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Les ateliers de l'éthique
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CHALLENGES OF PUBLIC POLICIES AND SOCIAL PRACTICES.

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BUILDING HAPPINESS INDICATORS SOME PHILOSOPHICAL AND POLITICAL ISSUES

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ABSTRACT:

Happiness has become a central theme in public debates. Happiness indicators illustrate this importance. This article offers a typology of the main challenges conveyed by the elaboration of happiness indicators, where happiness can be understood as hedonia, subjective well-being, or eudaimonia. The typology is structured around four questions: (1) *what to measure?*—i.e., the difficulties linked to the choice of a particular understanding of happiness for building an indicator; (2) *whom to include?*—i.e., the limits of the community monitored by such an indicator; (3) *how to collect the data?*—i.e., the difficulties stemming from objective and subjective reporting; (4) *what to do?*—i.e., the concerns about the use of happiness indicators in public policy. The major points of normative contention are discussed for each of these dimensions. The purpose of this article is to contribute in a constructive manner to happiness research by offering an overview of some major philosophical and political challenges of building happiness indicators. The conclusion underlines the importance of the strategy of diversification-hybridization, which consists in setting a variety of indicators or composite indicators that articulate different understandings of happiness. It is stressed that happiness indicators raise democratic and institutional issues with which normative thinkers should deal.

RÉSUMÉ :

Le bonheur est devenu un thème central dans les débats publics. Les indicateurs de bonheur illustrent cette importance. Cet article offre une typologie des principaux enjeux contenus dans le travail d'élaboration d'indicateurs de bonheur quand ce dernier est compris comme hedonia, bien-être subjectif ou eudaimonia. La typologie est structurée autour de quatre questions : 1) *que mesurer?*, où sont en jeu les difficultés liées au choix d'une compréhension particulière du bonheur pour construire un indicateur; 2) *qui inclure?*, c'est-à-dire comment tracer les limites de la communauté morale qui est l'objet d'un tel indicateur; 3) *comment collecter les données?*, où on interroge les difficultés propres aux techniques subjectives et objectives de collecte de données; 4) *que faire?*, où on soulève l'enjeu des craintes quant à l'usage d'indicateurs de bonheur dans les politiques publiques. Les points majeurs de dispute normative sont discutés pour chaque dimension. Nous espérons ainsi contribuer de manière constructive à la recherche sur le bonheur en offrant un aperçu de quelques défis philosophiques et politiques majeurs relatifs à la construction d'indicateurs de bonheur. Nous concluons en soulignant l'importance de la stratégie de diversification-hybridation qui consiste à mettre en place des indicateurs variés ou composites articulant différentes compréhensions du bonheur. Ces indicateurs soulèvent des enjeux démocratiques et institutionnels que les penseurs normatifs doivent considérer.

Over the last decades, happiness has received increased attention. Psychologists have been investigating understandings[1] (Biswas-Diener et al., 2009; Kashdan et al., 2008; Keyes and Annas, 2009; Waterman, 2008) and determinants of happiness (Diener and Seligman, 2004). Positive psychology (a branch of eudaimonia) has elaborated on "authentic happiness" (Seligman, 2002) while researchers like Daniel Kahneman (1999) coined "objective happiness," a modern version of Benthamian hedonia. The Easterlin Paradox[2] has been intensely studied and debated (e.g. Clark et al., 2008; Easterlin, 1974, 1995; Easterlin et al., 2010; Graham, 2009; Stevenson and Wolfers, 2008). Finally, philosophers have been discussing the foundations of various understandings of happiness and the relationship between happiness and well-being (e.g., Annas, 1993; Haybron, 2010; Kraut, 1979; Sumner, 1996).

Public decision-making is affected too. Researchers advocate for national and international measures of happiness (e.g. Diener, 2000; J. F. Helliwell and Barrington-Leigh, 2010; Kahneman and Krueger, 2006; Kahneman et al., 2004a; Krueger, 2009). Political decision-makers have increasingly become receptive to the idea of creating happiness indicators. International organisations lobby for reforming existing indicators or elaborating new ones that include happiness (e.g., United Nations). Happiness (often understood as subjective well-being) is on the agenda of local and central governments too (Saamah et al., 2012, p. 3). Some already have or will soon have their own happiness indexes—including Bhutan, southern Denmark, Canada (unofficially), the city Somerville in United States, United Kingdom, and Japan—while other governments consider developing such tools (Stiglitz et al., 2009).

This increased attention appeals to a normative evaluation because social indicators have deep moral and political underpinnings and implications, in particular when implemented by public institutions.[3] There is a need for an analytical overview of the philosophical and political challenges. Political philosophy and public ethics have not so far proposed an encompassing overview of these challenges.

This article represents such an attempt. It reviews some of the main questions that happiness indicators raise, organized in a taxonomy (see the table below); the criticisms that can be lodged against happiness indicators; and replies that can be opposed to these criticisms. The taxonomy is structured along four categories: The first includes questions about *which understanding of happiness should be measured?* The second relates to the population that should be monitored: *whose happiness to measure?* The third gathers methodological questions about the construction of these indicators: *how to elaborate such an index?* The last category is about the use of indicators by public institutions: *how to apply happiness indicators?*

By evaluating the construction and use of diverse happiness indicators, this article neither endorses happiness as the ultimate goal of life, the definitive metric of justice, nor assumes that happiness research and some of its political

outcomes cannot be challenged at a foundational level (e.g., as being a controversial conception of welfare). In this article I review some philosophical and political issues raised by happiness indicators. The methodology is *to take seriously the diversity of indicators that are or could be proposed by researchers and institutions*. The point is not to discuss happiness as a philosophical concept or to defend the politics of happiness. It is simply to provide a normative evaluation of happiness measurement when carried on by public institutions.

The originality of this work in public ethics is that it covers the main issues about building happiness indicators, the debates they generate, and the possible replies that could be framed *in good faith* and with close attention to happiness research. Furthermore, it highlights the importance of the strategy of diversification-hybridization. Indeed, it is shown that most worries about happiness indicators (e.g., moral/epistemological partiality) can be deflected by building composite indicators (i.e., indicators including several understandings of happiness) or by favouring the elaboration of various indicators for capturing the complexity of human happiness. The conclusion recaps challenges that are of interest for normative thinkers, in particular on democratic grounds. It also presses the point that attention from normative thinkers is required even more now that the process of diversification-hybridization is already being discussed in social sciences and is a reality of public decision-making.

Table – Structure of the Argument

1. What to Measure?	2. Whom to Include?	3. How to Collect Data?	4. What to Do?
1.1 Which Happiness? - Hedonia - Eudaimonia - Subjective well-being **1.2 Concepts, Conceptions, and Understandings** **1.3 Broad Philosophical Issues** a) Respect for pluralism b) Nature of "True" happiness **1.4 Political and Epistemological Partiality** - Political - Epistemological **1.5 Subjective Well-being and Diversification/Hybridization** - Culturally diverse conceptions/interpretations of happiness - International comparisons - Incomparable national indicators - Different evaluations of the components of a given indicator - Theoretical monstrosity	**2.1 Membership Scope** **2.2 Generation Scope** **2.3 Species Scope**	**3.1 Methods of Collection** **3.2 Objective Reporting** Supporting arguments a) Negative reply: difficulties with subjective reporting b) Positive reply: it can access material without mediation **3.3 Subjective Reporting** a) Affects b) Self-evaluations and judgments c) Functioning and flourishing **3.4 Objections** – Adequacy between happiness and the measured object – Reliability of the measure	Four objections against the institutional use of happiness indicators **4.1 The Uselessness Objection** They are worthless because a) incomparable b) individuals quickly adapt to changes in their life circumstances c) the pursuit of happiness makes sense only at the individual level *d)* they try to quantify something that should not be quantified **4.2 The Manipulation Objection** They may be manipulated to serve certain interests **4.3 The Capture Objection** They give too much power to experts in the political decision-making process **4.4 The Non-neutrality Objection** They promote specific moral, political, or cultural norms

1. WHAT TO MEASURE?

When building happiness indicators, the first step is to identify the basis of the indicators, i.e. the type of happiness that is being analyzed. This step is important because it may express underlying political choices and commitments. Thus the first section introduces us to (1.1) the three understandings of happiness available for building indicators, (1.2) the proper characterization of happiness, (1.3) the broad philosophical issues such indicators raise, (1.3) the two-pronged criticism of political or epistemological partiality that could be brought against either hedonia or eudaimonia, and (1.4) the issues proper to indicators based on subjective well-being.

1.1 WHICH HAPPINESS?

In the literature, there are three main understandings of happiness: hedonia, eudaimonia, and subjective well-being (SWB).[4] Each articulates two interrelated dimensions: a descriptive one (*Happiness is X or Y*) and a normative one (*Happiness as X or Y is good because of A or B*). They are interrelated in the sense that the normative value is rooted in the descriptive dimension (e.g., hedonia is good because pleasures or positive emotions are good things for human welfare, eudaimonia is good because flourishing or functioning well is a good thing for human welfare, etc.).

Hedonia is an affair of affects (or sometimes emotions (Diener, 1984; Diener et al., 1999), even if the hedonic nature of emotions might be disputed). An individual is happy to the extent that he or she is "feeling" happy, i.e., that individual is experiencing positive affects. And, overall, a life may be called qualified as "happy" in the hedonic sense if the balance between positive and negative affects is positive. The World Happiness Report defines it as "affective happiness" (Sachs, 2012, p. 6). Authors such as Jeremy Bentham, Francis Edgeworth, and Daniel Kahneman are representative of this understanding.

The second understanding, *subjective well-being* (SWB hereafter), has three components: positive affects, negative affects, and life satisfaction (Pavot, 2008). Positive and negative affects are hedonic whereas life satisfaction is of a different nature, implying self-assessment (poll respondents judge their whole life or life domains such as work, family, social relations, etc.). The World Happiness Report characterizes this form as "evaluative" (Sachs, 2012, p. 6) because respondents are required "to make a retrospective judgment about how their lives are going overall" (Tiberius, 2006). SWB, especially the life satisfaction component, is widely used for national and international surveys and popular among psychologists (e.g., Ed Diener), heterodox economists (e.g., Richard Easterlin, Bruno Frey) and philosophers (e.g., Wayne Sumner).

The third understanding, *eudaimonia,* identifies happiness with the development of personal faculties. An individual is happy in the eudaimonic sense to the extent that he or she is virtuous (Aristotle), functions well—rather than simply "feels" good—(Keyes and Annas, 2009), is self-determined (Ryan et al., 2008),

or is personally expressive (Waterman, 1993). So "happiness is something like flourishing human living, a kind of living that is active, inclusive of all that has intrinsic value, and complete, meaning lacking in nothing that would make it richer or better" (Nussbaum, 2005, p. 171). Despite notable differences, eudaimonic views share a common idea: an "happy" life consists in the actualization of individuals' potential that could be related to morality (e.g., virtues in Aristotle), agency (e.g., capabilities), intellectual capacities (like in John Stuart Mill), flourishing, etc. Psychologists (e.g., Carol Ryff, Martin Seligman, Alan Waterman), philosophers (e.g., Julia Annas, Martha Nussbaum) and economists (e.g., Amartya Sen) have discussed this understanding.

A last, important, point: one may deny that eudaimonia is about happiness by claiming, for instance, that eudaimonia is about well-being, assuming that happiness and well-being are two different things. There are several ways of making sense of the distinction. A common way is to postulate that happiness is about psychological states whereas eudaimonia is not. The problem is that there are eudaimonic conceptions that are subjective (Kraut, 1979), or contain a strong psychological dimension (e.g., Waterman's personal expressiveness, Singer and Ryff's psychological well-being, Nussbaum's view on eudaimonia). One may acknowledge this, but maintain the point that eudaimonia is something else than "happiness" (in a sense that often is unclear).

To this, it can be replied that happiness is a continuum ranging from feeling to functioning well, a continuum that expresses the deeper idea that the life is going well according to the individuals themselves. To some extent, this is the complexity that SWB tries to capture by combining affective and evaluative dimensions. Hedonists may contest the label of "true happiness" to eudaimonia and eudaimonists may do the same with hedonia. These controversies express something common in philosophy and beyond: interpretative conflicts about the true nature of values and principles. This article adopts a neutral posture on the true nature of happiness in order to present a structured overview of the challenges faced by all types of indicators that monitor happiness as understood in its diversity defined by many philosophers, psychologists, sociologists, and economists.

1.2 CONCEPTS, CONCEPTIONS, AND UNDERSTANDINGS

But before going any further it is worth to ask a simple but fundamental question: what are hedonia, SWB, and eudaimonia? Are they "forms," "types," "kinds," "dimensions," "conceptions," "concepts," of happiness or something else?

A possibility is that hedonia, eudaimonia and SWB are *conceptions* of happiness: there would be a concept (happiness) that would receive different interpretations (conceptions). This concept would exist independently of any particular interpretation. A problem with this view is that if hedonia, SWB and eudaimonia expresses a common idea, it might not be a single, unified, concept.

A second possibility is that hedonia, SWB, and eudaimonia are different *concepts* (Haybron, 2010, p. 31). Hedonia would be a subjective feeling (i.e., a psychological state) while eudaimonia would be an objective manner of being or functioning and SWB the combination of affective and evaluative conditions. A variant is to posit that hedonia is about happiness and eudaimonia about well-being. This view has the merit of simplicity, but this simplicity is misleading. As stated, some eudaimonic conceptions are subjective or rooted in specific psychological states. Also, SWB is not a self-standing concept; it is a construct made of hedonic components (affects) and life satisfaction (individuals' judgment on their life).

The purpose of this article is not to reach the truth about happiness, but to review public policy issues raised by happiness indicators. We therefore need to find a characterization of hedonia, SWB, and eudaimonia that serves this purpose. In this article I chose the term of *understandings*. The word has the merit of accommodating the opposite view of hedonia, eudaimonia, and SWB as conceptions and concepts. Its encompassing nature leaves room for a general overview of public policy issues conveyed by happiness indicators. This choice might be tackled as accepting the terminology framed by happiness researchers and any ensuing confusion.

One might also deny any relevance to happiness research as such or consider that social scientists are so confused about the "essence" or true nature of happiness that they end up talking about different things. These criticisms call for two comments.

Firstly, the confusion that would reign in happiness research is sometimes exaggerated. The fact that different authors have different understandings of happiness does not mean that the whole research is crippled by confusion. An analogy is useful: the fact that philosophers mobilize different understandings of equality (e.g., in regard to the metric, to the rule of distribution, etc.) does not imply that equality as an object of philosophical investigation is crippled by confusion.

Secondly, the criticism would be fair if researchers never defined their object or if they disregarded the diverse uses of "happiness". But, on the one hand, most researchers are clear on their understanding, how it is constructed, how it differs from other understandings. On the other hand, they are also clear on the diversity that exists within their field as illustrated by various debates (Biswas-Diener et al., 2009; Kahneman, 1999; Kahneman et al., 1997; Kashdan et al., 2008; Keyes and Annas, 2009; Pavot, 2008; Waterman, 1993, 2008).

For a moral thinker interested in public policies, the challenge is precisely to offer a structured view of the philosophical and political issues of building indicators of happiness in its diversity. In other words, it is to adopt a pluralistic and neutral view on happiness when dealing with public ethics issues.

1.3 BROAD PHILOSOPHICAL ISSUES

The choice of an understanding by researchers and public institutions is fundamental. Depending on this choice, a given index will emphasize dimensions of well-being at the expense of others (with the limit that no understanding of happiness is exhaustive of welfare), which will affect the feed-back that institutions receive. The choice raises two main challenges: the respect for pluralism and the nature of "true" happiness.

a) Respect for pluralism. Despite significant overlaps, citizens do not share identical moral, religious, or cultural views. Individual opinions diverge on what constitutes the good life, even if this divergence is often overstated. Therefore, institutions need to pick an understanding of happiness that can accommodate different conceptions of the good life. Because hedonia, SWB, and eudaimonia are never purely descriptive when used in the public realm (they are measured, compiled, monitored for political purposes ranging from monitoring to decision-making), the normative charge that indicators are carrying should be compatible with most of the reasonable comprehensive doctrines endorsed by individuals.

Axiological diversity is an issue. But diversity also has a cultural dimension. Understandings of happiness may vary depending on cultural membership (Vazquez and Hervas, 2013, pp. 33-34). People may also weight components (e.g. positive or negative affects) or understandings (e.g., hedonia, eudaimonia) differently (Diener, 2009). Recognizing pluralism when building happiness indicators is an acute issue for any society as well as for international comparisons.

b) Nature of "true" happiness. There is also a question as to which understanding most closely matches "true," "authentic," "real," or "veritable" happiness (if such a thing exists, which is controversial in itself), and not something illusory or delusive.

If we start with hedonia, this understanding is often criticized for giving an unrefined or partial and, as a result, unappealing view of human well-being (Alexandrova, 2005; Haybron, 2010). This is either because a life structured around hedonistic goals is intrinsically undesirable or because hedonia leads to undesirable outcomes such as the pursuit of short-term pleasures at the expense of lasting satisfaction or self-flourishing. There is a further criticism. Hedonia is accused of being an indiscriminate theory that does not (cannot) discriminate pleasures according to their moral content (Nussbaum, 2010). A pleasure will remain a pleasure, no matter if it results from sadistic or antisocial behaviour.

If hedonia is endorsed by the state, through an indicator, as (part of) what has value in life (i.e., as (part of) *the* good life), lifestyles based on temporary, immediate, or even immoral pleasures might be promoted at the expense of more ambitious and fulfilling life paths. This leads to two broader criticisms, which indiscriminately apply to hedonia and eudaimonia.

According to the neutralist critique, it is objectionable for the public to endorse any comprehensive doctrine, independently of the fact that this doctrine is hedonic or eudaimonic. A *partisan critic* argues that when institutions adopt hedonic indicators, they endorse an inferior moral view (hedonia) at the expense of a preferable alternative (eudaimonia or SWB).

However, in cases where hedonia is adopted for some indicators without any further public endorsement, it is possible to argue that a moral ideal is not being promoted as such. But the choice of hedonia as the baseline of an index may still distort the feedback received since other important components of well-being are not taken into account.

1.4 POLITICAL AND EPISTEMOLOGICAL PARTIALITY

This criticism of partiality, either *political*—the public commitment to a specific interpretation of the good life—or *epistemological*—the construction of biased indices—, can also be addressed to eudaimonia.

In regard to *political partiality*, the objection is that eudaimonia expresses a perfectionist view. If happiness lies in the development of human capacities, which could be understood as the highest intellectual abilities (as expressed by Aristotle and John Stuart Mill), eudaimonia could also be criticized for being biased in favour of a particular conception of the good life (Landes 2013).

Not all eudaimonic understandings are equally vulnerable to this criticism. Objective understandings based on a predefined list of precise items classified in a moral hierarchy are particularly vulnerable, contrary to understandings focusing on general human traits or abilities that are not overly specific. For example, the capability approach emphasizes general human functioning (e.g., a self-sufficient, socially integrated, individual life) rather than specific functioning (Nussbaum, 1992; Sen, 1999). Another example of a not-so-vulnerable understanding is Self-Determination Theory, which grounds eudaimonia as psychological well-being in individual autonomy and intrinsic motivation (Ryan et al., 2008).

As regards *epistemological partiality*, eudaimonic indexes can be criticized for disregarding the affective aspect of happiness (as well-being): if they are based on eudaimonia alone, the indexes will provide a partial view of the actual well-being of a given population. They will leave out of the picture presumably important elements for living a happy life (e.g., positive feelings such as pleasure or joy).

Both hedonic and eudaimonic supporters may reply by asserting the epistemic and/or moral superiority of either hedonia or eudaimonia. The difficulty with this response is for hedonia supporters to dismiss eudaimonia (and vice-versa) they must prove that the life aspects that the other theory encompasses do not contribute to happiness in any reasonable sense. If it is shown that pleasures/pains or flour-

ishing/functioning are part of widespread understandings of happiness, it becomes difficult to exclude them from the construction of an indicator that attempts to measure the happiness of a population. The reason is that individuals themselves assess their condition by appealing to these understandings.

1.5 SUBJECTIVE WELL-BEING AND DIVERSIFICATION-HYBRIDIZATION

One strategy for avoiding this difficulty is to combine elements of hedonia and eudaimonia into a single index. Even if SWB does not include eudaimonic components *per se* (Ryan and Deci, 2001), it partially adopts this strategy of *diversification* (by referring to the different understandings that might be separately accounted for in an indicator or a set of indicators) or *hybridization* (by referring to the creation of a composite indicator drawing on different understandings) (Diener, 2000).[5] Because SWB is made of positive affects, negative affects, and life satisfaction,it contains affective and evaluative aspects. Therefore, an indicator based on SWB is more resistant to the partiality objection (without completely deflecting the criticism). This versatility has contributed to the popularity of SWB among researchers who work on indexes (Diener and Seligman, 2004).

Since SWB tracks both affective and evaluative dimensions, it is less vulnerable to the partiality objection. Yet reservations have been raised about SWB's capacity to capture adequately culturally diverse understandings of happiness (e.g., the valorization of negative affects and de-valorization of positive affects, the lesser emphasis on the importance of self-evaluation in certain cultures (Diener, 2000)). The problem is that SWB components are measured by requiring individuals to reply to questions ("are you satisfied with your life?," "are you satisfied with your work/family/social relations?") or to provide a cardinal evaluation ("how depressed / elated / etc. do you feel?" on a 0 to 3 scale for instance) that can be interpreted differently according to respondents' cultural backgrounds. This might be a problem for a national index since it leads to aggregate data that does not have the same content (and meaning) in different places and populations.

For international comparisons, the problem is twofold: the same indicator applied to different countries may not measure the same thing because people may interpret the questions differently depending on their culture and, therefore, the answers cannot be compared. Individuals may also value the diverse domains or emotions under evaluation differently. Some data may appear, at first sight, negative or positive, whereas they are not intended as such by respondents, which undermines international comparisons and can render interpretations difficult. For instance, certain negative affects are positively valued in Eastern cultures while certain positive affects are despised (Diener, 2000, p. 39).

Partiality is the main criticism made against happiness indexes based only on either hedonia or eudaimonia. Researchers usually address this objection by

using or invoking the potential diversification-hybridization of indicators, by employing SWB measurements or other composite indicators (e.g., the Pemberton Happiness Index, which tracks positive affects, negative affects, general well-being, eudaimonic well-being, hedonic well-being, and social well-being (Vazquez and Hervas, 2013)). In other terms, the combination of different elements, which capture different understandings of happiness, make the partiality criticism less convincing by rendering indicators more encompassing.[6]

Like other composite indicators, SWB may deflect most of the criticisms in relation to partiality. However, they still face a shortcoming. They do not account for functioning, flourishing, or individual capabilities. But it is far from being a fatal defect since other, eudaimonic, components may be added up to a given indicator or used to supplement the information given by SWB. Thus happiness research has internal resources for turning happiness indicators into less partial indicators.

A final criticism regards the supposedly monstrous nature of hybrid-diversified indicators. One may claim that they compile unrelated elements (e.g., affects, self-assessment, flourishing) for creating a chimer. On theoretical grounds, it might be the case: hybrid-diversified indicators might be judged monstrous since they blur "some" boundaries between understandings of happiness. Practically, it is another matter. On political grounds, it is difficult to grasp the monstrous nature of hybrid-diversified indicators and see in it a problem for public policy. Public monitoring and decision-making continuously rely on composite indicators (e.g., UN Human Development Index, OECD Better Life Index). If the goal of indicators is not to say the truth of happiness, but to inform public policies on *some*, complex and multilayered, aspects of human welfare, then theoretical monstrosity is no defect. To the contrary, it might constitute an advantage. Furthermore, if designers and public users of these indicators are aware of their composite structure and the nature of the various components, it is difficult to see what kind of monstrosity it could be.

2. WHOM TO INCLUDE?

In this section we deal only briefly with the scope of happiness indexes: *whom to include?* The topic is not unimportant, but it raises issues that go beyond the scope of this paper—i.e., the inclusion of three specific groups—residents/citizens, non-human animals, and future generations. Although this is only a quick overview of this issue, it should be stressed that researchers and public institutions need to identify the population(s) they wish to survey (which implies providing justifications) when they construct and implement an index. For national indicators, the choice has practical *and* moral implications because it expresses an underlying view about the limits of the moral community, understood as the community whose interests are taken into account even if happiness indicators do not offer a complete and definitive view on welfare and, so, might be completed by other indicators.

2.1 MEMBERSHIP SCOPE

Should national indicators measure the happiness of citizens, legal residents, or anyone present on the territory regardless of status (Durand and Smith, 2013, p. 120)? This question might seem rhetorical since, in practice, most existing indicators and surveys do not discriminate among people on the basis of their immigration and citizenship situation. But the question is still relevant since institutions may have an interest in monitoring different populations separately. In addition, when international studies claim, for instance, that Swiss are the happiest people in the world (J. Helliwell et al., 2015, p. 26), is it really about Swiss citizens or about residents in Switzerland? The question is both political and epistemological.

Furthermore, public institutions may have difficulties collecting data from various population categories. For instance, illegal refugees usually do not appear on national statistical database (and so are not picked by large-scale surveys that use such databases) or prefer to remain invisible for obvious reasons. Another example is homeless or migrant people who may not appear in happiness indicators because they do not have a constant residence. It is a shortcoming because happiness indicators ought to monitor the well-being of these groups (except if decision-makers consider these groups as socially unimportant and their well-being as morally irrelevant).

On moral grounds, if the well-being of these groups is not monitored, there is a risk of accentuating some of the vulnerabilities they face by reducing their social visibility and, as a consequence, their political weight. In short, is a national index only about the happiness of the nationals, the legal residents, all the residents whoever they are, or only the residents with a fixed address (excluding for instance homeless people)?

Also, should different populations be aggregated in a single index or monitored through different indexes? This question implicitly raises the diversity issue discussed above. If members of cultural minorities understand hedonia or eudaimonia differently or value SWB components differently (e.g., the value of negative vs. positive affects), it will affect the happiness index. In short, national indexes will aggregate material that is not understood in the same way or data that does not refer to the same psychological or objective conditions. Consequently, the salience of happiness indicators will be diminished.

2.2 GENERATION SCOPE

This question could be summarized as follows: should future generations be included in a happiness index (Brülde, 2010, p. 572)? The inclusion of non-existing individuals echoes a series of discussions in the field of intergenerational justice that are not addressed in these pages. But, generally speaking, if we agree on the very general principle that happiness of future generations is morally relevant, the issue is how to calculate such happiness and integrate it into an indicator that also tracks the situation of existing generations.

This question contains three aspects. The first aspect is moral. It is about combining the happiness of different generations in a single index—i.e., what relative weight to give to existing and future people. Grouping the well-being of several generations in a single index (or combining several indexes) raises technical issues too, the most important being the appropriate discount rate to be imposed on the (potential) happiness of future generations. The third aspect is epistemological: is happiness the same when we consider actual or future individuals? Are we comparing the same thing? This question will presumably grow in importance as sustainability becomes a primary goal of institutions and as we increasingly rely on happiness and well-being indexes.

2.3 SPECIES SCOPE

Should non-human animals be included in happiness indexes (Brülde, 2010, p. 572)? It may be argued that, in order to be exhaustive, happiness indexes should include non-human animals. Or the argument can be more moral in the sense that excluding non-human animals cannot be justified on moral grounds.

A quick glance over the literature may suggest that some understandings of happiness are better suited than others for applying to animals. By claiming that happiness is reducible to the presence of pleasure and the absence of pain, classical hedonism, for example, offers an analytical framework that seems readily applicable to non-human animals (especially if no distinction is made in regard to the nature or quality of pleasures (Crisp, 1998, pp. 9-13)).

Another aspect of the issue is that researchers and institutions may favour some understandings of happiness over alternatives because of their ability to include non-human animals in indicators. In that case, it is very likely that qualitative hedonism, SWB (through the life satisfaction component), and "intellectual" eudaimonism (e.g., Aristotelian rationalism or virtue ethics) constitute inferior options in comparison to classical hedonism, subjective emotional state theory, or "naturalistic" eudaimonism.[7] In sum, taking the species issue seriously impacts on the choice of understanding for building happiness indexes.

The scope question encompasses issues that are central to the measurement of happiness. Most of the research does not identify the membership scope: indicators are often presented as recording the happiness of everyone on a given territory without any further analysis of the people included and how they are represented in a given index. Moreover, future generations and non-human animals are excluded from current initiatives for developing happiness indexes. Such exclusions may be seen as morally problematic, which leaves room for debate in which philosophers have a direct stake.

3. HOW TO COLLECT THE DATA?

As with any indicator, the construction of happiness indicators raises two separate questions: *how to collect the data?* (Durand and Smith, 2013, pp. 119-130) and *how to build the indicator?* The latter covers issues such as the choice between monetary and non-monetary indexes, the rules of aggregation, the weighing of the various components in the case of composite indicators, cardinal vs. ordinal measurement, and so forth. Despite its importance, the issue of *how to build indicators* is not addressed in these pages. It raises questions of engineering that that are beyond the scope of this article, which focuses on philosophical and political challenges of happiness indicators, not technical ones. So this section focuses on the first set of challenges created by the collection of data.

3.1 METHODS OF DATA COLLECTION

The two methods for collecting data are *objective* and *subjective reporting*. The distinction can be formulated as being between directly observable and unobservable material (Frey, 2008, p. 162). Subjective reporting records data that are not directly observable from outside like affects, feelings, emotions, sensations, and so forth. Investigators have no direct access to the raw material (e.g., individuals' feelings, emotional states, or satisfaction with life). Objective reporting tracks the "hard data" such as functioning, capabilities, or flourishing that can be observed from outside.

The split operates at two levels: the nature of the object under evaluation (pleasure, pain, life satisfaction, flourishing, etc.) and the nature of the assessment (biochemistry, brain waves, hormones, questionnaire, self-report) (Veenhoven, 2002). On the first level, objective assessment focuses on things that exist independently of the subject's mental states, while the subjective is about psychological states. On the second level, the objective implies external criteria and observers, whereas the subjective is mostly about self-reporting. There is an overlap between the two, which should be acknowledged.

Despite these methodological issues, this section outlines the common understanding and practices of data collection: subjective reporting refers to an indirect access to happiness, whether that happiness is hedonic, eudaimonic, or subjective well-being. Information is obtained through self-reports or evaluations. Objective reporting refers to direct measurement of individuals' happiness through external observation with minimal mediation (which excludes self-reports and assessments).

3.2 OBJECTIVE REPORTING

Favoured by economists for indicators such as Gross Domestic Product, objective reporting seems a natural fit for eudaimonic understandings of happiness based on an objective list. For example, it is possible to calculate a capability index, inspired by the works of Martha Nussbaum (2010, pp. 110-111), through

the external observation of the performance of individuals (e.g., Human Development Index). A possible criticism is that it is not fine-grained enough for capturing the complexity of part of human well-being that relates to happiness, especially the subjective dimension. It does not collect all the information that matters for evaluating happiness—namely, feelings, emotions, affects, moods, and satisfaction.

Against this criticism, two counter-arguments can be made in defence of objective reporting, one negative and one positive. The negative argument is to stress the difficulties of subjective reporting—e.g., the risk of manipulation or inaccuracy.[8] But this reply is convincing only insofar as it could be proven that the lack of subjective elements is less of a serious defect than the lack of reliability of subjective reporting.

The positive argument is that objective reporting can directly access individual subjective elements. Possible methods include brain waves (Layard, 2005) or physiological screening (e.g., cortisol, oxytocin). But one may argue that objective reporting offers only unmediated data, and is therefore only distantly related to what is supposed to be measured (e.g., affects) because hormonal reactions or brain waves are different from the subjective states they are correlated with. As a result, subjective reporting would still be valuable for individual feelings, affects, satisfaction, or moods. In any case, happiness researchers use only marginally objective indicators, so there is no need to elaborate.

3.3 SUBJECTIVE REPORTING

Subjective reporting is the most common method for collecting happiness data. The methodology is to ask individuals about their lives as a whole (life-satisfaction); specific domains like work, family, social relationships, and so on (domain-satisfaction); or particular moments, feelings, and emotions (affects). This method is used by major happiness surveys and indicators, such as the World Values Survey, the Eurobarometer, and Gallup's Global Barometer of Hope and Happiness. Subjective reporting is the method *par excellence*, especially for SWB (i.e. positive and negative affects plus individual satisfaction) (Kashdan et al., 2008, pp. 221-222; Ryan and Deci 2001, p. 144).

There are several ways of collecting individuals' self-reports depending on the sort of happiness that is monitored, each of which has specific issues.

a) Affects. Central in hedonia and present in SWB, positive and negative affects may be measured as *experienced* or *remembered* states (Kahneman et al., 1997; Kahneman and Krueger, 2006). Experienced states are measured "on the spot," at the very moment individuals experience specific activities or situations. Measuring experienced happiness (or utility in Kahneman language, which is derived from the Benthamian view that equates utility with the total aggregate of pleasure and pain) is complex and demanding since individuals must be prompted while they carry on their daily activities.

The *Experience Sampling Method* (ESM) is a method for measuring experienced mental states (Csikszentmihalyi, 1990). Participants are equipped with electronic devices that regularly require them to enter information on their affective and emotional states (elated, bored, stressed, angry, etc.) and on the kind of activity they are currently undertaking, and other information (e.g., the time when the activity started). The *Day Reconstruction Method* (DRM) is an alternative method for tracking remembered happiness (utility). Participants have to keep a diary of their daily activities (Kahneman et al., 2004b), report information such as the kind of activities they undertook, the length of each activity, the affects, feelings, or emotions experienced during these activities, and so on.

The choice between experienced and remembered utility is a trade-off between practicability and accuracy. Studies in psychology have shown that individuals make mistakes when they recall past events, especially when they try to recollect mental states and emotions (Gilbert, 2006). As shown by Kahneman *et al.* (1997), remembered utility substantially diverges from experienced utility (understood as instant utility).[9] When individuals are asked to recall specific events and what their affects were at those moments, they average the peak affect (i.e., the most intense moment) with the affect at the end of the event. The so-called peak-end rule produces hedonic accounts that diverge from experienced utility, especially when understood as the integral of the intensity and length of affects.[10] This alteration is due to the combined effect of judgment and memory.

A psychometric method such as ESM reduces the noise inherent to self-reporting, but it suffers from a practical shortcoming: it is very demanding for the respondents and costly to implement. Proponents willingly acknowledge that this method is not fit for large-scale indicators (Kahneman et al., 2004a, p. 431). The alternative, DRM, does not interrupt individuals in their activities and reduces implementation costs, but re-introduces significant noise due to the time gap between the experience and the individual report. In addition to the effect of the delay, individuals, consciously or not, filter out their experiences, producing distorted accounts.

b) Self-evaluations and judgments. Self-evaluative and judgmental components are usually collected through questionnaires where individuals are asked to situate their happiness (or satisfaction) on a scale. A popular method is the Cantril self-anchoring scale (e.g., Gallup) where individuals are asked to imagine the best possible world and to weigh their actual life against it. Other methods include life satisfaction questions ("On the whole, are you very satisfied, fairly satisfied, not very satisfied or not at all satisfied with the life you lead?") and happiness questions ("Taking all things together, would you say you are very happy, rather happy, not very happy or not at all happy?") that are part of numerous indicators like the Eurobarometer, the Gallup World Poll, and the World Values Survey.

While the mediation of individual self-assessment, i.e. a person's evaluation of his or her own situation, is a problem for monitoring affective states, it is

precisely what is tracked by evaluative components: how individuals judge their life as a whole or by domains (e.g. work, family, personal relations). Self-assessments therefore offer a *weighted* picture of life: when individuals express how satisfied they are with their life, work, family, etc., they elaborate on their objective situation by taking into account subjective elements such as life goals, moral or religious values, etc. By doing so, they produce a weighted judgment, a reconstruction of how their life or parts of it is going from their own point of view.

However, self-reports of life satisfaction may be more prone to biases than affects because they are constructed judgments. But techniques are available for making self-reports more robust (Diener, 1994). Also, circumstances under which questionnaires are administered influence responses (Diener, 2000, p. 35; Kahneman et al., 2004a, p. 430). Respondents may have distorted views on how their life is going (Gilbert, 2006). They might also distort their self-reports for various reasons: they may be under the sway of social conventions (e.g., in regard to the expression of personal satisfaction) or have various psychological motives (e.g., to appear in a better light in the eyes of the investigator).

c) Functioning and flourishing. The last category is eudaimonic happiness. Even if objective reporting is important for monitoring eudaimonia, especially for objective list theories, subjective methods are used too. For instance, the Personally Expressive Activities Questionnaire is made up of a series of questions about a given activity that concentrate on factors that contribute to *feelings* of flourishing, accomplishment, or completeness (Waterman, 2008, p. 236). Another example is Psychological Well-Being: respondents are asked to rate their level of disagreement/agreement in regard to statements covering six eudaimonic domains (self-acceptance, environmental mastery, positive relations, purpose in life, personal growth, autonomy) (Ryff and Keyes, 1995).

In both surveys (as for other eudaimonic monitoring tools), respondents are asked to provide a self-evaluation. As phrased by Julia Annas and Corey Keyes (2009, p. 198) “our measures of well-being reflect individual’s judgments of their functioning in life.” For the Psychological Well-Being, they evaluate their own functioning across several areas generally. For the Personally Expressive Activities Questionnaire, they evaluate their more limited eudaimonic experience during a given activity. The methodology is so close to the one used for self-evaluation and judgments that we will not go any further and will now consider criticisms against subjective reporting.

3.4 OBJECTIONS

Whether subjective reporting is used for monitoring affects, life satisfaction, or eudaimonia, it needs to reply to two objections.

The first is the *adequacy* of the measured object to capture happiness: to what extent is the measured thing really happiness? It can be asked whether experienced utility, remembered utility, life-satisfaction, or personal expressiveness

reflects true happiness. Eudaimonists may argue that experienced and remembered utilities offer *a* measure of emotions that has nothing to do with "true" happiness understood as human flourishing or functioning. Hedonists may reply that personal expressiveness, life-satisfaction, and other evaluative components track individual qualities such as a person's self-reflective capacities or judgment on his or her situation that are not related to happiness.

To be fully convincing, these criticisms ought to prove that happiness indicators based on hedonia, eudaimonia, or SWB (depending on the point of view of the critique) do not overlap with some shared understanding of happiness or folk conception. Since it is reasonable to consider that affective *and* evaluative components capture different dimensions that a significant number of individuals identify with happiness, it is difficult to argue that to measure experienced utility, remembered utility, life satisfaction, flourishing, or any other hedonic/eudaimonic/SWB concept is to measure something other than happiness from people's own point of view.

The second objection tackles the *reliability* of the measurement. Affective states as well as evaluative judgments may (or not) be components of happiness. The quarrel is not about this. The criticism is that researchers use tools that do not offer reliable accounts of these components. At first sight, the objection is supported by psychological findings from happiness research itself. As Kahneman *et al.* (2004a, p. 430) put it, "the life satisfaction and happiness questions that are used in well-being research request the type of global assessment that people perform poorly on in the psychological laboratory." Academics such as Daniel Kahneman (2011) and Daniel Gilbert (2006) have built part of their careers on this idea of individual insufficiency. Thus if we consider that individual rationality is bounded, that individuals suffer from cognitive biases, that they adopt (flawed) heuristics, and that they have trouble correctly remembering what made them happy (Gilbert and Wilson, 2000), how can subjective reporting be trusted (Landes 2013)?

It may be argued that two reasons make it difficult to disregard subjective reporting. First, these measures have something to do with happiness even in a loose sense. They record emotions, affects, evaluations, and judgments that matter for individuals who experience them (the folk conception of happiness). When an individual rates a given experience as painful or pleasurable, that individual positively or negatively values an episode of his or her life on affective grounds. When that individual reports being satisfied or dissatisfied, he or she positively or negatively values how his or her life is going. Self-assessment of satisfaction, feelings, etc., even partly mistaken, still expresses something of value: individual experience. In other words, one's judgments about one's own affects or satisfaction have some prudential value.

Secondly, personal authority in regard to one's own welfare forces us to take seriously individual affective or evaluative self-assessments, even if they do not accurately track happiness as a complex of feelings/emotions or an informed

judgment on one's own situation. This second reason is not epistemic. It doesn't imply or require that individual statements perfectly reflect a person's well-being with a perfect, or even high, degree of accuracy. The bottom line is that individual statements cannot be overridden *qua* expressions of an authoritative agent without further qualification (e.g., impaired judgment).[11] It is a question of principle.

The reliability objection is not a knockout argument. First of all, it suggests that more accurate monitoring tools are needed, not that we should give up on measuring happiness. An analogy with inequality is illustrative: because the Gini coefficient is an imperfect snapshot of income inequalities, it does not imply that it is worthless. In that respect, such imperfections argue in favour of improving or supplementing the Gini coefficient, not dropping it. The same goes for happiness indicators. Instruments like ESM or DRM represent improvements in the measurement of hedonic states when compared to retrospective evaluations. In addition to forging better tools, one way of addressing reliability is to diversify the components of the indicators (the diversification/hybridization strategy) and/or to assess happiness measurements through the correlation with other indicators such as brainwaves, blood pressure, physiological monitoring, etc. (Frank, 1988; Kahneman and Krueger, 2006; Kahneman et al., 1997; Layard, 2005).

4. WHAT TO DO?

Happiness indexes are assumed to have two qualities, especially those based on subjective reporting. They promote more encompassing views on welfare and they provide a picture of human welfare that is closer to what actually matters for individuals than most common alternatives like GDP. In addition, they are tools for monitoring the evolution of happiness and well-being in a given country, as well as differences across various groups within a country or across countries (as long as the questions are understood in the same manner in the countries compared).

From the perspective of political philosophy, the use of happiness indicators by public institutions raises numerous challenges. So far this article has addressed those related to the identification of a conception of happiness, the choice of a population to be monitored, and the collection of data. There are further issues that are about the institutional use of indicators. Happiness indicators are subject to four criticisms: uselessness, manipulation, capture, and non-neutrality. These four objections derive from the previous methodological points. The purpose of this last section is to present an encompassing view of the objections to attempts to use happiness indicators for public decision-making. This section also gives an overview of the possible replies to these objections.

4.1 THE USELESSNESS OBJECTION

Happiness indicators are worthless for public policy for different reasons.

a) Happiness indicators are useless because the results cannot be compared, especially at the international level. The inability to compare the results may stem from the fact that individuals understand questions about happiness differently [12] or from the fact that they hold different understandings of happiness. As a result, individual responses will be poorly informative:

> Many of measures still leave a lot to be desired. Probably the least useful are the surveys that simply ask people to say how 'happy' they are. Since people interpret the word 'happy' differently, different respondents will effectively be answering different questions. (Haybron, 2013, p. 44)

Three replies are possible. The first one is to concede the lack of comparability only for international comparisons. National indicators are still useful for longitudinal evaluations since they monitor a population that, except under dramatic circumstances such as war, massive emigration, or genocide, keeps a relatively stable composition. This continuity gives an opportunity for identifying significant variations in happiness because the biases presumably remain constant through time if the population remains the same.

A second reply is to underline that evaluative components of happiness and SWB are more likely to depend on cultural norms than affective/emotional ones (Vazquez and Hervas, 2013, p. 32). There is still room for international comparisons, at least by using hedonic components such as affects and reducing the weight of evaluative dimensions.

The last counter-argument is to engage with the premise of the argument by pointing out that it is based on too radical a view of pluralism according to which moral or cultural differences are so profound that it will generate insurmountable incommensurability. If it is right that people may understand questions differently or give different weight to different components, it is still possible to compare groups of people from different cultural backgrounds by adjusting or correcting the data or by analyzing these differences. Finally, it should be noted that cultural differences are often exaggerated.

b) Happiness indicators are useless because individuals quickly adapt to changes in life circumstances (Frey, 2008, pp. 164-165). This is the most controversial finding of the literature stemming from the Easterlin Paradox (Easterlin, 1995).[13] Also, a study (now contested) suggested that lottery winners and newly tetraplegics rapidly adapt to their new situations, almost returning to their level of happiness before the lottery gain or the accident that caused the handicap (Brickman et al., 1978). Thus, aspiration and hedonic treadmills will render

happiness indicators poor in useful information. Moreover, public policies grounded on such information would be 'Sisyphus policies' that pursue impossible social improvements since happiness would be fated to return to its long-term level.

The criticism is based on the premise that individuals fully adapt to changes in their life conditions and concludes that no public policy can have a lasting effect on collective happiness. But the amplitude of individual adaptation has been exaggerated by initial studies (e.g., on tetraplegics and lottery winners): individuals do not completely adjust to life changes, especially when changes are non-pecuniary (Easterlin, 2003). In addition, indicators may still record short-term variations in happiness levels—i.e., before adaptation. Moreover, the different dimensions of happiness (affects, self-assessment, etc.) or understandings (affective, evaluative, etc.) adapt differently depending on the kind of changes in a person's life circumstances (Kahneman and Krueger, 2006, pp. 9-14). As a result, happiness indexes can still be useful for identifying potential social reforms.

c) *Happiness indicators are useless because the pursuit of happiness makes sense only at the individual level*. The criticism is that happiness does not pose any particular problem as a personal goal, but does as a political one. There is a practical or/and normative gap that cannot be overcome, between the value of happiness in personal life and its political pursuit (Duncan, 2010, pp. 172-173; Landes 2013).

From a practical point of view, individuals hold so many different understandings of happiness that there *cannot* be such a thing as public happiness. Consequently, the usefulness of happiness indicators is limited. From a normative point of view, individuals hold so many different understandings of happiness that the state *should not* enact politics of happiness. Echoing Rawls's objections to the separateness and sacrifice of the minority (Rawls, 1971, pp. 26-27), the risk is that public happiness will impinge on individuals who hold original, marginal, minority views on happiness. Consequently, it undermines more than the usefulness of happiness indicators: it undermines its moral desirability.

Such criticisms are relevant only insofar as institutions intend to use happiness indexes for maximization purposes (such as Bentham's felicific calculus). But this is not necessarily the case. As a matter of fact, happiness indicators are often viewed by researchers and decision makers as not having the final say on human welfare. Indicators may be used only as part of more general socioeconomic feedback on the state of the population. They can serve to spot vulnerable groups within the society that could not be identified otherwise (i.e., through traditional socioeconomic indicators) (Stiglitz et al., 2009, pp. 10-11). They can also serve to monitor the evolution of a given population or to compare different groups within a given population. They may be used by entities that are not directly involved in public decision making—e.g., advocacy groups or non-profit organ-

izations. Even if individuals do not share the same conception of happiness, happiness differentials among groups or the evolution through time of the happiness of specific groups may still be a valuable source of information for institutions and various organisations.

To summarize, the pursuit of public happiness is not the only reason institutions want to measure it. They may use indicators as complements of other decision-making tools (as recommended by the Stiglitz-Sen Commission) that assess other dimensions of welfare (some unrelated to happiness) and for the sole sake of having a more finely tuned image of vulnerability. Thus, the objection is a *non sequitur*: it is not because the pursuit of happiness could only make sense at the individual level that happiness indicators are necessarily useless.

d) The final criticism is that *happiness indicators are useless because they try to quantify something that should not be*. The criticism is sometimes made as part of a more general point against the contemporary obsession with accounting for any dimension of human life (Jany-Catrice, 2012). The problem with happiness indicators is that they try to quantify segments of human experience that should not be quantified. There is a risk that the happiness determinants (e.g., family, friends, personality traits, etc.) and understandings (hedonia, eudaimonia, SWB) will be reduced to things, objects, and, as a result, happiness will lose what makes it valuable in individual lives.

Against this criticism, it can be said that, first, it is difficult to determine in what sense evaluating dimensions of life and compiling data to form indicators leads to reification. That criticism could be made against all public policy tools that rely on evaluation and aggregation (e.g., unemployment, violence, birth rates). Due to its radical premise and implications, the last criticism may not be addressed here in a way that could be judged satisfactory by those who argue for it. But, there is also not so much to discuss since the objection tackles the justification for having any index at first place.

4.2 THE MANIPULATION OBJECTION

Happiness indicators may be manipulated to serve certain interests (Frey, 2008, pp. 166-167). *Subjective reporting, at the core of most initiatives for building indexes, facilitates such manipulation*.

Different agents may manipulate happiness indicators: individuals, public institutions, and political parties. Especially when happiness is the focus of public policies (Frey and Gallus, 2013, p. 4206), citizens may alter their self-reports in order to punish the government. Subjective reporting facilitates manipulation because there is no "fundamental" (i.e., easily accessible background facts, the "raw material") against which to check the collected information. Also, institutions may manipulate indicators by diverse means: legal, legal but morally problematic, and illegal (like increased and/or targeted public spending, propaganda, creative accounting, and so forth) (Frey and Gallus, 2013, pp. 4207-4209).

Happiness indicators will be more easily manipulated than other indexes based on objective data such as GDP or HDI (Frey and Gallus, 2012, pp. 103-104). Finally political parties might "cook the facts" by misinterpreting or perverting the data provided by indicators (De Prycker, 2010, p. 595). If this is an issue (and as such problematic, whether they are about happiness or other data), it says nothing about the indicators *per se* since the manipulation happens *ex post*, on already gathered and analyzed data.

One counter-argument is to point out that so-called objective indicators can be manipulated too. GDP, inflation, and public debt for instance are, *qua* objective measures, assumed to be more verifiable and therefore less easy to "cook," but as a matter of fact they have been repeatedly falsified (e.g., the 2010 Greek public finances scandal). As expressed by Derek Bok (2010, p. 40), "in light of these weaknesses, the results of happiness studies seem, if anything, more reliable than many familiar statistics and other types of evidence that legislators and administration officials routinely use in making policy." Of course this counter-argument does not make the case for happiness indicators based on subjective reporting. Rather it suggests that the distinction between objective and subjective indicators is not one between indicators that can be manipulated and those that cannot be manipulated. Both types can be bent to specific ends.

A reply to this counter-argument is to emphasize the relative advantage of indicators based on objective reporting in comparison to those based on subjective reporting. The reply agrees that both types of indicators can be manipulated, but affirms that it is easier to twist the latter. Moreover, agents have incentives to do so. Governments have incentives to give more weight to particular happiness indicators and to try to talk down others; respondents can easily alter their self-assessments depending on their intention.

It might be possible to agree with the spirit of this reply but still believe that manipulation can be significantly reduced by various tactics. (While all address governmental manipulation, only the first is effective for preventing the alteration of self-reports by respondents.) First, happiness indicators might incorporate more objective reporting such as brain waves, biochemical activity, and so forth. This data can be used for building indicators that will be teamed up with subjective indicators for producing more encompassing measurements. Or this data can be directly incorporated into existing indicators for building composite indicators.

Secondly, the responsibility for collecting data and building indicators may be delegated to independent organizations, as it is already the case for central banks for inflation (Frey and Gallus, 2012, p. 108) or national statistics institutes. There are several ways for preserving the independence of these institutions. One is to set up constitutional and legal provisions that guarantee independence, such as for the European Central Bank.

Finally, the number of happiness indicators may be multiplied in order to diversify the sources that inform public policies and render manipulation more diffi-

cult to undertake or more visible when undertaken. This argument may be supported by a consequentialist argument that emphasizes the virtue of a diversity of opinions for resisting propaganda. In other words, a diversity of happiness indicators will reduce the risk of manipulation, but also will enhance public information and democratic debates. To conclude, the three tactics illustrate the potential of diversification/hybridization measures for meeting the manipulation objection.

4.3 THE CAPTURE OBJECTION

Happiness indicators give too much power to experts in the political decision-making process.

If public policies are based on happiness indicators, governance will be captured by experts and will ultimately lead to a "government of the experts." Such capture will be accentuated by the degree of complexity of happiness indicators.

However, it is difficult to see how happiness indicators are or could be much more complex than other indicators routinely used for political decision-making (e.g., GDP, Human Development Index, Gini coefficient, balance of trade). If the capture of the decision-making process is a legitimate source of worry and if complexity is what grounds this worry, many dimensions of decision making in modern societies must raise identical concerns. Thus this objection is not so much against happiness indicators *per se* than against indicators as governance tools.

A counter-argument is to underscore that public institutions could provide extensive information on the construction of such indexes. By being completely transparent about the data and methodology used, they may reduce the role of experts as the hermeneutists of happiness indicators. Transparency could then serve as a safeguard against attempts to capture the decision-making process (and incidentally against the manipulation objection). In conclusion, the worry about the capture of democratic processes is legitimate, but it does not justify a rejection of happiness indicators (if it did, opinion polls would also be problematic). To the contrary, it advocates for finding instruments and processes that reduce this risk.

4.4 THE NON-NEUTRALITY OBJECTION

Happiness indicators promote specific moral, political, or cultural norms.

This objection is the immediate consequence of the methodological choices imposed by the construction of happiness indexes. Since different understandings of happiness do not account for the same aspects of human life, happiness indicators are bound to offer partial views on human well-being depending on the understanding chosen. Furthermore, public policies based on them express this moral and political partiality. As a result, moral, cultural, religious, or specialist doctrines are favoured at the expense of others, which undermines the ideal of state neutrality in regard to axiological diversity.

a) The first counter-argument is to claim that happiness indicators are neutral, so there is no risk of violating the principle of neutrality. This response is articulated by Ed Diener and Martin Seligman when they write that they "believe that measures of well-being are—and must be—exactly as neutral politically as are economic indicators" before adding that such measures are "descriptive, not prescriptive, and should remain so" (Diener and Seligman, 2004, p. 24).

However, it is unclear in what sense happiness measures are politically neutral "as economic indicators are." First of all, if Diener and Seligman are right in the sense that SWB measures, for example, do not contain an *ought*, it is still a far cry from guaranteeing political neutrality, especially politically neutral use. They are other ways to be non-neutral than by explicitly endorsing or promoting political (or moral, religious, cultural) views. As seen above, the choice of a conception of happiness for building an indicator is non-neutral in a double sense: it indicates that the architects of the indicator have chosen an understanding of happiness over alternatives (but without explicitly endorsing it) and it provides a measuring tool focused on specific dimensions or understandings of happiness at the expense of alternatives.

b) A second counter-argument is to challenge the interpretation of the ideal of neutrality as requiring fully neutral political decisions. It may be argued that no one ever seriously defends the principle of completely neutral public policies. Neutrality matters as a question of degree—i.e., that it is preferable to have policies that are as neutral as possible (Dworkin, 1985, p. 191). Therefore, any rebuttal of happiness indicators rooted on their lack of neutrality may rely on too radical and, therefore, too indefensible a view. The crux of the objection is to ask what could be wrong about the fact that happiness indicators may favour specific conceptions of the good life. In other words, non-neutrality in itself is insufficient for proving that there is a moral issue.

As a reply to the second counter-argument, it could be contended that the neutrality issue is still pertinent. The utopian nature of a full-blooded ideal of neutrality may be acknowledged, but there is still the question of how much non-neutrality to accept. Since the idea of public institutions oppressively promoting a particular conception of the good life will (presumably) appear problematic to most citizens, there is a need to define the conditions for acceptable non-neutral decisions. It could be argued that happiness indicators cross this line because they influence public policies (through feedback) in a direction that advantages some individuals to the detriment of others, without a morally valid reason.

c) A third counter-argument is to recognize the lack of neutrality of happiness indicators and to accept the fact that it may be problematic, but to limit the divergence from the ideal through a "strategy of diversification/hybridization," either internal or external.

Internal diversification is about diversifying the constituents of happiness indicators in order to cover the broadest possible spectrum of happiness under-

standings through, for instance, the inclusion of positive and negative affects, moods, life-satisfaction, domains-satisfaction, functioning, and so forth (Diener, 2000, pp. 35, 40; Vazquez and Hervas, 2013, p. 39). A further step could be to allow respondents to rate the importance of the diverse constituents of the indicator when their responses are collected.

External diversification can be enabled by, as already mentioned, allowing independent actors to develop their own happiness indexes and taking them into account for political decision-making. As such, the diversity of views on happiness will be accounted for from various perspectives and through various indicators. Consequently, public decision making will be made more pluralistic (Frey and Gallus, 2012, p. 108).

CONCLUSION

The previous pages have shown that happiness indicators raise issues related to the conception of happiness on which they operate, their internal construction, and the ways in which they are used. In addition, the specific issues raised by happiness indicators have been presented systematically and discussed, and tackled one by one. It should be noted that this article was neither an endorsement of happiness indicators nor a rebuttal of the possibility of measuring happiness. Instead, the purpose was to identify philosophical and political challenges of happiness indicators and to try answering them in good faith—i.e., by taking happiness research seriously.

From a bird's eye view, three encompassing issues present an immediate interest for political philosophers and normative thinkers in public ethics. I would like to conclude this article by succinctly presenting them.

Firstly, the adequate balance among understandings of happiness within hybridized-diversified indicators opens up research avenues for political philosophers. In short, how to weight hedonic, eudaimonic, or SWB components within a single indicator? Or, how to balance different indicators (tracking hedonic, eudaimonic, or SWB components) within a given decision-making process? An easy answer is to consider that the appropriate balance is different depending on the indicator, context, institution in charge, and political aim. The answer might appear too simplistic, but the devil is in the detail. Arguably one of the tasks of applied political philosophy could be to look into such details to depart from the over-generality and lack of specificity that often characterizes discussions on happiness measurement.

Secondly, there are institutional and democratic issues: how should these indicators be handled in liberal democracies? Various sub-questions emerge. For instance, there is the question of the distribution of the responsibility for administrating these indicators: who should be in charge? In a democracy the choice of the institutions, public and private, that provides the information and necessary feedback for political decision making is never trivial for reasons evoked in this article (e.g., risks of manipulation, capture, involvement of citizens).

A related question is: how should such responsibility be exercised by the institutions (private or public) in charge? In other words, the mandate of these institutions, when they build happiness indicators, needs to be defined. Behind these issues, there is one that is much more fundamental and that relates to the public status of happiness. Public institutions need to be clear about the role played by happiness in the more general framework of quality of life. They ought to articulate the new data that will be provided by these emerging indicators with more classical measurements. They also need to determine the importance they place on happiness as a political goal.

This means that there are further reflections to carry out on happiness as a political value (among other values). This also means that an underlying institutional theory of happiness and well-being indicators is required. Political theorists and normative thinkers may have a stake in contributing (more than they currently do) to the debates about the public value happiness of course, but also about the institutional implementation of such value. For instance, one of the tasks of this institutional twist is probably to determine the adequate degree of transparency of happiness indicators or the value of happiness arguments in specific debates (e.g., on unemployment, climatic change, work environment, social policies).

Last but not least, there are issues of inclusion: how should these indicators be handled in *pluralistic* liberal democracies? If we consider that democratic struggles have often been about ending the exclusion of particular individuals or groups from the decision-making process, as well as taking into account their interests and welfare, happiness indicators raise issues in this dimension too. The second section (whom to include?) echoes this of course, but not only that. Transparency issues illustrate this challenge of better inclusion of citizens in public decision-making processes. Moreover, it could be argued that due to their subjective nature and their multidimensional aspects (feelings, functioning, life satisfaction, etc.), happiness indicators require the inclusion of all stakeholders (citizens, non-citizens, and animals) much more than traditional indicators like GDP.

In conclusion, if it is accepted that institutions have a responsibility to design public policies that enhance the quality of life of their citizens (partly captured by happiness indicators), and if the pluralistic nature of happiness is acknowledged as a legitimate constraint, political philosophers and normative thinkers have to discuss the diversification-hybridization strategy. If the idea is taken seriously that individuals hold divergent views on the determinants *and* the "true" nature of happiness, the creation of indexes capable of accounting for such plurality is either morally or strategically necessary. Furthermore, the inclusion of stakeholders appears to be necessary too.

Happiness indicators should be at the core of both public debates and academic research. The need for such a debate is reinforced by three trends. The first is the rising concern about traditional indicators of welfare such as GDP and the harsh criticisms that they are attracting in a situation of environmental and economic

crisis. The second is the necessary reforms the world is facing for addressing global issues such as climate change, depletion of natural resources, and anemic economic growth, which implies, if not completely changing, then at least amending political goals, economic structures, and so forth. The last trend is the current momentum enjoyed by happiness measurement (J. Helliwell et al., 2013). As specialists of political design, political philosophers have a "natural" competence for being more present in these debates that they currently are.

For these reasons, as well as the increased interest from psychologists, sociologists, and political theorists, normative thinkers should pay more attention to the issues related to the construction and political use of these new indicators, which includes happiness ones. As stated, there is a "natural" fit for political philosophers and normative thinkers because these issues intersect with themes that have always been utterly important for philosophy like pluralism, democracy, and inclusion, as well as themes that benefit from a growing interest in the profession, like institutional design and social architecture.

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NOTES

[1] For the reason why *understandings* is used instead of *concepts* or *conceptions*, see below section 1.2.

[2] In short, the Easterlin Paradox, or Happiness Paradox, stipulates that material affluence does not make societies happier over time.

[3] Few analyses pave the way to this present article (Sharpe, 1999).

[4] To be exhaustive, mood and emotional-state theories should be mentioned (Haybron, 2013). But we focus here on the key players in the discussions regarding happiness indicators, and mood theories are, for the moment, marginal in philosophy, psychology, and other social sciences.

[5] Todd Kashdan *et al.* (2008, p. 224) consider that there are some significant overlaps between eudaimonia and SWB. Moreover, various authors defend the idea that SWB is flexible enough to integrate much more the eudaimonic dimension (Deci and Ryan, 2008, p. 2).

[6] Happiness 'monists' may still find this reply unsatisfactory since the problem, according to them, is focusing on the appropriate understanding of happiness, not accommodating as many understandings as possible.

[7] "Intellectual eudaimonism" encompasses all interpretations of the *eudaimon* (the "true self") as depending on the flourishing of higher rational or moral abilities, whereas "naturalistic eudaimonism" identifies the *eudaimon* with the fulfilment of one's nature, no matter what this nature could be. According to the latter, a plant, a fish, or an ox can be *eudaimon*.

[8] In support of the criticism, it is widely recognized that individual self-reports of life satisfaction and happiness are influenced by irrelevant factors: e.g., the order of questions in the questionnaire, the circumstances under which the questionnaire is administered (Diener, 2000, p. 35). Such discrepancies may be due to the manipulation of respondents' moods, the manipulation of the context, interpersonal comparisons, and comparisons with past experience (Kahneman et al., 2004a, p. 430).

[9] *Experienced utility* represents the utility as felt on the spot by the respondent, whereas *remembered utility* is the utility as recalled by the respondent. However, Kahneman sometimes gathers under the umbrella of *experienced utility* both *instant utility* (previous *experienced utility*) and *remembered utility*. This all-encompassing concept of *experienced utility* is used in contrast to both *decision utility*—used, for instance, in game theory—and *predicted utility* (Kahneman et al., 1997).

[10] Kahneman's position is not crystal-clear. He seems to pursue two different agendas in regard to 'experienced' (or 'instant') utility. On the one hand, he tries to provide the most solid empirical account of Benthamian utility—namely, experienced utility. But, on the other hand, he also seems to advocate for 'experienced' (or 'instant' utility) as the "true" happiness. This ambiguity explains why, while he claims that his objective is only methodological (i.e., to frame the most solid account for Benthamian happiness) (Kahneman et al., 1997, p. 377), he is criticized for endorsing 'experienced' (or 'instant') utility as the proper view on happiness or well-being (Alexandrova, 2005).

[11] Haybron (2010, pp. 11-14) criticizes the postulate of individual authority.

[12] Solutions to the issue of the disparity among the interpretations of index components have been advanced. For instance, Daniel Kahneman and Alan Krueger propose the inclusion of a 'U Index' ('misery index') as a response to the fact that individuals may interpret the categories of life-satisfaction inquiries differently (Kahneman and Krueger, 2006, pp. 18-19).

[13] The Easterlin Paradox states that 1) in a given country, happiness (understood as life satisfaction) is correlated with wealth, 2) in cross-country comparisons, happiness is correlated to income until a certain point, after which happiness stagnates, and 3) longitudinal studies do not show any increase in average happiness in several countries over several decades (e.g., Japan, United States).

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MORAL ANIMALS AND MORAL RESPONSIBILITY

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ABSTRACT:

The central question of this article is, Are animals morally responsible for what they do? Answering this question requires a careful, step-by-step argument. In sections 1 and 2, I explain what morality is, and that having a morality means following moral rules or norms. In sections 3 and 4, I argue that some animals show not just regularities in their social behaviour, but can be rightly said to follow social norms. But are the norms they follow also *moral* norms? In section 5, I contend, referring to the work of Shaun Nichols, that the basic moral competences or capacities are already present in nonhuman primates. Following moral rules or norms is more than just acting in accordance to these norms; it requires being motivated by moral rules. I explain, in section 6, referring to Mark Rowlands, that being capable of moral motivation does not require agency; being a moral subject is sufficient. Contrary to moral agents, moral subjects are not responsible for their behaviour. Stating that there are important similarities between animal moral behaviour and human, unconscious, automatic, habitual behaviour, I examine in section 7 whether humans are responsible for their habitual moral behaviour, and if they are, what then the grounds are for denying that moral animals are responsible for their behaviour. The answer is that humans are responsible for their habitual behaviour if they have the capacity for deliberate intervention. Although animals are capable of intervention in their habitual behaviour, they are not capable of deliberate intervention.

RÉSUMÉ :

La question centrale dans cet article est celle de savoir si les animaux sont moralement responsables de ce qu'ils font. Répondre à cette question nécessite une argumentation minutieuse et progressive. Dans les sections 1 et 2, j'explique ce qu'est la moralité, et qu'être doté de moralité signifie de se conformer à des règles ou à des normes morales. Dans les sections 3 et 4, je pose que certains animaux ne se contentent pas de montrer des régularités dans leur comportement social, mais qu'ils suivent aussi véritablement des normes sociales. Toutefois, les normes qu'ils suivent sont-elles *morales*? Dans la section 5, je prétends, en me référant aux travaux de Shaun Nichols, que les compétences ou capacités morales de base sont déjà présentes chez les primates non humains. Respecter des règles ou des normes morales est bien plus que d'agir conformément à ces normes; cela requiert d'être motivé par des règles morales. Dans la section 6, me référant à Mark Rowlands, j'explique que d'être capable de motivation morale ne nécessite pas d'être un agent moral; le fait d'être un sujet moral suffit. Contrairement aux agents moraux, les sujets moraux ne sont pas responsables de leur comportement. Affirmant qu'il y a de grandes similitudes entre le comportement moral d'un animal et le comportement inconscient, automatique et habituel d'un humain, je me penche, dans la section 7, sur la question de savoir si les humains sont responsables de leur comportement moral habituel, et si tel est le cas, sur quelle base on peut alors nier le fait que les animaux sont eux aussi responsables de leur comportement. La réponse à cette question est que les humains sont responsables de leur comportement habituel s'ils disposent d'une capacité d'intervention réfléchie, délibérée. Bien que les animaux soient capables d'intervenir dans leurs comportements habituels, ils ne peuvent le faire de manière réfléchie, délibérée.

INTRODUCTION

According to a widely accepted view, only humans are considered to be morally responsible for their behaviour. Only humans can be praised or blamed for what they do, and might in certain cases even be said to deserve punishment. Only humans have moral duties that do not stop at the border of the human community. Their moral community comprehends—at least—all sentient beings. In that view, human and nonhuman sentient beings have a different moral status. Duty-bearing humans are moral agents, while nonhuman animals as the objects of the duties of agents are moral patients. Humans as moral agents have duties *to* other humans and duties *regarding* all sentient beings. This became the received view after Peter Singer and others successfully attacked speciesism.[1] The distinction between humans as moral agents and animals as moral patients is now disputed, since, according to some scholars in animal behaviour, there is evidence that some animal species—e.g., chimpanzees and bonobos—have their social behaviour regulated by a morality, comparable to human morality, and not just by a functionally equivalent regulative system. A morality is not just a pattern of behavioural regularities. It is a system in which the regularities in social behaviour result from following social norms or rules. The recognition that at least some animals are moral—belong to a species that has a morality—might require us to revise the received view. Are moral animals morally responsible for what they do?

I cannot, of course, simply assume that some animals have a morality. I have to provide arguments. In sections 1 and 2, I explain what morality is, and that having a morality means following moral rules. In sections 3 and 4, I argue that some animals do not just show regularities in their social behaviour, but can be rightly said to follow social norms. But are the norms they follow also *moral* norms? In section 5, I contend, referring to the work of Shaun Nichols, that the basic moral competences or capacities are already present in nonhuman primates. Following moral rules or norms is more than just acting in accordance with these norms. It requires moral agency. However, can animals be moral agents? Since agency is generally seen as condition for moral responsibility, by showing that animals have agency, I would also have answered the question about the moral responsibility of animals. In section 6, I follow Mark Rowlands who distinguishes between moral subjects and moral agents. Moral subjects have the capacity for moral motivation. However, they are not moral agents, in the sense of what some authors call full agency. Animals can be motivated by moral reasons that are internal, but not available to their conscious, rational scrutiny. These reasons are, according to Rowlands, embodied in their non-conscious processing operations that are cognitively impenetrable. In the last section, section 7, I make a last attempt to prove that animals can have moral responsibility. I contend there that animal moral behaviour shows important similarities to habitual behaviour of humans. I then ask if the reasons why we hold humans responsible for their habitual behaviour also justify attributing responsibility to moral animals. The answer is that we cannot hold animals responsible while they lack the capacity for deliberate intervention in their behaviour.

1. A FUNCTIONAL DEFINITION OF MORALITY

Before going into the question of whether animals can have a morality, I have to clarify what I mean by morality. In my view, the best definition of *human* morality is a functional one, formulated by G.J. Warnock: "(t)he 'general object' of morality, appreciation of which may enable us to *understand* the basis of moral evaluation, is to contribute to betterment—or non-deterioration—of the human predicament, primarily and essentially by seeking to countervail 'limited sympathies' and their potentially most damaging effects." According to Warnock, becoming a moral person implies learning to resist and control one's always-present self-regarding tendencies. Morality's biggest enemy may be the pure egoist. But pure egoism is as rare as pure altruism. The average person has sympathy and concern, but only for a limited number of people—usually his or her family and friends. Therefore the proper business of morality is, in Warnock's view, "to expand our sympathies, or, better, to reduce the liability inherent in their natural tendency to be narrowly restricted."[2] Next to self-interestedness then, favouritism and partiality are on this view the most widespread moral problems.

Warnock speaks of expanding our sympathies. In his view, universal intent is a formal characteristic of morality. Moral rules are meant to guide and protect everybody. This is why his definition doesn't cover the moralities of human societies in which the moral community coincides with the social group. It is evident that within such a definition no system for the regulation of the social behaviour of a non-human species qualifies as a morality. A similar, but less restrictive functional definition is found in Jessica Flack and Frans de Waal. In their view human morality needs to take human nature into account either by fortifying certain natural tendencies—such as sympathy, reciprocity, loyalty to the group and family, and so on—or by countering other tendencies—such as within-group violence and cheating.[3] Flack and de Waal's definition can be broadened to cover animal morality, simply by skipping the adverb "human" in "human morality" and by substituting "human nature" for "animal nature." They themselves avoid speaking of animal morality. In their view, non-human primates have a *proto*-morality. Human moral systems, they say, rely on basic mental capacities and social tendencies that humans share with other co-operative primates, such as chimpanzees. That is why they regard it as justified to conclude that these other primates have a protomorality. Morality, however, also requires capacities that are present only in humans—such as a greater degree of rule internalization, a greater capacity to adopt the perspective of others, and the unique capacity to debate issues among themselves and transmit them verbally.

The broadest definition of the function of morality is given by Dale Peterson: "The function of morality, or the moral organ, is to negotiate the inherent conflict between self and others." This definition, he says, includes the possibility that at least mammals have moral systems homologous to ours.[4] Marc Bekoff and Jessica Pierce define morality as "a suite of interrelated other-regarding behaviors that cultivate and regulate complex interactions within social groups. These

behaviors relate to well-being and harm, and norms of right and wrong attach to many of them."[5] They rightly distinguish between prosociality and altruism on the one hand, and morality on the other. To have a morality, they say, a given species must meet certain threshold requirements. These thresholds are the following: a level of complexity in social organization, including established norms of behaviour to which attach strong emotional and cognitive cues about right and wrong; a certain neural complexity that serves as a foundation for moral emotions and for decision-making based on perceptions about the past and the future; relatively advanced cognitive capacities (such as a good memory); and a high level of behavioural flexibility. All moralities consist of well-developed systems of other-regarding prohibitions and proscriptions.[6] The set of actions that constitutes moral behaviours varies among species. So does the degree of moral complexity. Morality can be thought of as nested levels of increasing complexity and specificity. Bekoff and Pierce don't enumerate the animal species that meet the threshold requirements. What they do say is that animals with a highly developed moral capacity may include chimpanzees, wolves, elephants, and humans.[7] This is not an exhaustive list. The distinction between human morality and animal morality is for them quantitative rather than qualitative. Humans appear to have evolved an unusually high level of moral complexity.[8]

The definition I suggest combines elements of the definitions by Warnock, Flack & de Waal, Petersen, and Bekoff & Pierce:

> Morality cultivates and regulates social life within a group or community by providing rules (norms) that fortify natural tendencies that bind the members together—such as sympathy, (indirect) reciprocity, loyalty to the group and family, and so on—and which counter natural tendencies that frustrate and undermine cooperation—such as selfishness, within-group violence, and cheating.

This definition leaves open the question of whether animals can have a morality. What it does say is that the mechanism for the moral regulation of social behaviour is rules. A species can be said to have a morality only if its supposedly moral behaviour is rule-governed. With humans not all rules are moral rules. If we want to find out whether a rule that people follow is a moral rule we ask them— e.g., how they justify it and what their motives are for following the rule, how other people react when they violate the rule, and what kind of feelings they themselves have on such occasions. Scholars in animal behaviour must start with observing the behaviour, body language, and facial expressions of animals, and the sounds they produce. If they observe certain regularities in their social behaviour, the next thing they do is to examine whether the regularity is caused by following a rule. Even if they can prove that animals follow a rule, additional evidence is needed to establish that the rule is a moral one and that the animals who follow it generally have moral motives. However, direct proof is impossible. The usual approach of animal behavioural scientists is more indirect. They try to find out if an animal species possesses the capacities that are needed

for acting morally. If the answer is affirmative, they still have to show that an explanation of a certain behaviour in moral terms is the best one available. If we want to find out about the morality of another society, we usually start by looking for behaviour and practices that are similar to the behaviour and practices that fall within the scope of morality in our society. Scholars in animal behaviour do the same.

2. BEHAVIOURAL REGULARITIES, NORMS, AND MOTIVATION

Rules become visible in behavioural regularities, but not every behavioural regularity indicates the existence of a social rule. Habits are also behavioural regularities. For a group to have a habit, it is enough that the behaviour of most of its members on certain occasions in fact converges. This can be determined by observers from an external point of view, without recurring to the beliefs and attitudes of the group. Rules can guide behaviour in two ways: externally and internally. Rules govern behaviour externally when subjects conform to rules out of fear for sanctions. Rules govern behaviour internally when subjects have accepted and internalized rules. How can it be established that behavioural regularities result from internalized rules? According to the highly influential philosopher of law H. L. A. Hart, a common behavioural regularity must be explained by a rule (norm) if (1) deviation of the regularity elicits criticism, (2) the deviation is generally accepted as a good reason for criticism, and (3) the norm is seen as binding and obligatory. The third criterion requires that a subject accepts—and not just observes—a rule. This is what Hart means by taking "the internal point of view."[9]

I venture to say that the first and the third criteria are also useful for distinguishing norm-based behavioural regularities of animals from mere behavioural regularities such as habits. The second criterion is not relevant for that goal, since reasons for criticism can only be expressed in language. Criticism itself, however, can also be expressed in non-verbal form. Even humans use non-linguistic means to show their disapproval of a certain behaviour. They express it by gestures, facial expressions, and sounds, which are means of communication also available to animals. While the first criterion points to reactions of group members to norm transgression, the third criterion refers to the attitude of the agent toward the norm. When an agent only follows rules out of fear for sanctions, they are not binding and obligatory for him or her.

Hart's third criterion for distinguishing a statistical behavioural regularity from a rule-based one is the presence of the internal point of view. The internal point of view with regard to norms or rules is the point of view taken by someone who has internalized the norm, or, in more technical terms, who has the practical attitude of norm-acceptance. Someone who has internalized a norm is motivated by a felt obligation.

In the next section I discuss whether some animal species can be said to follow social rules or norms (Hart's modified first criterion). Section 4 deals with norm internalization (Hart's third criterion).

3. SOCIAL NORMS IN ANIMALS

In their article "Evolutionary precursors of social norms in chimpanzees," Claudia Rudolf von Rohr, Judith Burkart, and Carel van Schaik develop a theoretical framework for recognizing different functional levels of social norms and distinguishing them from mere statistical regularities.[10] They define social norms as behavioural regularities that are normative to a varying degree and generate social expectations. These expectations do not have to be experienced consciously. Their satisfaction or violation might, according to von Rohr et al., produce distinct reactions observable from the outside. Since meeting expectations is the normal situation, no reactions have to follow. But when a certain behaviour violates expectations, nearly always negative reactions ensue. Most important are the negative reactions by uninvolved bystanders.[11] Von Rohr et al. distinguish three types of negative reactions from bystanders on the violation of three different types of norms: 1) *Quasi social norms*. The negative reactions might simply be caused by specific cues. For example, when an infant is attacked and screams, bystanders flow to the scene and harass the perpetrator. This type of bystander reaction does not reflect violated social expectations, and most likely does not involve emotions such as indignation towards the perpetrator. Bystanders in this category probably do not possess any specific inference about how the distress of an infant and the behaviour of the perpetrator are linked together and thus are not able to perceive harming an infant as norm violation per se. Their reaction is a response to the stimulus of hearing the child scream.[12] 2) *Protosocial norms.* If bystander reactions cannot be explained by simple stimulus-response mechanisms, it might be that they are responding to norm violation as such. In this case, bystander reactions might also involve emotions comparable to indignation in humans. Bystander reactions to norm violation per se require the capacity to exhibit some empathetic competence because only this would enable bystanders to understand to some extent the distress of the mistreated infant , and also its cause. Von Rohr et al. assume that apes but not monkeys have empathetic competence, because monkeys seem to lack the capacity to attribute mental states to others.[13] 3) *Collective social norm.* Humans are endowed with sophisticated empathetic and cognitive abilities, which enable them to grasp the full extent and far-reaching consequences of mistreating children. Moreover, they are able to reason that infants are completely defenceless and therefore highly vulnerable creatures.[14] An important difference between the reactions of chimpanzees and those of humans to norm violation is that chimpanzees might experience indignation in a fairly individualistic way, while humans are able to share their feelings of indignation. Referring to Tomasello and Carpenter,[15] von Rohr et al. state that, by analogy with shared intentionality, shared indignation goes beyond simultaneous experience by different individuals and includes the awareness of a collective experience,that may lead to collective protest against, and condemnation of, the violator. This exemplifies the collective nature of a social norm.

Negative reactions by non-involved bystanders to the deviation from a socially expected behavioural regularity, accompanied by feelings comparable to human

indignation, indicate that a social norm lies at the base of the behavioural regularity. According to von Rohr et al., this kind of negative reaction requires the capacity to exhibit some empathetic competence, a capacity which is, according to them, present in apes such as chimpanzees, and not in monkeys and other species that lack the capacity to attribute mental states to others.[16] They conclude that norms might play a role in guiding the behaviour of chimpanzees, but that these norms are not collective social norms but protosocial norms. Since, in their view, moral norms are collective social norms, the conclusion must be that only humans have a morality.

Although I am inclined to accept that only humans are capable of shared indignation, I am not convinced that shared indignation marks the violation of the kind of social norms we call moral norms. An important step in their argument is the distinction that von Rohr et al. make between personal norms and social norms. A personal norm refers to a personal expectation about how an individual wants to be treated. Personal norms are precursors of social norms because it seems implausible that one would form expectations about how others should be treated before forming expectations about how one wants to be treated oneself. Moral behaviour, they say, starts when personal expectations are generalized and extended to others. It seems that they call norms 'personal' if violation of a norm elicits a negative reaction only from the individual that is negatively affected. I find this concept of a personal norm implausible. If I punish my neighbour when he does not bow to me, because I personally expect that younger persons should bow to older ones, this clearly is a personal norm—provided that I myself also bow to older persons. Nobody else punishes youngsters who do not bow to older persons. The norm is personal because it is not shared by others. Suppose I am talking to some neighbours at the back of my house, when I see a stranger climbing over my fence. I get angry at that person and shout that he has no right to enter my garden without my consent. Although I am the only one who starts shouting, my neighbors—tacitly—approve of my reaction and would do the same if someone climbed over their fence. In the view of von Rohr et al., the norm that one should not climb over a fence protecting another person's house is a personal norm. I disagree. I consider it to be a shared, social norm because all individuals in my group would react negatively when the violation of a norm directly affects them—that is, when someone climbs over their fence. According to von Rohr et al., a norm can be called a social, collective norm only if the indignation about violating that norm in a group is not just simultaneously, but collectively experienced. Thus, the norm forbidding climbing over the fence can only be said to be social if it can be established that my neighbours collectively experience disapproval. How can that be established? Does it suffice that they declare that they share my indignation? Shared indignation among animals cannot be determined by asking them. It can be established only if it results in collective protest against, and condemnation of, the violator. However, von Rohr et al. state that collective experience *may* lead to collective protest. In the absence of clear behavioural expressions it is impossible to prove the presence of collective experience. When von Rohr et al. say, "It is this collectivity upon which the viability and the enforceability of a social

norm ultimately rests on and which on current evidence appears to be absent in chimpanzees," it remains unclear what kind of evidence they have in mind.[17] All in all, serious doubts about their conception of a collective social norm are possible. Their argument does not force them to conclude that only humans can have a morality.

4. INTERNALIZATION OF NORMS

Hart's third criterion for distinguishing a statistical behavioural regularity from a rule-based one, as we have seen, is the presence of the internal point of view, the point of view taken by someone who has internalized the norm. Humans are capable of internal guidance by norms. Are animals also capable of internalizing these rules or is their following of rules based only on fear of sanctions? In his paper "Normative Guidance," Peter Railton explores central features of normative guidance, the mental states that underlie it, and its relation to our reasons for feeling and acting, using fictive examples describing everyday activities involving all sorts of norms.[18] He develops in several steps what he calls "a partial largely functional characterization of conditions a piece of behavior must meet to be norm-guided." This characterization applies to all norm-guided behaviour, not only to behaviour guided by moral norms. I jump over these steps, and go right to the last formulation he gives, which I adapt—in his spirit—because I am here only interested in moral norms:

> Agent *A*'s conduct *C* is guided by norm *N* only if 1) *C* is the manifestation of *A*'s disposition to act in a way conducive to compliance with *N*, so that 2) *N* plays a regulative role in *A*'s *C-ing,* where this involves some disposition on *A'*s part 3) to notice failures to comply with *N*, 4) to feel shame or guilt[19] when this occurs, and 5) to exert effort to comply with *N* even when the departure from *N* is unsanctioned and non-consequential.

Condition 1—the disposition to act in a way conducive to compliance with *N*—expresses that "To be norm-guided is a matter of how one is disposed to think, act, and feel, not simply of how one sees oneself, or would like to." Condition 2—*N* plays a regulative role in *A*'s *C-ing*—says that reference to *N* must be a necessary part of the explanation of A's behaviour. Condition 3—the disposition to notice failures to comply with *N*—refers to the fact that A must monitor his or her behaviour because compliance with *N* matters to him or her. That it matters to him explains why he or she takes pains to comply with the norm even if non-compliance doesn't cause a disadvantage to him or her and goes unnoticed by other people (condition 5). The sanctions are internal: feelings of shame and guilt (condition 4).

Railton is not satisfied with a functional characterization of conditions that a certain piece of behaviour must meet to be norm-guided, and goes on to to explore the distinctive role of norm-guidance in an agent's psychology. He wants to know what mental acts or states of mind give a norm this sort of role in one's

life. He reviews several candidates that are discussed in recent philosophical literature: acceptance of norms, endorsement of norms, and identifications with norms. None of these attitudes accounts for the role of norms in shaping our lived world and contributing to the reasons for which we act:

> Humble *internalization* of norms without the self's permission, approval, or identification, like humble acquisition of beliefs without the benefit of judgement or reflection, provides much of our substance as agents. And the critical assessment and revision of norms that saves us from mere conformity and inertia, like the critical assessment and revision of what we believe, proceeds more often by trial-and-error feedback and unselfconscious readjustment over the course of experience than by spontaneous higher-order acts of endorsement or self-definition.[20]

To this he adds that these higher-order acts do play a crucial role in making us candidates for moral agency and moral accomplishment. The distinction between humble internalization of norms and higher-order acts of endorsement or self-definition is important for our subject. "Humble internalization" might be the right term to describe the way that animals can be said to possess norms that guide their behaviour. According to Flack & De Waal, one of the distinctive characteristics of humans is that they have a greater degree of norm internalization than non-human primates.[21] They think that this capacity is required for having a morality. They do not explain what this greater degree of norm internalization consists in. Following Railton, we can now interpret them as saying that humans, in contradistinction to animals, are capable of endorsing norms and of self-identifying with norms. By speaking of humans having a greater degree of norm identification, Flack & De Waal suggest that some degree of norm identification is required for having a protomorality. Railton would qualify that as a humble internalization of norms.

In the previous sections, I argued that some animal species follow rules (norms), and that these rules are not external, but, as Railton calls them, humbly internalized. I didn't discuss whether these species are following *moral* rules. In section 5, I examine if animals have the capacities for moral behaviour. Section 6 discusses whether animals can be morally motivated.

5. EMPATHY, CONCERN FOR OTHERS, AND HELPING BEHAVIOUR

Many specialists in animal behaviour suggest that the basic moral competences or capacities are already present in nonhuman primates. One of these competences or capacities is empathy. Bekoff and Pierce even call empathy the cornerstone of what in human society is called morality.[22] As is well-known from the literature in developmental psychology, empathy is not a single behaviour.[23] There is a whole class of behavioural patterns with varying degrees of complexity.[24] Empathy occurs in nested levels, with the inner core as a necessary foundation for the other layers. The simplest forms of empathy are body mimicry

and emotional contagion—largely automatic physiological responses. The next layer consists of somewhat more complex behaviours such as emotional empathy and targeted helping. Empathy of the two lowest levels can be found, for example, in mice. More complex is cognitive empathy, the capacity to feel another's emotion and to understand the reasons for it. Cognitive empathy appears to emerge developmentally and phylogenetically with other markers of mind, including perspective taking (PT), mirror self-recognition (MSR), deception, and tool use.[25] According to Preston and de Waal, cognitive empathy may be found in a wider range of species, in the hominoid primates and perhaps elephants, social carnivores, and cetaceans (whales, dolphins, and porpoises). Most complex is the capacity of attribution, in which an individual can take the other's perspective, which requires the use of imagination. According to Koski and Sterck, chimpanzees' capacities to understand others' emotional states operate at the level of what Hoffman calls 'quasi-egocentric empathy'—a complete separation between one's own distress and that of the other has not yet been established.[26] Chimpanzees would also be able to show initial other-regard. There is some evidence, for instance, that chimpanzees can attribute goals.[27] Research also suggests that non-human primates are sensitive to a conspecific's distress signals.[28]

More insight in the role of empathy and concern for the distress of others in human morality is provided by Shaun Nichols.[29] He examined the moral capacities of very young children. Nichols builds on the distinction made by Turiel and his colleagues between conventional and moral rules.[30] Turiel and colleagues contend that moral persons distinguish themselves by regarding the violation of moral rules as special along what they call the dimensions of seriousness, wide applicability, authority, independence, and justification. Violation of moral rules is above all serious when it causes harm to other people. Although the domain of morality is probably wider than that of harm-based violations, Nichols assumes that rules whose violation brings about harm constitute the core of morality. The capacity to see harm-based violations as very serious, generalizable, authority-independent, and wrong, because of well-being considerations, appears, according to Nichols, early in children's ontogenetic development—before their third year—and seems to be cross-culturally universal. Nichols calls this capacity the capacity for Core Moral Judgment (CMJ). CMJ depends on two mechanisms: a normative theory prohibiting harming others and a basic altruistic motivation that is activated by representing suffering in others. In referring to the studies of psychologist Robert Blair,[31] Nichols contends that psychopaths, known to be deficient in affective response to the distress of others, do have a normative theory prohibiting harming others. A striking feature of psychopaths is that they provide conventional-type justifications for why violating moral rules is wrong, rather than offering justifications in terms of harm suffered by the victim. This leads Nichols to the conclusion that the normative theory is at least dissociable from the affective system. As far as I understand, a normative theory is for Nichols simply a system of norms.

Nichols wants to know the cognitive and affective mechanisms underlying altruistic motivation. He argues that altruistic motivation depends on the minimal mind-reading (or empathic) capacity for an enduring representation of pain or some other negative affective or hedonic states in others. Thus, according to Nichols, altruistic motivation does not depend on sophisticated mind-reading capacities. How can attributing distress to others lead to altruistic motivation? Nichols assumes that the altruistic motivation is mediated by an affective response. He gives two accounts of this affect. The available evidence does not weigh in favour of either of these two accounts. The first account is that there is a distinctive basic emotion of sympathy. The other is that distress attribution might produce a kind of second-order contagious distress in the subject. Representing the sorrow of another person may lead one to feel sorrow. This would produce an empathic response—to help, for example. Nichols suggests that perhaps both affective mechanisms are operative. He introduces an overarching term for these two affective mechanisms: Concern Mechanism. Neither reactive distress nor concern require, according to Nichols, sophisticated mind-reading abilities.

Can we extend conclusions from Nichols's findings on the moral capacities of very young children to the moral capacities of animals? Although Nichols doesn't discuss the moral capacities of animals, he thinks it possible that at least some nonhuman animals have the minimal mind-reading capacity to attribute distress to another.[32] He notes that it is unclear from the available data which mechanism is operative in nonhuman primates—whether it is a form of concern or reactive distress.[33] As we have seen above, eminent scholars of animal behaviour think that at least some animals are able to attribute distress to others. However, they disagree whether this mind-reading capacity is required for following norms. Kristen Andrews, for example, argues that animals such as chimpanzees are capable of following norms and punishing violations *without* mind-reading.[34] She thinks that norms can exist prior to understanding others' beliefs and pro-attitudes. Andrews doesn't distinguish between moral norms and other norms. She just assumes that moral norms are among the norms that can be understood without a theory of mind.[35] Although Andrews may be right that norms in animal behaviour can be understood without a theory of mind, I doubt that the same applies to moral norms. In Nichols's theory, the capacity to attribute distress and to be motivated by the perception of distress is central to the moral capacities of very young children and, possibly, also to those of nonhuman primates. Maybe mind reading is not required for following norms, but it might be required for following *moral* norms.

6. MORAL SUBJECTHOOD AND MORAL MOTIVATION

In the previous sections, I made an attempt to clarify that the behaviour of at least some animal species is guided by a morality. In the previous section, I argued that it is possible to assume that at least some nonhuman animals possess basic moral competences and capacities. In section 4, I examined how norms can be present in the minds of animals and how they can guide animal behaviour. This section discusses whether animals can have agency.

In section 4, I referred to Railton's account of the distinctive role of norm guidance in an agent's psychology. However, his statements on guidance by norms and agency seem to be contradictory. First, he says that humble internalization of norms provides much of our substance as agents. Later on, he states that higher-order acts of endorsement of norms and self-definition make us candidates for agency and moral accomplishment. It is not clear whether or not Railton would call norm-following animals "agents." For many of those who keep animals, work with them, or study them, it is quite obvious that animals of many species have agency. To quote the historian Jason Hribal:

> Faking ignorance, rejection of commands, the slowdown, foot-dragging, no work without adequate food, refusal to work in the heat of the day, taking breaks without permission, rejection of overtime, vocal complaints, open pilfering, secret pilfering, rebuffing new tasks, false compliance, breaking equipment, escape, and direct confrontation, these are all actions of what the anthropologist James C. Scott has termed 'weapons of the weak'.[36] Hence, while rarely organized in their conception or performance, these actions were nevertheless quite active in their confrontation and occasionally successful in their desired effects.[37]

Is it really justified to interpret the behaviour of these animals, like Hribal does, as "*acts* of resistance"? Donald Davidson would probably admit that we often succeed in explaining, and sometimes predicting, the behaviour of non-linguistic animals by attributing beliefs and desires and intentions to them.[38] This method, Davidson says, works for dogs and frogs, much as it does for people. Moreover, we have no practical alternative framework for explaining animal behaviour. Davidson thinks that we are justified in applying this method, provided that we acknowledge that we are applying a pattern of explanation that is "far stronger than the observed behavior requires, and to which the observed behavior is not subtle enough to give point."[39] Contrary to humans, dogs and frogs are not rational, and they have no intentional agency. In his view, intentional agency is connected to the capacity to have propositional attitudes—beliefs, intentions, and desires—and to attribute them to others. And this capacity requires language. This is a highly distinctive concept of agency, but is it the only one? Referring to studies of developmental psychologists, Helen Steward states that there is much evidence supporting the view that a basic conception of purposive agency is in place, prior to the emergence of full-scale propositional attitude psychology. In her view, propositional-attitude psychology is a rather sophisticated outgrowth of the basic concept of agency—an outgrowth that is particularly suited to enable us to deal with our human conspecifics. The concept of agent is a more general and less demanding notion.[40]

According to Nichols, very young children are moral before they are capable of having propositional attitudes and ascribing them to others—that is, prior to their having full agency. Being moral doesn't require full agency, only agency in

Steward's less demanding sense. This is also the view of Bekoff and Pierce.[41] They argue that humans are not the only moral beings; at least some animal species also have a morality. [42] Bekoff and Pierce accept what they regard as the philosophical implications of their position: one cannot argue that animals have a morality while denying that they have agency. To that they add that nonhuman animals are not moral agents *in the same sense* in which most adult humans are. Moral agency is species-specific and context-specific; animals are moral agents *within the limited context of their own community*.[43] Unfortunately, Bekoff and Pierce do not tell us what their conception of animal agency is. To say that moral animals are not moral agents in the same sense as human adults is not very informative. Neither do they discuss whether animal agency implies that moral animals are responsible for their behaviour. Adherents of the Davidsonian conception might take the stance that responsibility requires what Steward terms *full agency*: the ability to have and attribute propositional attitudes. Animals clearly lack that ability. But how should we conceive of moral animals if they are not agents? What is the mechanism that makes them act morally when this cannot be explained by referring to the 'mechanism' of reflective capacities?

Mark Rowlands argues in his book *Can Animals Be Moral?* that animals can be morally motivated although they lack moral agency. Moral animals are moral *subjects*:

> X is a moral *subject* if and only if X is, at least sometimes, motivated to act by moral considerations.[44]

The notion of a moral subject has, according to Rowlands, almost invariably conflated with that of a moral *agent*:

> X is a moral *agent* if and only if X is (a) morally responsible for, and so can be (b) morally evaluated (praised or blamed, broadly understood) for, its motives and actions.[45]

In Rowlands's view, moral agency and moral subjecthood should be as conceptually distinct as the concept of motivation is distinct from the concept of evaluation. The main issue that troubles him in his book is that there are persuasive reasons to think that the distinction between motivation and evaluation is not applicable in the moral case.[46] The standard view, Rowlands says, is that an individual's action can only be morally motivated if he or she is conscious of the motivating reason and has control over it.[47] In this view, an individual can only be said to act morally if he or she is not only doing the right thing, but also for the right reason. If the standard view is correct, the distinction between a moral subject and a moral agent collapses. Moral agency is then a condition for moral subjecthood. To have moral normativity, a reason must be under the control of the acting individual. Rowlands sets himself to the task of showing that this concept of control is empty. He builds his argument by introducing the figure of an individual whom he calls "Myshkin"—after the prince in Dostoyevsky's *The Idiot*:

> Prima facie, Myshkin has the soul of a prince. Throughout his life he performs many acts that seem, to the impartial bystander, to be kind or compassionate. Moreover, he performs these acts because he is the subject of sentiments that—again, at least prima facie—seem to be kind or compassionate ones. When he sees another suffering, he feels sad and compelled to act to end or ameliorate that suffering. When he sees another happy, he feels happy because of what he sees. If he can help an individual get what he or she wants without hurting anyone else, he will help because he finds that he enjoys doing it. In short, Myshkin deplores the suffering of others and rejoices in their happiness. His actions reflect, and are caused by, these sentiments. Thus, Myshkin is, or at least seems to be, motivated by sentiments where these are understood as states individuated by their content. …What Myshkin does not do, however, is subject his sentiments and actions to critical moral scrutiny. Thus, he does not ever think to himself things like: "Is what I am feeling the right feeling in the current situation—that is, is what I am feeling what I *should* be feeling?" Nor does he think to himself things like: "Is what I propose to do in this circumstance the (morally) correct thing to do (all things considered)?."[48]

Rowlands does not think that Myshkin is incapable of reflection, but he supposes that his dealings with others operate on a more visceral level. This is the picture that Rowland gives us of Myshkin:

> (1) Myshkin performs actions that seem to be morally good, (2) Myshkin's motivation for performing these actions consists in feelings or sentiments that seem to be morally good, (3) Myshkin is able to subject neither the actions nor the sentiments to critical scrutiny.[49]

Since Myshkin does not reflect on his motivations, and is thus unable to articulate his reasons for action, we cannot know whether he is doing the right thing for the right reason. According to the standard view, we should thus conclude that Myshkin does not act morally. As a part of his attempt to avoid this conclusion, Rowlands introduces the figure of Marlow.[50] Marlow is a moral agent who understands his actions and their consequences. He has both knowledge that a given course of actions is wrong, and also why it is wrong. Marlow has access to the operations of his moral module, and is capable of critically evaluating his motivations. He is an ideal spectator and adjudicator of moral matters. Being a moral agent, Marlow is responsible for what he does and is a legitimate target of moral praise and blame. Suppose, says Rowlands, that Marlow arrives at the conclusion that the sentiments that drive Myshkin's actions are the morally correct ones, and that his actions are the morally right ones. The implication is that we don't have to continue saying that Myshkin *seems* to act morally good and *seems* to have the morally correct sentiments. Would we then still say that Myshkin does not act morally? It still could be that Myshkin's action is accidently morally right and morally correctly motivated. Rowlands's answer is that Myshkin is motivated by moral reasons that are internal, but not available to his conscious, rational scrutiny. They are embodied in his nonconscious, subper-

sonal processing operations that are cognitively impenetrable, which means that the operations of the moral module cannot be penetrated by, and so are not available to, subsequent belief- and concept-forming operations.[50] In the traditional view, motivating moral reasons must be not only internal, but also under the subject's control. Rowlands's solution—which I will not reconstruct in detail for reasons of space—is to provide us with an alternative account of agency that relies not on the concept of control, but on that of understanding. Marlow, who has knowledge that a given course of actions is wrong, and also knowledge of why it is wrong, and who is capable of critically evaluating his motivations and the principles underlying his actions, has a level of understanding of actions that moral animals are lacking: "What demarcates moral subjects from moral agents, it seems, is a kind of level of understanding."[52]

Rowlands's view that (animal) moral behaviour can be motivated by reasons resulting from unconscious, automatic processes finds support in present-day cognitive science and social psychology. Most psychologists nowadays agree that there are two types of cognitive processes or reasoning systems. Roughly, one system is associative and its computations reflect similarity and temporal structure; the other system is symbolic, and its computations reflect a rule structure.[53] Stanovich and West labeled these systems or types of processes "System I" and "System II."[54] There is now considerable agreement on the characteristics that distinguish the two systems. The operations of System I are fast, automatic, effortless, associative, and difficult to control or to modify. System I is cognitively impenetrable. The operations of System II are slower, serial, effortful, and deliberately controlled; they are also relatively flexible and potentially rule governed. The perceptual system and the intuitive operations of System I generate *impressions* of the attribute of objects of perception and thought. System II is uniquely human. Recent studies show that most of human judgments are not simply the outcome of conscious—System II—reasoning. To a large extent, they are intuitive and automatic—System I—responses to challenges, elicited without awareness of underlying mental processes.[55]

Automaticity is responsible for a large part of our judgments as well as for that part of our behaviour that we characterize as habitual. Habitual moral behaviour engages only System I processes. So does animal morality. It seems plausible to assume that habitual human morality, making use only of System I processes, guides human behaviour in the same manner as animal morality guides animal behaviour.[56] If we think that moral animals, not being agents, cannot held responsible for their automatic and unconscious morally (in)correct behaviour, what does that imply for the responsibility humans can be said to have for their automatic and unconscious moral behaviour? Reversely, if humans are held responsible for their habitual moral behaviour, why not moral animals?

7. RESPONSIBILITY AND HABITUAL BEHAVIOUR

This leads us to the question of what the conditions are for attributing responsibility to an individual for his or here behaviour. One of the most influential theories of responsibility is that of John Martin Fischer and Mark Ravizza.[57] Fischer & Ravizza explain responsibility in terms of (moderate) reasons-responsiveness. For them, responsibility involves a kind of control (guidance control) and this control does not require alternative possibilities (regulative control). Someone "exhibits guidance control of an action insofar as the mechanism that actually issues in the action is his own, reasons-responsive mechanism."[58] Guidance control requires that the actual mechanism be such that it would respond differently in the presence of different reasons.

What do Fischer & Ravizza mean by reasons responsiveness? The distinction between reason tracking and reason responding might be helpful here.[59] Creatures, says Karen Jones, might track reasons and respond to reasons. Reason trackers are capable of registering reasons and behaving in accordance with them. They need not possess the concept of a reason or a self-concept. Nonhuman animals may be seen as reason trackers. When a bird flees after hearing the warning signal of a member of its species, it registers a reason to flee and behaves accordingly. Jones assigns the function of tracking reasons to emotions and the affective systems. It is the intuitive system that tracks reasons. Contrary to reason trackers, reason responders are capable of deliberative reasoning. They can guide their actions via reasons understood as reasons. According to Jones, persons are both reason trackers and reason responders.

Fischer & Ravizza state that *moral* responsibility ought to be characterized not merely as a responsiveness to reasons, but rather as a responsiveness to a range of reasons that include *moral* reasons.[60] Young children act often on processes of thought that are reasons responsive, insofar as their ability to reason practically would have led them to do otherwise in response to some other sufficient reason to do otherwise (e.g., a threat of punishment). Still, we usually do not hold children *morally* accountable because they lack the ability to grasp and respond to specifically *moral* reasons.[61]

(Moral) reasons-responsiveness requires conscious, practical deliberation. If being able to engage in practical deliberation is a condition for attributing responsibility, animals cannot be held responsible for their behaviour since this abilityis clearly absent in all non-linguistic animals. However, Fischer & Ravizza distinguish between two reasons-responsive mechanisms: practical reason and non-deliberative habit. Non-deliberative, habitual actions are also reasons responsive. Reflection and deliberation are, they say, not the only reasons-responsive mechanisms.[62] If they are right, we still have guidance control over habitual actions. How should we conceive this guidance control?

Before going into this question, I need to clarify the concept of habitual action. According to psychologists, habits are represented in memory as direct context-

response associations that develop from repeated co-activation of the context and response. These responses are not mediated by representations of goals.[63] However, goals can guide habits by providing the initial outcome-oriented impetus for response repetition. These habits are often a vestige of past goal pursuit. Goals might direct habit learning when people repeatedly implement goals to respond to a particular context cue (e.g. skill learning) as well as when they repeatedly implement goals to respond that do not specify contexts (e.g., implicit learning).[64] When we deliberate, says Bill Pollard, we have direct control over our actions. The kind of control we have over habitual actions is indirect. We have the capacity to intervene in our habitual behaviour:

> Since there was a time when we didn't do such things, it will normally still be possible for us to refrain from doing them in particular cases (though perhaps not in general). We intervene by doing something else, or nothing at all, either during the behavior, or by anticipating before we begin it. In this way habitual behaviors contrast with other automatic, repeated behaviors such as reflexes, the digestion, and even some addictions and phobias in which we cannot always intervene, though we may have very good reason to do so.[65]

Pollard calls this kind of control "intervention control." In Pollard's view, having intervention control over a piece of behaviour is sufficient for someone to be responsible for that behaviour. Humans intervene in their habitual behaviour if they have reasons to do so. These reasons may be external or internal. An external reason is, for example, a prohibition by a superior entity, or a request by someone who is annoyed by that habit. An internal reason is, for example, the insight that the reason underlying the habit is no longer valid. Imagine John, who, having discovered a quicker route to his place of work, invariably goes that way. This route is so ingrained in his habits that he sometimes even takes it when, on his way to some other destination, he is deep in thought. At a party at his children's school, he meets Gerard, who works in an office in the vicinity of his work. Gerard knows a still faster route. If John decides to adapt his usual route, he shows intervention control. The talk with Gerard made him reflect on his habitual route. The reason behind taking the old route—that it is the fastest one—is no longer valid.

In the language of psychologists, Pollard says that new information might lead an individual to re-represent the goals that initially provided the outcome-oriented impetus for the repetitive behaviour. However, habits tend to persist, even when they no longer align with the initial goals. Suppose that Myshkin, compassionate as he is, has a habit of giving generous alms to beggars. He learns that beggar Pjotr has gained a small fortune by means of his begging activities. Pjotr repeatedly succeeds in getting alms from the same people by disguising himself in different guises. No recognizable human being, even someone whose actions are usually automatic and habitual, would in the long run continue giving alms to a beggar once becoming aware of the fact that the beggar is far from

poor. He will, perhaps slowly, realize that the reason underlying his alms-giving habit doesn't apply to this beggar. However, Rowlands's unreflective Myshkin would go on giving Pjotr alms because the image of a begging Pjotr still provides the cues that trigger his habit of giving alms. Unreflective Myshkin lacks the capacities for deliberate intervening.

Animals are capable of inhibiting habitual behaviour, which depends on having the ability of self-control.[66] However, the kind of intervention that Pollard has in mind is deliberate, reasons-based intervention. Self-control may also be a necessary condition for deliberate intervention, but certainly not a sufficient one. Having the ability to reflect is a necessary condition for *deliberate* intervention in habitual behaviour. Lacking that ability, moral animals are unable to intervene deliberately in their habitual behaviour. Therefore, the conclusion that even moral animals are not morally responsible for their behaviour is unavoidable.

CONCLUSION

The aim of this article was to examine if we can attribute moral responsibility to animals. The intuitive answer of most people will be that we cannot do so. However, many people also find that no animal species can have a morality. Given that this belief is highly contested, there is also reason to take a fresh look at the issue of animal responsibility. This is what I attempted to do in this article. Although the final answer is still the same—we cannot hold animals responsible for what they do—it became clear on our way to that answer that many still widely shared beliefs about animals have to be revised: some animal species do have a morality, and these species' members are capable of being motivated by moral reasons. I am convinced that these revised beliefs also affect our view on the moral status of moral animals, but I have to leave this issue for another occasion.

NOTES

[1] Singer, Peter, *Animal Liberation,* New York, Random House, 1975.
[2] Warnock, Geoffrey J., *The object of morality.* London, Methuen, 1971, p. 26.
[3] Flack, Jessica C. and Frans de Waal, "'Any Animal Whatever'. Darwinian Building Blocks of Morality in Monkeys and Apes," *Journal of Consciousness Studies*, vol. 7, no. 1-2, 2002, p. 23.
[4] Peterson, Dale, *The Moral Lives of Animals*, New York, Bloomsbury Press, 2011, p. 58.
[5] Bekoff, Mark and Jessica Pierce, *Wild Justice. The Moral Lives of Animals,* Chicago/London, The University of Chicago Press, 2009, p. 7.
[6] *Ibid.*, p. 13.
[7] *Ibid.*, p. 20.
[8] *Ibid.*, p. 139.
[9] Hart, Herbert L. A., *The Concept of Law,* Oxford, Oxford University Press, 1961, p. 153.
[10] Von Rohr, Claudia R., Judith M. Burkart and Carel P. Van Schaik, "Evolutionary Precursors of Social Norms in Chimpanzees: A New Approach," *Biology and Philosophy*, vol. 26, no. 1, 2011, pp. 1-30.
[11] *Ibid.*, p. 3ff.
[12] *Ibid.*, p. 16.
[13] *Ibid.*, p. 16.
[14] *Ibid.*, p. 17.
[15] Tomasello, Michael and Malinda Carpenter, "Shared Intentionality," *Development Science*, vol. 10, no. 1, 2007, pp. 121-125.
[16] Tomasello, Michael and Josep Call, *Primate Cognition,* New York, Oxford University Press, 1997.
[17] Von Rohr et al., "Evolutionary Precursors of Social Norms in Chimpanzees: A New Approach," *op. cit.*, p. 18.
[18] Railton, Peter, "Normative Guidance," *in* Russ Shafer-Landau (ed.), *Oxford Studies in Metaethics*, Volume 1, Oxford, Oxford University Press, 2006, pp. 3-35.
[19] Railton speaks here of discomfort, not of shame and guilt, which are more specific moral feelings.
[20] Railton, "Normative Guidance," *op. cit.*, p. 31f.
[21] Flack and De Waal, "'Any Animal Whatever'. Darwinian Building Blocks of Morality in Monkeys and Apes," *op. cit.*.
[22] Bekoff and Pierce, *Wild Justice, op. cit.*, p. 87.
[23] See Eisenberg, Nancy, "Emotion, Regulation, and Moral Development," *Annual Review of Psychology*, vol. 51, no. 1, 2000, pp. 665-697; Hoffman, Martin L., *Empathy and Moral Development: Implications for Caring and Justice,* Cambridge, Cambridge University Press, 2000.
[24] See Preston, Stephanie D. and Frans De Waal, "Empathy. Its Ultimate and Proximate Bases," *Behavioural & Brain Sciences*, vol. 25, no. 1, 2002, pp. 1-20; Bekoff and Pierce, *Wild Justice, op. cit.*.
[25] Preston and De Waal, "Empathy. Its Ultimate and Proximate Bases" *op. cit.*.
[26] Koski Sonja Elena and Elizabeth H. M. Sterck, "Empathetic Chimpanzees. A Proposal of the Levels of Emotional and Cognitive Processing in Chimpanzee Empathy," *European Journal for Development Psychology*, vol. 7, no. 1, 2009, pp. 38-66.
[27] See Premack, David and Guy Woodruff, "Does the Chimpanzee Have a Theory of Mind?," *Behavioral and Brain Sciences*, vol. 1, no. 4, 1978, pp. 516-526; Call, Josep and Michael Tomasello, "Distinguishing Intentional from Accidental Actions in Orangutans, Chimpanzees, and Human Children," *Journal of Comparative Psychology*, vol. 112, no. 2, 1998, pp. 192-206.

[28] E.g., Miller, Robert, James Banks and Nobuya Ogawa, "Role of Facial Expression in 'Cooperative-Avoidance Conditioning' in Monkeys," *Journal of Abnormal and Social Psychology*, vol. 67, no. 1, 1963, pp. 24-30.

[29] Nichols, Shaun, *The Sentimental Rules,* Oxford, Oxford University Press, 2004.

[30] Turiel, Elliot, *The Development of Social Knowledge: Morality and Convention,* Cambridge, Cambridge University Press, 1983; Turiel, Elliot, Melanie Killen and Charles Helwig, "Morality: Its Structure, Functions, and Vagaries," *in* Jerome Kagan and Sharon Lamb (eds), *The Emergence of Morality in Young Children,* Chicago, University of Chicago Press, 1987, pp. 155-244.

[31] Blair, R. James R., "Cognitive Developmental Approach to Morality: Investigating the Psychopath," *Cognition*, vol. 57, no. 1, 1995, pp. 1-39; Blair, R. James R., "Moral Reasoning and the Child with Psychopathic Tendencies," *Personality and Individual Differences,* vol. 22, no. 5, 1997, pp. 731-739.

[32] Nichols, *The Sentimental Rules, op. cit.*, p. 60.

[33] *Ibid.*, p. 61.

[34] Andrews, Kristin, "Understanding Norms without a Theory of Mind," *Inquiry*, vol. 52, no. 5, 2009, pp. 433-448.

[35] *Ibid.*, p. 446.

[36] Scott, James C., *Weapons of the Weak. Everyday Forms of Peasant Resistance,* New Haven, Yale University Press, 1987.

[37] Hribal, Jason C., "Animals, Agency, and Class: Writing the History of Animals from Below," *Human Ecology Forum*, vol. 14, no. 1, 2007, p. 103.

[38] Davidson, Donald, "Rational Animals," *Dialectica*, vol. 36, no. 4, 1982, pp. 317-327.

[39] *Ibid.*, p. 32.

[40] Steward, Helen, "Animal Agency", *Inquiry*, vol. 52, no. 3, 2009, pp. 217-231.
This is Steward's concept of agency:
(i) an agent can move the whole, or at least some parts, of something we are inclined to think of as *its* body;
(ii) an agent is a centre of some form of subjectivity;
(iii) an agent is something to which at least some rudimentary types of intentional state (e.g., trying, wanting, perceiving) may be properly attributed;
(iv) An agent is a *settler* of matters concerning certain of the movements of its own body i.e. the actions by means of which those movements are effected are considered to be non-necessitated events, attributed always first and foremost to the *agent,* and only secondarily to environmental impacts or triggers of any sort. (Steward, "Animal Agency", p. 226).

[41] Bekoff and Pierce, *Wild Justice*, *op. cit.*.

[42] Bekoff and Pierce argue that to have a morality, a given species must meet certain threshold requirements. These thresholds are the following: a level of complexity in social organization, including established norms of behaviour to which attach strong emotional and cognitive cues about right and wrong; a certain neural complexity that serves as a foundation for moral emotions and for decision making based on perceptions about the past and the future; relatively advanced cognitive capacities (such as a good memory); and a high level of behavioural flexibility (Bekoff and Pierce, *Wild justice*, *op. cit.*, p. 13). Bekoff and Pierce do not provide us with a list of animal species that meet the threshold requirements. What they do say is that animals with a highly developed moral capacity may include chimpanzees, wolves, elephants, and humans (Bekoff and Pierce, *Wild justice*, *op. cit.*, p. 20).

[43] Bekoff and Pierce, *Wild justice*, *op. cit.*, p. 144.

[44] Rowlands, Mark, *Can Animals Act Morally?*, Oxford, Oxford University Press, 2011*,* p. 89.

[45] *Ibid.*, p. 75.

[46] *Ibid.*, p. 93.

[47] *Ibid.*

[48] *Ibid.*, p. 124.

[49] *Ibid.*, p. 125

[50] Marlow is "christened after the skilled scrutinizer of motives who narrates some of Joseph Conrad's novels" (*Ibid.*, p. 128).
[51] *Ibid.*, p. 146f.
[52] *Ibid.*, p. 239f.
[53] See Sloman, Steven A., "The Empirical Case for Two Systems of Reasoning," *Psychological Bulletin*, vol. 119, no. 1, 1996, pp. 3-22.
[54] Stanovich, Keith E. and Richard F. West, "Individual Differences in Reasoning: Implications for the Rationality Debate?," *Behavioural and Brain Sciences*, vol. 23, no. 5, 2000, pp. 645-665.
[55] See Bargh, John A., Mark Chen and Lara Burrows, "Automaticity in Social Psychology: Direct Effects of Trait Construct and Stereotype Activation on Action," *Journal of Personality and Social Psychology*, vol. 71, no. 2, 1996, pp. 230-244; Bargh, John A. and Tanya L. Chartrand, "The unbearable automaticity of being," *American Psychologist*, vol. 54, no. 7, 1999, pp. 462-479.
[56] In contradistinction to System II cognitive processes, which are rule-based and computational, System I processes are said to be associative and/or heuristic based. This image is, according to Peter Carruthers, wrong. See Carruthers, Peter, "The fragmentation of Reasoning," *in* Pablo Quintanilla, Carla Mantilla and Paola Cépeda (eds), *Cognición social y lenguaje. La intersubjetividad en la evolución de la especie y en el desarrollo del niño*, Lima, Pontificia Universidad Católica del Perú, 2014. Carruthers refers to research by Gallistel and colleagues on conditioning of animals that shows that the behaviour of animals involved in conditioning experiments is best explained in rule-governed, computational terms, rather than in terms of associative strengths (Gallistel, C. R. and John Gibbon, "Time, Rate and Conditioning," *Psychological Review*, vol. 107, no. 2, 2000, pp. 289-344; Gallistel, C.R. and Adam P. King, *Memory and the Computational Brain*, Oxford, Wiley-Blackwell, 2009). Carruthers concludes that nonhuman animals engage in unreflective processes that can be both flexible and rule-governed. Otherwise learning by animals could not be explained
[57] Fischer, John M. and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility,* Cambridge, Cambridge University Press, 1998.
[58] Fischer and Ravizza, *Responsibility and Control*, *op. cit.*, p. 39.
[59] I derive this distinction from Karen Jones. Jones says that even brain-damaged persons who are unable to form long-term memories can have functioning fear systems that enable affective learning that 'tracks' their practical reasons without generating higher-level understanding of that tracking (Jones, Karen, "Emotion, weakness of will and the normative conception of agency," *in* Anthony Hatzimosyis (ed.), *Philosophy and the Emotions,* Cambridge: Cambridge University Press, 2003, p. 185). Jones refers to Joseph LeDoux (who reports the case of a woman who, though unable to recognize her doctors from one meeting to the next, was able to learn not to shake hands with a doctor who had previously pricked her with a tack concealed in his palm (Ledoux, Joseph, *The emotional brain,* New York, Simon & Schuster, 1996).
[60] Fischer and Ravizza, *Responsibility and Control*, *op. cit.*, p. 81.
[61] See also, Wallace, R. Jay, *Responsibility and the Moral Sentiments*, Cambridge, Harvard University Press, 1994, p. 189.
[62] Fischer and Ravizza, *Responsibility and Control*, *op. cit.*, p. 232ff. It is not clear how Fischer and Ravizza's reasons responsiveness by habitual actions relates to Jones's concept of tracking reasons.
[63] Wood, Wendy and David T. Neal, "A New Look at the Habit–Goal Interference," *Psychological Review*, vol. 114, no. 4, 2007, p. 845.
[64] Wood and Neal, "A New Look at the Habit–Goal Interference," *op. cit.*, p. 851.
[65] Pollard, Bill, "Can virtuous actions be both habitual and rational?," *Ethical Theory and Moral Practice*, vol. 6, no. 4, 2003, pp. 415f.

[66] According to Baumeister et al., the human capacity for self-regulation appears to be much more extensive than what is found in other animals, which may suggest that the evolutionary pressures that guided the selection of traits that make up human nature, such as participation in cultural groups, found self-regulation to be especially adaptive and powerful (Baumeister, Roy F., Matthew C. Gailliot, C. Nathan DeWall and Megan Oaten, "Self-Regulation and Personality: How Interventions Increase Regulatory Success, and How Depletion Moderates the Effects of Traits on Behavior," *Journal of* Personality, vol. 74, no. 6, 2006, pp. 1773-1801).

DOSSIER

LA PHILOSOPHIE POLITIQUE EN DEÇÀ ET AU-DELÀ DE L'ÉTAT

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INTRODUCTION

À plusieurs égards, la philosophie politique contemporaine semble s'être édifiée sur les bases modernes de l'État-nation. L'exercice des droits et libertés, souvent associé à la citoyenneté démocratique, serait conditionnel à l'appartenance des individus à une société politique définie par les frontières territoriales de la nation. La plupart des théories démocratiques ont assimilé cette société politique à la figure abstraite du *demos*. Les normes et les institutions à l'aide desquelles se gouvernent les sociétés démocratiques ont ainsi été comprises comme le produit de la volonté commune d'une nation décrite en termes « ethniques », « culturels » ou « civiques », et dont l'État souverain serait l'agent.

Loren A. King, un des contributeurs de ce dossier, rappelle ailleurs que l'ampleur de l'attention consacrée à l'État-nation n'est guère surprenante, compte tenu de l'importance de ce phénomène pour l'histoire des sociétés démocratiques[1]. Les divers récits historiques mobilisés par les philosophes pour clarifier ou situer leurs arguments présentent souvent l'avènement de l'État-nation comme l'un des instants décisifs d'un vaste mouvement de sécularisation de l'Occident. Sa création consacrerait, de plus, l'autonomie politique de la société. Celle-ci se serait concrétisée entre autres par le développement et la consolidation des caractéristiques et institutions typiques des démocraties représentatives : la liberté d'association, l'élection des dirigeants politiques et l'extension du suffrage. L'État-nation, observe Catherine Colliot-Thélène, s'est donc imposé comme « le cadre territorial d'aménagement de la démocratie moderne[2]. »

Plusieurs penseurs, issus de traditions intellectuelles variées, déplorent la place centrale occupée par l'État-nation dans les débats en philosophie politique contemporaine et le dénoncent comme inégalitaire et hostile à la liberté politique. D'après eux, une grande part de la philosophie politique se réduit malheureusement à la justification et à l'exploration de l'État comme structure paradigmatique des sociétés politiques. Par exemple, Robert Paul Wolff inaugure *In Defense of Anarchism* en affirmant : « Politics is the exercise of the power of

the State, or the attempt to influence that exercise. Political philosophy is therefore, strictly speaking, the philosophy of the state[3]. » Dans la charge critique qu'elle dirige à l'endroit de la philosophie politique moderne en général et envers sa théorie de la souveraineté en particulier, Hannah Arendt cible l'État-nation quand elle déclare que « Là où les hommes veulent être souverains, en tant qu'individus ou en tant que groupes organisés, ils doivent se plier à l'oppression de la volonté, que celle-ci soit la volonté individuelle par laquelle je me contrains moi-même, ou la "volonté générale" d'un groupe organisé. Si les hommes veulent être libres, c'est précisément à la souveraineté qu'ils doivent renoncer[4]. » Dans une veine similaire, Warren Magnusson a récemment écrit que la philosophie politique moderne justifie les multiples pratiques de domination observées dans les sociétés démocratiques, car son corpus « is shaped by the project of the State[5]. » Les théories qu'elle avance portent à croire qu'en l'absence d'un État-nation souverain, les êtres humains verseraient nécessairement dans le chaos, l'illégalité et la violence.

Au cours des dernières décennies, la valeur heuristique de l'État-nation a été profondément remise en question par plusieurs philosophes politiques préoccupés par la résurgence et l'émergence des minorités dans l'arène politique des sociétés démocratiques contemporaines. Leurs écrits soulignent la tendance des théoriciens à présumer l'unité politique, sociale et culturelle de la société politique. Selon eux, le concept d'État-nation génère des difficultés à rendre compte des dynamiques politiques contemporaines, et par conséquent à proposer des solutions appropriées aux problèmes auxquels sont actuellement confrontées les sociétés démocratiques. Des philosophes canadiens se sont d'ailleurs démarqués par leurs éminents apports à ces réflexions. Se penchant sur les sociétés marquées par la « diversité profonde », les travaux de Charles Taylor ont par exemple démontré que les pratiques constitutives des identités culturelles sont des « biens irréductibles » dont la valeur doit être reconnue par les institutions politiques.[6] La théorie libérale du droit des minorités élaborée par Will Kymlicka vise explicitement à répondre aux défis éthiques et politiques posés par la diversité sociale et culturelle propre aux sociétés libérales multiculturelles et multinationales[7]. Prenant pour point de départ la situation des Premières Nations du Canada, James Tully a quant à lui exposé une approche permettant de négocier la diversité politique et culturelle fondée sur diverses conventions constitutionnelles implicites[8].

Ces travaux révèlent, chacun à leur façon, que l'État moderne démocratique, censé représenter la volonté commune des membres du *démos*, ne reflète en réalité que les ambitions et les valeurs de l'une de ses parties, la nation majoritaire. Puisqu'elles sont construites sur une représentation unitaire de la société politique, les institutions démocratiques semblent exclure la coexistence de divers ordres normatifs ainsi que la possibilité de diverses autorités politiques. Les groupes minoritaires se retrouvent ainsi, la plupart du temps, dans l'impossibilité de faire valoir leurs intérêts, ou d'adopter des règles et des institutions qui permettent à leurs cultures de se développer et de se perpétuer dans le temps malgré le fait que leurs entreprises puissent être justifiées par des principes

libéral-démocratiques. Pour les partisans de l'État-nation, par contre, la coexistence d'une pluralité de groupes à l'endroit desquels les citoyens ressentent une loyauté durable au sein des frontières de l'État risque d'entraver les institutions politiques et de fragiliser les bases sur lesquelles repose la stabilité des sociétés démocratiques.

Ces problèmes n'ont évidemment pas été ignorés par la philosophie politique contemporaine. Néanmoins, comme l'observe Daniel Weinstock, plusieurs des philosophes qui s'y sont attardés se sont employés à élaborer des modèles de raisonnement destinés à déterminer les principes théoriques pouvant servir de base de justification commune à l'exercice du pouvoir[9]. Ils se sont détournés des enjeux soulevés par la réalisation pratique de ces principes. Peu d'entre eux se sont donc penchés sur les arrangements institutionnels concrets capables de favoriser leur accomplissement dans des contextes sociaux et politiques donnés. Ce virage a entraîné des conséquences importantes. Tandis que les désaccords théoriques au sujet des principes de justice perdurent, les institutions démocratiques éprouvent des difficultés croissantes à favoriser la résolution des différends entre citoyens. Les décisions qu'elles adoptent paraissent creuser les écarts qui les séparent plutôt que d'encourager leur rapprochement.

Prenant acte des limites rencontrées par une démarche intellectuelle exclusivement dédiée au raffinement théorique, plusieurs penseurs ont tourné à nouveau leur regard vers les institutions politiques. Ils s'intéressent aux modes de distribution de l'autorité politique (état unitaire ou fédéralisme) et aux règles qui encadrent le fonctionnement du processus décisionnel (organisation des systèmes électoraux, mécanismes de représentation politique et fonctionnement des pouvoirs législatifs ou exécutifs). Leurs travaux tentent d'identifier les schèmes institutionnels les plus aptes à réaliser certains principes moraux ou politiques, ou encore à faciliter la résolution de conflits persistants au sein des sociétés politiques.

Les articles regroupés dans ce dossier contribuent à cet effort. **Didier Zúñiga** démontre que la conception de la sécularisation formulée par Taylor tend à présenter les conflits entre groupes religieux comme des enjeux de justice, pouvant être résolus par une interprétation adéquate de la liberté de conscience et de la laïcité. Il soutient que l'adoption d'une position inspirée du pluralisme politique invite à reconsidérer ces conflits comme des oppositions portant sur le partage de l'autorité entre les groupes distincts, plutôt qu'un désaccord à propos de principes moraux. **Andreas Follesdal** et **Victor Muñiz-Fraticelli** s'intéressent à l'un des modes de partage de l'autorité privilégié par certaines sociétés démocratiques. Leur analyse du principe de subsidiarité explique que son application renforce l'issue des débats constitutionnels dans les fédérations multinationales comme le Canada et l'Union européenne. Or à elle seule, cette règle ne peut pas répondre à certains désaccords profonds, dont ceux portant sur le respect des droits de la personne. Dans son texte, **Loren A. King** avance que les philosophes politiques libéraux doivent opter pour un système de représentation démocratique proportionnel. Celui-ci permet une représentation plus équitable

des préférences des citoyens dans le processus décisionnel, favorisant de surcroît la légitimité des actions collectives, et conséquemment la stabilité de la société. Par leur examen des conceptions libérales de la justice globale, **Kevin W. Gray** et **Kafumu Kalyalya** questionnent la nature et la signification du consentement présumé des États-nations à l'ordre international. Leur texte expose l'effet des transformations institutionnelles observées dans les organisations multilatérales sur la façon dont ce consentement est désormais compris par les acteurs.

Ces textes considèrent que les citoyens des sociétés démocratiques ressentent un attachement à l'égard d'une pluralité de groupes, dont les identités s'articulent à des territoires qui s'échelonnent en deçà et au-delà des juridictions de l'État-nation. Leurs auteurs y évoquent les possibilités que portent en elles les institutions qui cherchent à faciliter la coopération sociale dans un tel contexte, de même que certaines des limites auxquelles elles se heurtent.

NOTES

[1] King, Loren, « Seeing Like a Theorist », *International Journal of Urban and Regional Research*, vol. 37, no. 2, 2013, pp. 804□814.
[2] Colliot-Thélène, Catherine, *La démocratie sans demos*, Paris, Presses universitaires de France, 2011, p. 12.
[3] Wolff, Robert Paul, *In Defense of Anarchism*, University of California Press, 1970, p. 3.
[4] Arendt, Hannah, « Qu'est-ce que la liberté? », *in L'humaine condition*, Quarto Gallimard, 2012, p. 736.
[5] Magnusson, Warren, *Politics of Urbanism: Seeing Like a City*, Oxford, Routledge, 2013.
[6] Taylor, Charles, « Irreducibly Social Goods », *in Philosophical Arguments*, Cambridge, Harvard University Press, 1995.
[7] Kymlicka, Will, *La citoyenneté multiculturelle : une théorie libérale du droit des minorités*, Montréal, Éditions du Boréal, 2001.
[8] Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995.
[9] Weinstock, Daniel M., « Cities and Federalism », *in* Jacob T. Levy et James E. Fleming (dir.), *Nomos LV: Federalism and Subsidiarity*, New York, New York University Press, 2014, p. 271.

PLURALISME ET SÉCULARISATION : UNE CRITIQUE DE CHARLES TAYLOR

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RÉSUMÉ :

Le présent article examine la façon dont Charles Taylor a entrepris de poser le problème politique de la sécularisation. Plus spécifiquement, nous voudrions montrer que, si son effort pour articuler une théorie de l'aménagement de la diversité morale et religieuse a certes contribué à critiquer les régimes rigides de la laïcité, Taylor accorde une prééminence incontestable à la liberté de conscience. Or, notre analyse entend démontrer que, selon cette vue, il n'y a pas de place pour l'autonomie religieuse. Notre hypothèse est qu'en présentant les conflits moraux et religieux comme des enjeux de justice, Taylor néglige l'important clivage existant entre, d'une part, les questions de reconnaissance reliées à la différence culturelle et, d'autre part, les revendications d'autorité exprimées par des groupes — et pas simplement des membres individuels — au sein de la sphère publique.

ABSTRACT:

This paper aims to challenge the assumption that Charles Taylor's conception of political secularism is pluralist. The article argues that, although Taylor's work provides the basis for an important critique of the most rigid forms of secularism, his theory places a strong focus on individual conscience. Yet Taylor's almost exclusive concern for individual conscience excludes the pluralist claim to religious institutional autonomy. In addition, this article argues that Taylor presents moral and religious conflicts as questions of justice, which can be resolved with a correct interpretation of freedom of conscience. Against Taylor's conception of "laïcité," the article attempts to show that these problems are best grasped as conflicts between the authority of different groups—not just individuals—and that of the state.

Charles Taylor a retracé la façon dont le terme de « sécularisation[1] » s'est articulé au fil de l'histoire moderne occidentale. Mais plutôt que de chercher à déterminer quelque chose comme un mouvement de fond de l'histoire de la sécularisation, Taylor propose une réflexion sur les conditions historiques de l'émergence d'un mode de coexistence pensé désormais exclusivement sous la forme d'espaces publics[2]. Bien que le mot soit polysémique, nous pouvons d'abord rappeler que, du point de vue de l'autorité juridique, notre compréhension de ces « conditions de sécularisation » n'aurait guère de sens sans le déplacement conceptuel de l'idée médiévale de « loi divine » (ou loi fondamentale) vers la discipline moderne du droit public (ou droit politique)[3]. Cela est important dans la mesure où l'émergence de notre conception séculière de l'espace public se caractérise avant tout par le fait d'être « vidée » de Dieu, ou bien de toute référence à une réalité ultime[4]. Lorsque l'on parle de sécularisation, on peut alors se concentrer sur les transformations successives du contexte spirituel en Occident qui permettent de clarifier cette conception moderne de l'autorité en tant que sphère autonome. Si jusqu'à alors l'autorité avait été déterminée par la transcendance, dès qu'elle le fut par l'immanence, au prisme de l'atomisme individualiste[5], elle acquit une certaine forme d'indépendance morale[6].

L'interprétation de Taylor constitue un grand récit (*a master narrative*) de ces transformations des conditions de la croyance, dont le but premier est de critiquer l'idée largement répandue selon laquelle la « sécularisation » ne serait qu'une conséquence inévitable de la modernité[7]. Or, c'est là une perspective qui applique un schéma d'évolution linéaire, schéma favori des sciences sociales depuis leur essor jusqu'aux récentes théories de la rationalisation. De ce point de vue, la sécularisation est conçue comme un processus continu, engagé dans une voie semblable à celle empruntée par la croissance économique, l'industrialisation, la mobilité sociale et géographique, l'urbanisation ou encore le développement de la science et de la technologie[8]. Ainsi comprise, la sécularisation devient une conséquence inévitable du progrès humain. Inutile d'insister sur le caractère profondément ethnocentrique[9] de cette interprétation – qui est, du moins à certains égards, l'interprétation partagée par les défenseurs de l'indivisibilité de la République française, du *wall of separation* jeffersonien, ou encore du projet de Charte des valeurs québécoises (loi 60)[10].

Les pages qui suivent s'attachent à examiner les termes dans lesquels Taylor a entrepris de poser le problème de la sécularisation. Plus spécifiquement, nous voudrions montrer que, si son effort pour articuler une conception politique de « l'aménagement de la diversité morale et religieuse[11] » a certes contribué à critiquer les régimes « rigides » de la laïcité[12], Taylor accorde une prééminence incontestable à la liberté de conscience. Or, notre analyse entend démontrer que, selon cette vue, il n'y a pas de place pour une véritable autonomie religieuse. Notre hypothèse est que la théorie de la laïcité de Taylor est incompatible avec une conception forte du pluralisme. Avant d'examiner et de critiquer ce que Taylor comprend par « les principes constitutifs de la laïcité[13] », on mettra en relief le rôle qu'il accorde à la philosophie de l'histoire, notamment dans son rapport aux sciences sociales. Nous tenterons ensuite de souligner la différence

entre un système de référence culturel et une norme dictée par une autorité qui se prononce de manière catégorique pour prescrire (et proscrire) des lignes directrices de conduite. Enfin, nous tenterons de dessiner les contours d'une distinction fondamentale entre la politique de la reconnaissance et une conception forte du pluralisme : les problèmes liés à l'exercice et à la définition de l'autorité publique posent la question de savoir *qui* précisément assurera la concrétisation de la norme.

1. PHILOSOPHIE HISTORIQUE ET ANTHROPOLOGIE SOCIALE

La philosophie de l'histoire a pour tâche d'élaborer un schème conceptuel permettant d'aborder la condition historique de nos formes de vie. Dans *Two Theories of Modernity*, Taylor note que les sciences sociales se heurtent à un conflit qui oppose deux philosophies historiques, à savoir deux façons de comprendre la modernité : la première est aculturelle (ou évolutionniste) et la seconde est culturelle (ou discontinuiste)[14]. Le premier schème regroupe essentiellement les « théories de la rationalisation » qui pratiquent ce que Taylor appelle l'explication moderne par soustraction (*a subtraction account of the rise of modernity*[15]). Ces théories prétendent fournir des explications de la modernité qui seraient désencombrées des horizons de signification, c'est-à-dire qu'elles envisagent l'homme ancien ou d'une société « traditionnelle » en le dépouillant de ce qui paraît superflu du point de vue « rationnel ». Une fois déchargé des croyances coutumières, des rituels, des tabous et de toutes les superstitions qui l'encombrent, l'être humain devient un *individu* au sens moderne du terme. C'est là le point décisif de l'explication du moderne par la soustraction, qui consiste à renvoyer à un passé obsolète les manières de faire et de penser qui prévalaient jusque-là (ou qui prévalent dans des sociétés traditionnelles) : « [i]ndividualism and mutual benefit are the evident residual ideas that remain after you have sloughed off the older religions and metaphysics[16]. » Pour Taylor, la solution aculturelle au problème de la compréhension de l'agir humain est donnée par le paradigme des sciences naturelles[17], une ambition théorique profondément réductrice qui néglige l'imbrication de significations communes (*shared meanings*) au sein du tissu social, et finit par concevoir le politique comme une question d'orientation strictement individuelle[18]. En effet, ce modèle épistémologique fournit une représentation du sujet comme fondamentalement désengagé, à savoir comme un être libre et rationnel dans la mesure où il parviendrait à se dissocier pleinement des mondes naturels et sociaux – de sorte que l'identité d'un tel être ne serait plus définissable en termes de ce qui ce se trouve dans de tels espaces, conçus comme extérieurs à lui-même[19]. Comme le fait remarquer Vincent Descombes dans son commentaire sur Taylor, c'est précisément de cette approche que découle l'idée selon laquelle « l'âge de la mondialisation » ne serait qu'un phénomène de convergence et d'uniformité, car le schème évolutionniste sera porté à juger que l'histoire humaine participe d'un passage universel à un même modèle de civilisation[20].

À rebours d'une telle démarche, Taylor considère le contexte de compréhension de nos représentations et de nos pratiques, c'est-à-dire ce qu'il appelle la « condition transcendantale » du langage commun[21]. Les cadres de référence qui déterminent notre positionnement au sein de l'espace moral présupposent l'existence d'une communauté linguistique : nos formes d'humanité se définissent non seulement dans l'échange entre interlocuteurs, mais elles sont également partiellement constituées par l'engagement de ceux-ci dans cette quête de sens dialogique[22]. C'est pourquoi la philosophie historique qui fait usage d'un schème discontinuiste récuse toute compréhension unifiée de la modernité, et reconnaît qu'il existe différentes façons d'ériger et de maintenir ces formes institutionnelles qui sont devenues des points de référence incontournables aux yeux de l'Occident – Taylor discute, par exemple, de l'expansion de l'État bureaucratique moderne, de l'économie de marché, etc.[23]. On retiendra en particulier cette observation de Taylor sur l'existence de plusieurs modernités (*multiple modernities*) :

> I am evoking the picture of a plurality of human cultures, each of which has a language and a set of practices that define specific understandings of personhood, social relations, states of mind/soul, goods and bads, virtues and vices, and the like. These languages are often mutually untranslatable[24].

La thèse avancée par Taylor est importante, dans la mesure où elle oriente directement le traitement de la question pratique de la laïcité : le contenu et les expressions de ce mode de coexistence, tels que d'autres caractéristiques de la « modernité », se développent sous l'influence d'exigences et d'aspirations radicalement distinctes dans différentes civilisations[25]. Pour Taylor, les approches aculturelles en philosophie de l'histoire posent l'individu comme indépendant des liens sociaux qu'il peut avoir par ailleurs et finissent par définir l'individualisme comme une affirmation de valeur. La modernité, dans cette optique, est ce passage où la personne, qui se concevait elle-même comme un être social, devient peu à peu un individu se définissant lui-même de manière indépendante. En réalité, l'humain traditionnel est incapable de se concevoir comme un individu au sens normatif, car dans la société à laquelle il appartient, la vie spirituelle n'est pas un domaine différencié du reste de la vie sociale – il y a alors une imbrication (*embeddedness*) de l'expérience religieuse dans le tissu général des rapports sociaux. À cet égard, il est intéressant de noter que ce n'est qu'à partir du 16e siècle, en Occident, que l'on retrouve cette idée de la sacralité de la conscience avec le concept luthérien du salut par la foi et du pouvoir dont dispose désormais l'individu pour modifier la nature par l'exercice de sa volonté[26]. D'où le point le plus important. Comme le suggère Taylor à la suite de Louis Dumont, le passage à la modernité a consisté, de ce point de vue, à désocialiser l'individu. En d'autres termes, nous sommes devenus modernes lorsque nous avons commencé à concevoir la société comme composée d'individus[27] :

> What had yet to happen was for this matrix [of embeddedness] to be itself transformed, to be made over according to some of the principles of Axial spirituality, so that the « world » itself would come to be

> seen as constituted by individuals. This would be the charter for *l'individu dans le monde* in Dumont's terms, the agent who in his ordinary « wordly » life sees himself as primordially an individual, that is, the human agent of modernity[28].

Dès lors, selon Taylor, une théorie de la modernité ayant pour projet l'exigence d'universalité prend la forme d'une philosophie du progrès, ou encore, pour reprendre l'expression de Dumont, d'un individualisme « intra-mondain[29] ». Il faut comprendre ce terme en contraste avec celui d'individu « extra-mondain », au sens religieux, pour qui le groupe n'est pas la volonté générale des individus, mais le passé, la religion des ancêtres[30]. En somme, l'analyse de Taylor permet de clarifier considérablement les termes du débat, car son approche s'efforce de comprendre les idéaux moraux de l'Occident dans leur particularité contingente, c'est-à-dire en ce qu'ils émergent d'horizons moraux déterminés et non en ce qu'ils expriment une modernité universelle. En ce sens, suivant l'argument de Taylor, il paraît parfaitement accidentel que nous soyons sortis du monde traditionnel des sociétés dont le droit était religieux et où les idéaux s'exprimaient dans le langage de l'identité collective. Ce qu'il y a d'unique dans le monde occidental, c'est le développement de sujets isolés et imperméables au « cosmos enchanté[31] » (l'antonyme du terme utilisé par Weber : « désenchanté[32] »); et pour qu'il devienne tout à fait normal pour le sujet moderne de se concevoir comme un individu au sens normatif, il faut qu'il y ait eu une révolution dans notre manière d'appréhender l'ordre moral : c'est ce que Taylor nomme la « grande désimbrication » (*the great disembedding*)[33].

2. SÉCULARISATION(S)

Dans *A Secular Age*, Taylor explique que dans les sociétés anciennes, la présence de Dieu était incontestable et évidente : la politique émanait du divin et la vie publique était inséparable d'un pouvoir supérieur et révéré. Entre le 16e et le 19e siècles, l'Occident est passé de ce que Taylor appelle un « monde enchanté », à un monde « post-durkheimien[34] », où notre relation au spirituel est de plus en plus détachée des rapports que nous entretenons avec le politique et où nos formes d'expérience religieuse sont plus diffuses – à savoir, complètement dissociées de nos identités nationales[35], ce qui n'est certainement pas le cas dans la plupart des pays du Moyen-Orient, par exemple[36]. Par ailleurs, bien que l'histoire du terme « séculier » soit complexe et ambiguë, Taylor situe son émergence au début de l'ère chrétienne, sous la forme d'une dyade dans laquelle se trouvaient différenciées deux dimensions de l'existence, caractérisées par des conceptions particulières du temps : les affaires appartenant au « siècle », et celles se référant à l'éternel[37]. Nous retrouvons ici la distinction de Dumont entre l'individu dans le monde (pour qui le religieux est renvoyé à un choix personnel) et le renonçant qui est, en un sens, hors du monde (car son cadre de référence lui permet de penser en termes holistes). Cette ligne de démarcation entre le sacré et le monde profane se serait rapidement transformée en une conception binaire opposant, d'un côté, un cadre immanent autosuffisant (« rationnel ») et de l'autre, un domaine transcendant, souvent qualifié d'« inventé » et d'« irrationnel »[38].

Taylor reconnaît que la sécularisation est un processus sociologique propre aux sociétés postchrétiennes, et qu'il ne peut donc être imposé (ou simplement transposé) à des personnes dont l'appartenance confessionnelle ne fait pas de distinction entre le sacré et le profane[39]. Cela se reflète non seulement dans ses recherches hautement éclectiques sur la sécularisation, mais aussi dans l'intérêt qu'il porte au rapport entre religion et politique dans des sociétés non occidentales[40]. Cependant, Taylor se demande si l'idée de laïcité en tant que mode de coexistence ne pourrait voyager de manière inventive et imaginative[41]. Comme il le soutient dans *A Secular Age*, il faut d'abord reconnaître le caractère polysémique du mot « séculier », et cela vaut non seulement pour les différences qui séparent les sociétés occidentales, disons, des sociétés traditionnelles, mais aussi pour les acceptions multiples du terme qui sont retenues en Occident. En fait, Taylor distingue trois sens particuliers de la sécularisation, à savoir (I) le retrait de la religion de l'espace public, (II) le déclin des croyances et des pratiques religieuses, et (III) la transformation des conditions de la croyance. Le premier sens de la sécularité fait référence aux institutions et aux pratiques communes, c'est-à-dire à la relation polymorphe existant entre les structures politiques et la religion[42]. En contraste avec le passé, où la validité normative du discours prescriptif était commandée par la foi chrétienne, la sécularisation, ainsi comprise, décrit des sociétés qui « se vident » de la religion au sens où leurs médiations institutionnelles disposent désormais d'une autonomie normative[43]. La deuxième dimension de la sécularité correspond quant à elle à l'observation sociologique d'un recul de la foi. Il va sans dire que dans les pays de l'Ouest, de manière générale, la population fréquente de moins en moins l'Église, et cela même dans des sociétés qui conservent des références résiduelles à Dieu dans l'espace public (on peut penser au Royaume-Uni ou aux pays scandinaves)[44]. Cependant, en opposition aux explications modernes par soustraction, Taylor soutient qu'on ne peut en conclure une relation causale entre la sécularité I et II, c'est-à-dire que la distinction historique entre l'autorité ecclésiastique et l'autorité séculière n'a pas pour autant suscité le déclin des croyances et des pratiques religieuses[45]. Enfin, Taylor propose d'étudier une troisième conception de la sécularité qui, elle, rend compte du passage d'une société où il était tout simplement inconcevable de ne pas croire en Dieu à une autre où la foi ne constitue qu'une « option parmi d'autres »[46]. C'est là que réside, aux yeux de Taylor, l'enjeu théorique primordial du concept de sécularisation, puisqu'il intervient pour décrire la puissance des valeurs individualistes dans la culture moderne en Occident : la religion, qui auparavant constituait une pratique collective, est aujourd'hui renvoyée au choix personnel.

3. LES PRINCIPES DE LA LAÏCITÉ

Ce qui fait la spécificité de l'âge séculier, si l'on suit l'étude phénoménologique de Taylor, est le déplacement anthropocentrique des finalités humaines en Occident[47]. La manifestation la plus évidente de cette modification profonde des conditions de la croyance est l'essor d'une source morale alternative qui a fait basculer l'arrière-plan de signification des sociétés postchrétiennes[48]. Il s'agit, bien entendu, de l'éclatement des possibilités morales et spirituelles, ce que

Taylor nomme l'effet nova : « [w]e are now living in a spiritual super-nova, a kind of galloping pluralism on the spiritual plane[49]. » Cette plurivocité caractérisant l'avènement de la modernité surgit en symbiose avec la croyance en un ordre moral fondé sur la primauté de l'individu porteur de droits[50] :

> The original idealization of [this modern understanding of moral order] comes in a theory of rights and legitimate rule. It starts with individuals, and conceives society as established for their sake. Political society is seen as an instrument for something pre-political. This individualism signifies a rejection of the previously dominant notion of hierarchy, according to which a human being can only be a proper moral agent embedded in a larger social whole, whose very nature is to exhibit a hierarchical complementarity. […] This theory starts with individuals, which political society must serve. More important, this service is defined in terms of the defense of individuals' rights. And freedom is central to these rights[51].

L'entrée de l'Occident dans un âge séculier signifie le développement historique de matériaux juridiques qui obéissent désormais aux critères d'une logique autonome, critères qui sont censés être inhérents au concept de droit conçu comme un corps de principes et de procédures qui se dégage progressivement des autres pratiques sociales. Cette perspective constitue la toile de fond sur laquelle Taylor entreprend d'exposer l'architecture institutionnelle qui permet de déterminer ce que signifie « l'exigence de laïcité de l'État[52] ». À cet effet, Taylor et Jocelyn Maclure s'accordent pour dire qu'il s'agit, de façon générale, d'un « régime politique et juridique dont la fonction est d'instituer une certaine distance entre l'État et la religion » – même si des désaccords profonds sont susceptibles de surgir quant à son application concrète[53]. Cette position présuppose qu'une distance régie par des principes est capable de poser les conditions de possibilité d'une neutralité politique, car le but est ici d'éviter de favoriser (ou de défavoriser) les différentes convictions morales auxquelles les citoyens s'identifient. En ce sens, les auteurs cherchent à dessiner les contours d'une politique qui repose sur les « principes constitutifs de la laïcité », de façon à « mieux cerner les options qui s'offrent aux sociétés lorsqu'elles font face à des dilemmes reliés à l'aménagement de la diversité morale et religieuse[54]. »

Réfléchir aux désaccords éthiques sur la place de la religion dans l'espace public revêt un caractère pratique dont l'objectif est le compromis. À la rigidité reprochée aux régimes stricts de la laïcité, dont la démarche républicaine, Maclure et Taylor opposent le modèle de « laïcité ouverte » dont la singularité tient, selon eux, au respect de la diversité des croyances et valeurs auxquelles les citoyens adhèrent[55]. Or, si l'on admet que dans une société il ne peut y avoir de consensus au niveau des convictions fondamentales (c'est-à-dire le « fait du pluralisme raisonnable » de Rawls), il faut dès lors reconnaître « les limites de la rationalité quant à sa capacité à statuer sur les questions de sens ultime de l'existence et de la nature de l'épanouissement humain[56] ». Il s'ensuit qu'un État démocratique doit éviter de hiérarchiser les différentes visions du monde et se maintenir

neutre ou impartial par rapport aux différentes conceptions religieuses, spirituelles et séculières du bien[57]. En outre, dans les pays de l'Ouest l'attention doit également se porter sur les *Weltanschauungs* qui prétendent être fondées sur la « simple raison » (*die bloße Vernunft*[58]), c'est-à-dire sur une morale indépendante de tout mode de vie, à laquelle les choses sacrées, perçues comme une menace pour l'ordre public, doivent être subordonnées. Cette forme de régime remplace un fondement religieux du vivre-ensemble par une « conception philosophique séculière englobante[59] » qui ne respecte pas l'ensemble des citoyens, car « la conception du monde et de la nature qui lui est sous-jacente n'est pas susceptible d'être partagée », entre autres, par ceux qui demeurent religieux[60]. En conséquence, la justice dans les sociétés plurielles contemporaines exige, selon Taylor et Maclure, que la laïcité repose sur une « pluralité de principes, chacun remplissant des fonctions particulières[61]. »

Les auteurs de *Laïcité et liberté de conscience* avancent que les deux grandes finalités de la laïcité sont la liberté et l'égalité. Ils stipulent que les normes et institutions publiques fondamentales doivent reposer sur une conception publique de la justice qui soit susceptible de faire l'objet de ce que John Rawls appelle un « consensus par recoupement[62] ». D'après le cadre théorique qu'ils proposent, la laïcité repose sur quatre « principes constitutifs », à savoir deux principes moraux : (1) l'égalité de respect et (2) la liberté de conscience et de religion, ainsi que deux modes opératoires : (3) la séparation de l'Église et de l'État et (4) la neutralité de l'État à l'égard des religions[63]. Aux yeux des auteurs, les deux premiers principes sont inébranlables; ils constituent des « finalités morales » qui impliquent que tout État laïque doive se montrer « agnostique » sur la question des différentes visions du bien, notamment en reconnaissant « la souveraineté de la personne quant à ses choix de conscience[64] ». Par contre, les modes opératoires ne sont que des « principes institutionnels », c'est-à-dire des moyens essentiels à la réalisation des finalités morales (soit le respect égal et la liberté de conscience), mais leur valeur est dérivée et non intrinsèque[65].

En dernier lieu, il est intéressant de noter qu'après avoir présenté ces « principes constitutifs », Taylor et Maclure présentent une typologie des « modes de la laïcité », catégorisés en fonction du rapport qu'ils entretiennent avec la pratique religieuse[66]. Ils décrivent un continuum qui va du plus rigide et strict (le régime Républicain) au plus flexible et accommodant (le régime qu'ils appellent libéral-pluraliste, ou de laïcité ouverte). Dans cette perspective, les désaccords profonds entre idéaux-types se situent au plan de la compréhension de la neutralité de l'État et de la séparation des pouvoirs politiques et religieux[67]. Il est vrai que les auteurs reconnaissent la possibilité de désaccords sur la signification de la liberté, c'est-à-dire qu'ils acceptent qu'il puisse y avoir des conflits entre, par exemple, la liberté de conscience et une doctrine englobante de la liberté religieuse. Or justement, comme nous le verrons, ce conflit particulier est arbitré au profit de la première option – ce qui est incompatible avec le pluralisme.

4. QU'ENTENDONS-NOUS PAR PLURALISME?

Il convient ici de revenir sur la distinction entre le monisme et le pluralisme en philosophie morale. Il n'est pas exagéré de dire, nous semble-t-il, qu'en théorie politique le concept de pluralisme est souvent employé de façon ambiguë. La grande majorité des études qui portent sur les problèmes posés par la diversité morale et religieuse prennent pour point de départ le « fait du pluralisme » selon Rawls[68]. Or, le mot pluralisme est pris ici dans le sens descriptif, c'est-à-dire en tant que synonyme de diversité : les sociétés libérales contemporaines admettent la pluralité des opinions et des manières de vivre, en plus d'être caractérisées par une diversité ethnique, culturelle, religieuse, etc. Mais si nous assimilons le pluralisme à une observation sociologique aussi générale, à savoir au fait d'une diversité culturelle, nous sommes conduits à restreindre de manière considérable la portée pratique du concept. En effet, il ne saurait y avoir une approche moniste[69] qui milite en faveur d'une homogénéité totale; c'est pourquoi la première hypothèse que nous avançons est que le concept qui tente de rendre compte d'un contexte de pluralisme culturel est dépourvu de sens[70].

Pourtant, malgré cette profonde ambivalence, il est possible de dessiner à grands traits une certaine structure qui tire sa validité d'un ensemble de thèses partagées par des courants de pensée précis – considérés pluralistes en raison de leur conviction de l'existence d'une pluralité normative dans différents domaines de la raison pratique. Le pluralisme en tant que courant de pensée est associé à une série d'arguments particuliers et radicaux sur les sources de l'autorité politique et sur la structure des relations entre associations et l'État[71]. La singularité de cette tradition tient aussi bien à un ancrage historique – notamment en ce qui concerne l'histoire conceptuelle de la souveraineté – qu'à des considérations normatives en philosophie politique contemporaine. Bien que cette tradition de pensée se soit développée au sein de la culture occidentale, nous pensons qu'il n'y a pas de lien logique entre le pluralisme et le libéralisme[72]. Le point de départ de notre reconstruction de cette tradition pluraliste est la thèse méta-éthique défendue par Isaiah Berlin, selon laquelle le monde moral est fragmenté en « valeurs » incommensurables, qui sont à bien des égards incompatibles entre elles; en conséquence, il est impossible de hiérarchiser des raisons d'agir sans avoir à faire des choix tragiques – autrement dit, sans avoir à se salir les mains[73]. En suivant l'analyse de Víctor Muñiz-Fraticelli, il est possible d'identifier trois thèses qui, ensemble, constituent les caractéristiques structurelles d'une conception forte du pluralisme[74] : la première thèse postule l'existence d'une pluralité de sources (morales, légales ou encore d'autorité politique). La deuxième reconnaît que les schèmes de référence de ces sources sont incommensurables; vu qu'elles relèvent de contextes hiérarchiques différents, elles ne peuvent être classées de manière catégorique. Enfin, la troisième soutient que ces sources peuvent donner lieu à des conflits tragiques dont les pertes morales induites seraient inévitables et incompensables.

Ces trois thèses ne prétendent pas démontrer l'authenticité ou l'incontestabilité de postulats qui seraient au fondement d'une théorie pluraliste; notre hypothèse

propose plutôt qu'il est pertinent de s'en servir à titre d'éléments utiles à la construction d'idéaux-types. Cette construction de caractéristiques structurelles s'efforce de refléter le plus fidèlement possible les présuppositions et dérivations logiques des travaux d'Otto Gierke, Frederic William Maitland, John Neville Figgis, Harold Joseph Laski, ou encore Mary Parker Follett sur l'histoire conceptuelle de la souveraineté[75]. Il est vrai, cependant, que si l'on a tendance à attribuer la paternité d'une approche pluraliste en méta-éthique à des philosophes comme Isaiah Berlin, Bernard Williams ou Stuart Hampshire[76], il est tout de même possible d'affirmer que les trois thèses structurelles mentionnées plus haut constituent l'essence commune qu'ils partagent avec les pluralistes politiques. C'est dans cette perspective que nous proposons d'aborder certains aspects de la pensée de Taylor qui sont directement liés au problème de la légitimité politique de demandes émanant de multiples sources d'autorité.

5. PLURALISME MORAL ET LAÏCITÉ

Au début de *Laïcité et liberté de conscience*, Taylor et Maclure citent respectivement Berlin et Rawls en vue de justifier la thèse selon laquelle nos sociétés modernes sont pluralistes[77]. Cependant, le diagnostic de pluralisme reste insensé tant qu'on ne précise pas de quelle pluralité il s'agit. Entre le « pluralisme des valeurs » de Berlin et le « fait du pluralisme raisonnable » de Rawls, il existe un écart fondamental[78]. En quoi un tel écart présente-t-il une difficulté? Notre hypothèse est qu'il y a une opposition de principe entre la description d'une pluralité de sources morales, comme c'est le cas chez Rawls, et la thèse défendue par Berlin selon laquelle ces sources ne sauraient être ordonnées ou classées de manière catégorique – puisqu'elles sont, selon Berlin, souvent incompatibles[79]. Pour reprendre les termes de Charles Larmore, ce que Rawls appelle le « fait du pluralisme raisonnable » est celui de reconnaître que même des personnes « raisonnables » (quoi que cela puisse vouloir dire) peuvent être incapables de s'entendre sur une doctrine compréhensible de la vie bonne[80]. Ce que Berlin a remarqué, toutefois, c'est que nos conflits moraux les plus profonds sont insolubles[81]. L'affirmation d'une pluralité de valeurs – dans la théorie de Taylor et de Maclure, la liberté et l'égalité – n'est justement pas la même chose que de reconnaître leur incommensurabilité, et encore moins leur incompatibilité. À ce sujet, Berlin fait l'observation suivante : « [b]oth liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted[82]. » Il est évident que dans certaines circonstances, l'exigence d'égalité peut imposer des contraintes à la liberté et vice versa : « liberty […] may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised[83]. »

Nul doute, néanmoins, que le propos de Taylor et de Maclure ne s'en tient pas à une vision qui croit naïvement qu'il est possible d'exclure tout conflit entre des exigences qui se font concurrence; ils reconnaissent certes que des « tensions

peuvent survenir, notamment, entre le respect de l'égalité morale et la protection de la liberté de conscience et de religion[84]. » Afin d'illustrer cette idée, les auteurs citent l'exemple du port du hidjab en classe par une enseignante musulmane[85]. En effet, ils se demandent comment concilier l'apparence de neutralité dont doivent faire preuve les institutions publiques et le respect de liberté de conscience et de religion[86]. Ils reconnaissent que dans certaines situations, les finalités et les modes opératoires de la laïcité ne peuvent être harmonisés parfaitement; c'est la raison pour laquelle il est nécessaire de « chercher des compromis qui favorisent une compatibilité maximale entre ces idéaux[87]. » Mais Taylor et Maclure mettent l'accent sur l'idée selon laquelle la définition même d'un régime de laïcité est donnée par ses finalités morales et non ses modes opératoires[88]. Ainsi, dans l'exemple de l'enseignante musulmane, étant donné que le respect de la liberté de conscience et de religion constitue la finalité morale et que l'apparence de neutralité n'est qu'un mode opératoire, le cadre théorique implique que l'interdiction du port du hidjab ne peut se faire au nom de la laïcité[89]. Par contre, les auteurs posent que l'interdiction du port du niqab ou de la burqa peut se faire pour des « motifs pédagogiques », car « l'enseignement passe nécessairement par la communication, et le recouvrement du visage et du corps exclut la communication non verbale[90]. » Il est vrai que Maclure et Taylor sont prêts à accepter la possibilité que surgissent des conflits entre les finalités morales et les moyens institutionnels permettant d'atteindre ces fins, mais il ne s'agit justement pas de conflits insolubles. Leur analyse conceptuelle permet de résoudre les conflits qui semblent opposer les deux grands principes de la laïcité sans que cela implique des pertes morales. Conséquemment, par le recours à cette distinction entre les principes normatifs et les modalités de leur application, le cadre théorique esquissé par Taylor et Maclure ne tient pas compte des potentiels dilemmes moraux auxquels l'État peut être confronté.

Domenico Melidoro avance lui aussi une critique du modèle de laïcité ouverte, dans laquelle il soulève une objection importante : la définition que donnent Taylor et Maclure de l'égalité de respect et de la liberté de conscience semble exclure à priori la possibilité de tensions du point de vue théorique[91]. L'argument est en substance le suivant : Melidoro prend pour acquis que dans une perspective pluraliste, les conflits de valeurs induisent des pertes morales[92]. Or, pour qu'il y ait un véritable « conflit de valeurs », il faut nécessairement établir une distinction analytique entre ces mêmes valeurs : « [a] conflict occurs only when [the values] can be defined in independent terms[93]. » À cet égard, ce que Melidoro reproche à la conception de Taylor et Maclure quant aux deux finalités de la laïcité est justement l'impossibilité de discerner une formulation indépendante pour chaque valeur. En effet, Melidoro montre que, dans leur ouvrage, l'égalité de respect est définie à titre de dignité : « [u]n régime démocratique reconnaît, sur le plan des principes, une valeur morale ou une *dignité* égale à tous les citoyens et cherche par conséquent à leur accorder le même respect[94]. » En d'autres termes, selon la définition proposée par Taylor et Maclure, la notion d'égalité de respect semble inclure la liberté de conscience – car on ne peut avoir une définition de la dignité qui exclue la liberté de conscience, celle-ci consistant en l'idée selon laquelle les individus ne doivent pas être contraints lorsque des déci-

sions morales fondamentales sont en jeu[95]. Dans la mesure où la liberté de conscience est un élément constitutif de l'égalité de respect, selon Melidoro, il ne peut y avoir d'authentiques conflits de valeurs entre les finalités morales de la laïcité.

Il est évident que la conception de la nature des biens humains défendue par Melidoro est atomiste. Son point de vue moral présuppose qu'un conflit tragique au sens pluraliste ne peut avoir lieu sans une définition indépendante de chaque bien. La faiblesse de sa critique repose dans le fait de ne pas faire de place, au sein de sa compréhension du pluralisme, à la possibilité d'appréhender les conflits moraux d'un point de vue holiste. Comme le fait justement remarquer Charles Blattberg, la façon par laquelle une approche holiste conçoit les conflits entre des biens incommensurables n'est pas à l'aune d'un affrontement entre des atomes séparables et indépendants, mais plutôt sur le plan des tensions qui surgissent entre des entités faisant partie intégrante d'un tout[96]. Quoi qu'il en soit, Melidoro a raison de remettre en question la démarche prétendument pluraliste de Taylor et de Maclure. Car, outre le débat opposant les approches atomiste et holiste, le cadre théorique de la laïcité ne peut être pluraliste au sens fort du terme, puisque dans *Laïcité et liberté de conscience*, les deux grandes finalités morales ne peuvent, en fin de compte, résoudre des conflits potentiellement irréconciliables – cela aussi bien au regard d'une pensée holiste qu'atomiste. On a vu plus haut dans l'exemple du port du hidjab qu'en ayant recours à cette distinction théorique entre les deux grands principes et les deux modes opératoires, les auteurs renvoient les dilemmes moraux au rang de problèmes institutionnels qui aboutiront à de simples compromis. Ainsi, ils rejettent la possibilité des conflits insolubles – conflits opposant des raisons d'agir irréconciliables et qui mènent inévitablement à des pertes morales, soit au tragique.

6. PLURALISME POLITIQUE ET LIBERTÉ RELIGIEUSE

C'est en ce sens qu'il faut conclure que le terme « pluralisme » employé par Taylor et Maclure renvoie au paradigme libéral du multiculturalisme, c'est-à-dire qu'il est pris au sens du respect et de la protection d'individus porteurs de droits. Cette interprétation est présentée comme une défense de la « légitimité des mesures d'accommodement visant à permettre à certaines personnes de respecter des croyances qui se démarquent de celles de la majorité[97]. » Dans cette perspective, les privilèges et exemptions dont peuvent bénéficier certaines associations religieuses sont justifiés comme moyens d'une fin supérieure : la protection de la liberté de conscience[98]. Dans les pages qui suivent, il s'agira de montrer comment Taylor a posé le problème de la légitimité politique de demandes émanant de multiples sources d'autorité. En somme, ce qui retient notre attention ici est la façon dont les hypothèses de Taylor sur la nature de la « différence » se traduisent par la défense du concept étroitement normatif de la liberté de conscience, cela aux dépens de la liberté religieuse. Il s'agira d'insister sur le brouillage de la distinction entre le multiculturalisme et le pluralisme, afin de mettre en question la capacité de l'approche de Taylor à reposer sur un droit et une politique à l'usage d'une société qui serait pluraliste quant à ses fins ultimes[99].

Taylor et Maclure confèrent au « multiculturalisme » un pouvoir de justification morale de ce qu'ils appellent la « norme d'accommodement raisonnable[100] ». Ils avancent que le multiculturalisme est enraciné dans la tradition libérale et fonde l'obligation juridique d'accommodement sur l'exigence de neutralité culturelle et religieuse[101]. D'ailleurs, Taylor pense qu'il est possible de résumer l'esprit qui sous-tend la laïcité dans les termes de la trinité révolutionnaire française, à savoir (I) la liberté, (II) l'égalité, et (III) la fraternité[102]. D'abord, en ce qui concerne le domaine de la religion, ou des convictions de base, personne ne doit être forcé à croire. Cela correspond, selon Taylor, à (I) la liberté religieuse (y compris, bien entendu, la liberté de ne pas croire), qui peut être décrite dans les termes du « libre exercice » de la religion – tel qu'inscrit, par exemple, dans le Premier amendement de la Constitution des États-Unis[103]. Taylor affirme qu'il faut aussi (II) une égalité de tous devant la loi, de manière à ce qu'aucun horizon religieux ou *Weltanschauung* (sacré ou séculier) ne puisse jouir d'un statut privilégié, ou encore moins qu'il puisse être adopté en tant que doctrine étatique officielle[104]. Enfin, Taylor défend l'idée selon laquelle (III) les familles spirituelles auraient dans l'ensemble leur mot à dire, et devraient contribuer, notamment, à déterminer le genre de société que nous établirons pour nous-mêmes[105]. On peut toutefois relever que selon la définition que donne Taylor de la liberté religieuse (I), celle-ci devient synonyme de liberté de conscience[106]. Or, comme le note Muñiz-Fraticelli, cette conception est fondée sur l'individualisme normatif, un idéal qui dérive de la doctrine des Lumières[107] et qui déplace le modèle de *libertas ecclesiae* qui prévalait jadis[108] :

> I suspect that the reason for the reduction of religious freedom to only one of its strains—the individualist one that emerges after the Enlightenment—is, to a great degree, derived from the larger frame in which the question is put: as an aspect of deep-seated individual commitments similar to those of culture, which may be granted protection in group-differentiated rights, but which also make unintelligible a more robust conception of institutional religious autonomy[109].

Par le biais d'une compréhension de laïcité faisant référence uniquement à la conscience individuelle, et au-delà d'une nostalgie juridique médiévale, se pose inévitablement la question de la légitimité du monopole des critères moraux par l'État – et, par conséquent, celle de l'importance du rôle joué par un contrepoids institutionnel à l'autorité étatique. C'est pourquoi il est intéressant de mettre l'accent sur les points de divergence entre le multiculturalisme et le pluralisme associatif, et donc entre la structure des demandes d'accommodement « raisonnable » et celle des revendications émanant de différents groupes religieux.

Le multiculturalisme a donné lieu à une abondante littérature en philosophie politique, notamment depuis la parution de *The Politics of Recognition* de Taylor, qui tient à la projection d'une image de l'identité dont la notion centrale de « culture » est elle-même contestée[110]. À cet égard, David Scott fait remarquer que la reconnaissance constitutionnelle des différences culturelles s'avère être une condition préalable à l'ensemble des principes libéraux comme la liberté,

l'égalité, ou encore le progrès économique[111]. Dès lors, les auteurs qui participent aux controverses contemporaines sur le multiculturalisme proposent un ensemble de mesures accommodantes pour améliorer ou corriger la tradition théorique existante (notamment le neutralisme de Rawls)[112]. Mais les théoriciens et les institutions publiques qui cherchent à traduire les demandes de reconnaissance dans la langue d'interprétation dominante se heurtent à un paradoxe : Scott note, et déplore avec raison, le fait que cet exercice de traduction revient à galvauder les demandes, car elles perdent inévitablement les particularités et caractéristiques qui font leur spécificité[113]. Pour le dire autrement, le travail de traduction culturelle a le défaut de se faire toujours à partir d'un cadre normatif qui, lui, jouit du privilège d'être incontestable. Scott le souligne vigoureusement : « […] for thinkers such as Walzer, Kymlicka, Kukathas, Carens, and Taylor, what is at stake is rethinking liberal democracy—or to put this another way, rethinking *from the standpoint* of liberal democracy. For them, in other words, the privileged status of liberal democracy is not itself in question[114]. » Certes, le multiculturalisme a contribué de manière décisive à affronter les enjeux contemporains touchant à la diversité, notamment en mettant l'accent sur le respect des conditions d'autonomie, de dignité et d'estime de « l'autre ». En somme, l'ouverture des négociations interculturelles a permis de parvenir à des accommodements constitutionnels pour les sujets marginalisés de l'histoire occidentale. Il est inutile de s'attarder ici en détail sur chacune des catégories exposées et débattues, mais il importe de souligner que, de manière générale, les théories multiculturelles s'accordent à dire qu'il est nécessaire de créer des délégations législatives pour transmettre la volonté de différentes « identités » afin de leur octroyer des droits, des ressources et des opportunités[115]. Dans leur ouvrage, Taylor et Maclure écrivent que « le principe d'accommodement [doit] être conçu comme une obligation juridique découlant des droits plus généraux enchâssés dans les chartes des droits et libertés[116]. » De fait, lorsque les institutions publiques évaluent des revendications identitaires à la lumière des chartes, la question se pose de savoir s'il est légitime que les institutions étatiques – qui sont, faut-il le dire, extrinsèques[117] aux groupes consultés – posent un regard critique sur les différentes facettes de ces associations afin de déterminer la potentielle compatibilité de certaines de leurs pratiques avec la laïcité et la liberté de conscience. Il est vrai que le multiculturalisme est une stratégie adoptée par les sociétés libérales dans le but de défendre l'autonomie individuelle – ou plus précisément, l'autonomie de l'individu comme citoyen de l'État-Nation libéral[118]. Cependant, de ce point de vue, les arguments dénonçant l'injustice historique commise contre les groupes religieux ne peuvent être acceptés que si l'appartenance (confessionnelle) est comprise comme une option « offerte » à l'individu[119]. On peut dès lors faire deux objections à l'approche de Taylor : d'une part, l'accommodement raisonnable n'est octroyé à un groupe que dans la mesure où il ne met pas en péril les idées et valeurs libérales elles-mêmes (et avant tout le principe de la liberté de conscience) et, d'autre part, il néglige les conflits de compétence au profit d'une attention portée exclusivement aux conflits culturels[120]. Cela vaut particulièrement pour le rapport Bouchard-Taylor, où le terme « religieux » est inclus dans la définition même d'une « pratique culturelle » : « l'analyse des pratiques d'accommodement liées à la culture

(incluant le religieux) ainsi que celle des enjeux associés nous ont conduits à interroger directement les dimensions socioculturelles les plus fondamentales de notre société[121]. » Or, les revendications présentées par des groupes religieux expriment une demande d'autonomie institutionnelle, et non la reconnaissance d'une identité ethnique ou culturelle, puisqu'ils remettent en question l'idée même d'une seule autorité, une seule juridiction ultime dans les limites d'un territoire donné. C'est en ce sens qu'il est possible de se demander ce qui fait que, pour Taylor, le droit en vigueur mérite d'être en vigueur et, surtout, ce qui donne à l'État un statut d'association politique privilégiée pour la concrétisation définitive du droit.

Il va sans dire que les notions de religion et de culture s'avèrent hautement polysémiques, et en vain cherchera-t-on dans la littérature à déceler des définitions ultimes et incontestables. Mais il est tout de même possible de s'accorder quant à la différence essentielle entre une norme culturelle et une norme dictée par une autorité formelle[122]. Alors que les traits distinctifs d'une pratique culturelle largement reconnue et adoptée par un groupe ethnoculturel pourraient bien coïncider avec les caractéristiques d'une prescription religieuse, il demeure que leur « validité » et leur « autorité » sont, par principe, analytiquement distinctes[123]. En ce sens, la religion est souvent plus active que ne le laissent entendre les horizons de signification chez Taylor[124], entre autres, car elle se prononce de manière catégorique pour prescrire (et proscrire) des lignes directrices de conduite[125]. Par ailleurs, un groupe religieux formellement organisé aura davantage tendance à suivre des règles explicites en matière d'adhésion, en plus d'avoir une hiérarchie d'instances et des procédures claires qui permettent au groupe d'agir en tant que personne morale – par exemple, dans la capacité juridique de contracter avec des tiers[126]. En fin de compte, il serait possible de résumer la différence entre le multiculturalisme et le pluralisme politique à un conflit d'autorité[127] : la question devient, par conséquent, celle de savoir *qui* précisément assurera la concrétisation de la norme.

De fait, les politiques publiques multiculturelles n'ont pas été conçues en réponse à des demandes formulées par certaines « cultures », mais plutôt par des individus concernés par des restrictions imposées sur leurs pratiques culturelles[128]. Dans les cas de revendication d'autorité émanant de groupes « culturels », l'argument multiculturel n'a été pris que dans un sens second et dérivé, puisqu'il consiste, en pratique, à inciter l'État à concéder des droits particuliers à des groupes minoritaires en fonction du bénéfice qu'ils sont susceptibles de conférer à des individus *en tant que* membres d'un groupe[129].

Il est clair que si Taylor défend une conception individualiste et subjective de la liberté de religion, c'est avant tout pour s'opposer à un relativisme désinvolte qui, en invoquant une prétention à l'autorité, pourrait justifier des contraintes imposées aux membres vulnérables d'un groupe. C'est pourquoi il soutient que la conception adoptée par la Cour suprême du Canada – qui est celle du « parti pris en faveur de l'autonomie morale des individus » – permet aux tribunaux de contourner le « danger de se rabattre sur l'opinion majoritaire au sein d'une

communauté religieuse et de contribuer à la marginalisation des voix minoritaires[130]. » Envisagée dans cette perspective, l'expérience religieuse est interprétée exclusivement dans les termes d'une quête de sens personnelle, c'est-à-dire qu'elle repose sur la distinction opérée par William James entre la « religion institutionnelle » et la « religion personnelle »[131]. Il semble dès lors difficile de voir comment la laïcité, telle que définie par Taylor, pourrait faire l'objet d'un conflit entre les prérogatives de deux autorités; en effet, elle ne désigne rien d'autre que la capacité pour le pouvoir souverain de tolérer la diversité des opinions personnelles. Selon cette vue, en dépit de l'étiquette « pluraliste », le régime de laïcité ouverte n'admettra en son sein la présence de minorités religieuses qu'à condition que celles-ci ne remettent pas en question la légitimité de l'État en tant que source ultime de l'autorité politique.

REMARQUES CONCLUSIVES

Taylor a développé une critique incisive des doctrines qui affirment l'autosuffisance de l'humain, c'est-à-dire qui présupposent que les individus sont dotés de droits fondamentaux en dehors d'un certain contexte[132]. Pour comprendre ce que peut signifier l'identité collective, selon Taylor, il faut préciser que les conditions de possibilité effective de liberté et d'égalité ne peuvent être pensées adéquatement sans une conception de l'épanouissement de soi où le « moi » est imbriqué dans le tissu social : « [t]he thesis is that the identity of the autonomous, self-determining individual requires a social matrix, one for instance which through a series of practices recognizes the right to autonomous decision and which calls for the individual having a voice in deliberation about public action[133]. » Dans cette façon de voir, la théorie doit penser le phénomène de la sécularisation d'un point de vue pratique et se méfier des doctrines qui accordent une importance prépondérante aux moyens politiques de la laïcité, car elles ont tendance à élever au rang de valeurs des formules comme : « la séparation de l'Église et de l'État », la « neutralité de l'État » ou encore « la distinction entre la "sphère publique" et la "sphère privée", avec la relégation de la religion dans cette dernière[134]. » Aux yeux de Taylor, les approches qui invoquent une de ces définitions comme critère ultime font de la laïcité l'équivalent séculier de la religion et finissent par inculquer les valeurs qu'elles défendent, par des politiques orientées en ce sens, aux citoyens qui ne les partagent pas.

Cela étant dit, bien que guidé par un souci de dépassement des approches rigides de la laïcité, le régime proposé par Taylor défend une conception subjective et individualiste du rapport entre le pouvoir politique et la religion. Or, c'est là justement une forme de justification qui voit dans l'ordre légal établi le seul et unique opérateur de la neutralisation des antagonismes confessionnels. Si l'on prend au sérieux la thèse méta-éthique du pluralisme, à savoir que nos conflits moraux les plus profonds sont incommensurables et, parfois, insolubles, il est dès lors inévitable, au risque de rabaisser les critères de l'action sociale[135], de déplacer la question de la justice vers celle de l'autorité. Car s'il est vrai que, du point de vue Taylor, on ne peut empêcher l'État de gérer des conflits entre les moyens de la laïcité, sa théorie exclut d'emblée la possibilité de conflits opposant les

finalités morales de celle-ci. En effet, dans la perspective multiculturelle qui est celle de Taylor, la théorie normative de la laïcité constitue le cadre de règlementation ultime dans l'entreprise politique de « gestion » de la diversité. Taylor néglige ainsi les conflits de compétence au profit d'une source unique d'autorité politique qui affirme sa neutralité devant la « résonance des croyances religieuses dans la quête de sens personnelle[136]. » Les tribunaux de la Cour suprême du Canada ont le dernier mot : c'est à eux qu'il revient de décider si les conditions sont réunies pour concéder un accommodement. La question qui demeure ouverte est de savoir si Taylor a raison de dire que la religion, qui auparavant constituait une pratique collective, est désormais renvoyée au choix personnel. Il ne fait guère de doute, cependant, que Taylor néglige les revendications d'autorité formulées par des associations politiques concurrentes qui sont pourtant capables de relever le défi de la légitimité.

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NOTES

1 Dans cet article, nous utilisons les termes de « laïcité » et de « sécularisation » comme synonymes pour des raisons pratiques. Bien qu'il existe un débat concernant la signification de ces termes, il semble que le mot « laïcité » se réfère davantage au contexte français. Notons qu'en anglais il n'existe qu'un seul terme pour désigner les deux (*secular*). Cependant, Jean Baubérot propose une distinction entre la « laïcité », qui concernerait la place et le rôle politique de la religion, et la « sécularisation » en tant que processus sociologique ayant une forte emprise sur notre façon de concevoir le monde. Voir Baubérot, Jean, *Laïcité 1905-2005 : Entre passion et raison*, Paris, Seuil, 2004, p. 53. Cette distinction est reprise par Charles Taylor et Jocelyn Maclure, pour qui « la laïcisation est un processus politique qui s'inscrit dans le droit positif », alors que « la sécularisation est plutôt un phénomène sociologique qui s'incarne dans les conceptions du monde et les modes de vie des personnes. » Voir Maclure, Jocelyn et Charles Taylor, *Laïcité et liberté de conscience*, Montréal, Boréal, 2010, p. 24.

2 Taylor, Charles, *A Secular Age*, Cambridge, MA, Harvard University Press, 2007, p. 2.

3 Voir Loughlin, Martin, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, p. 7. À ce sujet, voir aussi Gauchet, Marcel, *Le désenchantement du monde : une histoire politique de la religion*, Paris, Gallimard, 1985, p. 65; Gauchet, Marcel, *La religion dans la démocratie : parcours de la laïcité*, Paris, Gallimard, 1998, pp. 41-82.

4 Taylor, *A Secular Age*, *op. cit*., p. 2.

5 Dans un article important, Taylor emploie le terme d'« atomisme » pour caractériser les « doctrines of social contract theory which arose in the seventeenth century and also successor doctrines which may not have made use of the notion of social contract but which inherited a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual. The term is also applied to contemporary doctrines which […] try to defend in some sense the priority of the individual and his rights over society […] ». Autrement dit, l'atomisme est une conception particulière de la nature humaine qui affirme la « primauté des droits ». Voir Taylor, Charles, « Atomism », *in Philosophy and the Human Sciences: Philosophical Papers II*, Cambridge, Cambridge University Press, 1985, p. 187.

6 *Ibid*., p. 34. Nous retrouvons ici l'idée d'une « rationalité autonome » au sein de la philosophie rationaliste, de Descartes à Hegel.

7 Taylor, Charles, « *Apologia pro Libro suo* », *in* Warner, Michael et collab. (dir.), *Varieties of Secularism in a Secular Age*, Cambridge, MA, Harvard University Press, 2010, p. 301.

8 *Ibid*.

9 En effet, l'interprétation qui voudrait que la sécularisation ne soit qu'une étape parmi d'autres dans la voie du progrès et de la rationalisation soulève un certain nombre de questions sur la relation entre la portée « explicative » d'une théorie et les « définitions de soi » des agents concernés. Voir Taylor, Charles, « Understanding and Ethnocentricity », *in Philosophy and the Human Sciences: Philosophical Papers II*, *op. cit.*, pp. 116-133.

10 Voir Maclure, Jocelyn, « Political Secularism: A Sketch », *Recode Working Paper*, no. 16, 2013, p. 4.

11 Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 9.

12 *Ibid*., p. 39.

13 Gauchet, Marcel, *La religion dans la démocratie : parcours de la laïcité*, *op. cit*., p. 11.

14 Taylor, Charles, « Two Theories of Modernity », *in* Gaonkar, Dilip Parameshwar (dir.), *Alternative Modernities*, Durham, Duke University Press, 2001, p. 172. À ce sujet, voir aussi Descombes, Vincent, *Le raisonnement de l'ours*, Paris, Seuil, 2007, p. 51.

[15] Taylor, Charles, *Modern Social Imaginaries*, Durham, Duke University Press, 2004, p. 18.
[16] *Ibid*.
[17] Dans sa critique de l'épistémologie, Taylor a noté que la conséquence sociale de cette croyance selon laquelle la « performance » de l'intellect peut être comprise en des termes d'opérations formelles est la suivante : « an atomistic construal of society as constituted by, or ultimately to be explained in terms of, individual purposes. » Voir Taylor, Charles, « Overcoming Epistemology », *in Philosophical Arguments*, Cambridge, MA, Harvard University Press, 1995, p. 7.
[18] Voir Taylor, Charles, « Introduction », *in Philosophy and the Human Sciences: Philosophical Papers II*, *op cit.*, p. 2.
[19] *Ibid*.
[20] Descombes, *Le raisonnement de l'ours*, *op. cit*., p. 54.
[21] Taylor, Charles, *Sources of the Self*, Cambridge, MA, Harvard University Press, 1989, p. 38.
[22] Voir Taylor, « Introduction », *in Philosophy and The Human Sciences: Philosophical Papers II*, *op. cit*., p. 9.
[23] Taylor, *Modern Social Imaginaries*, *op. cit*., p. 195.
[24] Taylor, « Two Theories of Modernity », *op. cit*., p. 172.
[25] Voir Taylor, Charles, « Modes of Secularism », *in* Rajeev Bhargava (dir.), *Secularism and its Critics*, New Dehli, Oxford University Press, 1998, p. 53.
[26] Voir Berman, Harold, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1985, pp. 29-30.
[27] Voir « The Great Disembedding », *in* Taylor, *A Secular Age*, *op. cit*., pp. 146-159. On retiendra en particulier cette observation de Taylor : « The compromise between the individuated religion of devotion or obedience or rationally understood virtue, on one hand, and the collective often cosmos-related rituals of whole societies, on the other, was broken, and in favour of the former. Disenchantment, Reform, and personal religion went together. Just as the church was at its most perfect when each of its members adhered to it on their own individual responsibility […] *so society itself comes to be reconceived as made up of individuals*. The Great Disembedding, as I propose to call it, implicit in the Axial revolution, reaches its logical conclusion. » *Ibid*., p. 149 (nous soulignons).
[28] Taylor, *A Secular Age*, *op. cit*., p. 155.
[29] À ce sujet, voir Descombes, « Louis Dumont et les outils de la tolérance », *in Le raisonnement de l'ours*, *op. cit*., pp. 227-256.
[30] *Ibid*., p. 239.
[31] Taylor, *A Secular Age*, *op. cit*., p. 146.
[32] *Ibid*, p. 459.
[33] *Ibid*., pp. 146-158. On retrouve une idée similaire dans *Sources of the Self* : « Modern culture has developed conceptions of individualism which picture the human person as, at least potentially, finding his or her own bearings within, declaring independence from the webs of interlocution which have originally formed him/her, or at least neutralizing them. » Taylor, *Sources of the Self*, *op. cit*., p. 36.
[34] Taylor, *A Secular Age*, *op. cit*., p. 500.
[35] *Ibid*., p. 514 : « The tight connection between national identity, a certain ecclesiastical tradition, strong common beliefs, and sense of civilizational order, which was standard for the Age of Mobilization, has given way, weakening crucially the hold of the theology. »
[36] Voir « Religion Today », in *ibid*., pp. 505-539. Cependant, il faut insister sur le fait que si le Moyen-Orient est (possiblement) un cas paradigmatique, il n'est certainement pas unique; en effet, il suffit de penser au cas du Mexique (pays nord-américain, laïque depuis la Constitution de 1857) et à la place occupée par la figure de *Nuestra Señora de Guadalupe* dans la construction de l'identité nationale. À ce sujet, voir Vega Gómez, J., « Ley Sobre Libertad de Cultos », *in* Patricia Galeana, (dir.), *Secularización del Estado y la Sociedad*, México, Siglo Veintiuno Editores, 2010, p. 269.

[37] Taylor, Charles, « The Polysemy of the Secular », *Social Research*, vol. 76, no. 4, 2009, p. 1144.

[38] À ce sujet, voir Taylor, « The Immanent Frame », *in A Secular Age*, *op. cit*., pp. 539-594.

[39] Taylor, Charles, « Modes of Secularism », *in* Rajeev Bhargava (dir.), *Secularism and its Critics*, New Dehli, Oxford University Press, 1998, p. 31.

[40] On peut penser au cas de la démocratie laïque en Inde, par exemple, là où les religions brahmaniques se distinguent par l'absence d'un équivalent de ce qu'en Occident on comprend par une « église ». Voir Taylor, « Modes of Secularism », *op. cit*., pp. 31-54. Taylor s'est intéressé également à la Thaïlande, notamment dans « Conditions of an Unforced Consensus on Human Rights », *in Dilemmas and Connections*, Cambridge, MA, Harvard University Press, 2011, pp. 105-124, et dans Muntarbhorn, Vitit et Charles Taylor, *Roads to Democracy: Human Rights and Democratic Development in Thailand*, International Centre for Human Rights and Democratic Development, 1994.

[41] Taylor, « The Polysemy of the Secular », *op. cit*., p. 1144.

[42] Taylor, *A Secular Age*, *op. cit*., p. 1.

[43] *Ibid*., p. 2 : « […] as we function within various spheres of activity – economic, political, cultural, educational, professional, recreational – the norms and principles we follow, the deliberations we engage in, generally don't refer us to God or to any religious beliefs; the considerations we act on are internal to the "rationality" of each sphere – maximum gain within the economy, the greatest benefit to the greatest number in the political area, and so on. »

[44] *Ibid*., p. 2.

[45] *Ibid*. Ici, le cas des États-Unis est probant : c'est en effet une des premières sociétés à avoir décidé de la séparation de l'Église et de l'État (pays séculier au sens I), mais c'est aussi une des sociétés occidentales où le taux de croyances et pratiques religieuses demeure statistiquement très élevé.

[46] *Ibid*., p. 3 : « The shift to secularity in this sense consists, among other things, of a move from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace. »

[47] *Ibid*., p. 222.

[48] *Ibid*., p. 143.

[49] *Ibid*., p. 300.

[50] Voir *Ibid*., pp. 159-171.

[51] *Ibid*., p. 170.

[52] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 11.

[53] *Ibid*., p. 10. Taylor est d'ailleurs revenu maintes fois sur l'importance d'un rapport « neutre » et distancié entre le pouvoir politique et les religions. Voir Taylor, « Why We Need a Radical Redefinition of Secularism », *in* Judith Butler et collab. (dir.), *The Power of Religion in the Public Sphere*, New York, Columbia University Press, 2011, p. 34 et Taylor, « The Polysemy of the Secular », *op. cit*., p. 1150.

[54] *Ibid*., pp. 11-12.

[55] Voir *ibid*., chap. 3, « Les régimes de laïcité », pp. 39-47.

[56] *Ibid*., p. 18.

[57] *Ibid*., p. 21.

[58] Voir Taylor, Charles, « Die Blosse Vernunft », *in Dilemmas and Connections*, Cambridge, MA, Harvard University Press, 2011, pp. 326-346.

[59] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 23.

[60] *Ibid*., p. 24.

[61] *Ibid*., p. 29.

[62] *Ibid*., p. 20. Il est vrai que ce n'est qu'à partir des années 1990 que Taylor introduit dans ses écrits le concept rawlsien du consensus par recoupement (*overlapping consensus*). Voir Gagnon, Bernard, « Du communautarisme à la neutralité libérale : un tournant radical dans la pensée politique de Charles Taylor », *Politique et Sociétés*, vol. 31, no. 1, 2010, pp. 127-147.

[63] *Ibid*. p. 30.

[64] *Ibid*., p. 31.

[65] *Ibid*., p. 34. Notons que cette conception de « finalité morale » chez Taylor est présente dans ses travaux précédents. Selon Taylor, le fait que nous soyons à même d'établir des discriminations qualitatives, et donc d'effectuer des choix non arbitraires par rapport à des biens incommensurables, suffirait à montrer que nous sommes bien capables de « rechercher l'unité dans notre vie morale ». Taylor, Charles, « La conduite d'une vie et le moment du bien », *in* De Lara, Philippe (dir.), *La liberté des Modernes*, Paris, Presses Universitaires de France, p. 286. Taylor écrit également qu'il voudrait « contribuer à nous rapprocher d'une conception plus plausible du raisonnement moral, une conception qui rende compte aussi bien de son inévitable diversité que de son aspiration permanente à l'unité. » *Ibid*., p. 287.

[66] Voir *ibid*., chap. 3 : « Les régimes de laïcité », pp. 39-47.

[67] Taylor, *ibid*., p. 39 : « On dira, par exemple, que la laïcité est plus ou moins "rigide" et "sévère" ou "souple" et "ouverte" selon la manière dont sont résolus les dilemmes qui se posent lorsque les principes et les modes opératoires de la laïcité entrent en conflit. Une forme de laïcité plus rigide permet une restriction plus grande du libre exercice de la religion au nom d'une certaine compréhension de la neutralité de l'État et de la séparation des pouvoirs politique et religieux, alors qu'une laïcité "ouverte" défend un modèle axé sur la protection de la liberté de conscience et de religion, ainsi qu'une conception plus souple de la séparation et de la neutralité. »

[68] Cette expression a été introduite dans le débat mené par Rawls dans son article « L'idée d'un consensus par recoupement », *Revue de métaphysique et de morale*, vol. 93, no, 1, 1988, pp. 3-32 et dans son livre *Political Liberalism*, New York, Columbia University Press, 2005.

[69] Par monisme, nous retiendrons la définition éminemment politique qu'en donne Víctor Muñiz-Fraticelli : « […] the idea that the state [is] the unlimited and unitary source of legitimate authority in any given society, that it [is] owed allegiance above all other associations, and indeed that those authorities [can] legitimately exist only as long as the sovereign tolerate[s] them. » Voir Muñiz-Fraticelli, Víctor, *The Structure of Pluralism*, Oxford, Oxford University Press, 2014, p. 18.

[70] Mise à part la persistance de quelques aires de culture extrêmement cloisonnées (les Amish ou les Mennonites en Occident, peut-être), il est difficile de penser à une société dont la spécificité serait le pluralisme (la diversité) culturel(le).

[71] À ce sujet, voir Eisenberg, Avigail, *Reconstructing Political Pluralism*, New York, State University of New York Press, 1995; Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit.*.

[72] Il existe tout un débat à ce sujet. Voir, entre autres, Crowder, George, *Liberalism and Value Pluralism*, London, Continuum, 2002; Gray, John, *Two Faces of Liberalism*, Cambridge, UK, Polity Press, 2000; Dilhac, Marc-Antoine, « Introduction », *in Étant donné le pluralisme*, Paris, Publications de la Sorbonne, 2013, pp. 9-26.

[73] Comme le souligne très justement Dilhac, « [n]ous nous trouvons alors dans une situation tragique où nous devons faire des choix sans que nous puissions déterminer théoriquement quel choix est absolument le meilleur. » Voir Dilhac, « Introduction », *op. cit*., pp. 12-13.

[74] Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit.*, p. 11.

[75] Notre investigation oppose le « pluralisme libéral » de Taylor au « pluralisme politique » qui, lui, s'inspire des travaux sur l'histoire conceptuelle de la souveraineté ainsi que sur le pluralisme des autorités et des juridictions au Moyen Âge. Voir Gierke, Otto, *Political Theories of the Middle Age*, Cambridge, Cambridge University Press, 1988; Maitland, Frederic William, *State, Trust and Corporation*, Cambridge, Cambridge University Press, 2003; Figgis, John Neville, *Churches in the Modern State*, London, Thoemmes, 1997; Laski, Harold Joseph, *Studies in Law and Politics*, London, Archon Books, 1969; Follett, Mary Parker, *The New State*, London, Longmans Green and Co., 1918.

[76] Voir Berlin, Isaiah, « The Pursuit of the Ideal », *in The Crooked Timber of Humanity: Chapters in the History of Ideas*, London, John Murray, 1990, pp. 1-20; Williams, Bernard, « Politics and Moral Character », *in* Stuart Hampshire (dir.), *Public and Private Morality*,

Cambridge, UK, Cambridge University Press, 1978, pp. 55-73; Hampshire, Stuart, « Public and Private Morality », *in* Stuart Hampshire (dir.), *Public and Private Morality*, *op. cit.*, pp. 23-53; pour n'en citer que quelques-uns.

77 Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 18.

78 Larmore, Charles, *The Morals of Modernity*, Cambridge, Cambridge University Press, 1996, p. 154 : « There have indeed been some who have equated explicitly Rawls's concern with Berlin's. Yet the two cannot possibly be the same. »

79 En effet, il est important de préciser que les deux approches se situent sur des plans argumentatifs très différents : la thèse de Rawls est descriptive, tandis que celle de Berlin est normative. Mais cela n'empêche pas que Taylor et Maclure citent, à la même page, respectivement Berlin et Rawls pour justifier que leur théorie de la laïcité est pluraliste. Voir Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 18.

80 *Ibid*., p. 154.

81 *Ibid*. Il est intéressant de noter, comme le remarque Larmore, que Rawls semble lui-même reconnaître la différence : « (e) Often there are different kinds of normative considerations of different force on both sides of a question and it is difficult to make an overall assessment. » Aussi : « [S]ince I am […] trying so far as possible to avoid controversial philosophical theses and to give an account of the difficulties of reason that rest on the plain facts open to all, I refrain from any statement stronger than (e) ». Voir Rawls, John, « Domain of the Political and Overlapping Consensus », *New York University Law Review*, vol. 64, no. 2, 1989, p. 237. Voir aussi Rawls, John, *Political Liberalism*, *op. cit.*, pp. 86, 241 et 361.

82 Berlin, Isaiah, « The Pursuit of the Ideal », *in The Crooked Timber of Humanity: Chapters in the History of Ideas*, *op. cit.*, p. 12.

83 *Ibid*., pp. 12-13.

84 Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 34.

85 *Ibid*.

86 *Ibid*.

87 *Ibid*., p. 35.

88 *Ibid*., p. 40.

89 *Ibid*., p. 60 : « Notre position ne signifie toutefois pas qu'il faut accepter le port de tous les signes religieux par les agents de l'État. Elle implique plutôt que l'on ne devrait pas interdire le port d'un signe religieux simplement parce qu'il est religieux. »

90 *Ibid*., pp. 60-61.

91 Voir Melidoro, Domenico, « Review of *Laïcité et liberté de conscience* », *International Review of Sociology*, vol. 22, no. 1, 2012, pp. 167-169; Melidoro, Domenico, « Principles of Secularism: Is the Clash Among Principles Necessary? », *Ragion Practica*, no. 42, 2014, pp. 233-246.

92 Melidoro, « Principles of Secularism: Is the Clash Among Principles Necessary? », *op. cit*., p. 239.

93 *Ibid*., p. 242.

94 Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 30. Je souligne.

95 Melidoro, « Principles of Secularism: Is the Clash Among Principles Necessary? », *op. cit*., p. 242.

96 À ce sujet, voir Blattberg, Charles, « Political Philosophies and Political Ideologies », *Public Affairs Quaterly*, vol. 15, no. 3, 2001, p. 201.

97 Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 79.

98 Voir *ibid*., p. 80.

99 Il est vrai que cela correspond à ce que Taylor valorisait jadis par le thème de la « diversité profonde ». Bernard Gagnon aurait-il raison de dire que Taylor est récemment passé d'une position politique qui doit défendre et promouvoir une conception substantielle du bien à l'adoption d'une théorie libérale impartiale de la vie bonne? Faute d'espace, cette question sera ici laissée de côté. Voir Zuniga, Didier, *Charles Taylor et le pluralisme moral*, mémoire, science politique, Université de Montréal, 2015, pp. 36-39. Voir aussi Taylor, Charles,

Rapprocher les solitudes : écrits sur le fédéralisme et le nationalisme au Canada, Québec, Presses de l'Université Laval, 1992.

[100] *Ibid*., p. 85. En vue de fournir un ancrage théorique, Taylor et Maclure citent les auteurs et ouvrages suivants : Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, 1996; Taylor, Charles, « The Politics of Recognition », *in Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, 1994; Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995; Parekh, Bhikhu, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Cambridge, Harvard University Press, 2002.

[101] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., pp. 86-87.

[102] Voir Taylor, « The Polysemy of the Secular », p. 1151; Taylor, « Why We Need a Radical Redefinition of Secularism », *op. cit*., p. 34.

[103] *Ibid*., p. 1151.

[104] *Ibid*.

[105] *Ibid*.

[106] *Ibid*., p. 1157; et Taylor, « Why We Need a Radical Redefinition of Secularism », p. 41 : « goal 1, ensuring the maximum possible religious liberty, or in its more general form, liberty of conscience. » À ce sujet, voir aussi Bouchard, Gérard et Charles Taylor, *Fonder l'avenir. Le temps de la conciliation. Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles*, Gouvernement du Québec, Archives nationales du Québec, 2008, pp. 176-177 : « la liberté de religion doit être conçue comme un aspect de la catégorie plus large de la liberté de conscience. Celle-ci vise à faire en sorte que les personnes soient libres d'adopter les croyances ou les raisons profondes (religieuses, spirituelles ou séculières) de leur choix et qu'elles ne soient pas forcées d'agir de façon contraire à leurs convictions de conscience. »

[107] Mais on peut aussi penser à quelqu'un comme le romantique Whilelm von Humboldt.

[108] Muñiz-Fraticelli, Víctor, « The Distinctiveness of Religious Liberty », *in* René Provost (dir.), *Mapping the Legal Boundaries of Belonging*, Oxford, Oxford University Press, 2014, p. 99.

[109] *Ibid*., p. 109.

[110] Sur la question du statut normatif de la culture, la littérature est évidemment abondante. On peut penser, par exemple, à Dumont, Louis, *Homo Aequalis Vol. II : L'idéologie allemande*, Paris, Gallimard, 1991; Johnson, James, « Why Respect Culture? », *American Journal of Political Science*, vol. 44, no. 3, 2000, pp. 405-418; Scott, David, « Culture in Political Theory », *Political Theory*, vol. 31, no. 1, 2003, pp. 92-115; pour n'en nommer que quelques-uns.

[111] Scott, « Culture in Political Theory », *op. cit*., p. 96.

[112] *Ibid*., p. 93. Ou du moins, l'argument défendu par Will Kymlicka dans *Liberalism, Community and Culture* qui est la position adoptée par Rawls dans le dit « débat communautariens-libéraux ». Voir Rawls, *Political Liberalism*, *op. cit*., p. 27.

[113] *Ibid*., p. 96.

[114] *Ibid*.

[115] Voir Eisenberg, Avigail, *Reasons of Identity*, Oxford, Oxford University Press, 2009, p. 1.

[116] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 85.

[117] D'un point de vue moral, il y a lieu de se demander s'il ne s'agit pas ici tout simplement de paternalisme – et même de colonialisme : cette conception correspond à l'usurpation de la capacité de jugement moral des groupes en question.

[118] Voir Muñiz-Fraticelli, *The Structure of Pluralism*, *op cit.*, p. 38.

[119] Voir Eisenberg, *Reasons of Identity*, *op. cit*., chap. 5 : « Religious Identity and the Problem of Authenticity », pp. 91-118.

[120] En ce qui a trait à la deuxième objection, voir Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit*., p. 40 : « The exclusive attention to culture leads some prominent theorists of multiculturalism astray when they try to reduce jurisdictional disputes between incommensurable legal authorities to questions of accommodation of cultural values. »

[121] Bouchard et Taylor, *Fonder l'avenir. Le temps de la conciliation*, *op. cit.*, p. 33.
[122] À ce sujet, voir Muñiz-Fraticelli, « The Inadequacy of Multiculturalism », *in The Structure of Pluralism*, *op. cit*., pp. 31-56.
[123] Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit*., p. 40.
[124] Rappelons que, chez Taylor, les horizons de signification dénotent l'existence, indépendamment de toute volonté particulière, de quelque chose « grâce auquel certaines choses valent plus que d'autres ». Cet arrière-fond de signification correspond, en quelque sorte, à la culture à laquelle on appartient. Voir Taylor, Charles, *Grandeur et misère de la Modernité*, Montréal, Bellarmin, 1992, p. 54.
[125] Muñiz-Fraticelli, « The Distinctiveness of Religious Liberty », *op. cit*., p. 107. Notons que l'article de Taylor sur l'affaire Rushdie peut être considéré comme une exception. Voir Taylor, Charles, « The Rushdie Controversy », *Public Culture*, vol. 2, no. 1, 1989, pp. 118-122.
[126] Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit*., p. 40.
[127] Parce que « authorities are often instrumental in defining the meaning and the boundaries of a practice, and participation in a practice is often defined precisely by submission to a given authority. To put it in crude and oversimplified terms, to be a Roman Catholic involves, at a constitutive level, submission to the Magisterium […]. To deny this authority is not to be a bad Catholic; it is to be a Protestant ». Voir Muñiz-Fraticelli, *The Structure of Pluralism*, *op. cit*., p. 54.
[128] Muñiz-Fraticelli, « The Distinctiveness of Religious Liberty », *op. cit*., p. 113.
[129] *Ibid*.
[130] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 105. Les préoccupations de Taylor à ce sujet sont prégnantes, mais nous n'avons pas l'espace nécessaire ici pour aborder l'épineuse question des critères de justice visant à réguler le rapport entre les membres d'un groupe minoritaire.
[131] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 106. Voir aussi Taylor, *La diversité de l'expérience religieuse aujourd'hui*, *op. cit*.
[132] Voir Taylor, « Atomism », *op. cit*.
[133] *Ibid*., p. 209.
[134] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 11.
[135] L'inévitable accusation de relativisme moral est ici, faute d'espace, laissée de côté. On peut cependant noter que Berlin lui-même affirme qu'une posture pluraliste est difficilement dissociable d'une certaine forme de relativisme. Voir Jahanbegloo, Ramin, *Conversations with Isaiah Berlin*, London, Halban Publishers, 2013.
[136] Maclure et Taylor, *Laïcité et liberté de conscience*, *op. cit*., p. 105.

THE PRINCIPLE OF SUBSIDIARITY AS A CONSTITUTIONAL PRINCIPLE IN THE EU AND CANADA

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ABSTRACT:

A Principle of Subsidiarity regulates the allocation and/or use of authority within a political order where authority is dispersed between a centre and various sub-units. Section 1 sketches the role of such principle of subsidiarity in the EU, and some of its significance in Canada. Section 2 presents some conceptions of subsidiarity that indicate the range of alternatives. Section 3 considers some areas where such conceptions might add value to constitutional and political deliberations in Canada. Section 4 concludes with some reminders of crucial contested issues not fully resolved by appeals to subsidiarity alone, exemplified by the protection of human rights.

RÉSUMÉ :

Un principe de subsidiarité réglemente la répartition et/ou l'usage de l'autorité au sein d'un ordre politique où l'autorité est dispersée entre un centre et des sous-unités variées. La section 1 de cet article montre le rôle d'un tel principe de subsidiarité dans l'Union européenne, et certaines de ses implications au Canada. La section 2 présente des conceptions de la subsidiarité qui indiquent un éventail d'alternatives. La section 3 considère certains domaines où de telles conceptions pourraient ajouter de la valeur aux délibérations constitutionnelles et politiques au Canada. La section 4 conclut en rappelant certains problèmes cruciaux contestés, non entièrement résolus par les seuls appels à la subsidiarité, exemplifiés par la protection des droits humains.

A Principle of Subsidiarity regulates the allocation and/or use of authority within a political order where authority is dispersed between a centre and various sub-units. The principle places the burden of argument on those who seek to centralize such authority. In the EU, the principle has risen to prominence due to inclusion in several treaties. In Canada, arguments reminiscent of 'subsidiarity' appear to underpin the Supreme Court of Canada's 'provincial inability test' to interpret the extent of federal jurisdiction under section 91 of the 1867 Constitution Act,[1] and the principle has been expressly invoked on several occasions on different subject matters.[2]

Such comparisons between political orders with federal elements should only be done with great caution. One main reason for modesty when comparing the EU and Canada is that they exhibit features, strengths, and weaknesses from two different models of federation.[3] A 'coming together' federation emerges from independent states that agree to pool sovereign powers in certain areas to better achieve certain objectives. In contrast, a 'holding together' federation has emerged from a somewhat unified state in order to secure a different objective—namely, the survival of the state by quelling secessionist threats: delegating contentious issues such as language, religious holidays, etc. to the contesting groups rather than insisting on common policies. The EU has several features of 'coming together' federations among fully sovereign states, while Canada's constitutional and legal arrangements *also* result from attempts at 'holding together' the various provinces.

This cautionary note notwithstanding, Section 1 sketches the role of a principle of subsidiarity in the EU and some of its significance in Canada. In order to determine the relevance and value of subsidiarity in the Canadian setting, Section 2 presents some conceptions of subsidiarity that indicate the range of alternatives beyond those chosen by the EU. Section 3 considers some areas where such conceptions might add value to constitutional and political deliberations in Canada. Section 4 concludes with some reminders of crucial contested issues not fully resolved by appeals to subsidiarity alone, exemplified by the protection of human rights.

1. SUBSIDIARITY—IN THE EU AND IN CANADA

Several Treaties in the EU include a principle of subsidiarity. In the latest version, the Lisbon Treaty, the Subsidiarity Principle requires that:

> in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[4]

Such claims must be supported by reasons given in public.

A mechanism that further illustrate the workings of this Lisbon Subsidiarity merit mention. The Lisbon Treaty established a new procedure of parliamentary

review of proposed EU legislation (Protocol, Art 8). This procedure gives power to national parliaments to monitor proposals and to appeal them—to give out a "yellow card"—if they think the decision violates subsidiarity.

In Canada, the federal government may

> make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Supreme Court has interpreted this in part as a question of whether the provincial governments are *able* to address the issues of "Peace, Order and good Government." Call this *Canadian subsidiarity*. Decisions to centralize may turn on whether decisions made by one province impact on other provinces unduly, or whether federal rather than provincial action has comparative advantages, similar to the EU. The presumption is thus that decisions should be taken at the territorially lower level, and the burden of argument falls on those who seek central action. Several crucial issues either are determined in these treaties and constitutions or remain underspecified. To bring out the choices made, as well as the prospects for contestation, it is helpful to consider several partially conflicting theories of subsidiarity.

2. TRADITIONS OF SUBSIDIARITY

Proponents of subsidiarity have often ignored that this principle has several different historical traditions with drastically different implications for resolving conflicts between the centre and the member units—as those that arise regarding human rights. The following explores the implications of three central issues of contestation among theories of subsidiarity: (a) the *immunity* of smaller units, or rather, the obligations of larger units to *assist*; (b) the ambiguity as to the fundamental units—whether they are states or individuals; c) the question of who should have authority to *specify the objectives* and interests to be protected and promoted—and indeed to decide whether the principle of subsidiarity permits or requires more centralized action.

To get a better grasp of the specific features of *Lisbon* subsidiarity and *Canadian* subsidiarity, consider five alternative theories of subsidiarity, each of which has different implications both for authority above the state and for the allocation of authority about who should apply the principle of subsidiarity.[5]

I shall suggest that Lisbon subsidiarity grants undue privileges to the state and its interests, as we see when we compare to the various traditions from which this principle is drawn. On the other hand, Canadian subsidiarity seems restrained in the reasons for centralization consistent with subsidiarity. The five accounts draw on insights from Althusius, the American Confederalists, economic federalism, Catholic personalism, and liberal contractualism, respectively. They are sketched in an order that roughly grants the member units less authority. These accounts may regard subsidiarity as *proscribing* or prescribing central intervention, and

apply subsidiarity to the *allocation* of political powers or to their *exercise*. Some of these features reduce the scope of member unit authority, while some may protect them against intervention. Several of them seek precisely to reduce the need for general agreement among different world views or preference profiles, supporting the 'holding together' federal elements found, for example, in Canada.

(A) LIBERTY: ALTHUSIUS

Althusius, the so-called father of federalism, sketched an embryonic theory of subsidiarity drawing on Orthodox Calvinism. Communities are important supports ('subsidia') for the needs of individuals. Political authority arises on the basis of covenants among such associations. The role of the resultant centralized state is to co-ordinate and secure symbiosis among these associations on a consensual basis: "explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life" (Althusius, 1995, chap. 28). Althusius recognized that deliberation will not always yield agreement, particularly not in matters of faith. In such cases, he counselled religious toleration: "the magistrate who is not able, without peril to the commonwealth, to change or overcome the discrepancy in religion and creed ought to tolerate the dissenters for the sake of public peace and tranquillity, blinking his eyes and permitting them to exercise unapproved religion" (Althusius, 1995, chap. 28). This interpretation of subsidiarity would appear to take the existing sub-units for granted—a feature it shares with Lisbon subsidiarity. A weakness is thus that this approach fails to identify standards for legitimate associations regarding their treatment of members, their proper scope of activity, and their legal powers. Perhaps appeal might be made at this point to the value of freedom as absence of state constraint—this is indeed part of Althusius's argument for associations. But the grounds and scope of this paramount interest in non-intervention remain to be identified. The Althusian theory of subsidiarity might allow some conditions on legitimate subunits and on standards for power allocation among subunits, but such restrictions are not readily apparent.

This concern is perhaps most vividly underscored by the fact that the South African practice of *apartheid* and separation into so-called homelands was long regarded as justified precisely by this tradition of subsidiarity, of "sovereignty in one's social circle" (Kuyper, 1880; de Klerk, 1975, pp. 255-260). The South African model did show the influence of the Dutch pluralist tradition of *pillarization*, a system of social organization (inspired by Kuyper) in which distinct cultural or religious groups in a country control their own separate institutions. This tradition traces its origins to the same sources as Althusian subsidiarity (Baskwell, 2006). But the South African case demonstrated perversities that show some of the limitations of subsidiarity as a principle. But the segregation of the black South African population was not voluntary (as Kuyper would have it). Rather than taking subunits for granted and allocating competencies among them, the apartheid system *created* subunits on the pretense of subsidiary allocation of power. It is of course not clear that the role of subsidiarity should be

to determine the boundaries of units, rather than to be limited to allocating power between pre-existing units. And the homelands, of course, did not support, but rather inhibited the needs of individuals within them, thus perverting the idea of subsidia.

A second characteristic of Althusian subsidiarity is that, on this view, the common good of a political order is limited to such immunities and to those undertakings deemed by *every* subunit to be of their interest compared to their status quo. While this account allows for negotiation among subunit representatives based on existing preferences, agreement on ends is not expected—which is why subsidiarity is required in the first place.

Thirdly, Althusian subsidiarity is strongly committed to immunity of the local unit from interference by more central authorities. This raises severe problems when some subunits—associations or states—lack normative legitimacy, and insofar as interstate inequities raise issues of distributive justice, as in both the EU and in Canada. This point also brings attention to the so-called inability clause of Canadian subsidiarity: what should the central authorities do if one or more provinces are able but unwilling to act so as to secure the requisite objectives?

(B) LIBERTY: CONFEDERALISTS

Similar conclusions emerge from *confederal* arguments for subsidiarity based on the fear of tyranny, known from the US Federalist debates. On this view, individuals should be free to choose in matters where no others are harmed. This is thought to be best secured by decentralized government enjoying, as on the Althusian account, *veto* powers. Thus subunits may veto decisions, or supermajoritarian mechanisms must be established. An added reason for local politics often found in this tradition is that participation—and possibly subsidiarity—might be thought to facilitate learning and to secure political virtue.

Some limitations of this view should be mentioned. Firstly, it seems to assume a conception of the common good only as mutual advantage, leaving the areas of application open. Secondly, the exclusive focus on tyranny as the sole ill to be avoided is questionable. In the historic context of the European Union, similarly, abuse of centralized powers is not the only risk: local abuse, as experienced under Nazism, and the inability to secure necessary common action are also threats to individuals. Thus, as Madison pointed out, the plight of minorities is uncertain, since it is unlikely that smaller units are completely homogeneous. Indeed, tyranny may emerge more easily in small groups. It might also be easier for minorities to muster courage in larger settings.

As Jacob Levy observes, “Madison’s argument here combines insight about the oppressive potential of local homogeneity and local majorities with an unusually strong endorsement of heterogeneity and plurality in political life.” (Levy, 2015, p. 203). It is not in the abolition of national power or the suppression of local

allegiance that oppression is avoided, but in the multiplication of factions that "make[s] it difficult to assemble a national coalition in favor of any particular partial interest." Madison's is not an argument for subsidiarity, but it is an argument that recognizes the fruitful tension between local and national power.

This version of subsidiarity with subunits' veto powers may reduce opportunities and need for agreement. Montesquieu held that common interest is easier to see in a smaller setting. We may note that Scharpf (1988) makes similar arguments for subsidiarity in the European Union. Indeed, this narrow conception of relevant interests may be regarded as a response to such pluralism of worldviews and conceptions of the good life. But such a response could surely be enhanced by adding to this some further common interests, such as meeting certain basic needs. Human rights protections might thus also be grounded in this tradition. After all, perfect homogeneity is never achieved, and "the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression" (Madison 1787). These risks should be kept in mind when considering the implications of Lisbon subsidiarity or Canadian subsidiarity for human rights protections.

(C) EFFICIENCY: ECONOMIC FEDERALISM

This theory of subsidiarity holds that powers and burdens of public goods should be placed with the populations that benefit from them. Decentralized government is to be preferred where targeted provision of public goods is more efficient in economic terms. Member units do not enjoy veto powers, since free-riding member units may be overruled to ensure efficient coordination and production of public goods—namely, non-excludable and inexhaustible goods. One weakness of this view is that it is limited in scope to such public goods. One strength of this account is that it may help specify the comparative advantage sometimes provided by central action, as found in Canadian subsidiarity. However, economic federalism suffers from the standard weaknesses of economic theory regarded as a theory of normative legitimacy, including ignorance of important issues of preference formation. Moreover, it relies on Pareto improvements from given utility levels, ignoring the pervasive impact of unfair starting positions. Also note that arguments of economic federalism may recommend that issues are removed from democratic and political control, and instead be placed with market mechanisms, courts, or other non-political arrangements within subunits.

Of relevance for Lisbon subsidiarity, we may note that this argument *questions* the presumption in favour of member states as the appropriate subunits, and may instead support placing powers with substate regions or even individuals. Subsidiarity, also on this view, may go all the way down.

(D) JUSTICE: CATHOLIC PERSONALISM

The Catholic tradition of subsidiarity is expressed clearly in the 1891 Encyclical *Rerum Novarum*, and further developed in the 1931 Encyclical *Quadragesimo Anno* against fascism. The Catholic Church sought protection against socialism, yet protested capitalist exploitation of the poor. As developed in personalism, the human good is to develop and realize one's potential as made in the image of God. Voluntary interaction is required to find one's role and to promote one's good. The state must serve the common interest, and intervene to further individuals' autonomy.

This version of subsidiarity should regulate both competence allocation and exercise. It allows both territorial and functional applications of the principle, possibly placing some issues outside of the scope of democratic politics. Subunits do not enjoy veto rights, and interpretation of subsidiarity may be entrusted to the centre unit. Non-intervention into smaller units may often be appropriate, both to protect individuals' autonomy—we might think of human rights—as required for their proper development, and to save the scarce resources of the state or other larger unit. Conversely, state intervention is legitimate and required when the public good is threatened, such as when a particular class suffers (paras. 36 and 37; Pius XI 1931, para. 78).

This particular conception of subsidiarity rests on contested conceptions of the social order as willed by God, and of the human good as a particular mode of human flourishing. It is thus easily subject to the reasonable criticism that it cannot be applied among parties who fail to share this contested view. Indeed, the Catholic account of subsidiarity illustrates a broader feature of the principle—namely, that it presumes a significant amount of agreement about the common good (religious or not) and about the structures of adjudication of competencies (ecclesiastical or otherwise). In an organization like the Roman Catholic Church, in which the different components ostensibly share a common end and accept a common hierarchy, the jurisdictional problem of which authority ought to make decisions about competency and on what grounds it ought to make them is already resolved. This jurisdictional problem is prior to the application of the principle of subsidiarity, as we have observed several times above, and this conception of subsidiarity is ill-equipped to solve it (Levy, 2007, p. 459; Muñiz-Fraticelli, 2014, pp. 64-73).

The principle of subsidiarity cannot settle beyond reasonable disagreement which subunits and cleavages should be embedded—e.g., the role of families, or of labour unions. This may be an advantage, in that it makes this theory more flexible and adaptable to various forms of social organization. However, it does create problems when this version has strong yet contested views about what the responsibilities should be—e.g., those of families regarding care for the infirm and wages or support for the unemployed. Deliberation might reduce these disagreements for purposes of reaching public consensus. And one might be able to agree on certain basic human necessities—such as human rights—which are less open to challenge.

As long as there is such disagreement about conceptions of the good life, we should be wary of granting authority to make such decisions about flourishing to *any* authorities—be they decentralized or centralized. However, this is compatible with subunits pooling certain powers to secure objectives they deem in their interest. Furthermore, human rights treaties that limit state sovereignty may be more robust against criticism of this kind: these treaties and international efforts are not clearly aimed at promoting flourishing, but rather largely aimed at preventing abuse of state power that causes human *harms*. There is arguably more—but not full—agreement on such topics than on the details of human flourishing.

Some of these aspects of the Catholic view are consistent with the Lisbon Treaty and with Canadian subsidiarity, in that standards and objectives of the social order are to be taken as given—whether respectively, by God and His Church; by the treaty and its guardian, the Commission or as stated in the Canadian Constitution: "Peace, Order and good Government". Disagreement about such social functions are not easily managed by means of this conception of subsidiarity. On the other hand, this approach clearly allows challenges concerning the legitimacy of particular member units or states: The state must comply with natural and divine law to serve the common interest (John XXIII 1961, para. 20; Leo XIII 1891). This account also holds that subsidiarity must go all the way down to the individual—a view that sits less well with those conceptions of subsidiarity that only apply to the relationship between a state and interstate relations, as the EU or in Canada.

(E) A LIBERAL CONTRACTUALIST CASE FOR SUBSIDIARITY

Liberal contractualism of the kind associated with Rawls, Scanlon, or Barry might acknowledge a limited role for subsidiarity. Some but not all of the arguments above find support within this tradition. In addition, two arguments consistent with this tradition provide some support for subsidiarity. Firstly, individuals must be acknowledged to have an interest in controlling the social institutions that in turn shape their values, goals, options, and expectations.[6] Such political influence secures and promotes two important interests. Agreeing with the Republican claim of confederalists, it protects our interest in avoiding domination by others (cf. Pettit, 1997). In modern polities, this risk is arguably reduced by a broad dispersion of procedural control. Control over institutional change further serves to maintain our legitimate expectations. We have an interest in regulating the speed and direction of institutional change. This interest is secured by ensuring our informed participation, to reduce the risk of false expectations. When individuals share circumstances, beliefs, or values, they have a prima facie claim to share control over institutional change to prevent subjection and breaking of legitimate expectations. Those similarly affected are more likely to comprehend the need and room for change. *Insofar* as this holds true of members of subunits, there is a case for subsidiarity. Such considerations would, for instance, seem to support various legal powers enjoyed by the Francophone in Quebec. However, this account does not single out member units in the form of states as the only relevant subunits, contrary to Lisbon subsidiarity.

The second argument for subsidiarity concerns its role in character formation. The principle of subsidiarity can foster and structure political argumentation and bargaining in ways beneficial to public deliberation, and to the character formation required to sustain a just political order. By requiring impact statements and arguments of comparative efficiency, and by allowing member unit parliamentarians an institutional role, Lisbon subsidiarity may facilitate the socialization of individuals into the requisite sense of justice and concern for the common good. For this purpose, the principle of subsidiarity need not provide standards for the resolution of issues, as long as it requires public arguments about the legitimate status of member units, the proper common goal, and the likely effects of subunit and centre-unit action. However, this liberal contractualist argument *underdetermines* subsidiarity. That is, *other* rules for the exercise of political power could serve the same purpose, which is to ensure public debate about shared ends and suitable means, leading to preference adjustment. Furthermore, this debate must be supplemented by theories of institutional design in order to suggest suitable institutional reforms. Whether member units should enjoy veto, votes, or only voice is a matter of the likely institutional effects on character formation, and on the likely distributive effects.

SUMMARY: SUBSIDIARITY—IN THE LISBON TREATY, IN CANADA, AND OTHERWISE

In light of these brief sketches, we may conclude that Lisbon subsidiarity and Canadian subsidiarity seem to be conceptions of subsidiarity with features that fit with each of these five theories to varying degrees. The five accounts of subsidiarity sketched above suggest several reasons to support subsidiarity—but quite different versions of it.

(a) Member units are better able to secure shared interests, particularly if shared geography, resources, culture, or other features make for similar interests and policy choices among members of the subunits.

(b) A reduction of issues on the agenda and parties to agreements serve to reduce the risk of information overload, and foster joint gains.

(c) The deliberation fostered by subsidiarity can help build community, partly by preference formation towards the common good. The deliberation about ends also supports an important sense of community for a minority, that these decisions are ours, and can foster a sense among the majority about majority constraints. Deliberation may thus enforce the boundary within which majoritarianism is accepted as a legitimate decision procedure (cf. Miller, 1995, p. 257; Manin, 1987, p. 352).

(d) Subsidiarity helps protect against subjection and domination by others, by proscribing intervention into local affairs except when necessary for certain goals that are in some intriguing sense shared.

3. HOW MIGHT TRADITIONS OF SUBSIDIARITY ADD VALUE TO CONSTITUTIONAL AND POLITICAL DELIBERATIONS IN CANADA?

Tolstoy claimed that while all happy families are alike, the unhappy families are all different (Tolstoy, 2011). Similarly, each political order with federal elements is a response to unique situations—often to challenges, but also to special opportunities. Thus the arrangements of the European Union and Canada are different, and lessons may be difficult to draw between them. For instance, insights concerning risks of fragmentation and centralization may not travel well. The risks are different depending on the constitutional design: the best mechanisms are different, since they must reflect history. For instance, are these political orders the result of independent states 'coming together'—as in the EU—or are these prominent features the result, as in Canada, of attempts to accommodate differences by constitutionally devolving to quell local unrest by reducing the number of issues that all must agree on?

These differences notwithstanding, traditions of subsidiarity may contribute to more legitimate and more stable legal orders.

As most federations, the EU and Canada share one challenge: political orders with federal elements are less stable than unitary states; they have a permanent risk of undue centralization of power, or of fragmentation (Norman, 2001). Canada faces such concerns most saliently with regard to the status of Quebec. The Canadian constitution reduces the risk of untoward centralization or secession by careful listing the powers of both federal and provincial government bodies (in sections 91 and 92). However, issues of national concern may warrant federal action, which may lead to centralization over time. Similarly, the EU must address the emergence of eurosceptics, whose agendas may diverge but may well lead to calls for secession or for at least a removal of certain competences from the EU back to member states.

A principle of subsidiarity—however defined—may serve as a constitutional stabilizing device for such profound disagreements. It may be used as a mechanism to help keep federal arrangements responsive to new challenges, yet maintain federal elements over time. One may hope that it can foster dynamic stability, allowing reasoned change in allocation of competences, avoiding the perennial risks to federations of *undue* centralization or fragmentation in the form of secession. Appeals to subsidiarity may helps structure such 'constitutional' debates, and the critique and assessment of allocation of competences.

A related reason to value appeals to subsidiarity is that they may help in the critical and constructive assessment of calls for central action. Before turning to the Canadian case, recall that the Lisbon Treaty lays out the following account of subsidiarity:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the

> objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but *can* rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[7]

When interpreted strictly, the likelihood of success of union action is irrelevant for deciding whether union action is permitted: that is only a matter of whether the objectives (a) *cannot* be achieved to a sufficient level by member states, and whether these objectives (b) *can* be so achieved by the EU. A charitable interpretation is that some plausible assessment of *likely success* by EU actors is also required. Consider one example: different member states may give different priority to various objectives. Thus in the EU, some states may be more concerned with environment than with other issues. There may then be disagreement about which level of regulation to aim for. Indeed, there may be cases where an agreed EU level may result in lower standards in some states—and hence overall worse outcomes—than no common standard at all.

In the case of Canadian subsidiarity, the relevant clause is part of section 91 of the Constitution Act of 1867.

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

This and the next section enumerate the powers of federal and provincial governements, respectively. Thus, the provinces have exclusive power, for instance, to raise revenues through taxation for provincial purposes, to manage natural resources, to establish institutions for education and medical care, to charter corporations "for provincial objects," and to secure property and civil rights in the province (Sec. 92). In relation to agriculture or immigration, federal and provincial powers are concurrent (Sec. 95). The clause cited above concerns how residual powers should be allocated and used. While the Constitution allows the federal government to exercise authority in all areas not reserved to the provinces, this has been understood as legitimizing central action only in certain cases.

Generally, we see similarities to subsidiarity in Canada when the Supreme Court attempts to determine the applicability and limits of the federal power to promote "Peace, Order, and Good Government." The Supreme Court of Canada has focused on a doctrine of national concern test for promoting certain specified objectives. In order to determine whether a matter fell under the federal government's jurisdiction, the Court asked whether the provinces were unable to address the problem under consideration. *In R. v. Crown Zellerbach Canada*, the Court outlined the elements of the "national concern doctrine."

> For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution[.][8]

Pollution of waterways that cut across provinces is a typical example of such externalities wrought on other provinces. Another justification for federal action is when federal rather than provincial action has comparative advantages. Considerations of subsidiarity may foster systematic discussions about how to specify these reasons, and possibly add other reasons based on subsidiarity that may counsel central action consistent with the constitution. Central action is only permitted in cases where these objectives are at stake, or because decisions by one province impacts on other provinces to a sufficiently large extent. This is the basis of the provincial inability test of matters of national concern.

However, the effect of the Court's reliance of a test of provincial inability to curb excessive centralization (as one might expect of a principle analogous to subsidiarity) is at best equivocal, both before and after the Zellerbach decision.[9] Eugenie Brouillet observes that

> since the 1988 [Zellerbach] decision, this doctrine, although frequently invoked by the federal government in support of its legislative interventions, has been less frequently used by the Supreme Court, which prefers to validate its actions on the basis of the listed areas of jurisdiction, even if it has to extend their scope. (Brouillet, 2011, p. 622, n. 83)

The effect of the national concern doctrine and its provincial inability test has been, unsurprisingly, to justify further centralization of authority at the federal level. Brouillet is quick to note the difference between the notion of provincial inability and the principle of subsidiarity in the European Union. First, while "the European principle, … only produces its effects in a situation of concurrent jurisdiction, the Canadian notion can apply with regard to matters that are not under the jurisdiction of the federal parliament at all." (Brouillet, 2011, p. 621) It therefore bypasses the jurisdictional limits characteristic of federations and works to draw authority ever upwards, rather than towards the federal state or the provinces, depending on circumstances.

Other doctrines developed by the Supreme Court of Canada to allocate competencies between the federal and provincial level share features of subsidiarity, especially the federal power to regulate general trade and commerce.[10] Their application has likewise had a centralizing effect. In the opposite direction, Canadian courts have developed a doctrine of 'double aspect' when provincial and federal legislatures may simultaneously legislate on the same subject matter. The Supreme Court has not been clear on the principles to apply in such cases, although, Hogg suggests, it has cautioned judicial restraint (Hogg, 2015).

The discussion above prompts several questions. Who has the authority to determine the requisite "Order and Good Government," and is this allocation wise for purposes of avoiding centralization? Is this for the provinces to decide, possibly yielding profound disagreement and thus inaction? Or is it for the federal government, at the risk of imposing one contested conception of these concerns against others? Likewise, who has and should have authority to decide what counts as externalities—that is, costs borne by other provinces? What counts as such costs is in part determined by which objectives are recognized as legitimate. Consider a hypothetical case where one province creates an interprovincial competition by means of more attractive regulations. Lower tax rates or laxer protection of workers entice businesses to establish themselves there, but this results in lower redistributive services to the distraught. Other provinces or their citizens may charge that this competition induces a race to the bottom. For them this is a negative externality, but the province that lowers its tax rate may disagree insofar as it rejects redistribution as an objective.

With regard to the comparative advantage of central action, the overview of theories of subsidiarity reminds us that economies of scale may counsel centralization in some cases—while local clusters of policy preferences may do the reverse. However, it will often be contested whether the provinces or the federal level has comparative advantage in securing the requisite goals, not least with regard to cost effectiveness. One example from the EU may be environmental protection, which may be secured to a higher degree in some member states such as Germany, than in an EU-wide regulation. Again, a central issue is who has the authority to decide whether central action is better—and whether member units should have veto power.

These issues that come into focus when we explore alternative theories of subsidiary are grounds to consider central action other than in terms of inability and comparative advantage. In particular, important questions arise when one member unit fails to promote certain objectives not out of inability, but out of unwillingness. In principle, human rights violations may be of such kind. Depending on one's choice of conception of subsidiarity, such a member unit should be able to enjoy immunity, or to veto common action—or find itself defeated by a majority in the federal government.

4. LIMITS TO THE VALUE OF A PRINCIPLE OF SUBSIDIARITY: NOT A PANACEA.

The benefits of attending to subsidiarity arguments should not be overdrawn, for several crucial contested issues are not resolved by a generally acceptable principle. One such issue involves the consideration of human rights concerns when attempting to justify and structure the political order itself. These foundational questions demonstrate the limits of the principle of subsidiarity, and suggest either that human rights concerns may need to be directly specified by other principles, or that subsidiarity itself must be interpreted as going 'all the way down' to the individual, either in the sense that it is justified only insofar as

it serves individuals' interests, or because it recognizes individuals as the ultimate arbiters of these interests.

'The' Principle of Subsidiarity cannot on its own provide legitimacy or contribute to a defensible structuring of a political order with federal elements, or of human rights law. As indicated above, appeals to subsidiarity are too vague, and require attention to several items—including who should decide the objectives of central action, and whether central action is prohibited or required. We submit that more plausible versions of subsidiarity insist that, ultimately, these questions are answered in light of the arrangements that benefit individual persons' interests better than the alternatives. Neither subsidiarity nor sovereign states are obvious solutions.

With regard to the risks of undue centralization that federations face, we should also recall that appeals to subsidiarity *may* be used to defend more central action. Subsidiarity may promote centralization unduly if the central authorities can determine objectives contrary to the preferences of member units and override their protests. Some critics of subsidiarity in the European context have argued precisely that "instead of providing a method to balance between Member State and Community interests, [subsidiarity] assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work." (Davies, 2006, p. 67)

Finally, consider more fully the problems for conceptions of subsidiarity that arise in a multilevel setting with regard to human rights protection. Subsidiarity considerations do not automatically protect individuals from 'local' domination, incompetence, or tyranny—unless that is specified as an objective of the federal order, e.g., as a commitment to protect human rights. This is one reason why many hold that a principle of subsidiarity must be supplemented with human rights protection against the subunit authorities. But such a supplement does not sit well with all of the conceptions of subsidiarity that stress the autonomy of member units. In 'coming together' federations, treaties typically agreed to favour the interests of states, without due regard to the impact on individuals within or without their borders. This is not to deny that treaties may well benefit individuals, insofar as a sufficient number of these states happen to be democratic or otherwise responsive to the interests of their citizens. But arrangements that benefit individuals to the disadvantage of states can thus not be expected, and such arrangements are not likely to give the interests of individuals sufficient weight against other interests of states or of their governments. In the EU, this weakness is avoided by insisting that all member states are subject to the European Convention on Human Rights, and by various human rights conditions included in the EU treaties.

For 'holding together' federations, there is similarly no mechanism that ensures that the member units' autonomy is constrained by human rights protections maintained by the central authorities. In the Canadian setting, such tensions are addressed quite clearly, not least with the 1982 Canadian Charter on Rights and

Freedoms (Part 1). Thus, central authorities may seek to protect also good governance within member units. Some tensions remain, as in connection with conflicts between the rights of minority cultures and egalitarian citizenship rights, leading some to ask whether multiculturalism is good for women (Cohen, 1999).

In both these kinds of (quasi)federations, central courts may provide helpful services in protecting individuals from abuse by their member unit authorities. Important contested issues remain, especially in states that have long traditions of largely sufficient domestic human rights protection. They may ask, as the UK and other states in Europe now do, sometimes with appeals to subsidiarity: by what right should centralized courts with mixed credentials be permitted to override domestic legislation as incompatible with human rights standards? Again, the normatively best response may require attention to details such as what power such a central court should have—to overturn legislation or only to urge national legislatures to reconsider—and whether such courts should be more lenient toward member units that are generally more compliant with human rights. Some such suggestions will again be favoured by considerations of subsidiarity—but only if subsidiarity goes all the way down to the individual. That is, subsidiarity may be compatible with, and indeed supportive of, multilevel human rights protections including judicial review. But the justifiable principles of subsidiarity must insist that the ultimate standard of justification of the allocation of political authority is not whether it serves the interests of member units, but whether such a legal and political order serves the best interests of individuals.

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NOTES

[1] See R. v. Crown Zellerbach Canada, [1988] 1 S.C.R. 401 and General Motors Canada v. City National Leasing, [1989] 1 S.C.R. 641. We owe much of the Canadian discussion to Hogg, 1993.

[2] E.g., 114957 Canada v. Hudson [2001] 2. S.C.R. 241, par. 3 [whether municipal legislation allowed a municipality to pass a bylaw restricting pesticide use]; Canada Western Bank v. Alta. [2007] 2.S.C.R. 3 para. 45 [whether inter-jurisdictional immunity, by limiting provincial but not federal powers, undermines the principles (sic) of subsidiarity]; Re Assisted Human Reproduction Act [2010] 3 S.C.R. 457 [whether parliament had authority under criminal law power to regulate assisted human reproduction]; discussed in Brouillet, 2011.

[3] For the origins of the typology, see Stepan, 1999.

[4] European Council, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007," *Official Journal of the European Union*, vol. 50, no. 2007/C 306/01, 2007, Art 5.3.

[5] A fuller explanation of these traditions of subsidiarity is given in Follesdal, 1998.

[6] On a more local level, we may also consider Rawls's insistence that "the principles of justice are related to human sociability" and that the social bases of self respect (the most important of the primary goods) develop especially in social unions, settings in which "shared final ends and common activities valued for themselves" are collectively pursued by like-minded individuals within a larger social setting. Rawls, 1999, pp. 460-462.

[7] European Council, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007," *op. cit*, (our emphasis).

[8] R. v. Crown Zellerbach Canada, [1988] 1 S.C.R. 401, par. 33.

[9] A clear early example is the creation and regulation of federally chartered corporations. Under the Constitution Act of 1867, provinces have power over the "incorporation of Companies with Provincial Objects" (Sec. 92(11)). No such power is granted to the federal government, except for the incorporation of banks. Yet in *Citizens' and The Queen Insurance Cos. v. Parsons*, 1881, 7 App. Cas. 96 (P.C.), the Privy Council—which was then the final court of appeal in Canada—found the power to incorporate companies at the national level to be implicit in the Peace, Order, and good Government clause. Inversely, in *Bonanza Creek Gold Mining Co. Ltd. v. R.* [1916] 1 A.C. 566 (P.C) the Privy Council interpreted this clause narrowly to say that "[a] province is not capable of endowing a corporation the capacity to carry on business in other jurisdictions, but *will* be able to do so only if it obtains the permission from the other jurisdiction." Provinces may still regulate federal corporations (as when they regulate business generally), but only if this regulation does not "affect some essential aspect of a federal corporation." See VanDuzer, 2003, p. 86ff.

[10] See General Motors of Canada v. City National Leasing, [1989] S.C.J. No. 28, [1989].

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HOPEFUL LOSERS? A MORAL CASE FOR MIXED ELECTORAL SYSTEMS

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ABSTRACT:

Liberal democracies encourage citizen participation and protect our freedoms, yet these regimes elect politicians and decide important issues with electoral and legislative systems that are less inclusive than other arrangements. Some citizens inevitably have more influence than others. Is this a problem? Yes, because similarly just but more inclusive systems are possible. Political theorists and philosophers should be arguing for particular institutional forms, with particular geographies, consistent with justice.

RÉSUMÉ :

Les démocraties libérales encouragent la participation citoyenne et protègent nos libertés. Pourtant, ces régimes élisent des politiciens et décident de problèmes importants via les systèmes électoral et législatif, qui sont moins inclusifs que d'autres arrangements. Certains citoyens ont inévitablement plus d'influence que d'autres. Est-ce un problème? Oui, parce que des systèmes similairement justes, mais plus inclusifs, sont possibles. Les théoriciens et philosophes politiques devraient ainsi plaider en faveur de formes institutionnelles particulières, aux géographies précises, en cohérence avec la justice.

HOPEFUL LOSERS?

Existing liberal democracies encourage citizen participation in politics, and protect freedoms to pursue myriad (reasonable) ways of life. Yet many of these regimes also fill elected offices and decide important policy questions using electoral and legislative systems at various geographic and civic scales that are less inclusive than alternative arrangements, *ceteris paribus*. The arrangements in question are less inclusive in two distinct but related senses: first, some voters are more likely than others to influence outcomes; and, second, institutions are more responsive to some values and interests than others. We expect some citizens to remain persistently hopeful about democracy, even as they lose out time and again on matters deeply important to them and when no principled reasons are offered for this asymmetry, aside from pragmatic variations on the platitude "You can't always get what you want."

Suppose we can agree on a reasonable definition of *inclusion* (and correlative standards of *influence* and *responsiveness*). Is this a problem?

Much of political theory and philosophy would not be especially troubled here, worrying instead about whether the basic structure of institutions is just, or at least approximately so. Typically, the institutions under consideration are at the level of the sovereign territorial state, but sometimes, at a broader level. We should expect a range of political arrangements to be roughly consistent with justice, and thus political philosophy and theory (even allegedly nonideal theorizing) don't have much to say about the vagaries of electoral mechanics and legislative structures. Fairness doesn't mandate that all people always get what they each want; it may not even mandate strictly equal likelihood of influence over outcomes, and it certainly doesn't require that institutions ought to be uniformly responsive to all values and interests—even supposing we could agree on what 'equal responsiveness' might mean.

Against this tendency, I contend that political theorists and philosophers should be arguing for particular institutional forms with particular geographies, consistent with justice. Some institutions for collective decision making and some spatial arrangements of those institutions are more inclusive than others, and this matters: there is an ideal-theoretic and practical moral case for mixed electoral systems in particular configurations over time and space.

THE THESIS, ELABORATED

You can't always get what you want, but some people inevitably get more of what they want than others.

It would be a near-trivial exercise to cast influential debates in ethics and political philosophy in light of this truism. We have a variety of beautifully refined arguments about which principles ought to determine when, and the extent to which, people get how much of what they want. Some obvious candidates are the following: need, merit, preference, allocative efficiency, luck sensitivity,

non-envy, and neutrality of aim. You cannot always get everything you want, but philosophers and theorists have abundant resources at their disposal for crafting plausible arguments about how to regulate inevitable inequalities in who gets how much of what.

That said, the platitude has, I believe, a more troubling resonance in the case of democratic theory, where what we want is, among other things, government that is fair, in both how citizens influence outcomes and how responsive institutions are to our sincere and reasonable preferences.[1] Here, the connection between careful moral reasoning about a fair degree of influence and sufficiently responsive institutions, on the one hand, and the play of actual politics, on the other, is often exceedingly unclear, even presuming we can agree on precisely what we mean by *influence* and *responsiveness*.

In a free society under the rule of law, people are at liberty to pursue what they want, as long as they do not unduly interfere with their fellow citizens doing the same. In democratic politics, however, those same free citizens come together as moral equals to rule themselves, inevitably through some kind of electoral procedure and legislative arrangements. In that complex institutional setting, some citizens inevitably have more influence over outcomes than others—at the very least, in the sense that their votes are more likely to correspond with the winning outcome, but also in the closely related sense that their votes are more likely to decide a given outcome than others. On a range of issues, then, these voters are more likely to be on the side of the majority. Some citizens, furthermore, but in a similar vein, enjoy more responsive institutions—in at least the intuitive sense that laws and policies emerging from and enforced by those institutions tend to converge with their desires and expectations. Even when they disagree with a particular outcome, they are more likely to have access to means of redress, and to have available ways of mitigating negative consequences of their minority status with respect to the effective worth of their liberties. These differences in influence and responsiveness, thus understood, are obviously not due to merit, need, or some principled and plausibly argued claim. Rather, the inequality at issue is largely a function of demographic contingencies, paired with institutional realities that are exceedingly difficult to modify once entrenched.

The worry here is not the straightforward complaint that, over some range of important issues, majorities will persistently vote their shared preferences against losing minorities, although this obviously happens, and is sometimes morally troubling. Still, we have quite sophisticated theoretical arguments and institutional correctives to avoid the moral quagmire of brute majoritarianism. Indeed, some would argue that the very marriage of liberalism and democracy (that we now take for granted in most constitutional republics and federations) is precisely a history of reining in the majoritarian excesses of democracy. This line of argument seems to me to be, on the whole, rather convincing.

Yet suppose we have carefully crafted institutions, informed by liberal-egalitarian principles (of equal moral standing, extensive liberties, and neutrality of aim), within which exercises of power are justified by public reasons. We would have, in such happy circumstances, a well-ordered, political-liberal republic of reasons. Even under these ideal conditions, however, Arrow (1951), Gibbard (1973), Satterthwaite (1975), and many others have shown us that the very mathematical structure of collective decision making forces us to make difficult choices. Some electoral and legislative arrangements are more sensitive than others to a wider range of values and preferences, but that sensitivity may be purchased at the expense of greater vulnerability to forms of manipulation. Other arrangements may be robust against a range of likely vulnerabilities, yet tend toward longer debates and more complicated compromises, making resulting decisions unstable; in contrast, more stable arrangements may be less sensitive to diverse values and preferences.

To be sure, there has been fruitful debate about the practical relevance of these well-known properties of decision making arrangements—that is, their varied degrees of sensitivity and vulnerability to manipulation.[2] That debate, however, tends to confirm my motivating concern here: when political theorists and philosophers turn to the question of institutional choice, especially electoral and legislative procedures, they often seem to throw up their hands, morally speaking, and leave these concerns as, for the most part, mere technical issues of implementation.[3]

John Rawls is exemplary here, although hardly unique. After dismissing any thought that "what the majority wills is right" (Rawls, 1999, p. 313), he accepts "that a variant of majority rule suitably circumscribed is a practical necessity" (Rawls, 1999, p. 311). We accept the potential moral vagaries of majority rule, Rawls thinks, only on condition that basic liberties are preserved, and that "in the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case" (Rawls, 1999, p. 312).

The view of institutions here is either quietist or concessive: our political arrangements are inevitably flawed vehicles for realizing a shared political conception of justice, and so all that can really be said, as a matter of philosophy, is that democratic authority is invoked so as "to share equitably in the inevitable imperfections of a constitutional system," in light of which we ought "not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests" (Rawls, 1999, p. 312). Justice can help us here, perhaps, if it can show us a way to fix these imperfections, close those loopholes; or, if this is not (yet) possible, then justice tells us how to distribute the burdens of injustice more fairly.

My aim here is to challenge the concessive view. Choice of institutional arrangements, and especially electoral procedures, is not a mere technicality to be

muddled through once the (ideal) moral and constitutional architectures have been settled. Nor, however, is it a problem requiring a separate body of non-ideal theory to address some yawning chasm between our philosophical ideals, on the one hand, and our decidedly messy practices, on the other.

Rather, I mean to show that ideal theorizing about such things as justice and legitimacy has clear consequences for institutional design, in ways that reflect empirical properties of those institutions: how they are designed, how they tend to work, and how they can reasonably be expected to work under favourable and less-than-favourable conditions. Furthermore, if you sing your political liberalism in a roughly Rawlsian key, you should favour more inclusive mixed electoral and legislative arrangements over less inclusive options, other things being roughly equal. Just what those "other things" are I will now explain.

A REASONABLE EXPECTATION OF INFLUENCE: IMPLICATIONS

This last claim may seem strange: why would a political liberal, especially a Rawlsian political liberal, strongly endorse particular institutions, rather than allowing the play of (reasonable) argument to determine the institutional specifics of a just basic structure?

Indeed, for Rawls, the principles we would agree to under the constraints of an original position are informed by "the strains of commitment" and "the burdens of judgement." Consideration of the former (the "strains") gives us good reason to think that rational parties "will not enter into agreements they know they cannot keep or can do so only with great difficulty" (Rawls, 1999, p. 126). The burdens we find ourselves bearing in a just regime will be consistent with our basic needs and fundamental interests, including our equal moral standing as citizens, secure in our self-respect; otherwise, we would not accept them. Consideration of the latter (the "burdens") gives us reason to think that citizens who affirm just institutions will tolerate fellow citizens whom they think mistaken on moral and philosophical matters, because we accept that, on these deep issues, evidence is complex and uncertain, and how we interpret and weigh the significance of evidence is shaped by our interests, values, and experiences (Rawls, 2005, pp. 54-57). We would accept these "burdens of judgement" as the cause of persistent and legitimate disagreement *whether or not* we find ourselves in electoral majorities *vis-à-vis* the moral and philosophical questions that generate those disagreements. A just regime cannot and should not satisfy everyone, all the time. Such is life within sufficiently just institutions consistent with the strains of commitment and the burdens of judgement.

On the Rawlsian conception of stability, then, what matters is an overlapping consensus among reasonable comprehensive views on a political conception of justice, the resulting institutions of which are likely, over time, to foster reasonable citizens committed to that political conception, and to just social arrangements that flow from it. There is no legitimate expectation, on this view, that

our comprehensive doctrines will ever be decisive in public decisions. What matters to legitimacy and stability is the possibility of finding the resources for affirming shared political values and associated institutions within our respective comprehensive doctrines.

Nonetheless, there is an asymmetry here that may warrant concern. Some comprehensive doctrines—most likely a cluster of related doctrines closely convergent around liberal conceptions of justice—will indeed find that significant elements of their comprehensive doctrines do prevail in many political decisions. Outside of this privileged cluster, citizens will enjoy no such expectation. So, while an overlapping consensus on a political conception of justice may hold, and sustain the legitimacy of associated institutions, it is not the case that the resulting authoritative institutions are uniformly sensitive to all of the comprehensive doctrines party to that overlapping consensus. Some comprehensive doctrines will do better than others, politically speaking.

It seems a strange sort of loyalty that political liberals ask of reasonable minority groups—over repeated decisions, and perhaps over several generations—to affirm just but significantly unresponsive electoral and legislative institutions. Certainly these institutions, by virtue of being just (and justifiable within the public reason of a plural society) do satisfy the strains of commitment as Rawls presents them: they secure the conditions necessary for us to live meaningful, satisfying lives together, whatever our ultimate (but ultimately reasonable) values and aspirations may be. Yet, for some, this is all that is on offer: they will never further enjoy the privileges of power that come from being a stable electoral majority.

The (not unreasonable) political-liberal response is to note that, if the burdens of judgement are widely accepted by citizens of a just regime, then, while some reasonable minority views may not ever be decisive in politics, the majority will certainly tolerate those views. They will, furthermore, take care to respect and even accommodate them, so far as possible in public affairs.

In general, reasonable citizens will treat one another as free moral equals who share a political conception of justice, but the strains of commitment ensure that citizens will not accept any such conception that does not ensure extensive personal liberties, the social bases of self-respect, and sufficient means to pursue reasonable conceptions of the good. Rawls's principles were designed with these expectations in mind, so if they can be approximated in our basic structure of fundamental institutions, then that is sufficient.

So, understanding responsiveness as a specific kind of influence—that is, in terms of the likelihood that our reasonable values and preferences will be decisive in outcomes—is too strong a condition, and ignores the ways in which liberal values constrain democratic politics *just because* some reasonable views will never be decisive in this way. Still, if "responsiveness as likelihood of decisiveness" is too strong, why wouldn't some expectation of more diffuse but still

significant influence in the apparatus of political life be part of the strains of commitment?

Consider this possibility in terms of Rawls's famous argument from the original position: parties who anticipate a persistent lack of influence may argue that they will not accept principles without some guarantees that public institutions will allow them some fair expectation of influence over matters important to them in public life. If there is no such implied expectation, then it seems odd for Rawls to follow Mill in valuing the "education in public spirit" and "affirmative sense of political duty and obligation" that follow from participation in public life as free and equal citizens (Rawls, 1999, p. 206). After all, if we cannot reasonably expect our sincere and cogent judgements to be influential on at least some important matters, some of the time, then why would self-respect correlate with the "education" and "affirmative sense" to which Rawls refers?

If self-respect is in part implicated with the public activities fostered by a just basic structure, as Rawls hopes, then those activities must surely be *for* something: we argue to persuade, and through persuasion we hope to influence outcomes.[4] It seems perverse to encourage argument that is unlikely to ever have such influence. The best we might hope for—and this is not much, morally speaking—is that self-respecting citizens at least be reasonably civil in treating one another "as rivals, or else as obstacles to one another's ends" (Rawls, 1999, p. 206).

Certainly reasonable citizens cannot expect to be routinely influential in the sense of their votes being decisive, or to wield strictly equal influence on all, or even many, issues. But we might reasonably expect more than some kind of diffuse, indirect influence in the sense of having had our say in the cacophonous public sphere. Somewhere between decisive and diffuse influence is an expectation of our reasonable views having a serious hearing in the formal public sphere of legislatures, assemblies, and political campaigns. The appeal to public argument of a certain character—which is an abiding theme throughout Rawls's later formulations of his theory (2001), and is central to so much subsequent work by theorists of political liberalism—entails an expectation of possible influence of just this sort. Persistent losses in elections, legislatures, and referenda in spite of reasonable values and plausible arguments will challenge any such expectation.

If an expectation of influence in the formal public sphere is persistently denied, then the connection between legitimacy and participation in public argument will likely come to be seen as a merely formal guarantee of voice; real influence, however, must be sought elsewhere, and by other means. Suppose that one or a few issues matter deeply to those who find themselves effectively excluded from political influence: under such conditions, and in particular for profoundly important moral issues, reasonable citizens, thwarted over decades and generations, may be pushed toward increasingly antagonistic, even unreasonable challenges to the institutional status quo.

Furthermore, some reasonable citizens—perhaps those with more diffuse but longstanding complaints of insufficient influence, such as minority linguistic or religious communities—may have plausible grounds for thinking that they could achieve comparable benefits and gain effective influence under their own sovereign institutions. Exit may be perceived as a Pareto-improving strategy for some citizens without sufficient influence, if an alternative sovereign jurisdiction promises to secure the same basic rights, and provide the same (or comparable) public goods at similar costs. This problem cannot be resolved simply by rejecting such strategic reasoning as unreasonable. After all, some demands for recognition may be valid public claims in a liberal democracy, and such recognition may well require the institutions for effective self-government according to shared reasonable political values (cf. Patten, 2002). If so, then the basis of loyalty may be further undercut insofar as persistent minority status at some institutional scale seems inimical to such recognition.

Still, why give much weight at all to this expectation, however reasonable? Influence over legislative debates and party platforms is all well and good, and it is a reasonable thing to expect, other things being equal; but other things are often not equal, and if a just regime provides sufficient space and resources to pursue our projects together with those who believe and desire as we do, then where is the pressing problem? True, persistent minority status in electorates might motivate some of these reasonable citizens to retreat from mainstream politics, but why suppose that their retreat will generate perverse motivations and eventual failure of reasonableness? Why assume that the expectation of influence, however reasonable, is so pressing a concern for these reasonable minority groups?

There is a clear prudential reason for worrying about the retreat from public life: we have ample and growing evidence from political science and social psychology to show that insular groups can easily be driven to more extreme positions than their members may have originally held (e.g., Sunstein, 2002). The more we remove ourselves from public life, the more likely we are to find ourselves in smaller groups of those who think and believe and act as we do. Furthermore, some emerging evidence suggests that the retreat from public life correlates with a range of attitudes and behaviours that do not seem especially favourable to reasonableness if they are allowed to persist. In their analysis of community-level data from across the United States, Robert Putnam and his colleagues find tentative but troubling evidence that living in more diverse communities is associated with citizens participating less in civic associations and traditional political activities, but also having fewer friends, reading less, watching more television, and caring less about politics (Putnam, 2007). Although other studies and especially other countries reveal interesting complexity, similar results obtain (e.g., Stolle, Soroka, and Johnson, 2008; Stolle and Harrel, 2012).

Putnam himself is optimistic that this is a short-term tension, and that American democracy in particular has both the resources and the historical tendency to foster engagement and trust across diversity. But how? Aggressive assimilation,

or the imposition of a strong unifying identity, are not in the cards for political liberals, who agree with Rawls that "the extent to which we make engaging in political life part of our complete good is up to us as individuals to decide, and reasonably varies from person to person" (Rawls, 2001, p. 144). Assimilation tactics are simply not part of the calculus of social planning for political liberals, nor for multicultural liberals. Furthermore, the political liberal also agrees with Rawls that justice as fairness is consistent with a classical republican concern that continued liberty requires an engaged citizenry: "If we are to remain free and equal citizens, we cannot afford a general retreat into private life" (Rawls, 2001, p. 144).

INSTITUTIONAL DESIGN AND DOMINATED OPTIONS

In addition to serious prudential concerns about the dynamics of insular groups and disengaged citizens, there is a moral-philosophical case for taking seriously these patterns of exclusion. Whether or not you think that eventual instability is a serious problem, and whatever weight you are inclined to give to a reasonable expectation of political influence, so long as the weight assigned is positive, it should lead you to favour institutional arrangements that are more rather than less responsive to reasonable claims, other things being equal.

Quite specific constraints on institutions are arguably woven into the structure of Rawls's theory—indeed Rawls thought as much: "Certain institutional forms are embedded within the conception of justice" (1999, p. 231). This follows from the structure of the choice situation central to Rawls's justificatory logic: behind a veil of ignorance, the possibility of being in a sensitive linguistic minority, say (e.g., Kymlicka, 2001), or in a persistent electoral minority of the kind at issue here, may be serious enough to warrant parties behind the veil to favour institutional realizations of their favoured principles of justice that are more, rather than less, responsive to a diversity of reasonable moral claims and ways of life. I want to draw out two features of this line of argument.

First, this moral decision rule—rejecting dominated institutional options—is itself affirmed by Rawls early on in *Theory*, where he insists that "other things being equal, one conception of justice is preferable to another when its broader consequences are more desirable" (Rawls, 1999, p. 6). We can simply apply the same rule to collections of institutions consistent with a conception of justice: some configurations dominate others in this sense, other things being roughly equal with respect to basic justice.

Second, the institutions that are most likely to determine whether or not particular basic (and supervening) structures are dominated are electoral; the salient feature of those systems is their relative informational richness with respect to the range of values, preferences, and interests in the electorate. It is well known in the literatures on voting and elections that some voting systems tend to be more informationally rich than others. Specifically, 'first past the post' plurality systems tend not to be especially rich in this way, encouraging voters to vote

strategically and candidates to compete for the center, making it difficult for third parties to find purchase in electoral campaigns.

To be sure, informational richness may come at the cost of stability in legislatures: pure proportional and mixed voting rules tend to make coalitions necessary to form governments, meaning that strong stable majority governments may be less common. I offer the following reason to think this isn't a major concern: the kind of instability associated with unstable voting systems may in fact foster a kind of loyalty among diverse and often disgruntled citizens, although perhaps not the kind of loyalty we should praise with too much enthusiasm unless it is tempered by other considerations—such as the independent moral-philosophical attractiveness of more responsive institutional arrangements.

Students of elections since Borda, Condorcet, Dodgson, and Black have worried that, when several voters attempt to choose among more than two options by voting according to their preferences, a cycle may result such that no clear outcome is favored by the majority; more precisely, the collective ordering is intransitive (e.g., Black, 1958; Riker, 1982). This problem cannot be avoided without violating at least one of several intuitively plausible assumptions about fairness and rational consistency (Arrow, 1951). This makes outcomes sensitive to the order of pairwise contests among options, leaving majoritarian procedures vulnerable to manipulation (Riker, 1980) avoidance of which involves either constraints on admissible preference orderings, or on the agenda-setting process, or both (Dodgson, 1887; Black, 1948; Plott, 1967; Brams and Fishburn, 1978; Shepsle, 1979; McKelvey and Schofield, 1987; Saari and Tataru, 1999). But in two intriguing essays, Nicholas Miller (1983; 1996) argues that we should favour majoritarian procedures just because they are unstable in the way social choice theory suggests. For my purposes here, the relevant theme in Miller's work is the idea that, when majoritarian procedures fail to identify a clear social preference, there is sufficient uncertainty to motivate participants to continue playing subsequent rounds of the political game: future wins and losses are not sufficiently predictable to inspire unreasonable resistance or rational exit. Loyalty is ensured by instability, because that is evidence that the playing field is fair, that teams are evenly matched, and that continued play is thus worthwhile.

I have argued that we have independent philosophical and prudential reasons to reject simple majority rule systems because they are dominated by more informationally rich options. Still, if the resulting instability of coalition-dominated governments in proportional and mixed electoral systems is offered up as a mitigating concern, then we should note that the same instability might well attend to majoritarian systems, but over longer time scales.

To explain: the apparent stability of informationally sparse majoritarian arrangements (a two-party Westminster system, with single-member districts and first-past-the-post plurality voting, is the obvious example) is rooted in the greater likelihood of clear majority governments being able to pursue their mandates

without opposition support. Yet consider the matter across the electoral cycle, as the mandates of previous governments are painstakingly (and at considerable expense) reversed by subsequent governments.

Now, if Miller's instability argument persuades, then why should it matter if the instability involves alternating majority mandates or unstable coalition governments? The instability argument doesn't distinguish (at least not obviously) between informationally sparse or rich options: if the argument convinces you for Westminster-style two-party systems, then it ought to convince you for coalition governments under pure proportional or mixed-member proportional systems.

To be sure, the resulting loyalty to either sort of unstable system may seem less like that of reasonable citizens affirming a shared conception of justice within public reason, and rather more like the embittered loyalty of a chronic gambler to the roulette wheel. Indeed, as Miller himself notes, the structure of preferences is important to even the modest 'loyalty through instability' hope: given a deep cleavage along a single issue, majoritarian procedures are prone to generate a persistent minority rather than desirable instability. The volatility of majoritarian procedures depends on the absence of durable alliances that result in some citizens being persistently in the minority on a wide range of issues. The problem is that reasonable disagreements may pit a minority of citizens against the majority on a range of important moral issues over time.

This worry, however, dissolves when we turn to informationally rich proportional and mixed systems, which, however potentially unstable within legislatures, are unstable in the morally attractive sense that they allow more reasonable views to influence the political process.

CONCLUSION: TAKING RESPONSIVENESS SERIOUSLY

I have presented a problem internal to multicultural and especially political liberalism, and in particular to Rawls's definitive statement of the latter position: the political conception of justice as fairness. The problem is internal to Rawls's project in the sense that his own account of reasonableness and the workings of just social arrangements together seem to permit a regime that encourages "propensities and aspirations that it is bound to repress and disappoint" (1999, p. 474), something Rawls thinks a just regime ought not to do.

I have offered reasons to think that this standard might be an apt criterion of legitimacy for a just regime. Other things being equal, we ought to favour that just regime that is more inclusive of, and more responsive to, the full range of reasonable values and claims in a free and fair society. Less responsive regimes are relatively unresponsive by virtue of electoral procedures and rules governing political campaigns. These regimes are dominated by those that are more responsive.

Furthermore, if you concede that, while not decisive, the first two concerns together are at least plausible—and I have suggested a prudential reason, rooted in extant social-scientific evidence concerning citizen engagement in plural societies, for thinking they might be—then the conclusion that we should avoid dominated just regimes is that much more compelling.

Finally, a lesson that follows from these arguments is that the often seemingly mundane institutional trappings of a constitutional liberal democracy—from electoral mechanics to campaign finance rules, zoning ordinances, local school funding issues, and curriculum design—are properly considerations of justice. It may be the case that there are a great many basic and supervening institutional structures consistent with a given political conception of justice that meet the test of an overlapping consensus. But a reasonable expectation of influence, and worries about the sort of *ethos* that will follow from generations lived under less responsive institutions, seem to constrain the choice among those institutional structures, favouring more responsive just regimes over less sensitive alternative arrangements.

NOTES

[1] I use these terms in their technical senses. Our preferences amount to rankings, imposed on parts of the world that concern us. So we have *preferences*, rather than a single preference profile. I put it this way to remain agnostic on the question of whether we could meaningfully have a complete and consistent ranking over *all* possible states of the world, or even all probable states. We regularly partition the world into discrete spheres of concern—public and private, religious and secular, work and leisure, home and office—recognizing that these spheres are rarely (if ever) clearly segregated and causally distinct: there are many overlaps and interrelations, known and unknown. Completeness and transitivity are aspirational processes, within and across distinct spheres of concern, rather than strict constraints on a coherent preference profile. It suffices for my purposes here that, first, we can talk of coherent, well-ordered rankings of outcomes in particular spheres of concern, or *domains*; and, second, that even if we aren't strictly consistent across all domains (or even within them), we at least can be prodded to awareness and reflection when our ranking of outcomes in one domain is shown to be at odds with our stated ranking of outcomes in another. Our preferences, in this sense, are *sincere* to the extent that we state our considered desires for particular outcomes as we understand them (even if they violate completeness or transitivity within a particular domain or across them). We are not strategically mischaracterizing the substance of our desires, or endorsing a less-favoured option, on the gamble that our most-favoured option will ultimately prevail. Our preferences are *reasonable* to the extent that, when justifying them to others, we avoid, so much as possible, plainly controversial grounds for our desires, beliefs, and claims. We may, for instance, decidedly prefer a world in which scientific research is well funded by public monies and forms the basis of all school curricula; but we would not be reasonable in asserting these preferences solely on the ground that alternative priorities are based merely on ignorance and superstition. Similarly, my advocacy of a particular policy on moral grounds (legal restrictions on contraception, say) would be unreasonable if my only justification was that my faith is unquestionably correct and demands that policy. The constraint of reasonableness might be thought to violate the condition of sincerity, insofar as it seems to ask that we (strategically) mischaracterize the substance of our desires to secure assent from those with different preferences. I think this is a real concern, but mischaracterizes the respective domains of the two standards: sincerity applies to the substance of our desires and our ranking of them; reasonableness applies to the reasons we offer as public justifications for those desires and rankings as the basis of particular laws and policies.

[2] Most pointedly, Mackie (2003) has argued, against William Riker (1982), that there are simply no significant political examples of cyclic instability and subsequent manipulation in extant majoritarian decision procedures.

[3] That, or they sometimes turn, as Goodin and List (2001) and Estlund (2009) have done, to consider epistemic properties of various arrangements and procedures, or the transformative possibilities of structured deliberation in diminishing the likelihood of Condorcet cycles (List et al., 2013). An interesting effort is Brighouse and Fleurbaey (2008), who argue for proportionality vis-à-vis stakeholding as the best principle for implementing democratic decision procedures.

[4] This is, of course, a moral-philosophical claim; in reality, there is some psychological evidence that many of us argue not to persuade, in the philosophical sense, but either to signal our position to others or to win a perceived conflict.

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GLOBAL JUSTICE AND THE NEW REGULATORY REGIME

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ABSTRACT:

In this paper we challenge the role of consent in the global order by discussing current modes of international law making in the global order. We contend that the features of state consent in international law depart substantially from those assumed by theorists of the liberal order, who subscribe, in most cases, to the realist conception of state action. We argue, against those theorists, that state consents to coercive measures, and the state's role in carrying them out, has ceased to be central to an account of global law. We conclude that international law—often thought of as law beyond the state—now has expanded its scope to reach individuals and corporations, and that this change has important ramifications for theories of global justice.

RÉSUMÉ :

Dans cet article, nous interrogeons le rôle de l'accord dans l'ordre global en discutant les modes courants de constitution des lois internationales au sein de cet ordre. Nous prétendons que les fonctions de l'accord étatique en loi internationale s'écartent substantiellement de celles assumées par les théoriciens de l'ordre libéral, qui souscrivent, dans la plupart des cas, à la conception réaliste de l'action étatique. Contre ces théoriciens, nos posons que l'État consent à des mesures coercitives, et que le rôle de l'État d'effectuer celles-ci a cessé d'être central dans l'explication de la loi globale. Nous concluons que la loi internationale – souvent pensée comme une loi hors de l'État – a maintenant étendu son spectre jusqu'aux individus et corporations, et que ce changement a d'importantes ramifications que les théories globales de la justice devraient considérer.

A prominent feature of liberal, and also most republican, theories of global justice is that they begin from consent.[1] The nature, scope, and content of that consent is not uniform, however, but rather multifaceted in most theories of global justice. Two particular usages are prominent in the literature: consent to the domestic order and consent to the global order. On those accounts, the domestic order is distinguishable from the international order by the fact that individuals, rather than states, grant their consent to the domestic order, whereas states, through international treaty making and others legal procedures, grant their consent to the international order. Liberal theories of global justice—and here we use the term broadly—are distinguishable in particular by the fact that they begin from the consent of state actors to the global order. In this paper we argue that the concept of consent to the global order masks a considerable amount of ambiguity in how the concept is deployed, as the features that define state consent as a matter of law depart substantially from those assumed by theorists of the liberal order, who subscribe, in most cases, to the realist conception of state action.[2] Moreover, the consequences of that consent, most notably the directly coercive power of the state versus the (purportedly) non-coercive power of the international order, are under-theorized.

With respect to the importance of consent for the legitimation of normative orders, Michael Blake, for instance, argues that "it is the autonomy-restricting character of the state that demands special justification in terms of a conception of social equality."[3] On Blake's telling, because states use coercive mechanisms to enforce their laws, most notably by means of criminal sanctions, taxation, and systems of property rights, in ways that other (generally international) institutions do not, they are unique *loci* for justice. For Thomas Nagel, otherwise hardly a friend of the cosmopolitan theorists, it is "our joint authorship of coercively backed laws that generates a concern for equality."[4] Absent joint authorship, which obtains only inside a democratic polity, the concerns of justice do not apply.

The idea that consent, coercion, and joint authorship are properties that obtain at the level of states, and neither above or below it, is essential to the realist conception of the state. Even many cosmopolitan theorists, whom one might expect to have been sensitive to this trap, have made this same mistake.[5] Why most liberal theorists remain partisans of realist conceptions of international law is a question best left for intellectual historians. Clearly, a liberal view of the relations of states is imbedded in the curriculum of most graduate programs in political science and international law, even if by now the inadequacy of that account has become clear.[6] When studying the legitimacy of the global legal order, the first thing students of international law learn is that all international law is formed by the consent of states.[7] Where this view has been challenged, philosophers have focused on issues related to the formation of customary international law and the emergence of peremptory norms, which may bind states against their consent.[8] However, the existence of *jus cogens* norms is not the only possible, and arguably not the most severe, problem with the liberal theory of global justice. Instead, the liberal theory of state consent assumes the existence of a unitary state, a simplification that pervades theories of global justice.

The assumption that states are monolithic entities clearly makes it easier to address issues of global justice within the liberal framework. The downside, we will argue in this paper, is that it ignores serious challenges to the working assumptions surrounding consent in the global system. We will proceed in this paper by developing the classical models of consent to the global system, then suggesting ways in which it has been undermined by the recent developments of treaty law. We close by suggesting that the model of global justice in the theories of Blake, Risse, Nagel, and others is severely outdated.

CONSENT IN INTERNATIONAL LAW

Classic theories of international law view *jus gentium* as ultimately derivable from natural law.[9] However, by at least the early 20th century, the dominant view had changed. The Permanent Court of International Justice, in the Lotus Case, held that international law emanates from state consent alone.[10] Insofar as international law is assumed to rise from state consent, it is assumed that only the acts of duly appointed members of the executive can bind a state. There are two different components of international law that are ultimately derivable from state consent: treaty law and customary international law.[11]

The Vienna Convention on the Law of Treaties (VCLT) provides the clearest formulation of the definition of treaties and the consensualist doctrine of treaty law.[12] For the purposes of the VCLT, although the definition is generally considered to apply more generally, save for a few specific exceptions that are not of import here, a "'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation."[13] The consent theory of international law impregnates the modern conceptualization of treaty law. Under treaty law, states are bound by international agreements only when they consent to be so bound. In particular, they only consent when a duly appointed or authorized member of the executive provides a state's consent.[14] That consent is static; what a treaty initially meant, absent certain very specific conditions derivable from the nature of a state's consent, is what it continues to mean. Finally, they consent on behalf of their citizens, such that only the state, as a normatively unique institution, can impose coercive measures on its citizens.

On the other hand, unlike treaty law, customary international law does not require explicit state consent. Instead, once there is widespread state practice coupled with *opinio juris*, states become automatically obliged to conform their respective positions to these new rules.[15] Customary international law is composed of two elements: state practice and *opinio juris sive necessitatis*.[16] The former includes those actions that states actually undertake, while the latter includes those statements, made by states, that they are actually required by law to undertake those actions. However, there increasingly is evidence that many of the recent sources of customary international law do not directly emanate from state consent but rather from the work of super-state actors in a world of increas-

ingly disaggregated state action.[17] In other words, a state's executive and legislative branches are no longer the final say with respect to evidence of *opinio juris*. Instead, international institutions and international courts have interpreted rules of jurisdiction to grant national courts increasingly greater rights over non-nationals. The change in jurisdiction means that states no longer need consent for sanctions to be imposed on their citizens, nor are citizens co-authors, in Nagel's sense, of the law which govern them.

THE EVOLUTION OF TREATY DESIGN

As a general proposition, a state's signature to a treaty does not automatically bind that state.[18] In general, under the VCLT, while there are some cases where a simple signature is enough to bind a state, treaties require ratification by the country's parliament, along with the passing of the appropriate implementing legislation at the domestic level. Any introductory text on international law will likely divide treaties into contract treaties and law-making treaties. Although useful from a pedagogical point of view, the definition is largely one of ideal types, as it is difficult, if not impossible, in practice to draw a hard and fast division between the two. Contract treaties (*traités-contrats*) create an arrangement between states to undertake an act (for instance, to set in place a commercial arrangement). Contract treaties include a lesser type of treaties, dispositive treaties, whereby one state "creates in favor of another [state], or transfers to another, or recognizes another's ownership of, real rights, rights *in rem*, for instance, in particular treaties of cession including exchange."[19] Conversely, law-making treaties (*traités-lois*) serve to create new international rules for the law of nations (common examples include the international covenants and other human rights treaties).[20]

Law-making treaties, however, have become increasingly complicated, signaling an emerging problem for theorists of the legitimacy of international law.[21] At the same time, they have become increasingly vague as to what states are actually required to do. Prominent examples of this change can be found in international environmental law. So-called framework conventions do not produce specific binding rules, leaving the promulgation of specific standards to subsequent negotiations between the parties. For instance, the United Nations Framework Convention on Climate Change provides general principles for the reduction of greenhouse gas emissions without specifying manners in which these will be accomplished, leaving the details to subsequent meetings of the Conference of Parties.[22] Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer grants the Conference of Parties the right to set limits on, and exceptions to, the use of methyl bromides, after state ratification of the Protocol.[23]

Underlying this change in treaties is the emergence of global administrative law. Global administrative law comprises those principles and practices that underlie the international institutions created by law-making treaties.[24] It emerges from the various transnational systems of regulation that have been set up under treaty

law and comprises the mechanisms put in place to bind states through dispute resolution and the issuing of binding regulations. As Benedict Kingsbury and others have argued, as part of a detailed study of the phenomenon:

> "[u]nderlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees. "[25]

Faced with increased interdependence, states have chosen to enact interstate agreements designed to put in place to address common problems amongst nations, most notably in trade law—where effective trade regimes require coordination between states—and in international security law.

Administrative law differs from treaty law (and for that matter other forms of international law) as it operates "below the level of highly publicized diplomatic conferences and treaty-making."[26] *In toto*, administrative law regulates vast spaces of the international economy. It includes not only legislation (through the drafting of regulations) and adjudication (through dispute resolution mechanisms), mechanisms where were common not only to older treaties that created international organizations such as the League of Nations and the United Nations, but also the development of "standards and rules of general applicability adopted by subsidiary bodies."[27]

In the following sections, we will discuss ways in which the emergence of global administrative law poses challenges to consensualist model of international law. We will focus on those bodies of administrative law that have achieved the most thorough treatment by international legal scholars: market regulation, and anti-terrorism, and security law.[28] These fields represent areas of international law that challenge state consent and put lie to the claim that only states are involved in making decisions that directly regulate and control the choices of individuals.

ANTI-TERRORISM AND SECURITY LAW

Critiques of decision making in international organizations are often framed in terms of the so-called democratic deficit inside those organizations.[29] The democratic deficit can exist in many ways—for example, through the creation of treaty law, which, although initially (arguably) dependent on state consent, become undemocratic, or is substantially modified through the growth of administrative law. In the following sections, we consider not the broad case of the existence of the so-called democratic deficit, but specific ways in which law making occurs outside the consensualist model of international law. Beginning in this section

with a discussion of anti-terrorist law, we will discuss the diminution of state consent in emerging fields of public and private international law.

Article 24 of the Charter of the United Nations (hereinafter Charter) permits the United Nations Security Council (UNSC) authority to protect the peace, and grants it sole responsibility to determine what constitutes such a threat.[30] Although the events of September 11, 2001 increased awareness of both the risks of global terrorism and the efforts of governments to control it, efforts to regulate terrorism under Article 24 predate the current century.[31] Nevertheless, since the attacks on New York and Washington in September, 2011, the UNSC has been increasingly active in attempting to lead the war against terror and in its efforts to control transnational violence. In particular, the UNSC has adopted a series of resolutions designed to control the activities that make terrorism possible: the financial systems that support terrorism and the spread of weapons of mass destruction. The actions of the UNSC have led many critics to ask whether an imperial UNSC has become an instrument for the imposition of a hegemonic international law.[32] In contradistinction, our question is not whether the UNSC is acting as an imperialist agent, but how its actions have transformed the nature of states' underlying consent to the United Nations.

Immediately following the events of September 11, 2001, the UNSC passed Resolution 1373, which in many respects marked a radical departure from its previous acts.[33] First, unlike most of the UNSC's actions, this resolution was not made with respect to a well-defined situation or to a well-defined threat to international peace, at least not according to traditional understandings of threat or peace.. Instead, Resolution 1373 departed from previous UNSC practice insofar as it contained "far-reaching, general obligations for states to prevent and combat terrorism" and effectively turned the UNSC into a legislative body.[34] The first operative clause of the resolution required all states to adopt laws preventing the financing of terrorism, to criminalize the collection of funds designed to support terrorism (either on their territory or by their nationals), to prosecute individuals involved in the collection of such monies, and to freeze all funds on their territory that might be used to support terrorist activities.[35] Further, the resolution also requires states to adopt information-sharing mechanisms to prevent future terrorist activities, and to deny weapons and safe haven to members of terrorist groups. Finally, it enables, under clause 6, the Rule 28 Committee to monitor the implementation by states of the rules contained in the resolution.[36] Resolution 1373, in effect, made mandatory what was until then a treaty structure, the International Convention for the Suppression of the Financing of Terrorism, to which states were free to become (or not become) state parties. It also created a framework for the promulgation of future administrative law through the work of the Rule 28 Committee.

Naturally, law does not operate in a vacuum. As Hans Kelsen remarked as early as 1950, the UNSC can make new law by characterizing as illegal the acts of other states.[37] However, the characterization of the illegality of acts is markedly different from the imposition of certain requirements on states that no member state of the United Nations would be entitled to impose on its own.[38]

However, Resolution 1373 is not wholly without precedent. In many respects, it represents the end stage of the development of law making by the UNSC. Following the end of the First Gulf War, the UNSC, under Resolution 687, engaged in law making of its own, albeit on a more limited scale. It required Iraq to respect the disputed border with Kuwait.[39] Subsequently, under both that resolution and Resolution 692, the UNSC held that Iraq, contrary to normal procedures for determining liability and restitution, which would require negotiations or at least adjudication, was responsible for the losses incurred by Kuwait during the Gulf War and that it was obligated to pay, from its petroleum exports, restitution.[40]

Next, following the bombing, over Lockerbie, Scotland, of Pan Am flight 103 and the bombing, over Niger, of UTA flight 772—both in 1988—the UNSC purported to override, through Resolution 748, individual states' obligations under the Montreal Convention.[41] In particular, that resolution required Libya to extradite those intelligence agents suspected in the two bombings, rather than permitting their trial in domestic courts.[42] In both these situations, the UNSC would appear to have gone beyond its powers under the Charter, which limited the powers of the Security Council **"**in conformity with the principles of justice and international law."[43] By adjudicating borders and apportioning liability, with respect to the First Gulf War, and by overriding treaty rights, with respect to Libya's refusal to extradite suspects, it would appear to have engaged in law making and adjudication of a sort not intended by either Libya or Iraq when they became members of the United Nations.

Finally, with the rise of the Taliban Regime, the UNSC created an early version of the Article 28 Committee.[44] Resolution 1267, passed in 1999, contained many similar, although substantially narrower, restrictions.[45] Resolution 1267, at least initially, addressed support offered by the Taliban Regime in Afghanistan to suspected terrorists. Under that resolution, all states were required to freeze the assets of individuals associated with the Taliban and Al Qaeda, to prevent the entry into or transit through their territories by designated individuals, and to prevent the sale of arms and similar material to the Taliban and Al Qaeda.

Resolutions 1267 and 1373 are unique as they did not name specific targets of the sanctions regime. In fact, neither resolution named the individuals who were to be prevented from travelling, or whose assets would be frozen. Instead, much like municipal laws that create space for the promulgation of regulation, both resolutions left the creation of that list to the original Rule 28 Committee of the UNSC, which was tasked with developing procedures to enforce the embargo against members of the Taliban.[46] Soon, the resolution was "expanded into a complex smart sanction regime adopting measures against anyone anywhere associated with the Taliban, Osama bin Laden, or Al Qaeda."[47]

Several resolutions have since followed Resolution 1373,[48] all of which have determined the fate of state consent. Resolution 1540, passed in 2004, sought to block non-state actors from acquiring WMDs.[49] That resolution required, in part,

states to adopt specific legislative mechanisms, including criminal and civil penalties to control the export and transshipment of certain goods that could lead to the production of WMDs and on funds which could be used to aid proliferation.[50] Moreover, Resolution 1540 regulates activities such as export and transshipment that would contribute to proliferation. It also required states to establish end-user controls and criminal or civil penalties for violations of such export control laws and regulations.

The question at this juncture thus becomes what these Resolutions mean for the consensual model of international law. In general, insofar as Resolution 1373 and 1540 portend an emerging UNSC practice involving active legislating by the five permanent members of the UNSC, it appears, as Jean Cohen has suggested, to mark the emergence of a global constitutional order, and a radical threat to the constitutional orders of those states that are not permanent members of the UNSC.[51] However, we see it in a slightly different light. The creation of the Article 28 Committee, first, challenges the consensualist model of international treaty and second, means that, for one of the first times, global governance institutions direct their commands at specific individuals, with only the slightest of mediation by states.

First, the recent actions of the Security Council appear to have changed the enforcement model under Chapter VII of the Charter of the United Nations to a legislative model, a fact not lost on member states during the debate over the adoption of Resolution 1540.[52] Actions under the Charter must be proportional to the aim sought (i.e. to maintain international peace and security) and, if those actions constitute the enactment of legislation, to be of a temporary and emergency nature.[53] Now, instead of an interpretation of the UNSC's powers that emphasizes its unique role in policing and enforcement, the move to legislative power not only enshrines a dual model of states under international law—where the permanent members enjoy an enhanced legislative power—but also entails an alteration of the original conditions of consent provided by states to the Charter.[54]

Generally, organs of the United Nations are permitted to delegate a right to make binding decisions.[55] However, generally, such a delegation must be express and within the original rights of the organ performing the delegation.[56] And it is unlikely that the member states of the United Nations intended to grant the Security Council such rights, derogable or not.

Second, as Benedict Kingsbury has noted, instead of previous acts of the UNSC, under the new security regime, now, "the U.N. Security Council and its committees, which adopt subsidiary legislation, take binding decisions related to particular countries (mostly in the form of sanctions), and even act directly on individuals through targeted sanctions and the associated listing of persons deemed to be responsible for threats to international peace."[57] In this respect, state consent to coercive measures, and the state's role in carrying them out, ceases to be central to an account of global law, undermining Blake's thesis.

MARKET REGULATION AND PUBLIC GOODS

If the emergence of anti-terrorist law undermines the consensualist account of international law, the regulation of shared resources and activities (such as the environment or the marketplace) brings with it a similar risk. As we have argued elsewhere, contemporary international law has developed in such a way so as to expand a state's jurisdiction.[58] While several fields of international law lend themselves to the study of state jurisdiction, market regulation provides one of the clearest examples of how the acts of other states can bind citizens of third states, absent any consent by those third states themselves.

In a world of increased interdependence (be it economic, environmental, or social), the classical view of international law has created a situation that has made the consensualist model of international law virtually untenable. While states have traditionally had many different solutions available to them to solve collective action problems, global interconnectedness appears to have pushed the situation toward a breaking point. As result, several scholars, most notably Nico Krisch, have argued that the legal order has begun to undergo another substantial transformation.

The argument proceeds as follows. Classically, it has been thought that the effective and sustainable use of global public goods can only be achieved through the cooperation of states.[59] However, state cooperation has proven ineffective in tackling many of the most urgent public problems of our day (this is a question not only for legal scholars of terrorism, but also for scholars of regulatory law and environmental law, to name a few).[60] Thus, states have increasingly moved to a model of law that finds its legitimacy not in the consent of those individuals bound by a legal order (as Blake and others would have it), but through the recognition, by those affected, of the legitimacy of new laws and regulations insofar as they serve the popular good. This change in legitimation amounts to an attack on the consent theory of international law insofar as it has led to a "shift in the discourse about the legitimacy of global governance—a shift from input to output legitimacy. The urgency of solving global problems, expressed in the notion of global public goods and reflected in the shift to output legitimacy, has placed consent and sovereign equality under ever greater strain."[61]

Terrorism, as we discussed above, poses one such problem. However, more mundane spheres of law, including antimonopoly law, which we will discuss here, have developed to grant extraterritorial jurisdiction to states. While the idea that states may regulate commercial acts beyond their territories may seem novel or perhaps even illegal, it is actually well-settled law, at least in the Anglo-Saxon world, that they may. First, in the 1945 *Alcoa Decision*, the US Federal Courts accepted the effects doctrine with respect to the regulation of market activities.[62] The effects doctrine, well known to students of criminal law, holds that an action on one state's territory may fall under the jurisdiction of another state if the effects of the criminal act extend to that state's territory.[63]

The *Alcoa Decision* dealt with the question of whether or not American anti-trust laws could be applied to companies outside American territory. In *Alcoa*, the US Federal Government filed a civil suit against an American aluminum manufacturer, Alcoa, whose Canadian subsidiary had entered into an arrangement with several European companies to limit the supply of aluminum to the United States. That arrangement was not, however, entered into on American soil. In its decision, the Court could have held that it had jurisdiction due to the fact that Alcoa was headquartered in the United States, and hence licensed in the United States. Instead, the Court held that while customary international law might, in a few cases, limit the scope of power a state may exercise beyond its borders,[64] "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[65] In subsequent cases, courts have continued to apply the doctrine. In *Continent Ore Co. v. Union Carbide & Carbon Corp.*, the Supreme Court held: "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act [i.e. Anti-Trust Law] just because part of the conduct complained of occurs in foreign countries."[66] In other words, US Courts held that international law permits states to exercise jurisdiction over cases even where aliens have not intended to enter into acts on the territory of those states.

Although many states initially rejected *Alcoa* and its progeny, the extension of jurisdiction that the decisions signaled quickly became part of the international legal order.[67] In a series of rulings in the 1960s and after, the European Commission (EC) and European Courts would effectively adopt the jurisprudence of the US Federal Courts.[68] In *The Dyestuffs Cases*, the Court of Justice of the European Communities held that actions to infringe freedom of trade or to create monopoly pricing in the European Economic Community, even if entered into by companies headquartered in Switzerland and Britain (which were outside the reach of the court at the time), might be sanctioned by the Courts of the European Communities if those companies subsidiaries operated inside the European Economic Community.[69] The Court argued that Swiss and English companies and nationals could be held responsible for violating Article 85 of the Treaty of Rome.[70]

The principle was applied again in subsequent cases, such as in *Re Wood Pulp Cartel*, where the European Economic Commission filed suit against non-European Community producers of wood pulp. The EC alleged that non-EU wood pulp producers had engaged in various activities that sought to negatively affect trade in the EU common market.[71] Conversely, the defendants had argued that the suit against them should not stand, as they were wholly located outside the jurisdiction of the EC, and also as the application of European Economic Community competition rules in that very case would violate the basic tenants of public international law (in particular the principle of non-interference).[72] However, the European Court of Justice (ECJ) held that the EC had jurisdiction over firms located outside the EC if the firms in question implemented regimes (in particular, price fixing) that had effects within the EU, even if, presumably,

none of the firms were headquartered in the EU, provided that their commercial activities, viz., selling directly through intermediaries or directly to consumers, affected the market in the EU.[73]

As such, it now seems to be well established under international law that states may exercise "liberal extraterritorial jurisdiction" not only under criminal law, but in many different realms of law.[74] Not every state, of course, can compel corporations in other states to act in certain ways. Only large states or large trading blocs (such as the European Union) can actually force corporations beyond their borders to act in certain ways. However, the international regulatory environment is increasingly taking on the appearance of a world order where certain states "provid[e] the global public good in question [e.g., anti-trust law to ensure fair competition] in a 'hegemonic' mode, very much in line with classical hegemonic stability theory."[75] The effects of this expansion of anti-trust law therefore appears to be one more way in which state consent, and even individual consent through the state, to laws in force has been minimized by the extraterritorial application of laws, and allows individuals to be sanctioned by states other than their own.

CONSEQUENCES FOR THEORIES OF GLOBAL JUSTICE

In our introduction to this text, we suggested that liberal models of global justice are unable to account for the emerging complexity of issues of consent and jurisdiction in international law. We singled out, in particular, the work of Blake and Nagel. Blake, as is well known, argued that it is by virtue of the ability of states—and only states—to exercise coercive power over individuals absent their consent that certain stringent principles of justice apply at the domestic level, but need not apply at the global level. Nagel argued that it is by virtue of the fact that laws that apply at the domestic level are products of citizens' consent, that principles of justice apply at the domestic level and not at the global level (where, if consent is obtained, it is by virtue of state and not individual, consent). The persons so affected, suffice it to say, have never consented to these laws. However, as we have shown here, those suppositions are no longer true, if they ever were. International law now directly coerces individuals through the specific acts of the UNSC absent meaningful control or oversight by most states.[76] Similarly, individuals and corporations may now be brought before foreign tribunals if their actions indirectly affect economic activity in third states or with supranational institutions.

It has been argued that state consent might not be as static as we have supposed, and that states consent, on behalf of their citizens, by acquiescing to the acts of the other states or of the United Nations.[77] However, our argument does not hinge on state consent *per se*. Rather, we have argued that not only has the basis of consent to the acts of the UNSC under Chapter VII changed in ways that it is doubtful states ever intended or could even have predicted, individuals are now directly targeted by sanctions regimes or by laws of foreign countries. The former put a lie to the theory that individuals are not coerced by supranational

institutions; the latter, that they are subject only to legal regimes to which they themselves have consented (either democratically, by immigration, by travelling, or through some other overt act). Similarly, the extension of extraterritorial economic jurisdiction signals that, in an increasingly economically interdependent world, any individual may be brought under a foreign state's jurisdiction.

Thus, states' monopoly on coercive acts appears therefore to have been severely weakened. The takeaway is that international law—often thought of as law beyond the state—now goes deeper than national law, reaching individuals and corporations.

NOTES

[1] Kant, Immanuel, "Perpetual Peace," *in* H. Reiss (ed.), H. B. Nisbet (trans.), *Political Writings*, Cambridge, Cambridge University Press, 1977, pp. 93-130, 103. For representative liberal theories, see Rawls, John, *The Law of Peoples*, Cambridge, Harvard University Press, 2001; Dworkin, Ronald, "A New Philosophy for International Law," *Philosophy & Public Affairs*, vol. 41, no. 1, 2013, pp. 2-30; Nagel, Thomas, "The Problem of Global Justice," *Philosophy & Public Affairs*, vol. 33, no. 2, 2005, pp. 113-147; Held, David, *Democracy and the Global Order*, Cambridge, Polity Press, 1995. For republican theories, see Bohman, James, "Republican Cosmopolitanism," *The Journal of Political Philosophy*, vol. 12, no. 3, 2004, pp. 336-352.

[2] Representative realist discussions of the relationship between state consent and international law include Morgenthau, Hans, *Politics Among Nations: The Struggle for Power and Peace*, 2nd edition, New York, McGraw-Hill Companies, 1954, and Waltz, Kenneth, *Theory of International Politics*, Long Grove, Waveland Press, 2010 [1979].

[3] Sangiovanni, Andrea, "Global Justice Reciprocity and the State," *Philosophy & Public Affairs*, vol. 35, no. 1, 2007, pp. 3-39, 8; Blake, Michael, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs*, vol. 30, no. 3, 2001, pp. 257-296, 265. See also Moellendorf, Darrel, *Cosmopolitan Justice*, Boulder, CO., Westview Press, 2002, p. 30ff; Wenar, Leif, "Contractualism and Global Economic Justice," *in* Thomas Pogge and Darrel Moellendorf (eds.), *Global Justice*, Oxford, Blackwell, 2001; Beitz, Charles R., *Political Theory and International Relations*, Princeton, Princeton University Press, 1999.

[4] Sangiovanni, "Global Justice Reciprocity and the State," *op. cit.*, p. 8; Nagel, Thomas, "The Problem of Global Justice," *Philosophy & Public Affairs*, vol. 33, no. 2, 2005, pp. 113-147. Bohman, James, "Republican Cosmopolitanism," *The Journal of Political Philosophy*, vol. 12, no. 3, 2004, pp. 336-352.

[5] Accounts that do begin with sensitivity to the problem of consent either focus on the actions of individuals in perpetuating an unjust global order (Young, Iris M., *Responsibility for Justice*, Oxford, Oxford University Press, 2011) or focus on the hegemony of powerful states, as, for instance, in Pogge's discussion of the coercion of international economic order (Pogge, Thomas, *Politics as Usual*: *What Lies Behind the Pro-Poor Rhetoric*, Cambridge, Polity Press, 2010) or his discussion of the global borrowing privilege (Pogge, Thomas, "'Assisting' The Global Poor," www.princeton.edu/rpds/seminars/pdfs/pogge_assistingpoor.pdf).

[6] For important criticisms of the realist account, see Chayes, Abram and Antonia Handler Chayes, *The New Sovereignty Compliance with International Regulatory Agreements*, Cambridge, Harvard University Press, 1995; Franck, Thomas M., *Fairness in International Law and Institutions*, Oxford, Oxford University Press, 1995; Koh, Harold H., "Why Do Nations Obey International Law?," *Yale Journal of International Law*, vol. 106, 1997, pp. 2599-2659; Koh, Harold H., "Transnational Legal Process," *Nebraska Law Review*, vol. 75, no. 181, 1996.

[7] Crawford, James, *Brownlie's Principles of Public International Law*, 8th edition, Oxford, Oxford University Press, 2012; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (hereinafter VCLT).

[8] Vidmar, Jure, "Norm Conflicts and Hierarchy in International Law," *in* Erika De Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford University Press, 2012.

[9] Grotius, Hugo, *De iure praedae commentaries*, *in* Ger. Hamaker (ed.), Paris, Thorin, 1868.

[10] SS Lotus Case (France v. Turkey), 1927 P. C. I. J. (ser. A) No. 10, (Sept. 18), 7. In that case, the Permanent Court of International Justice held: "The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." See also North American Dredging Company (USA) v. Mexico 4 RIAA 26 at 29-30 (1926).

Corbett, P. E., "The Consent of States and the Sources of International Law," *BYBIL,* vol. 6, 1925, pp. 20-30.

[11] For the sake of this article, we simplify the sources of international law listed in the Statute of the International Court of Justice at Article 38.

[12] VCLT, art. 7; art. 8.

[13] VCLT, art. 2(1)a.

[14] Under Article 7, an agent is authorized to represent a state if that agent produces appropriate credentials to that effect, or if, under international law, such an agent of the state is presumed to have the authority to act for a state. Under the VCLT, presidents, heads of governments, ministers of foreign affairs, and, in some cases, diplomats are presumed to automatically possess such credentials.

[15] The only way a state may not be bound to principle of customary international law is if that state enjoys persistent objector status. See Stein, Ted L., "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal*, vol. 26, no. 2, 1985, pp. 457-482.

[16] North Sea Continental Shelf Case (Germany v. Netherlands/Denmark) ICJ Reports, 1969.

[17] Slaughter, Anne-Marie, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks," *Government and Opposition*, vol. 39, no. 2, 2004, pp. 159-190.

[18] The VCLT, Article 11, provides that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." In practice, however, ratification and accession are the most common forms of treaty consent.

[19] A. McNair, Law of Treaties (2nd ed., 1961), 740.

[20] The ICCPR and the ICESCR are such treaties. The ICJ also stated that the League of Nations Mandate system was such a treaty. See the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), ICJ Reports, 1966, at 266. The ECtHR found that the European Convention of Human Rights was such a treaty (European Court of Human Rights, Case of Loizidou vs. Turkey (Preliminary Objections), Judgment of 23 March 1995, Series A, no. 310, p. 25, § 84). For a more detailed discussion, see Brölmann, Catherine M., "Law-Making Treaties: Form and Function in International Law," *Nordic Journal of International Law*, vol. 74, 2005, pp. 383-404.

[21] Kingsbury, Benedict, Nico Krisch and Richard Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems*, vol. 68, no. 15, 2005, pp. 15-61, at 15 (hereinafter Kingsbury et al.).

[22] United Nations Framework Convention on Climate Change, 1771 UNTS 107 / (1994) ATS 2 / 31 ILM 849 (1992).

[23] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 29 (1987). We leave aside the question of whether or not municipal courts are likely to view such delegations as constitutionally permissible. See, for instance, Natural Resources Defense Council, Petitioner v. Environmental Protection Agency and Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency, Respondents Methyl Bromide Industry Panel of the American Chemistry Council, Intervenor, 464 F.3d 1 (D.C. Cir. 2006).

[24] Kingsbury et al., "The Emergence of Global Administrative Law," *op. cit.*, p. 17.

[25] *Ibid.*, p. 16.

[26] *Ibid.*, p. 17

[27] *Ibid.*.

[28] Other potential areas we could have chosen include the certification of products by the Kyoto Protocol Clean Development Mechanism, the work of the UNHCR to develop regulations to determine refugee status, and the certification of NGOs by UN agencies as being specifically authorized to participate in their internal policy debates. Even ISO standards, which are nominally elements of private international, may be required to be implemented in national law.

[29] Dahl, Robert A., "Can International Organizations Be Democratic? A Skeptic's View," *in* Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges*, Cambridge, Cambridge University Press, 1999.
[30] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art. 24; Sarooshi, Dan, *United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, Clarendon Press, 2000, p. 3.
[31] Notably, this includes the International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197, adopted in 1999.
[32] Johnstone, Ian, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit," *The American Journal of International Law*, vol. 102, no. 2, 2008, pp. 275-308, 275.
[33] Resolution 1373 UNSC S/RES/1373 (2001).
[34] Cohen, Jean L., *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge, Cambridge University Press, 2012, p. 272.
[35] Resolution 1373 UNSC S/RES/1373 (2001), cl. 1.
[36] In so doing, it empowered the committee, previously created—presumably under Article 7 of the Charter—to monitor sanctions against the Taliban.
[37] Kelsen, Hans, *The Law of the United Nations*, Clark, NJ, The Lawbook Exchange, 1950, p. 737ff; Arangio-Ruiz, G., "On the Security Council's "Law-Making," *Rivista di diritto internazionale*, vol. 3, 2000, pp. 609-725.
[38] On a consensualist reading of international law, the United Nations possesses only those powers possessed by its member states and so delegated.
[39] UNSC Resolution 687 (1991) S/Res/687. The resolution arguably imposed an international border on two states, in violation of Article 1(1) of the Charter of the United Nations. A more charitable reading would perhaps hold that Iraq was merely being required to uphold its treaty obligations, as laid out in the Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters (Signed at Baghdad 4 October 1963 and registered with the United Nations and published as document 7063, UNTS 1964).
[40] UNSC Resolution 687 provides, in relevant part, that "16. … Iraq … is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; 17. … that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt; [and] 18. [that the UNSC will] create a fund to pay compensation for claims that fall within paragraph 16 … and to establish a Commission that will administer the fund."
[41] UNSC Resolution 731 (1992) S/RES/731 and UNSC Resolution (1992) 748 S/RES/748.
[42] UNSC Resolution 748, cl. 1, which made Clause 3 of Resolution 731 mandatory on Libya, requiring the extradition of suspects in the two bombings, instead of permitting trial in Libya's courts. The Montreal Convention would, instead, appear under Article 7, to permit extradition or prosecution (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 178).
[43] Charter, art. 1(1).
[44] The same committee which would come to prominence under Resolution 1373.
[45] Cohen, *Globalization and Sovereignty, op. cit.,* p. 272.
[46] UNSC Resolution 1267 (1999), art. 6.
[47] Cohen, *Globalization and Sovereignty, op. cit.,* p. 272.
[48] These includes Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), 2083 (2012), and 2161 (2014).
[49] UNSC Resolution 1540 (2004) S/RES/1540.
[50] UNSC Resolution 1540 (2004), cl. 3.
[51] Cohen, *Globalization and Sovereignty, op. cit.,* p. 274.

[52] *Ibid.*, p. 277.
[53] Krisch, Nico, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council," *in* Christian Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin, Springer-Verlag, 2003, pp. 879, 883. Cited in Talmon, Stefan, "The Security Council as World Legislature," *The American Journal of International Law*, vol. 99, 2005, pp. 175-193, 184.
[54] The UNSC appears to have no interest in relinquishing its new powers. In its most recent acts, it has required states to adopt and enforce law against their citizens going abroad to join ISIS under Resolution 2178. S/RES/2178 (2014).
[55] Effects of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) ICJ Reports (1954), 47; 56-7.
[56] Schermers, Henry and Niels Blokker, *International Institutional Law,* Leiden, Brill Publishers, 1995; Meroni v. High Authority (1957-58) ECR 133, 149-150.
[57] Kingsbury et al., "The Emergence of Global Administrative Law," *op. cit.*, p. 21.
[58] Gray, Kevin and Kafumu Kalyalya, "Overcoming Statism from Within: The International Criminal Court and the Westphalian System," *Critical Horizons*, forthcoming.
[59] Krisch, Nico, "The Decay of Consent: International Law in an Age of Public Goods," Available at: www.ssrn.com/abstract=2335938, 3-4.
[60] For a representative account, see Esty, Daniel, "Good Governance at the Supranational Scale: Globalizing Administrative Law," *Yale Law Journal*, vol. 115, no. 7, 2006, pp. 1490-1562.
[61] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 6.
[62] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), at 444.
[63] Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7th Edition, London, Routledge, 1997, p. 152; "Criminal Competence of States in Respect of Offences Committed outside their Territory," *The American Journal of International Law*, vol. 20, no. 2, 1926.
[64] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945).
[65] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945).
[66] Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 704 (1962).
[67] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 12.
[68] *Ibid.*, *in* Re Wood Pulp Cartel (1985), CMLR 3 (1985), 474.
[69] Imperial Chemical Industries Ltd. v. Commission of the European Communities, Case 48/69, [1972] C.M.L.R. 557. The official decision is published in *Journal Officiel des Communautés européennes* of Aug. 7, 1969 L195/11. Cited in F. A. Mann, "Dyestuffs Case in the Court of Justice of the European Communities," *The International and Comparative Law Quarterly*, vol. 22, no. 1, 1973, pp. 35-50. In this respect, the ECJ arrived at the opposite conclusion to that of the ICJ in the Barcelona Traction decision. (Case Concerning The Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) ICJ Reports (1970) 3).
[70] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957; Mann, "Dyestuffs Case in the Court of Justice of the European Communities," *op. cit.*, p. 42.
[71] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 938; Friend, Mark, "The Long Arm of Community Law," *European Law Review*, 1989, pp. 169-172; Mann, F. A., "The Public International Law of Restrictive Practices in the European Court of Justice," *International and Comparative Law Quarterly*, vol. 38, no. 2, 1989, pp. 375-377; Breibart, Evan "The Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings," *Georgia Journal of International and Comparative Law*, vol. 19, no. 1, 1989, pp. 149-173; Vedder, Cristoph "A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law," *European Journal of International Law*, vol. 1, no. 1, 1990, pp. 365-377.
[72] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 939-940.

[73] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 941.

[74] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 12.

[75] *Ibid.*, p. 13.

[76] The cases of Kadi v. Council and Commission, 2005 E.C.R. II-3649, Case T-315/01, and Yusuf & Al Barakaat International Foundation v. Council and Commission, 2005 E.C.R. II-3533, Case T-306/01, are notable exceptions, in that they triggered a review of the listing procedures by the UNSC. Ultimately, Kadi was delisted from the sanctions established under SC Resolution 1287.

[77] States may make law for their citizens not only by actively consenting under treaty or customary international law, but also by acquiescing to new legal regimes. Sometimes this takes the form of acquiescing, or failing to object, to emergent custom (Continental Shelf Case (Libya v Malta) ICJ Reports (1985) 29; Fisheries Case (United Kingdom v. Norway), ICJ Reports (1951) 116, p. 131 & 138; Malanczuk, *Akehurst's Modern Introduction to International Law*, *op. cit.*. Other times, this may occur where they legitimate new interpretations of treaties or adopt treaties where treaty language is designed to evolve (Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua) ICJ Reports (2009) 213; Bjorge, Eirik, *The Evolutionary Interpretation of Treaties*, Oxford, Oxford University Press, 2014; Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2008; Rosenne, Shabtai, *Developments in the Law of Treaties, 1945-1986*, Cambridge, Cambridge University Press,1989.

DOSSIER

BOOK SYMPOSIUM ON ALAN PATTEN'S *EQUAL RECOGNITION: THE MORAL FOUNDATIONS OF MINORITY RIGHTS*

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INTRODUCTION

Alan Patten's *Equal Recognition* addresses a contentious and salient question in liberal political theory and practice: what normative significance should the fact of cultural pluralism have for conceptualizing the demands of liberal justice on our social and political institutions and practices? Patten seeks to respond to two major unresolved problems that objectors have advanced over the years against 'liberal culturalism,' or the view that "certain minority cultural rights, entailing the accommodation and recognition of minority cultures, are, *as such*, a requirement of liberal justice" (Patten, 2014, pp. 8, 22). First, how should we understand ideas of culture and cultural preservation, given widespread concerns that our prevailing understandings rely on an unavowed, but incoherent and objectionable, form of essentialism? And, second, what exactly constitutes the normative basis of support for claims to cultural rights, and do they also entail limits on those claims? Patten responds to these challenges by putting forth a novel and robust principled defense of liberal culturalism based on a reformulation of the ideal of liberal neutrality. In making his theoretical case for liberal multiculturalism, Patten's book makes important interventions in contemporary debates within liberal democratic societies about issues such as language rights, immigrant integration, secession, self-government, the design of political institutions and legal jurisdictional spaces, public spaces, and school curricula, as well as the designation of symbols, flags, and anthems.

Patten's argument for equal recognition of minority cultures involves the claim that the state has an obligation to represent all of its citizens, and to be equally responsive to the interests of each of those citizens. A just liberal state cannot show cultural favouritism toward the interests of one group, such as a national or religious majority, at the expense of the right of other non-majority cultural groups to equal consideration by the state of their interests. The ideal of liberal neutrality is grounded in the claim that each individual has to a fair opportunity for self-determination, which is important to all persons for well-being and autonomy-related reasons. In a culturally pluralistic society, a commitment to fair opportunity for individual self-determination entails neutrality of treatment of different conceptions of the good by the state and its policies. Although departures from neutrality are not always unjust, there needs to be a sufficiently good reason for such departures by a liberal state that is supposed to represent and be responsive to the fundamental interests of all its citizens. Extending a fair opportunity for self-determination to all its citizens gives the state a "*pro tanto* reason to extend neutral treatment to the various conceptions of the good valued by its citizens" (Patten, 2014, p. 29).

Equal Recognition is thus an ambitious rehabilitation of the concept of liberal neutrality, which Patten reformulates to serve as the normative basis for minority cultural rights claims. The following commentaries and response were part of a book roundtable that took place at the Canadian Political Science Association meetings held at the University of Ottawa in June 2015.

Jocelyn Maclure questions whether Patten's sophisticated version of liberal culturalism nevertheless is still ill-suited to address the more prevalent and vexing challenges facing contemporary liberal democracies—notably, the status of religion in the public sphere. He also wonders if minority cultural rights and recognition may not be somewhat superfluous, if liberal egalitarianism, well understood, contains the philosophical resources to secure fair terms of social cooperation for members of cultural minorities.

Andrew Lister's contribution to this symposium examines the idea of 'neutrality of treatment' that is at the heart of Alan Patten's defense of minority cultural rights. Patten's resuscitation of the idea of liberal neutrality involves thinking about neutrality in terms of treatment (by the state and its policies) rather than in terms of neutrality of intentions (of lawmakers) or neutrality of effects (of legislation). Lister raises questions about the philosophical foundations of neutrality of treatment, and wonders whether neutrality of treatment can do without an upstream, or foundational, commitment to neutrality of justification.

Patten argues that neutrality of treatment implies certain minority cultural rights; a state that denies such rights puts minorities at a disadvantage about which they can justifiably complain. Jonathan Quong presses Patten's claim that his account of minority rights is broadly continuous with Ronald Dworkin's theory of equality of resources. According to Quong, Dworkin's theory does not provide a basis to offer accommodations or minority rights, as a matter of justice, to some citizens who find themselves at a relative disadvantage in pursuing their plans of life after voluntarily changing their cultural or religious commitments.

Finally, I focus on the last chapter of Patten's book, in which he makes a limited case for accepting some modest departures from neutrality in the treatment of prospective immigrants' cultural rights, and that of majority and minority national groups. I challenge his thesis by asking whether such departures are justified with respect to already settled (as opposed to prospective) immigrants, whether the situational argument for unequal treatment is inconsistent with the theory of culture offered earlier in the book, and whether contexts of historical injustice against immigrant groups might complicate judgements about the national minority/immigrant dichotomy with respect to minority cultural rights.

The symposium closes with Patten's thorough engagement with these four critics, in a generous and spirited defense of his reformulation of the case in favour of liberal multiculturalism, based on an ideal of liberal neutrality that is grounded in the claim that each individual has to a fair opportunity for self-determination.

MULTICULTURALISM ON THE BACK SEAT? CULTURE, RELIGION, AND JUSTICE

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ABSTRACT:

Alan Patten's *Equal Recognition* is a major contribution to the normative literature on minority rights. I nonetheless suggest that liberal culturalism as a normative theory, even in Patten's sophisticated version, is ill suited to deal with the challenges related to the status of religion in the public sphere that are so prevalent in contemporary democracies. In addition, I submit that Patten did not supply a fully convincing answer to the argument that liberal egalitarianism, well understood, is capacious enough to secure fair terms of social cooperation for members of cultural minorities, making the (allegedly burdensome) language of "cultural rights" and "cultural recognition" superfluous.

RÉSUMÉ :

Le livre *Equal Recognition* d'Alan Patten contribue de façon majeure aux travaux de philosophie politique sur les droits des minorités culturelles. Je suggère néanmoins que la théorie normative qu'est le « culturalisme libéral », y compris dans la version sophistiquée défendue par Patten, n'est pas outillée pour penser les omniprésents défis concernant le statut de la religion dans l'espace public. De plus, j'avance que Patten n'a pas été en mesure d'offrir une réponse pleinement satisfaisante à ceux qui soutiennent que l'égalitarisme libéral bien compris est en mesure d'offrir des termes de coopération sociale justes aux membres des minorités culturelles, sans devoir être complété par des « droits culturels » ou par le langage de la « reconnaissance » des cultures.

Alan Patten's *Equal Recognition* offers one the most careful and systematic treatments of minority rights in political philosophy, as well as a sophisticated defense of liberal culturalism. It covers the major issues that political philosophers working on cultural diversity have been debating since the beginning of the 1990s, and moves steadily from foundational principles to public policy.

After reading Patten's book, I was nonetheless left with the impression that the current work in political philosophy on cultural rights or multiculturalism was becoming increasingly out of sync with some of the most salient questions of social justice, even within the 'recognition' and 'accommodation' stream of contemporary theories of justice.

I do not mean this claim to be too bold and wide-ranging. My impression comes from the observation that religious and conscience-based claims of recognition and accommodation have taken centre stage in many liberal democracies in the past decade.[1] It is not clear at all that concepts such as *culture*, *multiculturalism*, and *polyethnic rights* are appropriate to describe and make sense of these claims. My point is not that we can do without liberal culturalism and multiculturalism altogether, but rather that these views cannot be thought as the all-encompassing frameworks for thinking about justice and diversity. I take it that a proper—and *partly* independent or freestanding—political theory of secularism is needed to adjudicate religion- and conscience-based claims of recognition and accommodation.[2]

Let's first look at practice. Some of the most heated issues debated in liberal democracies have to do with the status of religion in the public sphere and more particularly with religiously-based exemption claims. Very often these claims are made by members of minority groups such as Muslims, Sikhs, or Orthodox Jews, but not always. Catholic parents in Quebec tried to get their children exempted from the mandatory secular Ethics and Religious Cultures courses a couple of years ago.[3] The case made it all the way up to the Supreme Court, which ruled in favour of the government. More recently, a Jesuit private school got the right to teach its own religious version of the Ethics and Religious Cultures programme.[4] In both cases, moral pluralism was more at play than the cultural diversity brought in by immigrants.

Tellingly, when Patten supplies examples for his principled rather than strictly pragmatic defense of the rights of minority cultures, he first mentions national minorities such as Scotland, and then moves to "accommodations for evangelical families who object to the ways in which religious faith is discussed and presented in the classroom and in textbooks".[5] Why should we use the concepts of culture and cultural minorities to think about the claims of evangelical families? In the same spirit, Will Kymlicka's most frequent examples of polyethnic rights are cases of religious accommodation. There is, in such cases, a mismatch between the concepts used and the phenomena that they are meant to grasp.

This is not only problematic for conceptual reasons. It also leads normative reasoning to an impasse. If one thinks—like liberal culturalists do—that religious exemptions are, under the right conditions, 'required' by justice (and not only 'permissible'[6]), this logically raises the question of the status of *secular* conscience-based accommodation claims, and multiculturalism is not designed to answer it. One of the most basic reasons why many citizens (including some political and legal theorist[7]) oppose religious accommodations is that they think that they are incompatible with state neutrality with regard to reasonable conceptions of the good. Is religion special? Do religious convictions deserve a special and *sui generis* moral and legal status?[8] These questions fall outside the scope of liberal culturalism, although Patten could use his 'neutrality of treatment' approach to expand his theory.

In addition, several key normative issues, both in officially secular countries such as France and in countries where a weak form of establishment prevails, have to do with the status of the majority's symbols and practices in public institutions: Can a prayer be said before classes or town hall meetings? Can the religious symbols of the majority be displayed within public institutions such as legislatures and courtrooms? Here again, Patten uses religious establishment as a test-case in his discussion of liberal neutrality.[9] But something like a political theory of secularism is needed to assess the weaknesses and strengths of different forms of state-church relationships.[10]

What all these examples reveal is that the normative questions raised are not always "minority-regarding" in Patten's sense and, when they are, culture is not always the relevant identity marker. This is why I gradually came to the view that multiculturalism has to play a more limited role in our normative theories than what liberal culturalists assume.

CULTURAL RIGHTS AND LIBERAL JUSTICE

At a more foundational level, I was not convinced that Patten provided a sufficiently compelling response to concerns about the role of principles such as cultural recognition or multiculturalism within a theory of justice. Consider, for instance, Samuel Scheffler's nuanced critique of multicultural theories of justice.[11] Scheffler's basic claim is that liberal egalitarianism, well understood, is already capacious enough to secure fair terms of cooperation for members of cultural minorities. Religious accommodations, anti-discrimination laws, and positive representations of diversity can all be derived from general liberal principles, and the space of personal autonomy created by individual and associative liberal rights allows groups to pursue their own cultural preservationist projects. According to Scheffler, cultural rights raise thorny questions about cultural essentialism and the status of internal minorities without being necessary from the perspective of social justice.

Scheffler does not address the status of national minorities. Perhaps he would have been more sympathetic to the politics of recognition had he done so. But

here again it is not clear that liberal culturalism has the normative weight that it claims. Can we not derive the collective rights of minority nations from the principle that nations or peoples ought to enjoy some form of political autonomy or self-determination right? With regard to multinational political communities, liberal culturalism seems to enjoin us to apply an already established principle—the right to self-determination of peoples—in a consistent and fair way. When one reads the jurisprudence and doctrine on the rights of indigenous nations, for instance, the right to self-determination carries most of the normative weight, whereas discussions of the recognition of aboriginal culture often leads to the cultural essentialism that Patten rightly wants to steer clear of.[12]

It might be the case that the linguistic rights of immigrants cannot be derived straightforwardly from liberal egalitarianism—except perhaps for rights such as to have a translator in court, for instance, which can be derived from due process—but then we have to show precisely what the normative underpinning of such rights is and what they involve at the level of public policy.

Scheffler also challenges the idea that cultural belonging should be thought as a source of the kind of reasons for action that deserve a special moral and legal status in the same way that religion, ethics, and philosophy do. Evolving in a culture might be a necessary condition for developing the capacity to form a conception of the good, but might not provide the substance of one's conception of the good in the way that faith or moral reflection do.[13]

In response, Alan writes:

> But attachments to a culture can be of crucial importance to individuals too in ways that track, if at some distance, the importance of religious convictions. Violating a cultural attachment may not produce a feeling of having sinned, but it may lead to a sense of having betrayed or compromised a relationship of community that is of central importance in an individual's life. Likewise, attachments to culture may not be worthy of autonomous protection because they represent ethical or metaphysical judgments, but they may represent judgments about the basic social relationships that a person wants to be part of which are also worthy of protection. In addition, both religion and culture are matters that can play a central role in a person's ends, and where publicly established inequality can be consequential for the respect that minorities feel they are getting from others.[14]

It seems like Patten is putting cultural preferences on par (normatively speaking) with moral and religious beliefs. I would like to know more about the family resemblances between cultural attachments and religious/moral beliefs here. The legal duty to offer accommodation measures such as exemptions is often thought to derive from freedom of conscience/religion or from antidiscrimination laws. How does the derivation work for cultural preferences or attachments?

Is Patten's point that citizens have deeper interests and attachments that deserve special recognition, and that these include cultural attachments? Or is it that neutrality of treatment implies that the state does not hierarchize at all among people's preferences, but that cultural recognition is nevertheless sometimes necessary because there are some significant public norms and institutions that simply cannot be neutral with regard to culture? The second answer opens the door to the accommodation of all subjective preferences, as opposed to what we can call "meaning-giving beliefs and commitments" or "strong evaluations," since the state might fail to treat any cluster of desires, interests, values, and commitments in a neutral or even-handed way.

I myself think that we need to distinguish between the beliefs and commitments that are central to the agent's moral identity and provide moral orientation in a strong sense from the other preferences that we have. Only the first should trigger an obligation to accommodate.[15] So my question is whether Patten wants to include cultural attachments in the meaning-giving category and distinguish them from the desires, tastes, and preferences that all agents have, or whether the neutrality of treatment argument entails that all preferences or interests are treated identically. Could Patten give examples of cultural attachments that "track, if at some distance, the importance of religious convictions," and of the way in which such attachments translate into legal claims?

CONCLUSION

As I said, I do not want my claim to be too wide ranging. My point is not that we can do without liberal culturalism or multiculturalism altogether. We still need a principle of *respect for cultural diversity* as an interpretive principle at the level of political morality—an interpretive principle that acts as an axiological filter in our interpretation of more basic and more directly regulative principles such as equality, freedom, and self-determination. In addition, culturalist theories of minority rights remain highly useful for thinking about the claims of national and linguistic minorities. That said, religious and moral diversity looms very large at the moment in the public sphere, and liberal culturalists should acknowledge that normative theories of secularism and freedom of conscience/religion are needed to address the questions that it raises.

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NOTES

[1] Islam, of course, is the centre of the resurgence of the concern about religion in the public sphere. As Will Kymlicka concedes: "We have witnessed a partial backlash against liberal multiculturalism, particularly in countries where Muslims form a clear majority of the immigrant population and hence are the focus of debates around multiculturalism." (Kymlicka, Will, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, New York, Oxford University Press, 2009, p. 125.)

[2] Such a theory has been sketched by Maclure, Jocelyn and Charles Taylor, *Secularism and Freedom of Conscience*, Cambridge, MA, Harvard University Press, 2011.

[3] S.L. v. Commission scolaire des Chênes, 2012 SCC 7, [2012] 1 S.C.R. 235.

[4] Loyola High School v. Quebec (Attorney General), 2015 SCC 12.

[5] Patten, Alan, *Equal Recognition: The Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, p. 12.

[6] See *ibid.*, pp. 21-24.

[7] Barry, Brian, *Culture and Equality*, Cambridge, MA, Harvard University Press, 2002; Leiter, Brian, *Why Tolerate Religion?*, Princeton, Princeton University Press, 2012. For an insightful critical assessment of Leiter's position, see Boucher, François and Cécile Laborde, "Why Tolerate Conscience?," *Criminal Law and Philosophy*, Original Paper online: http://link.springer.com/article/10.1007/s11572-014-9325-2/fulltext.html. Last consulted on 28th July 2015.

[8] Koppelman, Andrew, "Religion's Specialized Specialness," *The University of Chicago Law Review Dialogue*, 2013, pp. 71-83: https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf. Last consulted on 28th July 2015; Maclure and Taylor, *Secularism and Freedom of Conscience, op. cit*., Part Two; Nussbaum, Martha*, Liberty of Conscience*, New York, Basic Books, 2008.

[9] Patten, *Equal Recognition*, *op. cit.*, chap. 4.

[10] Maclure, Jocelyn, "Political Secularism. A Sketch," *The Public Management of Religion: From State Building to New Forms of Minorities' Mobilization*, RECODE Working Papers # 16, 2013.

[11] Patten spends more time on Brian Barry's more sustained but less persuasive critique. See Scheffler, Samuel, "Immigration and the Significance of Culture," *Philosophy & Public Affairs*, vol. 35, no. 2, 2007, pp. 93-125.

[12] See Patten, *Equal Recognition*, *op. cit.*, chap. 2, and Tully, James, "The Struggles of Indigenous Peoples for and of Freedom," *in* James Tully (ed.), *Public Philosophy in a New Key volume 1*, Cambridge, Cambridge University Press, 2008.

[13] For another response to Scheffler, see Maclure, Jocelyn, "Multiculturalism and Political Morality," *in* Duncan Ivison (ed.), *The Ashgate Research Companion to Multiculturalism*, Farnham, Ashgate, 2011, pp. 39-56.

[14] Patten, *Equal Recognition*, *op. cit.*, pp. 168-169.

[15] This argument, I believe, needs to be combined with the fair equality of opportunities argument defended by Jonathan Quong in his defense of (allegedly misnamed) cultural exemptions. See Quong, Jonathan, "Cultural exemptions, expensive tastes, and equal opportunities," *Journal of Applied Philosophy*, vol. 23, no. 1, 2006, pp. 53-71.

NEUTRALITY AS A BASIS FOR MINORITY CULTURAL RIGHTS

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ABSTRACT:

This comment examines the idea of 'neutrality of treatment' that is at the heart of Alan Patten's defense of minority cultural rights in *Equal Recognition*. The main issue I raise is whether neutrality of treatment can do without an 'upstream' or foundational commitment to neutrality of justification.

RÉSUMÉ :

Ce commentaire se penche sur le concept de « neutralité de traitement » au cœur de la défense des droits des minorités culturelles qu'offre Alan Patten dans son livre *Equal Recognition*. La principale question que je pose est celle de savoir ce que peut la neutralité de traitement si elle ne repose pas sur un engagement fondamental, en amont, quant à la neutralité de justification.

Liberal culturalism is the now-familiar view that some minority cultural rights are requirements of liberal justice (Patten, 2014, p. 3, citing Kymlicka, 2001, chap. 2). The standard arguments for this position are subject to some powerful objections, such as that they assume an essentialist view of culture, and that they only justify a right to some culture not necessarily one's own. Alan Patten's *Equal Recognition* restates the case for liberal culturalism so as to avoid these and other objections, solidifying "the moral foundations of minority rights." The objection that will be the focus on my comments concerns the idea of neutrality.

The liberal commitment to state neutrality originally seemed to undermine both majority nationalism and minority cultural rights. Citizens are free to pursue their cultural objectives within the framework of rules and institutions that establish fair terms of cooperation, but not to use the power of the state to advance religious or cultural goals shared by some but not all. One response was to reject neutrality, insisting that a state could be respectably liberal so long as its pursuit of less-than-universally shared goals took place within the limits set by basic individual liberties (Taylor, 1993, pp. 175-177). Will Kymlicka's innovation was to argue that minority cultural rights follow from liberal principles themselves. If liberty means autonomy rather than non-interference, it requires an adequate array of choices. Culture is essential to this range of choice, and members of minority cultures can be at an unchosen disadvantage with respect to the reproduction of their culture. The existence of brute-luck threats to the conditions of autonomy does not justify a right to one's own culture, however, because the solution could be subsidy for transition to the majority culture (Patten, 2014, p. 6).

This flaw in the argument from autonomy puts additional weight on a second liberal argument for minority cultural rights, which is that the state cannot avoid certain kinds of local non-neutrality. The state cannot be neutral with respect to language and culture in the same way it can with respect to religion, because it must conduct its business in some relatively small number of official languages, recognizing only some holidays, within certain geographical boundaries. Some minority cultural rights may therefore be called for as a matter of fairness, realizing cultural neutrality overall, though not with respect to each particular policy. This second liberal argument for minority rights (from unavoidable local non-neutrality) is open to the objection that it assumes neutrality of effects, while liberalism is committed only to neutrality of justification; policies that have differential impact may be legitimate if they are justifiable on neutral grounds (Patten, 2014, p. 8). In chapter 4, therefore, Patten reformulates the idea of liberal neutrality so as to salvage the argument from local non-neutrality. He argues that liberalism is not based on neutrality of justification or neutrality of effect but neutrality of treatment. Neutrality of treatment is a "downstream" conception of neutrality, in the sense that it is not a foundational principle, but a consequence of a more fundamental non-neutral commitment, which Patten calls "fair opportunity for self-determination" (Patten, 2014, pp. 108-109). The purpose of my comment is to get a better grasp on what neutrality of treatment involves, and what its relationship is with neutrality of justification and neutrality of effect. My main question is whether Patten is committed to a more foundational upstream conception of neutrality than he admits.

Neutrality of justification counts as neutral the establishment of a religion on grounds of maintaining social peace, because avoiding bloodshed is a neutral concern; neutrality of effect counts as non-neutral the legal protection of basic liberties, because such protection makes it harder for boring ways of life to flourish (Patten, 2014, pp. 112-114). The idea of neutrality of treatment is meant to avoid these counterintuitive implications. Even if it is publicly justifiable, religious establishment involves treating members of different religions differently. Conversely, the state treats everyone the same in protecting their basic liberties, even if the use people make of these liberties gives rise to unequal outcomes. To illustrate the distinction between neutrality of effect and neutrality of treatment, Patten gives the example of a philanthropist faced with a choice between donating to two worthy projects. I could give each project that amount of money it needs to succeed, or I could simply give each project the same amount of money. The same example can be used to illustrate the contrast between neutrality of treatment and neutrality of justification. Instead of giving each charity the same amount of money, I could decide how much to give based on reasons accepted by both charities.

I want to begin by raising some questions about the dilemma neutrality of treatment is meant to solve. Consider the first horn, about neutrality of justification and religious establishment justified by social peace. The problem is that neutrality of justification is overinclusive, which suggests that neutrality of justification is not enough, not that it is unnecessary or pernicious. However, since neutrality of treatment is a downstream approach, it seems that it must eschew neutrality of justification. Neutrality of treatment is justified by a "particular, justifiable, liberal value"—namely, fair opportunity for self-determination; Patten says that his account is "not embarrassed" that this value is "quite particular and nonneutral" (Patten, 2014, p. 109). If Patten is not committed to neutrality of justification, then in developing the alternative conception of neutral treatment, he is not articulating an additional requirement for policies to count as neutral, but an alternative to the requirement of neutrality in justification. The rejection of neutrality of justification might open the door to perfectionism, or a comprehensive/non-political approach to justice (meaning one that claims correctness rather than multiperspectival acceptability), an issue I'll return to below. If Patten were committed to neutrality of justification, in the form of a Rawlsian principle of public reason, the fact that neutrally justified policies can seem non-neutral would present no puzzle. We simply need to distinguish the principle of public reason from specific public reasons, such as equal treatment of religions, and recognize that the balance of public reasons may favour a policy that has unequal impact.

Turn now to the second horn of the dilemma, concerning neutrality of effect's failing to count legal protection of basic liberties as neutral. The objection works if neutrality of effect is interpreted as involving a guarantee of equal outcomes regardless of the choices people make, but no one has ever believed in that. Moreover, the idea of the *effect* of an action or policy is normally understood in comparative or counterfactual terms, as the difference that the policy makes rela-

tive to some alternate course of action. If there is more than one alternate policy, there is more than one effect, and if the effects of a policy on different ways of life are equal compared to one alternate policy, they won't in general be equal compared to others. To make the basic-liberties criticism stick, Patten has to define the inequality as unequal impact relative to a particular alternative policy: locking people into their existing conceptions of the good (Patten, 2014, p. 114). Yet every policy has unequal effect relative to *some* alternate policy. As Robert Nozick argued, it is irrelevant that the law against rape has a differential impact on men and women as compared to a state of nature, because the law in question is independently justified.[1] Similarly, laws against assault benefit the weak more than they do the strong, but that does not make them non-neutral. The fact that legal protection of basic liberties has unequal impact relative to *some* alternate policy is irrelevant unless that alternate policy is the appropriate baseline. The conclusion one might draw is not that liberals are uninterested in neutrality with respect to effects, but that they are interested in neutrality relative to the appropriate baseline, a property that is in any case shared by neutrality of treatment. Although the example of the philanthropist makes it seem as if the assessment of neutrality is non-comparative, Patten says that the state violates neutrality of treatment "when, relative to an appropriate baseline, its policies are more accommodating of some conceptions of the good than they are of others" (Patten, 2014, p. 115). Neutrality of treatment is not meant to be an effects-based conception of neutrality, so what role is the idea of a baseline playing here?

Patten identifies two further problems with neutrality of effect, apart from the alleged non-neutrality of basic liberal rights, but I don't think they bring us beyond neutrality of effect so much as they specify which effects are of concern. The first is that the effects in question might be understood as total effects, over the long term, including effects that arise by way of the different responses people freely make to the policies in question. The second is that even if we limit our attention to direct effects, the size of these effects might depend on background factors that are not a matter of public responsibility—e.g., the case of opening up a field for soccer and cricket, where field availability is not a binding constraint for the cricket players because there are so few of them that they can't play anyway (Patten, 2014, pp. 115-117). These points specify which effects are of interest—roughly speaking, direct effects controlling for the right background variables, relative to the right baseline package of policies.

So what is the appropriate baseline? Patten denies that it should be "no policy"—i.e., state inaction, a "do-nothing point" (Patten, 2014, p. 118). Nozick's rape example explains why; differential impact relative to a baseline in which people are free to violate each other's rights is not a bad thing. Instead, Patten favours "fair opportunity for self-determination" (Patten, 2014, p. 118). Yet fair opportunity for self-determination is also the value that grounds neutrality (Patten, 2014, p. 109). Thus it seems that fair opportunity justifies equal treatment relative to the baseline policies required by fair opportunity for self-determination. Does this mean that we could dispense with the idea of neutrality, employing

only the idea of equal treatment relative to the baseline policies required by fair opportunity for self-determination?

I think the answer must be "no," because questions of neutrality can be raised with respect to the baseline itself. Consider the legal protection of basic liberties, one of which is the right to vote and run for office. The choice of official languages will advantage some people and disadvantage others, with respect to their exercise of political liberty, and their pursuit of their way of life more generally. The problem here is that many of the policies and institutions that constitute the baseline (the package of policies that is the benchmark for assessing differential impact of all other policies) must have a particular cultural "format" (Patten, 2014, pp. 169-170). Some elements of the baseline institutions required by justice will therefore be unequally accommodating of cultures. As a result, some minority cultural rights are justified as a way of attaining neutrality overall.

How are we to determine whether a particular component of the baseline package of policies is unequally accommodating of different conceptions of the good? What is the metric of accommodation? One possibility is to think of the various possible packages of policies as arrayed in a space, and to assume that each culture or conception of the good prefers some ideal point in this space. Neutrality would then consist in maintaining equidistance between ideal points, or, where there are more than two conceptions and hence more than two ideal points, minimizing the total distance between the baseline package of policies and the various ideal points. Neutrality in this sense (splitting the difference between policy preferences) cannot be the main criterion for selecting the baseline package of policies, however, for the reasons discussed above in relation to Nozick. Some conceptions of the good are inhospitable to freedom of religion. Others are inhospitable to gender equality. Policies protecting people's basic rights and liberties will not be equidistant from all conceptions of the good, nor should they be.

The alternative is to think of equal accommodation as a matter of substantively equal treatment. In the case of the philanthropist, it initially seems obvious that giving each project the same amount should count as neutral treatment, because each party is getting the same amount; neutral treatment means treating people the same. However, there are lots of familiar cases in which treating groups the same does not count as equal treatment, meaning treatment that shows equal concern and respect: people with and without disabilities; children vs. adults; rich vs. poor. Treating these different groups the same might constitute unequal treatment, if not a violation of their rights. Suppose that I, the philanthropist, have to choose between donating to two elementary school associations to cover costs of extracurricular activities. One school is located in a wealthy neighbourhood and will have no trouble raising a lot of money. The other is located in a poor neighbourhood and will struggle to raise any. Treating these two groups the same might not count as substantively equal treatment. We presumably need a theory of justice that tells us which equalities are required by justice, and which are not.

In sum, although policies required by justice should not be equally accommodating of conceptions of the good that conflict with justice, equal accommodation of conceptions of the good that are compatible with justice is *pro tanto* a good thing. Justice does not in general require that a country have an official language; it simply requires political liberties, which must be exercised in writing and speech. Due to current constraints on human cognition, technology, and resources, this communication must take place in some small number of languages, within courts and parliaments. The choice of an official language is therefore non-neutral where justice does not require non-neutrality; that is to say, it is non-neutral between conceptions of the good that are fully justice-compatible. Other things equal, that's a bad thing, and since it can't be avoided in this dimension of policy, it may merit some form of compensation or accommodation for disadvantaged cultures in other dimensions of policy.

A further question that arises at this point is whether the conception of justice that sets the baseline for determining what counts as equal treatment must be political in Rawls's sense of being acceptable to all reasonable comprehensive doctrines, or if it can simply be true, despite being reasonably contestable. I see at least two ways of interpreting Patten's rejection of upstream neutrality (Patten, 2014, p. 109). The first involves rejecting justificatory neutrality across *all* views, while holding on to justificatory neutrality between an appropriate subset. Fair opportunity for self-determination is not and need not be neutral among *all* moral views; it is simply true. However, fair opportunity for self-determination might require neutrality of justification among all views accepting this value, and the resulting requirement of neutrality in justification. The model here might be David Estlund's defense of a qualified acceptability requirement, which he claims must be defended as true (against those who have different conceptions of the right standard of qualification); all other reasons invoked in political justification need only be acceptable to qualified points of view.[2] However, it is possible that Patten means to reject any requirement of neutrality in justification. The model here would be Ronald Dworkin's use of the "endorsement constraint" to yield a kind of practical neutrality out of a form of argument that involves no attempt to avoid disagreement or bracket controversial claims (Dworkin, 1983, pp. 25-30).[3] The endorsement constraint is a generalization of the view that, because belief is not subject to the will, forced worship is pointless. People's lives don't go better when engaged in valuable activities unless the people in question recognize this value. Thus, even though everyone's fundamental interest is in leading a truly good life, and politics should promote the leading of better lives, the state should be neutral between conceptions of the good, at least with respect to its coercive polices.

Given that Patten is appealing to a "distinctly liberal" value called "self-determination," one might think that the underlying consideration has something to do with the conditions necessary for individuals to reflect about what is valuable, and to form, adjust, or revise their plans of life on this basis. One could be self-determining, in this sense, even if one did not fully realize one's conception of the good (perhaps because it is a conception that is very hard to realize, such as

making a great work of art). Alternately, one could fulfil one's conception without engaging in reflection about what is valuable, as in the case of someone who unquestioningly leads a fulfilling family life in a society in which powerful social norms encourage conformity with traditional values. However, Patten says that people's interest in self-determination is "their interest in being able to pursue and fulfill the conception of the good that they, in fact, happen to hold" (Patten, 2014, p. 125). In other words, "self-determination" means fulfilment of one's conception of the good, whatever it is (though it can't be worthless (Patten, 2014, p. 131), and it has to be consistent with everyone having a fair opportunity for self-determination (Patten, 2014, p. 109)). Thus, despite the connotations that self-determination has, Patten is not attributing any particular importance to the capacity for revision and reflection. This impression is supported by Patten's sceptical comments about the intrinsic importance of autonomy (Patten, 2014, p. 132), and by his account of the connection between self-determination and well-being, which makes use of the endorsement constraint (Patten, 2014, p. 131). The endorsement constraint does not identify a value but a feasibility constraint, which is that without buy-in even objectively valuable activities don't make a person better off. Patten's conception of self-determination is thus quite minimal, in the sense of appealing to relatively uncontroversial normative premises.

However, if there really is no upstream constraint on the reasons we can appeal to, it is open to perfectionists to concede that self-determination in Patten's sense is important, but to insist that it is not all that matters, and therefore to respecify the baseline of comparison for determining what counts as equal treatment. I might be committed to equal treatment of conceptions of the good relative to a baseline of just institutions where justice is defined according to a particular comprehensive doctrine. That is to say, I may accept the *pro tanto* value of equal treatment defined relative to a background of just institutions, but define justice according to (not *so as to promote*) a particular comprehensive doctrine—fair opportunity to flourish, according to what I take to be the correct conception of the good.

Patten argues that a perfectionist definition of the baseline would undermine self-determination (Patten, 2014, p. 147). The situation Patten has in mind is one in which the state adopts a set of policies intended to promote superior conceptions of the good, then measures inequality of direct impact relative to this baseline (e.g., it builds promotion of art and culture into the baseline, but is still able to condemn the privileging of hockey over basketball). I think Patten is attacking the weakest form of perfectionism here. The perfectionist is taken to be someone whose fundamental principle is "promote flourishing," and who defines basic rights and liberties and settles other matters of justice based on this goal. The perfectionist subordinates justice to maximizing excellence, which seems obviously wrong. A more plausible version of perfectionism would recognize that respect for people's rights is an independent moral value, distinct from the goal of promoting well-being, excellence, or achievement, but would maintain that the identification of the rights people have as a matter of justice depends on what the truth about human flourishing is (Wall, 1998, p. 12). Such a concep-

tion of justice need not be committed to equalizing well-being regardless of the choices individuals make. For example, assume that the view in question is that interesting, meaningful work is an important component of a good life, much more important than wealth. An opportunity-focused perfectionist would conclude that we need to assess the economic system partly in terms of the distribution of opportunities for meaningful work across different social positions. If institutions that are just according to this metric are in place, and I nonetheless choose to focus on attaining wealth rather than meaningful work, there is no cause for the state to try push me into a better way of life, nor to compensate me for my lack of true well-being.

NOTES

[1] "That a prohibition thus independently justifiable works out to affect different persons differently is no reason to condemn it as nonneutral." Nozick, 1974, pp. 272-273.

[2] Estlund also argues that the qualified acceptability requirement is reflexive—i.e., it applies to itself, so it must meet its own standard of acceptability to qualified points of view. The point to which I am drawing attention, however, is that the QAR is not *meant* to be acceptable to all points of view; it is frankly non-neutral relative to that unconstrained set of perspectives. Its truth gives rise to a demand for neutrality, however, among a smaller set of perspectives. Estlund, 2008, pp. 40-65.

[3] See also Thomas Hurka's account of Kymlicka's "indirect perfectionism." Kymlicka allegedly believes that the state should promote the leading of intrinsically better lives, but nonetheless endorses state neutrality because political attempts to promote flourishing directly are likely to be counterproductive, given that the state acts via coercive general rules on the basis of limited information, and that good lives vary enormously, except for their having to be endorsed 'from the inside.' Hurka, 1995.

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EQUALITY, RESPONSIBILITY, AND CULTURE: A COMMENT ON ALAN PATTEN'S *EQUAL RECOGNITION*

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ABSTRACT:

Alan Patten presents his account of minority rights as broadly continuous with Ronald Dworkin's theory of equality of resources. This paper challenges this claim. I argue that, *contra* Patten, Dworkin's theory does not provide a basis to offer accommodations or minority rights, as a matter of justice, to some citizens who find themselves at a relative disadvantage in pursuing their plans of life after voluntarily changing their cultural or religious commitments.

RÉSUMÉ :

Alan Patten considère que sa théorie des droits des minorités s'inscrit en continuité avec celle de l'égalité des ressources chez Donald Dworkin. Cet article interroge cette affirmation. Je soutiens que, contrairement à ce que pense Patten, la théorie de Dworkin ne fournit pas de base en vue d'accommodations ou des droits de la minorité, en ce qui a trait à la justice, à des citoyens relativement désavantagés par la poursuite de leur plan de vie après avoir volontairement changé de culture ou d'engagements religieux.

I'm delighted to have the opportunity to comment on Alan Patten's great book, which offers the most philosophically nuanced and sophisticated treatment of minority rights of which I'm aware.[1] I'm also very sympathetic to the central claim Patten makes—namely, that liberal neutrality offers the best normative framework to adjudicate questions of cultural and religious justice.

That said, I'm going to focus on an issue on which I'm not entirely persuaded by what Patten has to say. He claims his account of minority rights is broadly continuous with Ronald Dworkin's resourcist conception of justice, and, like Dworkin, Patten denies that his account sanctions compensation for expensive tastes. I challenge this claim. I argue that, contra Patten, Dworkin's theory does not provide a basis to offer accommodations or minority rights, as a matter of justice, to some citizens who find themselves at a relative disadvantage in pursuing their plans of life after voluntarily changing their cultural or religious commitments.

I

Patten's account of minority rights draws on some ideas at the heart of liberal egalitarian theories of justice. First, he argues that the state has an obligation to treat citizens equally—in particular, to be equally responsive to the interests of all citizens, and not to single out some groups for favourable treatment. Second, he claims that we each have an important interest in self-determination, and so the state has a *pro tanto* reason to ensure that each person has a fair opportunity for self-determination—that is, to develop, revise, and pursue her conception of the good. From these ideas, Patten derives a principle of neutrality:

Neutrality of Treatment: The state violates this requirement when, relative to an appropriate baseline, its policies are more accommodating of some conceptions of the good than others.[2]

When the state violates this principle, it fails to treat citizens equally because it gives some citizens a greater opportunity for self-determination than others. If, for example, the state uses resources to subsidize the promotion of your conception of the good rather than mine, the state is not providing each of us with a fair opportunity to pursue our preferred plans of life; rather, it's helping you at my expense.

This idea of neutrality provides the moral foundations for minority rights in cases where the state is unavoidably entangled in promoting some ways of life rather than others. For example, the state cannot reasonably avoid conducting official business in some languages rather than others, or having some official holidays and not others; and perhaps also political boundaries and jurisdictions are drawn in ways that unavoidably favour some groups rather than others. When the state cannot avoid providing this sort of support to some languages or cultural groups, it must also provide prorated forms of recognition or cultural accommodation to other linguistic or cultural groups to avoid violating neutrality—

to ensure that each person is given the same fair opportunity to pursue his or her own conception of the good.

Patten says that the purest way for the state to realize neutrality of treatment is via the strategy of *privatization*—that is, the strategy where the state entirely avoids regulating or providing cultural goods, and where the provision and pricing of these goods is left entirely to an idealized market process. As he puts it, "the only way to achieve neutrality of treatment perfectly is through privatization. Leave people with all-purpose resources to spend and let them spend those resources in the way that best reflects their conceptions of the good".[3] Of course, he concedes that sometimes market failures or historical injustices give us reasons to depart from privatization, but it's clear that Patten thinks that giving each individual his or her fair share of resources to spend as he or she sees fit is the optimal way to realize neutrality.

In holding this view, Patten follows Ronald Dworkin's account of equality of resources and he explicitly presents his theory as continuous with Dworkin's.[4] Dworkin's view requires that each person be provided with an equal share of resources to develop and pursue her own plan of life, consistent with the moral rights of others. The aim is not to ensure that each person is equally successful in the pursuit of his or her plans. Some people may find their conceptions of the good difficult or even impossible to pursue successfully because doing so requires more than an equal share of resources. But so long as no person can complain that she has been given fewer resources or rights to pursue her preferred conception of the good, then each has been given a fair opportunity.

On Dworkin's account, if people have equal natural talents, abilities, and equal external resources, and face an otherwise fair set of background conditions, then we can hold each person responsible for her preferences and choices. If, at t^1, Anna chooses to spend her money on parties and holidays, whereas Betty chooses to save her resources for a rainy day, then Anna cannot complain at t^2 when she has fewer resources. She was given the same resources as Betty. She simply chose to spend those resources in a particular manner, one that valued more immediate consumption over long-term saving. Similarly, Carl has no legitimate complaint if he cannot pursue his very expensive conception of the good as successfully as Daniel's much less expensive conception of the good. As Patten emphasizes at several points in the book, individuals should be held responsible for their preferences and conceptions of the good when they face fair background conditions—that is, when each citizen has been provided with her fair share of resources, and the state has not violated neutrality of treatment.[5] Given a fair distribution of resources, Carl should have known that his plan of travelling the world, never having a job, and living in a mansion was doomed to be frustrated since it requires more than a fair share of resources. He should have adjusted his conception of the good to take account of what he could reasonably afford.

II

But now consider an example that Patten presents in chapter five. In the imagined society, everyone worships either on Sunday or not at all. To accommodate this fact, schools and government offices close on Sundays and Saturdays. Over time, however, some people freely convert to a new religion, and this new religion's day of worship is Tuesday.[6] The adherents of this new religion now demand accommodation—for example, requesting that schools and government buildings be closed on Tuesdays and Sundays rather than on Saturdays and Sundays.[7]

Patten believes there is a *pro tanto* reason of justice for the state to accommodate the new Tuesday Worshippers. He says:

> It is possible to mimic the justice of the market by favoring formatting solutions that are responsive to the cultural attachments of different citizens as well as to the costs of providing the various formats (hence the importance of *prorating* recognition). If these attachments change over time—as with the emergence of the Tuesday worshippers—it is reasonable to expect that the formatting solutions expected by justice would eventually have to change with them.[8]

But there's an obvious objection to this conclusion: shouldn't the preferences of the Tuesday Worshippers be treated like an expensive taste, like Carl's expensive taste for world travel and a mansion? Since the Tuesday Worshippers are responsible for choosing a religion that has requirements that are "expensive" to satisfy given the existing social rules, shouldn't they bear the costs for that choice rather than demanding society accommodate their expensive choice?[9]

Patten denies that the preferences of the Tuesday Worshippers constitute an expensive taste. He argues that tastes or preferences are only expensive in the relevant sense—that is, in the sense that we expect the individual to bear the costs rather than being able to claim some accommodation—when the preference is formed in the context of fair background conditions. As he puts it, "my account does leave room for the rejection of preference-based demands for accommodation on responsibility or expensive taste grounds, but *only* when those demands are made in a context where a fair distributive scheme is in place".[10] To illustrate, Patten offers an example where a country establishes Christianity as the official religion, and Muslim citizens complain that this violates neutrality of treatment. Patten rightly says that we cannot deny the complaint of the Muslim citizens by dismissing their religious preferences as an expensive taste since these citizens don't face fair background conditions—the state fails to meet the neutrality of treatment requirement and thus fails to provide each citizen with a fair opportunity to pursue his or her conception of the good. Put differently, it's implausible to say that Muslim citizens must pick up the tab for their "expensive" taste when it's the non-neutral treatment by the state that makes their religious preferences "expensive." For the same reason, Patten

argues, it's unfair to hold the Tuesday Worshippers substantively responsible for their "expensive" religious beliefs.

Here is a reconstruction of Patten's argument, as I understand it:

> P1 A person can only be held responsible for the expensiveness of her conception of the good when the conception develops in a context where a fair distributive scheme is in place.
> P2 A necessary feature of fair distributive scheme is neutrality of treatment.
> P3 If the state fails to offer accommodation to the Tuesday Worshippers, it violates neutrality of treatment.
> Therefore,
> C1 The Tuesday Worshippers cannot be held responsible for the expensiveness of their religious beliefs.

It might seem that we can easily reject P3 by pointing out that the case of the Tuesday Worshippers is disanalogous to the case where the state makes Christianity the official religion despite the existence of a Muslim population. In the latter case, the state violates neutrality of treatment by privileging some citizens' conception of the good over a conception of the good endorsed by other citizens. This is the legitimate basis of the Muslim citizens' complaint. In the case of the Tuesday Worshippers, by contrast, the state does not violate neutrality of treatment in initially designating Saturdays and Sundays as the official holidays since this doesn't disadvantage anyone. And if the initial decision is consistent with neutrality of treatment, then the subsequent decision of some people to become Tuesday Worshippers cannot render the existing framework a violation of neutrality of treatment. Shouldn't a resourcist hold people responsible for the choices they make in the context of a fair distributive scheme, rather than calling for the scheme to be altered when people make new plans? If so, then P3 is clearly false.

But Patten disagrees. He argues that a fair distributive scheme, even for a resourcist like Dworkin, must be sensitive to people's existing plans and preferences. To support this claim, Patten draws our attention to a particular feature of Dworkin's model for realizing an equal distribution of external resources amongst a group of immigrants who wash ashore on a previously uninhabited island.[11] As we know, the distribution of the island's resources must pass the envy test. That is, when the distribution is concluded, it must be the case that no immigrant would prefer some other immigrant's bundle of resources over her own. Of course one way to guarantee that the envy test is met would be to magically converts all of the island's various resources into identical bundles of some particular good or goods. In Dworkin's example, all of the island's resources could be magically converted into identical bundles of claret and plover's eggs. Although this would satisfy the envy test, Dworkin argues that doing this would be unfair, profoundly frustrating some people's preferences while perhaps perfectly satisfying those of others.[12] More specifically, he argues that this

conversion would violate what he calls the *principle of abstraction*. This principle "recognizes that the true opportunity cost for any transferrable resource is the price others would pay for it in an auction whose resources were offered in as abstract a form as possible, that is, in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences." Magically converting all the island's resources into claret and plover's eggs is unfair because it makes the array of available resources "much less sensitive—indeed as insensitive as possible—to the plans and preferences of the parties."[13]

Instead, Dworkin famously proposes an auction, where each immigrant is given an equal number of (otherwise worthless) clamshells to bid on each distinct item on the island.[14] The principle of abstraction also mandates that the resources available in the auction be sold with as few legal limits on their permissible use as possible, consistent with the security and property rights of others. So, for example, an auction where clay is the available resource but the winner of the bid is legally prohibited from using the clay to make satirical sculptures violates the principle of abstraction by effectively precluding bids from those who might have preferred to use clay for this purpose, thus hiding the true cost of purchasing the clay.[15] Dworkin's auction thus aims to make resources available in as flexible a format as possible, thus presumably ensuring that whatever price an immigrant ultimately pays for some resource reflects the true cost of excluding others from owning the resource.

A crucial part of Dworkin's argument is thus that an auction of the island's resources—unlike the magic conversion into identical bundles of some specific good—does a better job of being neutral with regard to the actual plans and preferences of the immigrants. As Patten says: "In Dworkin's view, then, a fair distributive scheme does have to be responsive to the conceptions of the good that people actually hold. If it is not appropriately responsive—if the auctioneer puts up a less varied mix of goods for auction than she needs to—then people with conceptions of the good that are disfavored by the auctioneer's decision can legitimately complain about the burden they are facing".[16]

But how exactly does this appeal to Dworkin's principle of abstraction support Patten's view that accommodating the Tuesday Worshippers is not equivalent to subsidizing an expensive taste? I think there are two potential arguments to which Patten might appeal. I consider each one in turn.[17]

III

First, imagine that the two days of the week that will be official state holidays are determined by a modified Dworkinian auction. Each citizen is allocated two clamshells to "bid" or "vote" for her preferred days: each citizen can pick two different days, or use both of the clamshells to vote for the same day. The two days with the highest aggregate number of clamshells are selected as the official holidays. We can assume that at the outset, t^1, everyone bids for the same two days—Saturday and Sunday—and so there's no problem when those days are

selected as the official state holidays. But now, several years later, some people have developed new religious beliefs, and request the official holiday auction be rerun to reflect their new conception of the good. Perhaps we should accept the following claim: it is a violation of the principle of abstraction if the auction to determine state holidays is fixed at a single moment in time, t^1, and cannot be rerun at later points in time. Allowing the auction to be rerun ensures a greater degree of flexibility in the way resources are made available, and so ensures greater sensitivity to the plans and preferences of citizens.

Should we accept this view? I think the answer is no. At no point does Dworkin suggest that his principle of abstraction mandates an auction that is sensitive to people's changing plans and preferences *over time*,[18] and indeed other central elements of his theory militate against this conclusion. In particular, Dworkin distinguishes between a person's personality (including character, convictions, preferences, motives, tastes, and ambitions) on the one hand, and that person's share of personal and external resources on the other.[19] Equality of resources aims to ensure that people are afforded equal resources with which to pursue their distinct plans of life, but individuals are assumed to bear consequential responsibility for the costs of their ambitions or plans.

Imagine that Dworkin's auction has been successfully conducted on the island amongst all the immigrants. Albert spends the bulk of his clamshells on a plot of land that will allow him to earn a decent living as an apple farmer. Two years pass, and Albert's career as an apple farmer is moderately successful: he is around the median in terms of wealth on the island. But then Albert, previously an atheist, experiences a religious revelation, and as a result he becomes devout. A feature of Albert's new religious beliefs is the importance of constructing a place of worship in a specific location, at the base of the island's only mountain. Betty, who bought it at the auction, owns the land where Albert wishes to build his place of worship. At the time of the auction, this land wasn't particularly expensive, since it wasn't obvious to anyone that it had any special features. Betty, however, has used the land to construct a lucrative vineyard (the shade from the mountain has proved ideal for this purpose), and the rest of the immigrants love Betty's wine so much that she's able to charge steep prices for her wine.[20] Given how valuable Betty's land has become, Albert doesn't have enough wealth to buy the land from her, and thus his ability to pursue his new conception of the good is significantly hampered. But had Albert had his religious revelation prior to the auction, he would have outbid Betty for the land, since he would have highly valued the land, but Betty was uncertain about the land's commercial value. Albert therefore requests that the auction be rerun, since the auction's allocation of property is no longer responsive to his plan of life.

A Dworkinian will deny that Albert has a claim of justice to a rerun of the auction or to any compensation for the fact his new conception of the good is expensive. Albert chose to use his clamshells in a way that does not now seem optimal to him, but he did so to pursue a plan of life, and so he must bear consequential responsibility for this choice in the same way that Dworkin would expect some-

one who develops expensive tastes for champagne and caviar to bear responsibility for her preferences. Albert has no egalitarian complaint that his new conception of the good is expensive, given his past choices. If he did, then it's not clear what it would mean to be responsible for the costs of your choices against a background of equal resources. An imprudent person could spend most of her resources on parties and holidays, then sincerely repudiate this imprudent lifestyle and decide to become a prudent person instead, and demand the auction be rerun with a new set of clamshells where she can purchase a large plot of land that will be a good long-term investment for the future. This is absurd from a Dworkinian perspective.

The upshot is that the principle of abstraction does not require that the auction be revisited whenever someone changes her conception of the good and as a result wishes the initial auction had been conducted differently. The flexibility mandated by the principle of abstraction requires that the auction be sufficiently sensitive to persons' plans and preferences *at the time of the auction*, but individuals are expected to take responsibility for the choices they make during the auction.

If we imagine, as we did earlier, that official state holidays are selected via a modified Dworkinian auction, then Dworkin's principle of abstraction cannot be deployed to defend the view that the auction should be re-run when the Tuesday Worshippers change their religious beliefs. Dworkinian auctions do not need to be designed to be responsive to people's changing plans and preferences.

But there's a second way one might appeal to the principle of abstraction to defend the accommodation of the Tuesday Worshippers. Recall that the principle of abstraction "insists that people should in principle be left free…to use resources they acquire, including the leisure they provide and protect through their bidding program, in whatever way they wish, compatibly with the principle of security."[21] So, to take our earlier example, if the winning bidder is legally prohibited from using the clay to make satirical sculptures, this violates the principle of abstraction by effectively precluding bids from those who might have preferred to use clay for this purpose, and so hiding the true cost of purchasing the clay. More generally, the principle of abstraction is inconsistent with any restriction on the use of private resources that is not required to protect the security or property of others.

Failing to accommodate the Tuesday Worshippers might seem inconsistent with this implication of the principle of abstraction. Suppose each person is the owner of a private resource: two holidays per week. Initially, everyone is happy to use this private resource in the same way—everyone wants Saturday and Sunday as the holidays, and this is why there's nothing objectionable about these serving as the official state holidays. But it would be a violation of the principle of abstraction to declare that once people identify Saturday and Sunday as their preferred holidays, no further use or change is permitted. One might argue this constitutes an objectionable restriction on the use of an individual's private

resources in the same way it would be objectionable to sell a plot of land at auction, but restrict the owner's use of the land by declaring that that owner must choose one use of the land (e.g., housing, farming, or commercial), and once she makes a decision, she cannot change her mind about how to use the land she has bought.

We should reject the argument in the preceding paragraph. The argument depends on an implausible assumption—namely, that each person "owns" a private resource: two official holidays per week. But this misrepresents what's at stake in the Tuesday Worshippers example. The issue is not whether some group of people is being prevented from using a purely private resource, like land, in the manner they prefer. Which days will be designated official state holidays is not a question of how, or in what way, people's private resources will be restricted. Instead, it's a question about the format in which some unavoidably public resource will be made available to everyone. Each person has his or her own preferences about how the public resource will be made available, and fairness requires that each person's preferences be taken into account in some way. But people's preferences about this issue, or the votes or bids they make to express those preferences, are not private resources subject to the same moral principles as the resources that get purchased in a Dworkinian auction. They are, rather, like the clamshells that people use to purchase resources in Dworkin's auction. And just as it is not a violation of the principle of abstraction to prevent people from reusing the same clamshells to make different purchases at a later date, I do not believe it's a violation of the principle of abstraction to allow people to express their preferences about official state holidays only once during their adult life. Just as Dworkin expects people to bear consequential responsibility for the way they choose to spend their clamshells in his auction, a Dworkinian can plausibly expect people to bear consequential responsibility for the preferences they express—or their votes—regarding which days of the week should be official state holidays.

Of course, that it is *not a violation* of the principle of abstraction is consistent with it *being permissible* for citizens to choose, via a fair political process, that decisions about official state holidays should be revisited every X number of years. But if a policy of revisiting the decision is optional in the sense of being subject to the distribution of preferences in the political community—what Dworkin would call a *choice-sensitive* political issue—then, contra Patten, the Tuesday Worshippers do not have a claim of justice, since claims of justice should not be ignored simply because a sufficient number of people prefer to do so.[22]

To some, this conclusion will seem clearly mistaken. A liberal theory of justice permits people to change their religious convictions whenever they like, and so shouldn't a liberal state also be responsive to the changes in people's religious convictions, with that responsiveness including changes in official holidays as needed?

I share the intuition that the Tuesday Worshippers have a *pro tanto* claim of justice for accommodation—I simply don't think that this conclusion can be derived from Dworkinian assumptions. The core difficulty is this: Dworkin's theory depends on the view that an idealized market process is the correct way to measure whether people have been given equal shares of resources with which to pursue their distinct plans of life. Dworkin is thus committed to two ideas. The first is that other people's preferences are parameters of justice, and so we have no justice-based complaint if other people's preferences, as expressed via the market, make our preferred plan of life more difficult or costly to pursue.[23] The second is that we must accept consequential responsibility for the decisions we make within a fair market, and, in particular, we must accept the costs associated with option luck—that is, "whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined."[24] If the state's policies with regard to culture and religion are presented as Dworkinian resources, to be allocated by a fair market mechanism that respects these ideas, it's difficult to see why a Dworkinian should accommodate the Tuesday Worshippers. If one already has a fair share of resources (as, by hypothesis, everyone initially does in the Tuesday Worshippers case), then choosing to change one's conception of the good looks like a paradigmatic instance of something for which you are responsible, in Dworkin's sense. In the marketplace, when some item goes up for sale and you choose to buy something else instead, you have to live with that choice: you cannot demand a second chance to buy the item when you change your plans a year or two later.

You might think the larger lesson to be drawn from all this is that minority rights or multicultural accommodations cannot be robustly justified from within a resourcist view of distributive justice. G. A. Cohen argues for this conclusion. He suggests that various cultural and religious preferences are, within the Dworkinian framework, expensive tastes, but he regards that conclusion as just one more reason to abandon resourcism and opt for something closer to his own equal access to advantage account.[25]

But that's not the lesson I think we should draw. Instead, I think we should conclude that the emphasis that both Dworkin and Cohen place on personal responsibility—on bearing the costs of certain choices for which one can be said to be responsible in the relevant sense—is unhelpful when tackling certain questions of cultural and religious justice.[26] In cases where some accommodation for a cultural or religious minority is a matter of justice, I suspect it's usually irrelevant whether the members of the group made a voluntary choice to be in a minority, or found themselves involuntarily in this position.[27]

I've tried to sketch part of my view on this elsewhere, and I don't have space to defend it here.[28] My main point is simply to raise a worry about Patten's aim to provide an account of minority rights that is congruent with the Dworkinian view of distributive justice.

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NOTES

[1] Patten, Alan, *Equal Recognition: The Moral Foundations of Minority Rights*, Princeton, NJ, Princeton University Press, 2014.
[2] *Ibid.*, p. 115.
[3] *Ibid.*, p. 122.
[4] *Ibid.*, p. 180.
[5] *Ibid.*, pp. 139-145.
[6] To avoid additional questions about intergenerational justice, assume that this conversion occurs within a single generation.
[7] Patten, *Equal Recognition*, *op. cit.*, p. 178.
[8] *Ibid.*, p. 182.
[9] It may be helpful, at this stage, to anticipate and defuse a preliminary response on Patten's behalf. You might object that the Tuesday Worshippers' request for accommodation cannot be an expensive taste since they are not asking for *more* days off per week than other people, they are merely asking to change *which* days are designated official state holidays. Since they are not asking for more days off than anyone else, their request cannot be deemed "expensive." This response is mistaken, however, since it ignores the fact that switching which days off are deemed official state holidays is an indirect way of taking resources from some people for the sake of the Tuesday Worshippers. When Saturday and Sunday are designated the official holidays, many people will plan their lives with this fact in mind. Altering the official holidays will disrupt many people's employment and leisure plans in ways that will be costly for those people. Consider a different example. Suppose we collectively agree that some plot of land will be preserved as a public beach with no commercial development permitted on the beach, and, as a consequence, you decide to invest in a residential property that has spectacular views overlooking the beach. Changing the zoning laws and permitting massive commercial development on the beach to make it easier for me to pursue my new plan of life clearly imposes significant costs on you: it takes some of the value from your investment and transfers it to me.
[10] Patten, *Equal Recognition*, *op. cit.*, p. 179.
[11] *Ibid*., pp. 180-182.
[12] Dworkin, Ronald, *Sovereign Virtue: The Theory and Practice of Equality*, Cambridge, MA, Harvard University Press, 2000, pp. 68, 151-152.
[13] *Ibid*., p. 151.
[14] *Ibid*., p. 68.
[15] *Ibid*., p. 152.
[16] Patten, *Equal Recognition*, *op. cit.*, p. 182.
[17] To be clear, Patten does not explicitly advance either of these arguments as I formulate them—I offer these only as possible interpretations of the way he might appeal to Dworkin's principle of abstraction to support his conclusion about the Tuesday Worshippers.
[18] Setting aside, recall, the issue of future generations.
[19] Dworkin, *Sovereign Virtue*, *op. cit.*, p. 286.
[20] To avoid complications, we can stipulate that Betty's ability to produce valuable wine depends purely on the location—she doesn't possess any natural talents that other immigrants lack.
[21] Dworkin, *Sovereign Virtue*, *op. cit.*, p. 152.
[22] For Dworkin's distinction between choice-sensitive and choice-insensitive political issues see *ibid*., pp. 204-205.

[23] *Ibid*., pp. 298-299.
[24] *Ibid*., p. 73.
[25] Cohen, Gerald A., "Expensive Tastes and Multiculturalism," *in* Rajeev Bhargava, Amiya Kumar Bagchi and R. Sudarshan (eds.), *Multiculturalism, Liberalism, and Democracy*, Delhi, Oxford University Press, 1999, pp. 80-100.
[26] Cohen's final position is more complex, though, since he revises his view to allow for compensation of expensive tastes that people are responsible for forming, but which embody important valuations. See Cohen, Gerald A., "Expensive Taste Rides Again," *in* Justine Burley (ed.), *Dworkin and His Critics*, Oxford, Blackwell, 2004, pp. 8-9.
[27] In this respect I also disagree with some of Patten's claims in chapter eight about the diminished cultural rights of immigrants.
[28] Quong, Jonathan, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," *Journal of Applied Philosophy*, vol. 23, no. 1, 2006, pp. 55-73.

LIBERAL CULTURALISM AND THE NATIONAL MINORITY/IMMIGRANT DICHOTOMY

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ABSTRACT:

Is the discrepancy between the cultural and linguistic rights of immigrants on the one hand and national groups on the other justified, with the latter group typically enjoying a fuller set of such rights than the former category? Patten presents a case for accepting some modest departures from neutrality in the treatment of immigrants' cultural rights and that of majority and minority national groups. I challenge his thesis by asking whether such departures are justified with respect to already settled (as opposed to prospective) immigrants; whether the situational argument for unequal treatment is inconsistent with the theory of culture offered earlier in the book; and whether contexts of historical injustice against immigrant groups might complicate judgements about the national minority/immigrant dichotomy with respect to minority cultural rights.

RÉSUMÉ :

L'opposition entre les droits culturels et linguistiques des immigrants, d'une part, et ceux des groupes nationaux, d'autre part, est-elle justifiée, considérant que ces derniers apprécient un ensemble plus complet de tels droits que ne le font les immigrants? Patten pose que de modestes écarts de neutralité seraient acceptables dans le traitement des droits culturels des immigrants et ceux de la majorité ainsi que ceux de groupes nationaux minoritaires. Je critique sa thèse en demandant si de tels écarts sont justifiés eu égard aux immigrants déjà installés (plutôt qu'à venir); si l'argument pour les traitements inégaux n'est pas incompatible avec la théorie de la culture offerte auparavant dans le livre; enfin si les contextes d'injustice historique contre les groupes d'immigrants ne compliquent pas les jugements sur la dichotomie entre minorité nationale et immigrants lorsqu'il s'agit des droits des minorités culturelles.

The last chapter of Alan Patten's rigorously argued and clarifying work *Equal Recognition* addresses the question of whether it is justified to distinguish between immigrant and national minority groups in thinking about minority cultural rights. Is the discrepancy between the cultural and linguistic rights of immigrants on the one hand and national groups on the other justified, with the latter group typically enjoying a fuller set of such rights than the former category? Is it reasonable for liberal citizens to make the national/immigrant distinction the basis for inclusion/exclusion (Patten, 2014, p. 288)? "Is it reasonable or permissible for citizens attached to liberal democratic principles to adopt a policy that gives more help to members of national groups in securing what they care about than it does to speakers of immigrant groups" (Patten, 2014, p. 290)? Patten presents a case for accepting some departures from neutrality in the treatment of immigrants' cultural rights and in that of majority and minority national groups.

Overall, Patten's theory of equal recognition does not make a normative distinction between national and immigrant groups. One important aspect of his theory is how it allows us to distinguish between 'liberal culturalism' and 'liberal nationalism,' the latter of which tends to assume that the types of cultural groups that deserve accommodation and recognition must have a nationalist agenda or be viable nations, and that such national groups have justice-based claims to dominate culturally some part of the state (Patten, 2014, p. 6). For liberals who are uneasy with the use of liberal principles to endorse nationalist projects that may conflict with individual self-determination, Patten's theory contains the resources to criticize national majorities *and* minorities for imposing certain restrictions on the cultural or linguistic rights of members of other cultural minorities. For example, Patten argues that establishing fair background conditions for the self-determination of minority-language-speakers, including immigrants, entails offering after-school or in-school classes in "particular minority languages (where there is a demand) to help parents to pass on their native language to their children" (Patten, 2014, p. 286).

Another important intervention that Patten makes in this debate is to confine the term "immigrants" to the first generation only—that is, to "people who are adults at the moment of immigration" (Patten, 2014, p. 276). In popular discourse, people from historically immigrant groups (i.e., people whose parents were first-generation immigrants) are sometimes themselves still considered by the culturally dominant group to be (second- and third-generation) immigrants, even if they are born in the country. Patten, I think, is rightfully criticizing this popular discourse, especially if its implication is that second- and third-generation members of historical immigrant groups do not enjoy the same rights to fair opportunity for self-determination as members of dominant national groups, majority or minority. According to Patten's argument, even first-generation immigrant cultural minorities can appeal to the liberal principle of neutrality in support of their demand for certain cultural or linguistic rights.

But if liberal culturalism based on the principle of liberal neutrality is more accommodating of non-national cultural groups, how can the liberal state justify unequal treatment of national minorities and immigrants, granting a fuller set of cultural and linguistic rights to the former, and a more restricted set of such rights to the latter category of citizens? If Patten's theory cannot justify unequal rights between national minority groups and immigrant groups, and immigrants have grounds to claim cultural rights similar to national groups, this could mean that liberal culturalism would lead to an "uncontrolled proliferation of rights claims" (Patten, 2014, p. 270) in culturally pluralistic societies, making it an unsustainable theory. Privileging national minority groups' cultural rights would violate the principle of equal recognition founded on the idea of liberal neutrality, but giving equal cultural and linguistic rights to all groups, national and immigrant, would be infeasible.

As mentioned earlier, Patten's theory is generally hospitable to immigrants enjoying cultural rights as a requirement of liberal justice. He argues that prospective immigrants should not be deemed to have waived toleration and accommodation rights, or any rights that are relevant to an immigrant's capacity to integrate into the (or a) societal culture of the receiving society. Also, immigrants should not be deemed to have waived cultural and linguistic rights that could easily be extended to an indefinite number of groups without compromising other legitimate functions and purposes of the liberal democratic state. If some cultural or linguistic rights have a low cost or are not scarce, then it is unreasonable for the receiving society to make their surrender a condition of immigration. Patten also argues that there are some forms of partiality that are unreasonable and illegitimate, such as state officials favouring members of their own cultural group over other citizens, or members of the majority acting in a democratic capacity to favour their own culture over the minority culture of fellow citizens.

But Patten wants to endorse the conclusion that "there is nothing objectionable about a receiving society [of immigrants] that makes the waiving of a full set of cultural or language rights a condition of admission to immigrant status. In insisting on this condition, the receiving society is not exacting an extortionate price but is defending legitimate interests in a reasonable manner" (Patten, 2014, p. 293). Further, "by deprioritizing the claims of immigrants, a state is not denying them rights that are essential to freedom or a worthwhile life but is instead imposing on them a disadvantage that, in any case, will have to be imposed on some people given the impossibility of extending a full set of cultural and linguistic rights to all groups. And in prioritizing the claims of national minorities over those of prospective immigrants, a state is recognizing legitimate situational and perspectival differences between the different groups making claims" (Patten, 2014, pp. 294-295).

The situational reason addresses the potential of continual shifting of group rights, with some groups' rights being dismantled. Patten argues that "once it is common knowledge that the state would withdraw support in this way, its inter-

ventions on behalf of minority languages and cultures would become gradually less effective" (Patten, 2014, p. 289). Fair opportunity for self-determination, to be stable, requires some durability in the legitimate expectations that people have surrounding their cultural and linguistic rights. If such rights shifted to different groups depending on numbers, this is likely to be disruptive to the plans and expectations of people who had made decisions (and committed resources, including time and energy) based around the public guarantee of such rights. While I am mostly convinced by this argument, I wonder if the stability of legitimate expectations requires that they can never be legitimately changed. On Patten's own theory of culture as the precipitate of shared, but fluid and ever-evolving, formative conditions of socialization, the expectation that cultural and linguistic rights of different cultural minorities would never change would not be a legitimate one, even if some people's self-identification with a certain precipitate of culture is essentialist. Given the possibility of radical substantive cultural change over time, it must be conceivable and legitimate that the cultural and linguistic rights of different cultural minorities will change over (a very long period of) time.

The perspectival reason, according to Patten, allows citizens to deviate from the impartial or impersonal perspective, and to express some partiality for their own attachments and projects. With respect to scarce cultural and linguistic rights, citizens can collectively favour the cultures that are found among themselves over the cultures of would-be immigrants in allocating scarce cultural rights (Patten, 2014, p. 293). For Belgians, according to Patten's example, "several of the languages whose claims are being considered are their own and are, for some of them at least, objects of attachment" (Patten, 2014, p. 291). It would not be unreasonable, then, for the Belgian state to refuse the demand of Arabic-speaking immigrants that Arabic be recognized as Belgium's fourth national language. According to the perspectival argument, there is an "asymmetry in decision-making authority between potential immigrants and national groups: it is from the perspective of the latter, not the former, that decisions about cultural and linguistic rights are made" (Patten, 2014, p. 288).

One limitation of this argument is that it focuses on what the receiving state can impose as a condition of immigration on prospective immigrants, and not on whether the cultural and linguistic rights of established national groups and settled historically immigrant groups (second- and third-generation members) should be asymmetrical in principle. While the argument may justify the Belgian state requiring that prospective Arabic-speaking immigrants to Belgian waive a right to have their children educated in Arabic, it does not justify prioritizing the established national languages over demands by Arabic-speaking Belgians (second- and third-generation) to make Arabic a fourth national language.

Indeed, Patten's particular understanding of culture and his theory of equal recognition actually should push liberal states towards periodic reconsiderations and revisions of the cultural and linguistic rights of the various groups that make up society. According to Patten, a distinct culture is "the relation that people

share when, and to the extent that, they have shared with one another subjection to a set of formative conditions, that are distinct from the formative conditions that are imposed on others" (Patten, 2014, p. 51). Cultural continuity exists when new generations and newcomers are exposed to the same distinctive set of formative conditions that are controlled by members of the culture. At the same time, Patten notes that the substantive content of a culture can change quite radically, without amounting to cultural loss or disappearance. For example, Canada's population is no longer dominated by people with British and French ethnic or cultural heritage, and Canada's national identity has changed over decades, away from the idea of Canada as "two founding nations," and in favour of a multicultural Canadian identity. These changes make it plausible that the cultural and linguistic attachments of Canadians have likely changed over time. If through immigration, the cultural make-up of a country changes, it is not clear why the cultural rights of established national groups, majority and minority, should have priority over those of settled historically immigrant groups (who are now also members of the larger culture) who may seek to change substantively the formative processes and conditions of the society. In terms of the perspectival argument, while it is true that there is an "asymmetry in decision-making authority between *potential* immigrants and national groups" (italics mine), there should be no asymmetry in decision-making authority between settled (historically immigrant) culturally distinct groups and established national groups over the cultural and linguistic rights such existing groups enjoy; otherwise different conceptions of the good valued by citizens would not enjoy neutral treatment by the state.

Patten might find it implausible that second- and third-generation members of historically immigrant groups, whose socialization involved learning the dominant languages, would advocate recognition of their parents' or their own minority native languages. It is true that currently, many second- and third-generation citizens never develop fluency in the language of their immigrant parents, but this might be because liberal states have not provided adequate accommodation and toleration rights to such cultural minorities. For example, they do not offer after-school or in-school classes in "particular minority languages (where there is a demand) to help parents to pass on their native language to their children" (Patten, 2014, p. 286). If we imagine a more culturally just liberal society in which minority-language speakers have greater access to minority-language education for their children, it is conceivable that second- and third-generation citizens would build up an attachment to such languages, which could be the basis of a demand for equal recognition with national minority languages.

Patten also considers the possibility that historical injustice (against a national minority group) may require reparation or amends, which might take the form of prioritizing their claim on scarce linguistic-cultural rights over that of immigrant claims. If we think about the denial of Indigenous self-determination and destruction of Indigenous cultures in Canada, Patten's argument supports the idea that the state may be required to provide a proportionately larger share of resources, compared to other cultural groups, to assist such Indigenous cultures

to revive their languages and cultural practices, even if the people who benefit from such assistance constitute a small portion of the Canadian population.

This is another important intervention that Patten makes in discussions about the relationship between cultural rights and cultural preservation. Patten's understanding is that the commitment to liberal neutrality as the ground for cultural rights is not a defense of a right to cultural preservation or to any particular cultural outcome (Patten, 2014, p. 29): "The point of cultural rights is not to guarantee the preservation of any particular culture but to secure fair background conditions under which people who care about the survival or success of a particular culture can strive to bring about that outcome" (Patten, 2014, p. 31). Patten's argument for enhanced cultural rights for Indigenous peoples based on the rectification of historical injustice does not imply that Indigenous peoples have a unique right to preserve their cultures. Rather, such assistance is a rectificatory measure to try to repair the consequences of denials of cultural self-determination, with a view to establish fair background conditions from which Indigenous peoples may pursue their cultural endeavours.

While Patten seems to think that historical injustice against national minorities can be a ground for giving priority to national minority claims over those of immigrants, it would be interesting to consider whether historical injustice against immigrant groups might complicate this judgement. History is full of injustices, not only to national minorities but also to immigrants. In Canada, for example, the Chinese head tax and the Exclusion Act were state policies that actively sought to reduce and prevent immigration of ethnic Chinese to Canada.[1]

Between 1880 and 1885, Chinese immigrants, many hired mainly to help build the Canadian Pacific Railway, came to make up between 15 and 40 per cent of British Columbia's population.[2] In the context of so-called nation-building, Canadian politicians came to be concerned about what a large Chinese population "could do to the character of the new country." As early as 1876, in the British Columbia Legislative Assembly, various politicians expressed the view that it was "expedient for the Government to take some immediate steps…to prevent this Province being overrun with a Chinese population to the injury of the settled population of the country."[3] In 1885, then-Prime Minister John A. Macdonald told the House of Commons that the Chinese worker "has no common interest with us, and while he gives us labour he is paid for it, and is valuable, the same as a threshing machine or any other agricultural implement which we may borrow from the United States on hire and return it to the owner on the south side of the line. He has no British instincts or British feelings or aspirations, and therefore ought not to have a vote."[4] To discourage Chinese immigration, the Canadian government implemented an increasingly prohibitive head tax in 1885 on prospective Chinese immigrants, while providing financial assistance to British (white) immigrants to Canada. In 1923, the passing of the Chinese Immigration Act, also known as the Chinese Exclusion Act, restricted virtually all immigration from China to Canada, effectively halting Chinese immigration to Canada between 1923 and 1947 (when the Act was

repealed). According to census data, the number of Chinese in Canada declined between 1921 and 1951, from 39,587 to 32,528.

If immigrants, national minorities, and Indigenous peoples have all endured historical injustices of various kinds, rectificatory justice for historically mistreated national minorities does not necessarily imply a justified deviation from the standard of liberal neutrality regarding immigrants' cultural rights.

Furthermore, let's imagine that these racially discriminatory and exclusionary policies did not exist and Chinese immigration continued to increase, to the point where Chinese immigrants became the majority of the British Columbian population. While such immigrants would come to be socialized into formative processes established by the British settlers, it is conceivable that they would have eventually also sought to alter such processes. On what grounds could the British settler minority have any claims for priority of their cultural rights over the majority Chinese immigrant population, rather than neutral treatment? If the Chinese-Canadian (second- and third-generation) population supported legislation to make Chinese an official language—at least, of British Columbia—it is difficult to see how Patten's theory of equal recognition could defend partiality toward the British settler population and deny the extension of linguistic rights of the Chinese-Canadian population, from the point of view of a liberal state that is supposed to represent and be responsive to the interests of all of its citizens, and provide conditions of fair opportunity for self-determination.

NOTES

[1] This policy also prevented Chinese in the United States from emigrating to Canada.
[2] Most of the information in this paragraph comes from the CBC Digital Archives, "Chinese immigrants not welcome anymore." http://www.cbc.ca/archives/entry/chinese-immigration-not-welcome-anymore
[3] Extract from *Journals of Legislative Assembly of British Columbia*, 9 May 1876, p. 4 (UBC Archives). http://archives.leg.bc.ca/EPLibraries/leg_arc/document/ID/LibraryTest/395021239
[4] http://www.cbc.ca/archives/entry/chinese-immigration-not-welcome-anymore

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EQUAL RECOGNITION: A REPLY TO FOUR CRITICS

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ABSTRACT:

Equal Recognition seeks to restate the case in favour of liberal multiculturalism in a manner that is responsive to major objections that have been advanced by critics in recent years. The book engages, among other questions, with two central unresolved problems. First, how should ideas of culture and cultural preservation be understood, given widespread suspicion that these ideas rely on an unavowed, but objectionable, form of essentialism? And, second, what exactly is the normative basis of cultural rights claims, and what are the limits on those claims? My four commentators advance a variety of different criticisms of the book's answers to these questions. I offer replies to each of their main challenges.

RÉSUMÉ :

Equal Recognition réaffirme l'argument en faveur du multiculturalisme libéral de façon à répondre aux objections majeures qui lui ont été adressées ces dernières années. Le livre se penche, entre autres, sur deux problèmes centraux, non résolus. Premièrement, comment les idées de culture et de préservation culturelle devraient être comprises, étant donné la suspicion répandue selon laquelle ces idées se fondent sur une forme d'essentialisme aussi inavoué que répréhensible? Deuxièmement, quelle est exactement la base normative des requêtes de droits culturels, et quelles sont les limites à ces requêtes? Mes quatre commentateurs avancent une variété de critiques différentes quant aux réponses que ce livre apporte à ces questions. Je réponds ici à chacune d'elles.

Conflicting claims about culture are ubiquitous in contemporary politics, whether they originate from majorities seeking to fashion the state in their own image or from cultural minorities pressing for greater recognition and accommodation by the state. Theories of liberal democracy disagree about the merits of these competing claims. Multicultural liberals hold that particular minority rights are a requirement of justice conceived of in a broadly liberal fashion. Critics, in turn, have challenged this defense of multicultural liberalism on a number of grounds. They have questioned the coherence of the concepts of culture and cultural preservation that many justifications of cultural rights rely upon. They have objected to the reasons that liberal multiculturalists have offered for the claim that liberal principles mandate cultural rights. They have pointed out various perverse effects that may be brought about by a pursuit of the multicultural program. And they have questioned the motivation behind the liberal multiculturalist project by suggesting that the rights and entitlements protected by traditional, non-culturalist liberalism already offer ample accommodation of minority cultures.

In *Equal Recognition*, I seek to restate the case in favour of liberal multiculturalism in a form that is responsive to all of these major concerns. I elaborate a new, non-essentialist account of culture, one that is compatible with commonplace observations about cultures and that responds to some of the deep challenges that have been leveled against the very coherence of the idea. I rehabilitate and reconceptualize the idea of liberal neutrality, and use this idea to develop a distinctive normative argument for minority cultural rights. And I elaborate and apply this core theoretical framework by exploring several important contexts in which minority rights have been considered, including debates about language rights, secession and self-government, and immigrant integration.

My four commentators in this symposium address different parts of the argument. Jocelyn Maclure politely asks whether an account of cultural rights is still relevant today. He also wonders what response I would offer to non-multiculturalist liberal philosophers such as Samuel Scheffler. These are good, big questions with which to begin, and so I consider them first. I then turn to Andrew Lister's commentary, which zeroes in on the book's attempt to reconceptualize liberal neutrality. After offering some replies to Lister, I then take up Jonathan Quong's interesting challenge to the justification offered in the book for cultural rights. I close by considering Catherine Lu's very penetrating discussion of the book's account of the immigrant/national minority dichotomy. I'm very grateful to each of these colleagues for taking the time to read the book and write out their critical reactions. While I offer replies to the major criticisms, I regret that I didn't have these reactions available to me as I was writing the book.

Maclure begins his remarks by asking whether a political theory of cultural justice is still interesting and important in the context of today's debates about recognition, accommodation, and justice. In recent years, he detects a shift in these debates away from questions about culture and towards a focus on claims based on religion and conscience. Theories of cultural justice, Maclure thinks,

are not well equipped to illuminate these claims. The claims in question are not always made by minorities, and they revolve around moral and religious convictions rather than cultural attachments.

I detect a similar shift, as Maclure does, in the issues that are receiving both public attention and attention from political theorists. In part, this is because some of the central cases that have animated normative debate about cultural recognition—e.g., Canada/Quebec and Israel/Palestine—have turned into protracted stalemates. Meanwhile, as Maclure observes, debates about religion, conscience, secularism, and "reasonable accommodation" could hardly be more prominent in the United States, in Europe, and in Canada and Quebec. In addition, debates in political theory seem to have a normal lifespan. A topic becomes hot, and a great many interesting scholars try their hand at contributing to it. Over time, the contributions to the debate become ever more refined and minute, and eventually people become bored with it and move on. Since completing the book, I have followed a similar migration to other theorists interested in diversity by turning my attention to a new project about religious liberty.

Although I see some of the same trends as Maclure, I am not convinced his observation works as a criticism of the book. Even if the public's attention, as well as the attention of some political theorists, has moved on from debates about cultural recognition and accommodation, this certainly does not mean that the underlying philosophical issues have been resolved. Many of the more recent contributions to these debates have come from liberal skeptics. As I noted at the outset, they have questioned the coherence, the desirability, and the liberal credentials of multiculturalism and nationalism. Even if these questions are not at the top of the political agenda today, there is a set of philosophical problems here that merit attention.

My book engages, among other questions, with two central unresolved problems. First, how should ideas of culture and cultural preservation be understood, given widespread suspicion that these ideas rely on an unavowed, but objectionable, form of essentialism? And, second, what exactly is the normative basis of cultural rights claims, and what are the limits on those claims? I don't think the defenders of liberal multiculturalism—Kymlicka, Raz, Taylor, and so on—get to the bottom of these questions, and in this sense I am sympathetic with critics of the past fifteen years—e.g., Barry, Appiah, Benhabib, Buchanan, and Scheffler. But I also think that the conception of justice advocated by these latter thinkers is missing something important in the liberal tradition—a notion of liberal neutrality that, I argue, can be grounded in the claim that each individual has to a fair opportunity for self-determination.

Maclure seems to think that some of these philosophical questions are of little interest because a notion of self-determination can do the work that cultural justice is offering to do. "It is not clear that liberal culturalism has the normative weight that it claims," he writes. "Can we not derive the collective rights of minority nations from the principle that nations or peoples ought to enjoy some

form of political autonomy or self-determination right?" But this is a puzzling view. Claims about self-determination and autonomy are fundamentally about *who* gets to decide particular questions. A theory of cultural rights—of equal recognition—by contrast is a theory about what substantive standards should guide the deliberations and decision making of whoever it is who has the responsibility to make decisions. Appeals to self-determination and autonomy don't take us far enough. A self-determining people still need some criteria for *how* they should decide. Should they seek to accommodate minorities or should they put all their power behind expressing the culture of the majority? This is the sort of question that my book is designed to address.

Moreover, self-determination claims are themselves contested, both legally and normatively. Should Quebecers be regarded as a self-determining people with respect to central domains of their lives or should these domains be controlled by all Canadians? This is the sort of question that a theory of cultural justice can help to address. In chapter 7 of the book, I argue that considerations of national identity and culture are relevant for thinking about both the boundaries of the political unit and permissible and impermissible attempts to change those boundaries through secession.

Returning to the relationship between culture and religion, I agree, of course, that it would be unhelpful to mechanically apply a theory of cultural recognition to the domain of religion and conscience. Each domain has its own idiosyncrasies and its own specialized concepts and principles, so Maclure is right to say that an account of religion and conscience needs to be partly independent or free-standing. However, we shouldn't let this partial independence obscure the ways in which the problems are related. Contrary to Maclure's expectation, I have found that a theory designed to illuminate questions of cultural justice can also be helpful for thinking about claims of religion and conscience (and vice versa). In each of these contexts, the question of justice is, in part, a question about what is owed to people in virtue of the fact that they have certain commitments and attachments. The nature of these commitments and attachments varies in interesting and significant ways from case to case, but in general I think the problem has the same theoretical structure.

The answer I would defend for both the cultural and religious spheres also has the same generic form: what is owed to people is a fair opportunity to pursue and realize the commitments and attachments that they in fact hold—what I call in the book a "fair opportunity for self-determination." Having a fair opportunity is not a guarantee of the success of one's cultural or religious commitments, but it is also not a norm that makes no difference with regard to the treatment of those commitments. In the case of culture, as the book argues, fair opportunity can justify the equal recognition of different cultures. In the case of religion and conscience, fair opportunity helps to explain what is objectionable about religious establishment, and also whether and why various accommodations are justified.

An assumption that I think underlies Maclure's remarks is that religion and conscience involve claims that are special in a way that cultural claims are not. Claims of religion and conscience are relevant to a person's moral identity, Maclure says, whereas cultural claims have a different sort of valence. I agree with Maclure that there is a difference here. In the book, I argue that claims to the neutral treatment of religion and conscience ought to enjoy an especially weighty presumption in virtue of their assertion of normative authority.[1] At the same time, we should avoid thinking about the character of different kinds of commitments in too dichotomous a fashion. Cultural commitments have some, even if not all, of the features that mark out religious claims as special. The presumption in favour of neutral treatment of cultural claims is perhaps not as weighty as it is for religion, but it is weightier than it would be for many ordinary tastes and preferences.

One other question raised by Maclure is how my account of cultural justice would respond to Samuel Scheffler's contention that (in Maclure's words) "liberal egalitarianism, well understood, is already capacious enough to secure fair terms of cooperation for members of cultural minorities." Although there aren't a great many specific references to Scheffler[2], chapter 5 of the book offers a sustained engagement with a Scheffler-like position. The more minimal picture of egalitarian liberalism favoured by Scheffler and others (what I call "basic liberal proceduralism") is treated as a null hypothesis, which is then challenged for permitting the state to depart from neutrality in significant ways. When neutrality is added to the conditions emphasized by Scheffler (to form what I call "full liberal proceduralism"), the case for minority cultural rights comes into view. Maclure is right that "cultural rights raise thorny questions about cultural essentialism and the status of internal minorities," but that is why the book devotes so much space to trying to resolve these questions in a reasonable way.

Andrew Lister correctly identifies neutrality as a central normative principle in the book. Rather than grounding cultural rights directly in autonomy or identity considerations, I argue that such rights are based on the weighty reasons that states have to be neutral between the different commitments and attachments of their citizens. This strategy shares an affinity with some suggestions made by Will Kymlicka—when he talks of the inevitable non-neutrality of the state—and by Joe Carens when he talks of "even-handedness."[3] I try to work out how exactly this argument is meant to go and how it is rooted in some basic commitments of liberal thought—in particular, the idea that each individual should enjoy a fair opportunity for self-determination.

Neutrality is usually understood by political theorists in terms of either the *intentions* of lawmakers (their aims and justifications) or the *effects* of legislation on different conceptions of the good. I propose a third conception of neutrality, which I term "neutrality of treatment." A state extends this form of neutrality to several different attachments or commitments when, relative to an appropriate baseline, its policies are equally accommodating of those different attachments

and commitments. The reasons that the state has to be neutral in this sense are based on the reasons it has to leave people with a fair opportunity for self-determination.

Lister's comment seeks to get a better grasp on what neutrality of treatment involves, and what its relationships are with neutrality of justification and neutrality of effect. His main question is whether my book is committed to a more foundational ("upstream") conception of neutrality than it admits, but he raises several other questions as he builds up to that one.

One set of questions concerns the dilemma that neutrality of treatment is meant to solve. I motivate the introduction of a new conception of neutrality by pointing out limitations of the two main existing conceptions. Neutrality of intentions has trouble explaining why some intuitively non-neutral policies should be regarded as such. In the book's example, a state seeks to bolster its own perceived legitimacy by aligning itself with the symbols and practices of the majority religion. Since the intention is to strengthen the state, such a policy looks neutral according to neutrality of intentions. But this seems to be the wrong judgment, as many would regard the favouring of the majority religion as a paradigm of non-neutrality. As I understand it, Lister's response consists in biting the bullet and insisting that, properly understood, the policy in question is a neutral one if indeed it is justified by an appropriate balance of public reasons. This gives up on neutrality as a specific norm within political morality and instead makes it a kind of meta-norm that imposes a public reason constraint on justification. I don't object to theorists using the term in this way, but my hunch is that they are then going to need to coin some other term to capture the difference between a state that favours some religions (or conceptions of the good) over others and a state that seeks to avoid such favouritism. Whatever terminology is adopted, it is this second issue that I am interested in.

I argue that neutrality of effects suffers from the opposite problem: apparently neutral, and generally uncontroversial policies (to liberals, at least), such as protections for the basic liberties, may produce non-neutral effects. Giving people the freedom to think, or say, or do what they want may lead to outcomes in which boring or frustrating conceptions of the good are unsuccessful, and interesting and stimulating ones flourish. If a principle of neutrality objects to such outcomes, then that principle doesn't look like one that liberals have any reason to adopt. Lister replies, however, that this objection to neutrality of effects fails to appreciate a subtlety in the view. The judgment that some set of effects is neutral or non-neutral can only be articulated relative to a specified baseline (which, among other things, determines *which* effects are relevant). It is open to the proponent of neutrality of effects to select a baseline that filters out the differences in effects that give rise to the problematic judgments about the basic liberties, or that account for other apparent counterexamples. Lister suggests that once the baseline question is addressed there may turn out to be no difference between neutrality of effects and neutrality of treatment: the latter would turn out to be merely a special case of the former. Lister does not actually formulate the

baseline that he thinks would have this implication, so it is hard to evaluate his challenge here. But, even if he is right, and neutrality of effects could be rigged up so that it coincides with neutrality of treatment, I'm not convinced that Lister and I have anything more than a terminological difference. Whereas Lister recognizes several different variants of neutrality of effects (corresponding to different specifications of the baseline), my proposal could be viewed as pulling one of these variants out, giving it its own label, and arguing that it is not vulnerable to objections that afflict the other variants.

Lister's reflections on the relationship between neutrality of effects and treatment lead him to wonder whether neutrality of treatment might be dropped in favour of a principle requiring the state to provide equal treatment relative to a baseline set by fair opportunity for self-determination. Once one crucial clarification is added, this is indeed the view that I defend (again, I'm not too bothered about the labels). The needed clarification pertains to the object of equal treatment. Lister writes as if it is *persons* who are owed equal treatment on my proposal, and then rightly points out that what counts as equal treatment depends on one's overall view of justice. But neutrality of treatment says something more specific than this: it says that, relative to a baseline determined by fair opportunity, it is *conceptions of the good* that are to be given equal treatment. I am taking for granted a background conception of justice, which is shaped in part by the idea that each person should enjoy a fair opportunity to pursue and fulfill the conception of the good that he or she holds. And I am arguing that equal treatment of persons in this sense implies that the state should extend equal treatment to the conceptions of the good that are valued by those persons.

Lister's main question is about the philosophical foundations of neutrality of treatment. I characterize neutrality of treatment as a "downstream" conception of neutrality, meaning that it is supposed to follow from accepting some other value (which I argue is fair opportunity for self-determination), and there is no claim that this other value is itself neutral. Lister interprets this to mean that I am rejecting, or am open to rejecting, neutrality of justification as an overarching requirement. I do not, for example, say that the fundamental values that figure in public justification must be public in Rawls's sense. This is a problem, Lister suggests, because, without a public reason requirement, I have no good response to the perfectionist opponent of neutrality. If neutrality of treatment is not based on a neutral value (because of a reluctance to invoke neutrality of justification), then how do I fend off perfectionist challenges? What do I say to the perfectionist who thinks that self-determination isn't the only value and who wants to balance claims of self-determination (including neutrality of treatment) against claims about the value of particular ways of life? Such a perfectionist might think that justice requires that people have a fair opportunity to pursue true well-being ("to flourish") rather than to pursue whatever conception of the good they happen to have (to be "self-determining").

This is an interesting and difficult challenge. The book does briefly engage with a version of the challenge, albeit in a slightly different context than Lister has in

mind.[4] My argument against perfectionism is a substantive one rather than a metatheoretical one about public reason. In short, I offer well-being-related and autonomy-related reasons for thinking that self-determination matters for individuals, even when their ends are not favoured by a perfectionist standard. It is true that perfectionists hope to *influence* what ends people have, but this is merely an aspiration. There is no guarantee of success. A perfectionist standard of what opportunities are owed to people risks unfairness to those who cling unrepentantly to conceptions of the good that are disfavoured by such a standard. They are left with fewer resources and opportunities with which to pursue their ends, and thus with diminished prospects for well-being and/or autonomy. Lister imagines a perfectionist who thinks that meaningful work is an essential part of the good life, and who thus evaluates economic systems in part on the basis of their propensity to encourage meaningful work. My concern is with people who, rightly or wrongly, do not value meaningful work but prefer to prioritize leisure instead. Under Lister's fair opportunity for flourishing, they may end up with fewer resources and opportunities than they would under a justice standard that was equally accommodating of different conceptions of the good. To my mind, there is a fairness problem here with perfectionism, one that does not depend on an appeal to public reasons or justificatory neutrality.

Jonathan Quong's comment zeroes in on a central claim in my justification of minority rights. I argue that neutrality of treatment implies certain minority rights, and, when these rights are denied, minorities are at a disadvantage about which they can justifiably complain. Critics of multiculturalism have sometimes dismissed this form of argument on the grounds that the disadvantage in question boils down to the frustration of preferences, and preference satisfaction is not something that should concern a liberal theory of justice. To think that justice does concern itself with unfulfilled preferences is to open it up to a problematic indulging of expensive tastes. This implication is problematic, so the critics say, if persons are regarded as responsible for their preferences. Assuming responsibility, it is the job of society to establish fair background conditions, and it is up to individuals to adjust their preferences within those parameters to arrive at the desired level of preference satisfaction.

In *Equal Recognition*, I embrace the idea of responsibility for preferences but deny that this idea is in tension with the neutrality-based justification of minority rights. Even if we take a case in which the preferences of the members of a group have indisputably been acquired voluntarily—such as the case of the Tuesday Worshippers—still the members of the group have a good neutrality-based claim on an accommodation of their religion or culture. The general argument for this proposition has two steps. The first consists in the observation that responsibility for preferences is a reasonable expectation only if background conditions are fair. And the second says that part of what makes a set of background conditions fair is that those conditions extend neutral treatment to different conceptions of the good. I look for support for this general argument in two different places. One is a case in which a state establishes Christianity as the official religion, and Muslim citizens complain that this violates neutrality of

treatment. Since we would not want to dismiss the complaint on the grounds that the Muslim preferences are "expensive," it seems that the fact that background conditions are unfair (in this instance because of the establishment of Christianity) is sufficient to insulate the Muslim claimants from that charge. The second place I look for support is Dworkin's theory of equality of resources. This is surprising because Dworkin's theory is associated with the expensive-taste objection, but I show that the theory's principle of abstraction implies a responsiveness to preferences that lends support for including neutrality of treatment in the background conditions needed for preference responsibility.

In his contribution to this symposium, Quong disputes both of these supporting arguments. He agrees that the Muslim complaint about Christian establishment should not be dismissed on expensive-taste grounds, but he sees a difference between the Muslim/Christian case and the case of the Tuesday Worshippers. The difference seems to be that the Muslim preferences were not developed under fair conditions and thus they cannot reasonably be held responsible for those preferences. By contrast, by assumption, the preferences of the Tuesday worshippers *were* developed under fair conditions, and thus it is legitimate to hold them responsible for those preferences and so to deny the claim for an accommodation. As for Dworkin, Quong argues that my argument rests on a misinterpretation. If Tuesday worshippers are permitted to insist on a "rerun" of the auction, once they've changed their preferences, then the same would be true in ordinary market cases, which is something that Dworkin's theory clearly cannot countenance.

In reply, let me explain why I remain unconvinced by both of Quong's objections. Consider, first, Quong's take on the Muslim/Christian case. We both agree that responsibility presupposes fair background conditions but we understand those conditions in importantly different ways. For Quong, the key issue is the fairness of the conditions under which preferences are developed. Since, by assumption, those conditions are unfair (Christianity was established as the state religion), he thinks the Muslims should not be considered responsible for their preferences, and thus the expensive-taste objection cannot be pressed against them. The Tuesday worshippers are different, since they form their preferences under fair background conditions: by assumption, there were no Tuesday worshippers around at the moment they formed their preferences, and so there was nothing unfair about the absence of any measures designed to accommodate worship on Tuesday. On my view, by contrast, the key issue is the fairness of conditions at the moment at which a claim for accommodation is made. A claim is tantamount to a request for a subsidy of an expensive taste only if there isn't some other fairness-based rationale that could be adduced in favour of the claim instead. Viewed from this perspective, the Muslim/Christian and Tuesday-Worshipper cases *are* alike. In both cases, at the moment at which a claim for accommodation is made, that claim can be justified on neutrality-of-treatment grounds. This contrasts with the claim of Carl (in Quong's example), who cannot justifiably complain, even at the moment of making a claim, that his preferences are non-neutrally treated.

For Quong's objection to find its mark, he would need to provide some justification for focusing on the fairness of background conditions at the moment of preference-formation rather than at the moment at which the claim is made. The more one thinks about the Muslim/Christian case, the shakier such a justification starts to seem. One question is what Quong would say about a case in which Muslim preferences were formed under a regime of neutral treatment and in which only now has the state established Christianity. The deeper question is why the fact that Muslims formed their religious commitments under conditions in which their religion was disfavoured by the state should make them any less responsible for bearing the costs associated with those commitments. If Muslims were complaining that they are not more numerous, then that would be one thing. Unfavourable treatment by the state is a plausible factor accounting for their numbers. But suppose we are evaluating claims made by people who have formed the relevant commitment and want nothing more than an accommodation that reflects their actual numbers. If anything, the fact that the commitment was formed in a context where their religion was disfavoured might raise our confidence that the commitment is voluntary. For this reason, I would submit that my presentist conception of fair background conditions does a better job of accounting for the Muslim/Christian case than does Quong's backwards-looking conception. And on the presentist conception, the Muslim/Christian and Tuesday-Worshipper cases are alike.

I am also unpersuaded by Quong's alternative interpretation of what Dworkin's theory of equality of resources would imply about the Tuesday-Worshippers case. Quong characterizes the Tuesday worshippers as requesting a "rerun" of the auction determining weekly days of rest. But this notion of a rerun is ambiguous. It could mean a *do-over*, in which all the consequences of the first run are nullified and there is a fresh determination of everyone's property holdings. Or it could mean an *update*, in which further transactions are permitted after an initial run of the auction, with these transactions quite likely influenced by the whole history of previous transactions. Quong rightly objects, on Dworkinian grounds, to a demand for a do-over by someone who changes his or her preferences. Such a demand would betray a failure to take responsibility for one's previous choices. But the Tuesday worshippers needn't be understood as asking for a do-over. Instead they want the public process that determines days off to mimic the ongoing operation of markets. They want the same sort of opportunity to update that market participants normally enjoy. The ongoing character of markets *is* plausibly connected with Dworkin's principle of abstraction. In part, this is because, from the start, individuals may have life plans that require a sequence of transactions over time. But it is also because people predictably revise their preferences over time, and an ongoing market allows for better responsiveness to these preferences (compared with a single run of the auction at the outset) consistent with the other constraints of Dworkin's theory.

Quong's example of Albert and Betty obscures the parallel between an ongoing market and a public process with updates. The Albert/Betty example is not a case of a single once-and-for-all run of an auction to settle holdings for all time.

It is a case with an ongoing market, but one in which, with his fair share of resources, Albert finds he cannot afford the resources he wants (after he revises his preferences) because those resources are highly valued by Betty. The lesson to draw from this case is not that the Tuesday worshippers display expensive tastes when they request a periodic update to public rules about days off, but that they would display expensive tastes if they insisted on an accommodation that were disproportionate to their numbers, given the distribution of preferences among all citizens at the moment at which they advance their claim to such an accommodation. If one wants a better market analogue to my case of the Tuesday Worshippers, then one should revise the Albert/Betty example so that Betty's land is affordable to Albert. Under such a revision, we would of course say that Albert should be allowed to adjust his holdings by purchasing Betty's land. If such a transaction were prohibited, then Albert would have a legitimate complaint—a complaint that would, in effect, be grounded in the principle of abstraction.

Finally, let me turn to Catherine Lu's characteristically generous and insightful comments. Lu discusses the argument I make in the concluding chapter of the book, where I seek to defend a version of the national minority/immigrant dichotomy. This dichotomy is one response to a problem of which proponents of minority cultural rights have long been aware. Contemporary liberal democracies contain a tremendous number of different cultural groups. For some rights, including self-government rights and certain language rights, there is no way that a full and equal set of cultural rights could be extended to so many groups. The costs to other values of such a rights proliferation would be prohibitive.

One solution to this problem would be to refuse to grant the rights in question to anyone. If one can't give a benefit like minority recognition to everybody, then better to give it to nobody. Although there is a superficial fairness to this approach, I don't think it survives closer inspection. It is no fairer to draw the circle of inclusion around the majority culture and exclude all others than to draw the circle so that it includes the majority and one or several minority cultures but excludes others. A second solution would be to limit a full set of cultural rights to only a few groups, and to select these groups on the basis of general criteria such as size, territorial concentration, economic need, and so on—criteria that make no reference to the national or immigrant character of the groups. This 'general criteria' approach strikes me as a worthy default position and may be the best that can be hoped for. But it has trouble explaining some cases, such as the strength of the claims of Indigenous peoples and of tiny European national minorities who find themselves on the wrong side of international boundaries.

In chapter 8 of *Equal Recognition* I set out to defend a third approach to allocating cultural rights, which posits a categorical difference between immigrant and national minorities. I think there is some truth in Kymlicka's suggestion that immigrants can be understood to have voluntarily relinquished certain cultural rights, whereas national minorities more typically were involuntarily incorpo-

rated into the state or voluntarily joined the state with an understanding that their culture would be recognized and accommodated. As Lu points out, the version of the dichotomy I defend is quite modest. I do not think the liberal state can invoke the dichotomy to deny toleration or accommodation rights to immigrants. These include rights that individuals have to speak their own language and follow their own cultural beliefs in private, and the rights that individuals have to transitional accommodations that ease their integration into the majority culture (e.g., translation and interpretation services in courts and hospitals for immigrants who cannot yet speak the majority language). I also think it would be impermissible for the host society to insist as a condition of admission that immigrants give up neutrality-based rights that could feasibly be extended to everyone. The dichotomy is relevant only to rights that could not be extended to all cultural groups without excessive cost to other values. A state cannot have a limitless number of official languages or offer self-government to a limitless number of cultural groups. Given that some groups will not be able to enjoy rights to these cultural accommodations, I argue that it is permissible for a host society to expect immigrants to waive their rights to them.

As Lu notes, I offer both a "situational" and a "perspectival" argument for this thesis. The situational argument draws on the familiar idea that there is a presumption in favour of established practices and institutions insofar as they are functioning well. A host society deciding which cultures to prioritize in allocating rights might reasonably give some priority to patterns of recognition and accommodation that are already entrenched in successful practices and institutions. The perspectival argument maintains that the citizens of the host society can permissibly give some priority to their own cultures because those cultures are their own and it is permissible for people to show some partiality to their own projects and attachments.

Lu puts pressure on even my moderate version of the dichotomy in several ways. First, she says that, even if my account has some traction for prospective immigrants, it doesn't justify the dichotomy with respect to already settled immigrants. We sometimes use the term "immigrant" to describe whole groups of people (e.g., Chinese-Canadians) even though many members of these groups were born in the receiving country or were children at the moment of immigration. Presumably, there is no sense in which these individuals ever voluntarily relinquished rights as a condition of immigration.

Second, while she thinks there is something to the situational argument, she questions whether it implies that cultural rights could never be changed. She thinks this is inconsistent with the theory of culture advanced earlier in the book, according to which cultures are in a constant state of flux and evolution. Third, Lu fastens upon an important complication in the situational argument: some national groups—e.g., Native peoples in Canada—were excluded at the outset of the creation of a Canadian state. The situational argument seems to imply that long-excluded groups might have no or only a weak claim on a full set of minority rights. In the book, I acknowledge this possibility and suggest that the unjust

exclusion of a group might give it a different kind of claim on a full set of cultural rights: a claim to the rectification of a historical injustice. But Lu argues that it is not just national groups who have experienced past injustices; immigrant groups, like the Chinese in Canada, did so as well. Does this mean that contemporary Chinese immigrants have a good claim on a full set of cultural rights grounded in the rectification of past injustice?

These are hard questions about a section of the book that I have always regarded as the most exploratory and speculative. Let's take the case of settled immigrants first. Suppose, for the sake of argument, that my position on potential immigrants is accepted. It is permissible for the state not to offer certain limited sorts of rights that are offered to established groups—including some language and self-government rights. Presumably this will impact the way in which these immigrants are integrated into the host society. When all goes well, subsequent generations will speak the dominant language of the host society and think of their political identity as tied to the host society. There will likely be very little demand for a full set of cultural rights.

Things will be different where there is substantial injustice and exclusion in the way in which immigrants are integrated. Here separate immigrant identities may harden over time, and there may well be demands for cultural rights (as one sees in various places in Europe). These demands do carry extra weight, I think, although there may also be especially weighty countervailing considerations having to do with what Elizabeth Anderson calls the "imperative of integration."

So, in principle, I don't disagree with Lu's analysis of my theory's implications for second- or third-generation immigrants. Such immigrants could, in principle, have a strong attachment to their language, or to self-government by their ethnic group, and their claims based on such an attachment should be treated as being on all fours with the claims of established, national groups. In practice, however, a successful, liberal, egalitarian state will normally integrate immigrants into the dominant host culture (or one of the host cultures if there are several). Second or third generations will normally want to be full participants in the dominant culture, and large numbers will not seek to educate their children, or receive public services, in a distinct linguistic setting or to establish their own structures of self-government. This generalization may not extend to non-ideal cases of immigrants who have been excluded and marginalized, and so for these groups the claims might be proportionately stronger. But, as noted above, these are also the cases in which countervailing considerations favouring integrationist policies are especially strong.

Lu's comments about the situational argument also strike me as plausible in theory but unlikely to pose a serious challenge in practice. I do regard cultures as diverse and evolving, and so in principle it's possible that new demands and claims for cultural recognition and accommodation could come to the fore. Remember, though, that, on my view, the host society can permissibly expect immigrants to waive only a limited set of cultural rights: rights that cannot feasi-

bly be extended to all groups without prohibitive cost, such as rights to equal linguistic status or to structures of self-government. So, I'm not, in general, unsympathetic with new demands and claims for cultural recognition and accommodation. The rights that can reasonably be limited do strike me as highly susceptible to situational considerations. Consider, for instance, the critical question of which languages will serve as the principal medium of public education, including public high schools and universities. It seems to me that a plausible answer to this question will, in large part at least, be driven by the existing situation in society. Schools will properly prepare students to participate in the society's existing economic, social, cultural, and political institutions and practices. As a consequence, even though a culture is pluralistic, and it evolves and changes over time, there will still be legitimate pressure to conduct some of society's most important business in the established, more dominant cultures.

Finally, let me say something about Lu's third point. The Chinese in British Columbia do seem like a pretty hard case to me. On the one hand, the British settlers had only just arrived themselves, and the Chinese were perhaps the only sizeable local minority. On the other hand, the Canadian state in the west was only being established at the time and presumably its capacity to accommodate cultural difference was much less than it is today. Later in Canadian history an effort would be made to recognize the substantial Francophone population elsewhere in the country by establishing statewide French-language rights. Overall, with hindsight, but bracketing the actual motives of decision makers, the decision not to extend full language rights to Chinese-speakers in B.C. was arguably defensible. The motives driving this decision were in fact racist, and, as Lu points out, there were many instances of unjust treatment of Chinese immigrants in the Canadian West. There was historical injustice in this case that calls out for acknowledgement and rectification. But I'm not persuaded by Lu's comments that the appropriate form for these reparative efforts to take would be to extend full language or self-government rights to Chinese-speakers. The injustice suffered by Chinese-speakers in Canada is different in kind than the injustice suffered by Indigenous peoples, and so the remedy is appropriately different as well.

NOTES

[1] Patten, Alan, *Equal Recognition: The Moral Foundations of Minority Rights*, Princeton, NJ, Princeton University Press, 2014, p. 168.
[2] But see, *Ibid.*, pp. 151 n. 1, 168.
[3] Kymlicka, Will, *Multicultural Citizenship*, Oxford, Oxford University Press, 1995; Carens, Joseph, *Culture, Citizenship, and Community*, Oxford, Oxford University Press, 2000.
[4] Patten, *Equal Recognition*, *op. cit.*, pp. 146-147; the main argument against perfectionism is developed at pp. 128-139.