one another until they form into a fully adequate scheme. And they get specified by degrees at different stages: in the original position at first, and then at the constitutional, legislative, and judicial stages. Yet this process of specification is not left to happenstance: it must instead be guided by clarifying, in the original position, the basic liberties special role and central range of application (*ibid.*, 334–40).

There are three matters to be addressed in this process of specification. (a) First, as discussed, we have to fix the criteria by which to guide the mutual adjustment of the basic liberties into a fully adequate scheme: these criteria will have to be substantive enough to guide the specification, yet not so stringent as to compromise the absolute priority the basic liberties have as a whole. (b) Second, we have to consider the proper attitude by which rational agents should go about blocking out the basic liberties and their interrelation at the four consecutive stages of specification (original position, constitutional convention, legislation, and judicial decision-making), gauging as well, for each of these stages, the admissible degree of specification. (c) And third, we have to consider the role of constitutional justice. Let us take up each of these three questions in turn.

#### (a) The Criteria of Specification

In *A Theory of Justice*, Rawls suggested two criteria by which to specify the basic liberties: first, we should seek to achieve the most extensive scheme of these liberties; and second, the basic liberties should satisfy the rational interest of the representative equal citizen (Rawls 1971, 250). Both of these criteria became a focus of Hart's criticism: the first criterion is merely quantitative and does not apply to the most significant cases of conflict among the basic liberties; and the second criterion is simply too vague for application, since it is unclear what the representative equal citizens' rational interest should consist in.

This twofold applicative gap is one that Rawls, in response to Hart, filled in the first place by acknowledging that it would indeed be absurd to think of the specification criteria as quantitative, for that would entail that we should maximize something, and yet there is nothing in the system of basic liberties that could conceivably be maximized: certainly, we cannot maximize the liberties themselves, nor can we maximize the moral powers, since we lack a notion of their "maximum development."

In the second place, Rawls pointed out that, as much as there may be the focus of a higher-order interest in exercising the two moral powers, these powers do not fully account for the person, since the person is also assumed to have put these powers to use in developing a conception of the good and to have an interest in pursuing such a conception. Stated otherwise, our interest in exercising the two moral powers may be primary, but this exercise is certainly not our only form of good or even its highest form: it is rather a condition of that highest good. It thus makes more sense to think of the two moral powers as goods to be secured to a minimum indispensable degree rather than as goods to be maximized: in this way, we recognize that each person has a higher interest in fulfilling a conception of the good or plan of life by using those two powers.

This suggests a criterion for specifying the basic liberties: these should be so adjusted to one another as to enable not the maximum development of the two moral powers but an *adequate* development of them. And there are "two fundamental cases" to which the liberties apply, corresponding to the two moral powers, that is, a capacity for a sense of justice and a capacity for a conception of

the good. The idea is that we have to guarantee for all citizens the essential conditions for the adequate development of these two powers (the two fundamental cases). This means that the test of adequacy splits into two criteria, one for each of the two moral powers, and that the two criteria are closely bound up: we have a sense of justice, and the political liberties that go along with it; and we have a capacity for a conception of the good, with another set of liberties especially suited to serving our rational interest in developing such a conception. The two criteria are thus made to cohere, “for it is clear from the grounds on which the parties in the original position adopt the two principles of justice that these interests, as seen from the appropriate stage, are best served by a fully adequate scheme” (Rawls 1993, 333).

Rawls thus sets up an ordering for the basic liberties on the basis of their connection with the two moral powers and the two corresponding fundamental cases. The freedom of thought and the political liberties make possible the full and effective exercise of our sense of justice, securing the application of the principles of justice to the basic structure of society; liberty of conscience and freedom of association make it possible to form, revise, and pursue a conception of the good over a complete life, making sure that citizens can make a full, informed, and effective use of their powers of deliberative reason; the remaining basic liberties—relating to the integrity of the person and the rule of law—serve as a necessary support in guaranteeing the preceding basic liberties, and in this way they connect with the two fundamental cases.

Rawls also suggests at this point a further criterion that can help us make sense of the basic liberties so arranged. This consists in the notion of the *significance* that each liberty has in the arrangement: “A liberty is more or less significant depending on whether it is more or less essentially involved in [...] the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases” (ibid., 335). This notion of significance plays an essential role when it comes to applying the basic liberties, because it guides us in assessing the weight of the claims asserted on the basis of this or that basic liberty—it therefore helps us figure out how each of these liberties is best protected.

We can see, then, that the mutual adjustment of the basic liberties and their specification proceeds on the basis of different criteria, all of them closely connected: the fulfilment of our interest in developing the moral powers, without thereby sacrificing our interest in pursuing a conception of the good; an interest in securing the liberties’ central range of application, the indispensable core needed to secure the two preceding interests; the significance of the basic liberties in assessing the claims made on the basis of these liberties in exercising the two moral powers in the two fundamental cases; and the adequacy of the scheme of liberties with respect to the rational interests of the equal representative citizens.

This scheme of liberties thus responds to a unitary logic, by which the liberties are specified and applied in accordance with the reasons for their priority and the meaning ascribed to such a priority. Which is to say that all the specification and application criteria descend from the conception of the person as a free and equal citizen and from the companion conception of a reasonable and fair scheme

of social cooperation—which conceptions also help Rawls establish a line of continuity between the foundation and the application of the basic liberties.

The overarching idea, in short, is that we have to keep specifying the basic liberties and adjusting them to one another until we achieve an equilibrium in which the arrangement or scheme they compose is fully adequate, in such a way that the scheme so modelled will secure, with its priority, a reasonable system of social cooperation, namely, a system central to which is the idea of reciprocity, and which offers a public space where our interest in exercising the two moral powers can thrive in conjunction with our interest in pursuing a conception of the good.

### (b) Stages of Specification

The basic liberties are specified at three consecutive stages, these being the constitutional convention, where the liberties are modelled as constitutional rights, followed by the legislative and the judicial stage.

At each of these stages, “the reasonable frames and subordinates the rational” (ibid., 340). What change are the tasks assigned to the “rational agents” (delegates, legislators, and judges as rational representatives of the free and equal citizens) and the constraints to which they are subject. These constraints are all based on the subordinating idea of the reasonable, and they become increasingly strong with each successive stage as the veil of ignorance becomes thinner and thinner. Thus, at the first stage, in the original position, the reasonable is weakest and the veil of ignorance thickest, whereas at the last stage, of judicial decision-making, the inverse is true, with the reasonable carrying the greatest weight and the veil of ignorance almost entirely lifted.

This sequential process is designed to shape the basic liberties through a fair and effective procedure in which the reasonable plays a stronger and stronger role, but the transition from one stage to the next is not described exhaustively: as Alexy (Alexy 2002b, 7) points out, we have to look at the kinds of considerations made in the original position before we can specify the leeway afforded to the delegates to the constitutional convention, whose job it is to fashion the family of the basic liberties into an adequate scheme of constitutional rights. The point of the constitution is to frame a just political procedure in such a way as to incorporate the basic liberties and ensure their priority: the parties in the original position are tasked with selecting the principles of justice and the liberties on which rests the basic structure of society, and the delegates will then have to apply these liberties through the constitution, in keeping with the constraints imposed by the reasonable and in view of the equal citizens’ rational interest in an adequate scheme of basic liberties.

The main focus at the constitutional stage will be on the first principle of justice. Which means that the delegates will be concerned in the first place with securing freedom of thought and the equal political liberties. This is an essential task in the process of framing a just political procedure, and it should proceed without thinking ahead and trying to fix the outcome of the subsequent legislative and judicial stages. Indeed, the constitutional convention should provide only a rough sketch or basic skeleton, to be fleshed out in full only later at the judicial stage, when

new constitutional constraints will be established in the continuing and closer-to-experience effort to protect freedom of association and liberty of conscience.

Overall, the constitutional constraints for the protection of the basic liberties must be aimed at ensuring the possibility of social cooperation for free and equal citizens. On the sequential rationale, the constitution is entrusted with the task of framing a just political procedure incorporating constraints designed to protect the basic liberties, with the rest of the job being left to the legislative stage. The constraints of the reasonable are therefore stronger at the constitutional stage than they were in the original position, since the scheme of the liberties worked out at that earlier stage must now be recast as a scheme of constitutional rights; and then at the subsequent stages the constraints become stronger still, with the legislators having less leeway and the judges the least—indeed, the latter have to proceed under the constraints placed by the veil of ignorance and the constitution, and the former under those two constraints plus those that come by way of legislation.

This four-stage sequence can be described in this sense as incremental, for it keeps piling on “layers of reasonableness” in the process of shaping and interpreting the basic liberties. And, on the reading we are offering here, the stronger the reasonable, the greater the protection of the basic liberties, which in a constitutional democracy function as a condition enabling free and equal citizens to cooperate on the basis of an idea of reciprocity.

And as the constraints of the reasonable become stronger, so does the specification and application of the basic liberties come to depend more and more on the use of public reason—itself essentially defined by the idea of reciprocity. We can appreciate, then, how pervasive the idea of reciprocity is, which guides the process of specifying and mutually adjusting the basic liberties, understood as political values, and which also guides, in a broader way, the activity of evaluating principles and values in the forum of public reason.

### (c) The Role of the Courts

We have discussed the use of public reason to work out the meaning of political values and the basic liberties, but we should also note that a sizable part of this continuing effort is bound occupy itself with matters of constitutional justice. Indeed, in a dualist constitutional democracy—distinguishing constitutional power from legislative and executive power, the supreme law of the land from the public laws—the supreme court, along with all constitutional courts generally, functions as the principal institutional tool for upholding the constitution, and this consequently involves the task of protecting the system of constitutionally guaranteed basic rights through the constraints based on the principles of justice. And in addition to serving in this protective capacity, the Supreme Court must also uphold public reason, by giving it a lasting and adequate form and substance, indeed acting as its “institutional exemplar” (Rawls 1993, 235).

Clearly, then, constitutional justice plays a key role in specifying not only the constitutional essentials but also the basic liberties: the idea of public reason applies in the strictest way to judges, who along with the executive, the legislature, and

those running for public office are part of the political public forum, where political discussions are held on matters of basic importance.

Public reason, on Rawls's conception, defines at the deepest level the basic moral and political values of democratic constitutional systems: it does so by providing a forum for discussions and decisions that develop and get justified in light of the criterion of reciprocity. The idea of public reason is applied in different ways depending on who is using it. Where the judges are concerned, the decisions they make and the justifications they provide for these decisions are framed by public reason alone, that is, on the sole basis of political values that, in their judgment, offer the most reasonable understanding of the public conception of justice and its constituent ideas.

The Supreme Court is a product and a tool of public reason. In this sense, the court stands as the emblem of a constitutional democratic system that depends on reasonable choices for all questions of political justice. And in the forum of constitutional justice, these questions are debated in terms of principles, because principles make up the subject of the court's reason and serve at the same time as its only tool of judgment and justification.

It seems, then, that the constraints the reasonable places on constitutional justice account for the whole of judicial decision-making, exhausting all of the conditions subject to which this activity unfolds: the courts invoke no other values than political values and make no other decisions than political decisions—political by virtue of their connection with constitutional principles expressing basic political values. Which means that the courts use no other reason than public reason, and so that they proceed solely within the bounds of the reasonable and its nested criterion of reciprocity.

#### **4 Habermas's Criticism and the Epistemic Mode of Reasonableness**

We will now briefly reconstruct Habermas's view of reasonableness and his criticism of Rawls's theory, but only as concerns the question whether it is admissible to balance goods against one another. The first thing Habermas does in reading Rawls is to underscore the background assumptions the two theories equally proceed from. Briefly stated, both theories reject moral realism and moral scepticism alike, finding a third way that seeks to ascribe a cognitive content to normative propositions through an account of intersubjectivity in practical reason based on the device of a consensus among equals. Habermas feels at the same time, however, that several features of Rawls's foundation call for critical comment in both its first account in *A Theory of Justice* and its second account in *Political Liberalism*. The focus of Habermas's criticism is on *Political Liberalism*, to be sure, but he also looks critically at the original position. He finds that the original position in *A Theory of Justice* embeds substantive content lacking its own independent justification, and that the construction in *Political Liberalism* "involves a weakening" (Habermas 1999b,

83) of the Kantian perspective and fails to specify an authentic “moral point of view.” This last point of criticism also applies to the first construction, and is framed differently in that case as compared to the second construction, but the underlying theme is the same: Rawls’s perspective fails to identify a moral point of view capable of establishing effective conditions of impartiality. This prompts Habermas to critically question the use of reasonableness in support of an overlapping consensus and to consider only its use in the foundation of morality as a criterion alternative to truth. As we will see, Habermas draws from this analysis the conclusion that reasonableness cannot be used as a criterion by which to balance disparate sorts of goods and values against one another.

Habermas takes up the foundation of morality offered in *A Theory of Justice* and in *Kantian Constructivism in Moral Theory* and criticizes reflective equilibrium as a method of construction. Rawls constructs the original position by building into it “substantive concepts” not set on any deeper foundation, such as is necessary if we are to bring them into that construction. Habermas is referring here to the complex of ideas introduced with the conception of a moral person as having a capacity for a sense of justice and a capacity for a conception of the good: this is all normative content used as such in the process of foundation, without further reasons. The substantive moral content built into the foundational process makes it so that in order to specify a moral point of view (passing from the golden rule to the categorical imperative) we have to remove all such content as is not essentially connected with the moral person—whence the need to resort to a device like the veil of ignorance. But this tends to overload and make static the conditions fixed through the veil of ignorance; that is, as Habermas argues, “the veil of ignorance must extend to all particular viewpoints and interests that could impair an impartial judgment; at the same time, it may extend *only* to such normative matters as can be disqualified without further ado as candidates for the common good to be accepted by free and equal citizens.” It follows that “the impartiality of judgment would only be guaranteed in the original position if the basic normative concepts employed in its construction—those of the political autonomous citizen, of fair cooperation, and of a well-ordered society [. . .] withstand revision in light of morally significant future experiences and learning processes” (Habermas 1999a, 58–59).

So Habermas is criticizing here the method of reflective equilibrium in Rawls’s use of it as a basis for constructing a conception of moral personality. The kind of foundation this method allows—on the basis of historical experience and rational elaboration—ends up having too close a connection with substantive reasons to be able to achieve any authentic impartiality. Habermas proposes his own method for doing so: this is his well-known discourse ethics, which proceeds on the basis of quasi-transcendental rules of discourse to achieve a procedural impartiality unconnected to any substantive presuppositions.

*Political Liberalism* comes under a broader criticism. Habermas starts out with the argument “that reasonable citizens cannot be expected to develop an overlapping consensus so long as they prevented from jointly adopting a moral point of view independent of, and prior to, the various perspectives they individually adopt from within each of their comprehensive doctrines” (Habermas 1999b, 77). This is



to say that the reasonable cannot be fixed independently of the morally just. The basis for this consideration is that an overlapping consensus as Rawls constructs it cannot be described in any epistemic terms. An overlapping consensus cannot be distinguished from an acceptance as a matter of fact, and it therefore fails to specify any higher vantage point from which to pass in review the principles to be adopted for the basic structure of society. Habermas is basically saying that Rawls's idea of reciprocity cannot adequately serve as a criterion for universalizing decisions. Reciprocity is confined to the two third-person perspectives of the observer and the participant and does not allow the construction of a shared point of view (the first-person *us*) from which the principles of justice may gain rational acceptance. There are two reasons for this failure: the first of these is that the reasonable cannot be defined without reference to independent criteria specific to it; and the second is the difficulty involved in managing conflict. For Habermas, the problem in the first case is that there is no way to describe worldviews as reasonable unless standards of practical reason are available which do not depend on those worldviews; and in the second case the problem is that reasonableness alone seems unable to resolve the most important kinds of conflict. On the one hand, says Habermas, defining the reasonable involves discriminating normative images in the light of specific "normative decisions" (Habermas 1999b, 88–89); at the same time, reasonable conceptions defined by the sole criterion of mutual tolerance make an inadequate basis on which to handle conflicts involving the priority of political values over nonpolitical ones. Rawls's theory, then, fails to specify a moral (impartial) point of view, one that is not circular and does not beg the question: What is moral about an overlapping consensus? Indeed, such a consensus seems to be not a generalizing moment but simply a transient fact, that is, a possible acceptance and not a foundation.

The upshot of this critical reconstruction we just summarized in very broad strokes is that we have to question the distinction between the political and the moral (the metaphysical) set out in *Political Liberalism*. Habermas is saying that Rawls's domain of the political cannot really be a freestanding entity, for it fails to show how we might single out a criterion of political consent capable of securing an authentic impartiality and neutrality. Habermas draws a distinction between ethics and morality that Rawls fails to make, and in consequence of this nondistinction, Rawls's criterion for distinguishing the political from the moral ends up being almost entirely dependent on the conceptions of the good that live in the background of an overlapping consensus. In this sense, Rawls finds himself stuck in a conception whereby moral reasons are not public reasons, and in which consensus relies (à la Hobbes) on a public forum built proceeding from private positions. A public justification so construed may respond to a criterion of reciprocity, to be sure, but as long as it essentially depends on conceptions of the good—as it does when based on reciprocity—it cannot make any claim to universality or impartiality.

For Habermas, as is known, a consensus can have any authentic foundation only if based on "the pragmatic presuppositions of an inclusive and noncoercive rational discourse between free and equal participants" in which "everyone is required to take the perspective of everyone else and thus to project herself into the understanding of self and world of all others" (Habermas 1999a, 58). That makes it possible

to specify a point of view corresponding to the first-person *us*, and there is no other way, on Habermas's conception, to achieve impartiality properly so called. An equality of roles can only be established on the basis of universal pragmatic requisites of discourse as just briefly sketched out: in this way we can achieve a "qualified" consent, thus grounding the validity of normative discourse in what Habermas calls the discourse principle.<sup>20</sup>

This critique in light of the presuppositions of a discourse ethics suggests two conclusions, one of them concerning the idea of reasonableness and the other the separation between the political and morality. Let us consider the first question first. Reasonableness is understood by Habermas as providing the criterion alternative to truth in the foundation of normative discourse. If consensus can be used as a criterion of validity, then the reasonable can be considered the only idea authentically "synonymous with 'morally true', that is, as a validity concept analogous to truth and on the same plane as propositional truth." Whence Habermas's definition of the reasonable as the "discursive redemption of a validity claim." The reasonable, then, should properly be understood "by analogy with a nonsemantic concept of truth purified of all connotation of correspondence [...] as a predicate for the validity of normative statements" (Habermas 1999a, 64–65).<sup>21</sup>

Let us turn now to the second question, concerning the idea marking off a political forum as distinguished from morality, as Rawls proceeds to do in *Political Liberalism*. Habermas argues a separation of this kind should not be based exclusively or even primarily on the distinction between public and private spheres, which has problems of its own, but should take into account the criterion of action necessitated through the "medium of the law" (Habermas 1999b, 98). A justification becomes public not only by virtue of its having to do with the basic elements of a social system, but also because it calls for "legal institutionalization" (*ibid.*, 72). What distinguishes the domain of the political from that of morality, then, is the role of the law<sup>22</sup>: this brings about a different application of the discourse principle (which gets specified as a democratic principle), and it makes law complementarily foundational with morality. There are several consequences that follow from this role of the law. Habermas puts this criterion to use in several ways: to argue that Rawls collapses the concept of morality into the "ethical dimension",<sup>23</sup> for example, as well as to question the priority of the negative liberties. But what matters to us here is that the criterion (i.e., action necessitated through the medium of the law) is used

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<sup>20</sup> Under the discourse principle, or D principle (Habermas 1996, 107), validity can be predicated only of "those action norms [...] to which all possibly affected persons could agree as participants in rational discourses."

<sup>21</sup> Compare Habermas (1999a, 64–65), arguing that Rawls "denies himself the possibility of exploiting the epistemic connotations of the expression 'reasonable.'"

<sup>22</sup> Habermas (1999b, 101): "once moral principles must be embodied in the medium of coercive and positive law, the freedom of the moral person splits into the public autonomy of co-legislators and the private autonomy of addressees of the law".

<sup>23</sup> Habermas (1999b, 100): "Rawls's construction [...] shifts the accent from the Kantian concept of autonomy to something like ethical-existential self-determination."

by Habermas to illustrate the impossibility of balancing different kinds of goods against one another. Rawls's theory is criticized for adopting an ethics of goods that reduces the deontological meaning of rights and makes these akin to values, understood as "teleological legal interests or goods" (Habermas 1996, 258). This, says Habermas (*ibid.*, 204), is an error owed to a failure to consider that "moral contents, once translated into the legal code, undergo a change in meaning that is specific to the legal form." This sort of translation introduces several important differences between principles and values,<sup>24</sup> thus making it so that there is no way to balance. Any attempt to balance (to assess comparative weight and significance) is going to be simply irrational, in that "there are no rational standards for this: weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies" (*ibid.*, 259). On Habermas's view, then, the whole point of engaging in public reason is not so much to balance different claims, goods, or considerations as to judge a "given conflict" and "decide which claim and which action [. . .] is right."

## 5 Conclusions

We will simply sum up in these closing remarks the three main conclusions we have reached:

- (a) The two statements of Rawls's theory of justice, for all the differences that set them apart, are united by a common thread. This consists in Rawls's use of the reasonable as a constraint on the rational.
- (b) The reasonable as expounded in *Political Liberalism* is crucially centred on the criterion of reciprocity. This yields a conception of the reasonable requiring that decisions be reached by balancing different values against each other under the guiding criterion of proportionality, whereby a view or argument that we offer as *most* reasonable to us must *at least* be reasonable to others (the idea being to achieve some kind of approximation between what *we* think is justified and what can be justified to *others*, thereby narrowing down the gap between most and least reasonable).
- (c) Habermas, by contrast, rejects as unjustified and devoid of any theoretical foundation the idea that the reasonable requires any such balancing. This rejection can be explained by his different way of drawing the distinction between the sphere of the political and that of morality, and he views reasonableness as an exclusively epistemic criterion.

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<sup>24</sup> Habermas (1996, 255): "Norms and values [. . .] differ, first, in their references to obligatory rule-following versus teleological action; second, in the binary versus graduated coding of their validity; third, in their absolute versus relative bindingness; and fourth, in the coherence criteria that systems of norms and systems of values must respectively satisfy."

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