

# ARTICLE

## REASON'S FREEDOM AND THE DIALECTIC OF ORDERED LIBERTY

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#### I. INTRODUCTION

A significant, if not dominant, strain of contemporary legal theory posits the following ideal as a fundamental precondition of civic justice: given the nature of human persons and their pluralistic beliefs and practices, autonomous determination of choices about intimate conduct can be justly constrained by the state only when such constraint is imposed under the application of rational principles that all citizens could be reasonably expected to accept. This general epistemological standard for the foundation of civic freedom and, concomitantly, the condition for its restriction, has been explicated most familiarly under the notion of "public reason" as proposed by John Rawls and other legal theorists.<sup>1</sup>

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<sup>1</sup>See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). Rawls states: [P]olitical liberalism looks for a political conception of justice that . . . can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it. Gaining this support of reasonable doctrines lays the basis for . . . how citizens, who remain deeply divided on religious, philosophical, and moral doctrines, can still maintain a just and stable democratic society. To this

Reflection upon constitutional substantive due process case law as it has developed over the last century suggests that the Supreme Court of the United States has not been indifferent to political philosophy. Culminating in two relatively recent decisions, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>2</sup> and *Lawrence v. Texas*,<sup>3</sup> the Court has demonstrated its awareness and seeming acceptance of the demand that any articulation of fundamental legal rights and any restriction upon such rights be justified by standards of rationality that all citizens could be expected to accept in principle.

In the (in)famous *Casey* “mystery passage,”<sup>4</sup> the Court observed that the nature of the human person demands that citizens be free to determine themselves in basic matters of liberty without coercion by the state.<sup>5</sup> In *Lawrence*, elaborating specifically on the import of this passage, the Court explained that in view of this ideal the state may not permissibly impose constraints upon basic liberties based on either religious or moral grounds. Such bases are not shared by citizens in common: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>6</sup>

The present Article proposes, via consideration of a contrast between two classical accounts of dialectical reasoning, that the employment of “public reason,” in substantive due process analysis, is unworkable in theory and contrary to more reflective Supreme Court precedent. The project of “public reason” claims to offer an epistemological resolution to the civic dilemma created by the clash of incompatible options for the exercise of freedom adopted by citizens in a diverse community. In fact, however, although logical commonalities might be available to pick out from the multitude of particularized accounts of what constitutes “civic order,” no “public reason” so derived could adequately capture—and thus be able to secure in a practical sense—any single determinate civic order, much less one that would be consistent with all citizens’ conceptions of public order.<sup>7</sup> The demand that coercive limitations on autonomy be justified only by rational arguments that all citizens could in principle accept is founded upon a deficient philosophical understanding of practical reasoning (of which legal analysis is a subset) and supported by little, if any, historical precedent.

Part I of this Article raises a number of issues for consideration relating to the epistemology of law and focuses especially on the concept of public reason and its critique. Part II addresses alternative approaches to legal reasoning suggested by

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end, it is normally desirable that the comprehensive philosophical and moral views we are wont to use in debating fundamental political issues should give way in public life. Public reason—citizens’ reasoning in the public forum about constitutional essentials and basic questions of justice—is now best guided by a political conception the principles and values of which all citizens can endorse . . .

JOHN RAWLS, *Fundamental Ideas*, in *POLITICAL LIBERALISM*, *supra*, at 3, § 1.4, at 3, 10 (footnote omitted) [hereinafter *Fundamental Ideas*].

<sup>2</sup>*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>3</sup>*Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>4</sup>*See Casey*, 505 U.S. at 850; *see also* discussion *infra* Part I.B.5.a.

<sup>5</sup>*Casey*, 505 U.S. at 850.

<sup>6</sup>*Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

<sup>7</sup>*See infra* notes 137-49 and accompanying text for an elaboration of this conclusion.

classical accounts of practical reasoning and virtue theory and considers the operation of such legal analysis outside the area of substantive due process; Part III analyzes post-*Lawrence* case law confirming the dilemma created by the Supreme Court's ambiguous approaches to substantive due process and concludes that only one interpretation—that articulated fully in *Washington v. Glucksberg* and given lip service in *Lawrence v. Texas*—provides a method for resolving novel substantive due process challenges that is philosophically sound as well as historically coherent. Rather than perpetuating a fiction that denies the propriety of lawmaking unless based on principles that all citizens can rationally agree upon, an appropriate model of substantive due process analysis recognizes that law must inevitably be based upon principles that *cannot* be agreed upon by all citizens in virtue of rationality alone.

## II. THE EPISTEMOLOGY OF SUBSTANTIVE DUE PROCESS

In general, the minimal standard for review of all legal judgments, whether legislative or judicial, is that they not be “arbitrary and capricious” but rather supported by a *reasonable* basis in the eyes of the law.<sup>8</sup> While the factual content of a reasonable basis varies from case to case,<sup>9</sup> this general requirement demands that legal determinations be based on adequate sorts of “reasons.”

Due process analysis, as in other legal contexts, protects against the imposition of arbitrary and capricious governmental conduct.<sup>10</sup> Specifically, review of substantive due process challenges to a legal enactment involves the application of one of two standards, depending upon the general nature of the liberty interest at stake, as well as the interest of the state in enforcing that law.<sup>11</sup> In default cases involving regulation of “garden variety” social or economic activity, a deferential “rational basis” standard is applied.<sup>12</sup> In such cases, the enactment generally will be upheld

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<sup>8</sup>*See, e.g.*, *Lewis v. Jeffers*, 497 U.S. 764, 765 (1990). In *Jeffers*, the Supreme Court states the following:

[I]n determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eight Amendment violation, we think the more appropriate standard of review is the “rational factfinder” standard established in *Jackson v. Virginia* . . . where . . . federal courts must determine . . . “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

*Id.* (quoting *Jackson v. Va.*, 443 U.S. 307, 319 (1979)).

<sup>9</sup>*See infra* text accompanying notes 11-15 regarding the differing standards of reason required to impinge on otherwise constitutionally protected conduct.

<sup>10</sup>The Supreme Court often declares that ‘arbitrary’ governmental action is constitutionally prohibited. The most influential judicial opinion ever written about the meaning of substantive due process proclaimed that ‘the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints.’” Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1037 (2006) (footnote omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

<sup>11</sup>Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801 (2006).

<sup>12</sup>*See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (refusing to overturn an Oklahoma statute permitting only licensed optometrists and ophthalmologists to

provided the law in question is “rationally related to a legitimate interest.”<sup>13</sup> However, in cases involving “fundamental” or “basic” liberty interests,<sup>14</sup> the government must show that enforcement of the statute satisfies a “strict scrutiny” test, whereby the court must determine whether the enactment is narrowly tailored to serve a “compelling” state interest.<sup>15</sup> In short, both tests aspire to assure that the government’s conduct is not “arbitrary and capricious,” *mutatis mutandis*, based on the nature of the value threatened by a particular law, the extent of the burden imposed upon that value, and the interest of the state in enforcing the law.<sup>16</sup> The more fundamental a value is considered, the higher the standard of rationality must be in order to conclude that an interference with it is not “arbitrary and capricious.”

The most problematic inquiry in matters of substantive due process centers around determining the appropriate rationales that should be brought to bear in defining the scope of “basic liberties” and “legitimate state interests.” Controversy concerning the content of such rights commonly reflects significant disagreement concerning the proper characterization of these interpretive factors. Unfortunately, no clear consensus exists as to the sorts of normative distinctions to be employed. Chief Justice Rehnquist’s comments on equal protection claims apply with similar force to substantive due process considerations:

“What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?”

Surely there could be no better nor more succinct guide to sound legislation than that suggested by these two questions. They are somewhat less useful, however, as guides to constitutional adjudication. How is this Court to determine whether or not a state interest is

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fit lenses for eyeglasses); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (sustaining a Kansas law prohibiting anyone from engaging in the business of debt collecting except as an incident to the lawful practice of law).

<sup>13</sup>See Staszewski, *supra* note 10, at 1038. Staszewski states:

The Court . . . reviews ordinary legislation under the rational basis test and examines whether a challenged provision is rationally related to a legitimate governmental interest. [T]his test is extremely deferential to the legislature and effectively results in the invalidation of a challenged provision only when it lacks any conceivable public purpose or is entirely irrational.

*Id.* (footnote omitted).

<sup>14</sup>See discussion *infra* Part III.A.

<sup>15</sup>See generally, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

<sup>16</sup>See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating that the purpose of the Due Process Clause was “to secure the individual from the arbitrary exercise of the powers of government” (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (finding that to sustain state action, a court need only decide that it is not “arbitrary or capricious”); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (invalidating state action where it “passes the bounds of reason and assumes the character of a merely arbitrary fiat” (quoting *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912)); *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 211 (1989).

“legitimate”? And how is the Court to know when it is dealing with a “fundamental personal right”?

. . . Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a “legitimate” state interest, or what is a “fundamental personal right.”<sup>17</sup>

#### A. *Religious Belief and Legitimate State Interests*

Although no specific criteria defining a theory of legitimate state interest may be dictated by the Constitution, a starting point for the delineation of this concept is possible, at the minimum, by a *via negativa*: that is, by consideration of the sorts of interests that generally have been excluded as an appropriate basis for enacting laws. There is little dispute that under both the First and Fourteenth Amendments direct reliance on specific religious beliefs is an impermissible basis for the enactment of a law.

For example, in *Edwards v. Aguillard*,<sup>18</sup> the Supreme Court rejected a Louisiana state law requiring the teaching of “creation science.”<sup>19</sup> In the face of an Establishment Clause challenge, Louisiana argued that the purpose of the statute was “to protect a legitimate secular interest, namely, academic freedom.”<sup>20</sup> In response, the Court noted that while it is “normally deferential to a State’s articulation of a secular purpose, [it requires] that the statement of such purpose be sincere and not a sham.”<sup>21</sup> Concluding that the actual purpose of the Louisiana legislature was to further religious interests,<sup>22</sup> the Court held the statute unconstitutional.<sup>23</sup> Of note in

<sup>17</sup>Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting).

<sup>18</sup>Edwards v. Aguillard, 482 U.S. 578 (1987).

<sup>19</sup>*Id.* at 596-97. In fact, the statute required the teaching of creation science only if evolution was also taught. *Id.* at 580. Therefore, if evolution were not included in the curriculum, there was no requirement to teach creation science. *Id.*

<sup>20</sup>*Id.* at 581.

<sup>21</sup>*Id.* at 586-87; see also *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005) (“[G]overnment action must have ‘a secular . . . purpose,’ and after a host of cases it is fair to add that although a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” (alteration in original) (citation omitted) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971))).

<sup>22</sup>*Edwards*, 482 U.S. at 592-93. The Court stated:

[I]t is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the Act’s primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. . . . The legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.

*Id.*

<sup>23</sup>*Id.* at 593 (“Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.”).

*Edwards*, both the state and the Supreme Court agreed that a valid law could not be motivated by a desire to advance religious belief as such, but rather must be grounded in a “secular purpose.”<sup>24</sup>

The same rationale prevents the government from imposing restrictive laws motivated primarily based on animus *against* a religious belief rather than enforcing a legitimate interest.<sup>25</sup> In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court struck down, under the Free Exercise Clause, a purportedly “neutral” city ordinance against animal cruelty.<sup>26</sup> The Court cited the record and legislative history in finding that the regulation was in fact motivated primarily by opposition to the ritual sacrifice practiced by members of a local religious group.<sup>27</sup> It rejected the conclusion that the prohibition was supported by an adequate governmental interest.<sup>28</sup>

Due to the far reaching breadth of the Establishment and Free Exercise Clauses, holdings directly focusing on the impermissibility of government’s adoption or rejection of a religious belief as grounds for resolving a substantive due process or equal protection claim are rare.<sup>29</sup> Discussion, however, of the role of religious belief in substantive due process cases is not lacking.

In *Bowers v. Hardwick*, (a pivotal case in virtue of its eventual reversal in *Lawrence v. Texas*), Justice Blackman noted in his dissent that the petitioners’ reliance on the legal argument that sodomy violated traditional religious beliefs undermined their argument:

The assertion that “traditional Judeo-Christian values proscribe” the conduct involved cannot provide an adequate justification for § 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. Thus, far from buttressing his case, petitioner’s invocation of Leviticus, Romans, St. Thomas Aquinas, and

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<sup>24</sup> *Id.* at 582.

<sup>25</sup> *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (requiring government to show that law was motivated by “compelling state interest” because law not neutral).

<sup>26</sup> *Id.* at 520.

<sup>27</sup> *Id.* at 534-38.

<sup>28</sup> *Id.* at 533. The Court stated:

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

*Id.* (citations omitted).

<sup>29</sup> “The Court’s attempted devaluation of the free exercise clause to challenge religious discrimination, at least in cases not presenting outrageous facts of religious intolerance, may signal the need to focus on the equality principle of the equal protection clause as an additional source to protect religious liberty.” *Religion*, in JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5:21 (2006).

sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>30</sup>

Of course, in ruling to uphold the statute that criminalized sodomy, the majority in *Bowers* had not relied on the petitioners' argument based on religious grounds.<sup>31</sup> Instead, they cited the validity of general morals legislation among those considerations that justified the statute. Rejecting the respondents' argument that the moral grounds in question were inadequate, Justice White observed: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>32</sup>

Prior to *Lawrence*,<sup>33</sup> the basic distinction between Blackmun's impermissible religious basis and the majority's permissible morals basis appears to have been generally accepted. As reflected in Supreme Court opinions and opinions of numerous other courts, a legislative object can often function as the object of both religious and secular reasoning. While laws based on general moral or ethical norms might be historically related to, and overlap with, religious convictions, such association does not undermine the secular nature and constitutionality of such laws:

[T]he "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of

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<sup>30</sup>See *Bowers v. Hardwick*, 478 U.S. 186, 211-12 (1986) (citation and footnote omitted) (quoting Brief of Petitioner at 20, *Bowers*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939, and *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989). In *Webster*, Justice Stevens stated:

There is unquestionably a theological basis for such an argument, just as there was unquestionably a theological basis for the Connecticut statute that the Court invalidated in *Griswold*. Our jurisprudence, however, has consistently required a secular basis for valid legislation. Because I am not aware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization, I believe it inescapably follows that the preamble to the Missouri statute is invalid under *Griswold* and its progeny.

*Id.* at 565-66 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

<sup>31</sup>*Bowers*, 478 U.S. at 196.

<sup>32</sup>*Id.*

<sup>33</sup>See discussion *infra* Part III.A.2.

adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.<sup>34</sup>

In short, the demand for a secular rationale to justify governmental conduct is relatively uncontroversial as a matter of established Supreme Court precedent. While the question of what constitutes a “religious belief” as opposed to a “moral belief” is inevitably implicated by the statements in *Bowers* and other cases (as will be discussed below), the potential overlap between religious convictions and secular rationales, at least traditionally, was not thought to entail a collapsing of the concepts into one another. Rather, the distinction was essential in attempting to protect religious freedom while at the same time affirming laws of secular import whose content has been traditionally associated with religious beliefs.<sup>35</sup>

### B. Liberal Democracy and Epistemological Restraint

The preceding discussion illustrating how specific religious beliefs are excluded from the otherwise broad set of interests that may be asserted as legitimate state interests parallels discussions in political theory concerning how the religious beliefs of citizens—whether individual voters, judges or legislators<sup>36</sup>—ought to inform their political conduct. This normative discussion is especially relevant in substantive due process contexts, that is, when religious reasons might be offered as a rationale for legal determinations having a coercive effect over conduct normally associated with matters of personal conscience, religion or privacy. One scholar has formulated this purported epistemological restraint in the following manner: “a good citizen of a liberal democracy will refrain from allowing religious reasons to be determinative when deciding and/or debating political issues . . . unless, perchance, those religious reasons are themselves held for reasons of the acceptable sort.”<sup>37</sup>

#### 1. Secular Rationales and Liberalism

In defending such a restraint, Robert Audi argues that liberal democracies such as the United States are founded upon the supposition that coercive laws should be

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<sup>34</sup>See *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (citation omitted); see also *Horace Mann League v. Bd. of Pub. Works*, 220 A.2d 51, 61 (Md. 1966). In *Horace Mann League*, the Court of Appeals of Maryland reiterated as follows:

“As *McGowan* makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is primarily secular, and if those secular purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the ‘establishment’ clause is not violated.”

The above rationale is supported and emphasized by so many statements in the Supreme Court's decisions that one is at a loss to know where to start and where to end in naming them.

*Id.* at 61 & n.14 (emphasis added) (citation omitted) (quoting *Murray v. Comptroller of Treasury*, 216 A.2d 897, 907 (Md. 1966)).

<sup>35</sup>See discussion *infra* Part I.B.4 on the meaning of religion.

<sup>36</sup>In ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* 7 (1997), neither author argues that such a position is required for public participation, but only for what is virtuous.

<sup>37</sup>*Id.* at 69.

based on citizens' "secular" reasons and motivations.<sup>38</sup> Audi's justification for this restriction flows from the nature of liberal democracy itself: "A liberal state exists in good part to accommodate a variety of people irrespective of their special preference for one kind of life over another."<sup>39</sup> Thus, because one constitutive rationale of liberal democracy is to enable an appropriate autonomy, coercion of any sort ought to be limited to situations when there are considerations "that any rational adult citizen will find persuasive and can identify with."<sup>40</sup> Further, such coercion must be justified by reasons showing that the coercive laws are strictly necessary for "civic order," and not instituted merely on the basis of "majority preference."<sup>41</sup>

Based on this limitation, Audi argues that religious beliefs, insofar as they are not shared by all rational members of society, cannot be justified as a basis for imposing coercive laws.<sup>42</sup> Although Audi allows that actors may have religious reasons and motivations that are effective in moving citizens to act, in order to exercise democratic civic virtue, the actor must also have secular reasons for such conduct and be able to affirm that such secular reasons would be sufficient to motivate that conduct absent religious considerations.<sup>43</sup> The dictates of democratic virtue require that only those religious motivations capable of finding a self-supporting secular analogue form a proper basis for public discourse.<sup>44</sup> All other motivations will invariably betray the value of individual freedom that lies at the foundation of liberal democracy. Ultimately, an actor can claim to exercise *civic virtue* only when the non-religious justifications that he offers are capable of standing alone.

## 2. Deconstructing Liberal Epistemology

In disagreement with Audi's position, Nicholas Wolterstorff challenges the view that one's virtuous participation in liberal democracy entails the religious-reason constraint. Wolterstorff's strongest argument flows from his critique of the epistemology underlying liberalism. He notes that the function of the religious-reason constraint is essentially negative, that is, it states what *cannot* count as a reason:

[C]itizens (and officials) *are not* to base their decisions and/or debates concerning political issues on their religious convictions. . . . They are to base their political decisions and their political debate in the public space

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<sup>38</sup>*Id.* at 16-17.

<sup>39</sup>*Id.* at 16.

<sup>40</sup>*Id.* Audi also states:

A liberal democracy by its very nature resists using coercion, and prefers persuasion, as a means to achieve cooperation. . . . A liberal state exists in good part to accommodate a variety of people irrespective of their special preference for one kind of life over another; it thus allows coercion only where necessary to preserve civic order and not simply on the basis of majority preference.

*Id.* at 16-17.

<sup>41</sup>*Id.* at 17.

<sup>42</sup>*Id.* at 16.

<sup>43</sup>*Id.* at 23.

<sup>44</sup>*Id.*

on the principles yielded by some source *independent of* any and all of the religious perspectives to be found in society.<sup>45</sup>

In its positive description, however, Wolterstorff observes that different versions of liberalism offer diverging accounts of what *can* permissibly serve as a valid independent source, varying from concepts of “publicly accessible reasons,” to “secular reasons” to “reasons derived from the shared political culture.”<sup>46</sup>

According to Wolterstorff, the only thing that these secular theories hold in common is their steadfast refusal to concede legitimacy to religious beliefs in enacting civil law.<sup>47</sup> Noting the mutually exclusive presuppositions of these positions, Wolterstorff proposes that in the absence of an independent source shared by all rational participants, the only reasonable conclusion a person could have is that the common sharing of a single independent source is impossible:

No matter what principles of justice a particular political theorist may propose, the reasonable thing for her to expect, given any plausible understanding whatsoever of ‘reasonable and rational,’ is *not* that all reasonable and rational citizens would accept those principles, but rather that *not all* of them would do so.<sup>48</sup>

In view of the diversity of rational justifications constituting liberalism, each proposing its own notion of an “independent source,” Wolterstorff rejects liberalism’s singling out of “religious reasons” for exclusion. He concludes from that lack of agreement, that the very project of liberalism “is unacceptable in all its versions. It is unacceptable not because none of the extant versions happens to get all the details right, but unacceptable because no rationale offered for the restraint is cogent, and no independent source meets the demands.”<sup>49</sup>

In view of this inherent epistemological weakness, Wolterstorff concludes that the appropriate response of liberal democracy—one more in keeping with a commitment to let persons live as they see fit—would be to remove all epistemological restraints on political decision-making as long as the conduct in question does not violate the restraint against direct religious content.<sup>50</sup> In short,

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<sup>45</sup>*Id.* at 73.

<sup>46</sup>*Id.* at 74. Wolterstorff asserts that some versions of liberalism exclude as a proper basis for decision-making even conclusions flowing from “non-religious comprehensive perspectives” that do not comport with one of these alleged shared bases. *Id.*

<sup>47</sup>*Id.* at 75 (“What unites this buzzing variety of positions into one family of liberal positions is that they all propose a restraint on the use of religious reasons in deciding and/or debating political issues.”).

<sup>48</sup>*Id.* at 99. Examining, in detail, John Locke’s and John Rawls’ accounts of the “independent source,” Wolterstorff argues that both positions ultimately fail to offer any ground that can be shared by all rational participants: “[T]he contested fate of Rawls’s own proposed principles of justice is illustrative. What is reasonable . . . to expect is that . . . proposals will stir up controversy and dissent not only at the point of transition from the academy to general society, but within the academy.” *Id.*

<sup>49</sup>*Id.* at 81.

<sup>50</sup>Here, Wolterstorff must have in mind something like a neutral, generally applicable law, such as that considered in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Such a position,

because of liberalism's failure to provide an account of an independent basis justifying secular beliefs, Wolterstorff argues that no reason exists to isolate religious belief as an impermissible basis for enacting laws.<sup>51</sup>

### 3. Secular versus Religious Rationales: A Distinction without a Difference?

Wolterstorff's critique of the restraining condition of secular reasoning, while certainly raising legitimate concerns, is not lacking difficulties of its own. As illustrated above in the discussion of the limits of legitimate state interests, federal constitutional law differentiates between secular and religious rationales for legal enactments. Legislation adopted on the basis of a specific religious belief as such, or adopted primarily because of a religious motivation, is impermissible.<sup>52</sup> While this argument, standing alone, does not theoretically justify the exclusion of religious rationales, it does suggest that Wolterstorff's *reductio ad absurdum* may not be as effective as he believes. Although such exclusion may ultimately prove rationally incoherent, the practice presents a *prima facie* legitimacy that suggests some possible justification.

Additionally, Wolterstorff's argument appears to fall under the weight of its own epistemological skepticism, that is to say that his argument proves too much. By maintaining that *all* positions are *equally* foundationless, the position undermines its own claim to rational justification. In Wolterstorff's view, no reason exists to believe that citizens have a shared rational ground for agreement upon rational principles. Thus, no common basis exists for corporately distinguishing what counts as a "reasonable" basis from what counts as an "arbitrary and capricious" basis. If so, upon what common ground does Wolterstorff propose his own argument favoring elimination of the distinction between religious and secular rationales? If differences cannot be resolved by appeal to *some* shared rational foundations, this undercuts, if not completely negates, the value of his attempt to present a *reasoned* argument favoring his position and justifying the rejection of the liberal restraint. One has the distinct impression that he seems to be saying more than just "follow me."<sup>53</sup>

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according to Wolterstorff's view, would be more in keeping with the notion of liberal democracy than imposition of the religious-reason restraint. See AUDI & WOLTERSTORFF, *supra* note 36, at 77. Wolterstorff asserts:

[T]here is something profoundly paradoxical about the suggestion that the role of citizen in a liberal democracy includes this restraint. . . . Using their religious convictions in making their decisions and conducting their debates on political issues is part of what constitutes conducting their lives as they see fit. . . . The liberal position—restraint on religious reasons—appears to be in flagrant conflict with the Idea of liberal democracy.

*Id.* For a similar argument, see Richard W. Garnett, Essay, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 553 (2003).

<sup>51</sup>AUDI & WOLTERSTORFF, *supra* note 36, at 99.

<sup>52</sup>See discussion *supra* Part I.A.

<sup>53</sup>Wolterstorff elsewhere encapsulates this epistemological skepticism by stating: "Confronted as we are with the fact that we lack a shared foundation, each of us has no choice but 'to one's own self be true.'" NICHOLAS WOLTERSTORFF, *REASON WITHIN THE BOUNDS OF RELIGION* 66 (2d ed. 1984) (1976).

#### 4. Religious Beliefs and Reasons

Further, even if one accepts Wolterstorff's conclusion that no set of rationales exists that all citizens can agree upon in principle, it does not follow that all rationales are thereby rendered equally (il)legitimate bases for lawmaking. In fact, there may be other relevant distinctions between secular rationales and religious bases that justify the exclusion of one type of reasoning over another, even if none can claim universal acceptability or accessibility.

Wolterstorff's own prohibition against direct incorporation of religious *content* into law indicates that he strongly distinguishes between religious beliefs and secular beliefs, even if implicitly. Although both religious beliefs and motivations may be utilized in full force when making decisions about lawmaking, he apparently does not believe that this eliminates all epistemological restraints on the content of the law that can be enacted. "[W]hy should epistemological restraints be laid on a person *when the legislation advocated by that person does not violate the restraints on content?*"<sup>54</sup>

Wolterstorff's argument, however, had been offered to demonstrate that "religious reasons" have no less warrant or justification than "secular" reasons in political thinking. If this were true, why should the "content" of religious beliefs continue to be excluded from direct legislation? Wolterstorff's willingness to exclude religious content from public law belies his parallel efforts to assert that religious reasons and secular reasons are equally legitimate bases for lawmaking. Insistence upon *this* epistemological restraint reveals that Wolterstorff, too, accepts some relevant difference between religious beliefs and secular beliefs that makes the former an inappropriate object for direct legislation.

For obvious reasons, no individual study could adequately account for the breadth and variety of views that address the epistemological status of religious beliefs, especially as such views manifest themselves in theological, philosophical, and legal contexts that are virtually limitless. Supreme Court definitions of "religion," for example, have been extended over time to apply broadly to any "given belief that is sincere and meaningful and occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."<sup>55</sup> Expansion of the definition of religious beliefs sometimes is a two-edged sword, at once broadening protection for those beliefs under the Free Exercise Clause, while at the same time jeopardizing the right to employ such "religious" reasoning in lawmaking under the Establishment Clause.

The following discussion will consider the propriety of the restraint on religious reasons based on what is arguably the most characteristic, if not unproblematic, notion of religious belief: the notion of assenting to some truth (of propositional,

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<sup>54</sup>AUDI & WOLTERSTORFF, *supra* note 36, at 77.

<sup>55</sup>United States v. Seeger, 380 U.S. 163, 166 (1965). As one scholar summarizes the Court's modern conception of the beliefs that are protected by the First Amendment:

With the near infinite malleability of the content of what is "moral" or based on a "policy," the Court expanded the definition of religion to its farthest reach, encompassing all belief systems that are strongly held with only three ill-defined exceptions for beliefs that are pragmatic, expedient or based on policy.

Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 203 (2002).

factual, or other type)<sup>56</sup> based on its having been revealed by God, or in more common terms, as accepted by “faith.”<sup>57</sup>

In broad strokes, at least in the mainstream of Western tradition, the concept of religious belief refers to a mode of cognitional acquisition and assent defined in contradistinction to “natural knowledge.” In matters held *by faith*, as opposed to matters attained by natural reason, the justification for affirming a religious concept or doctrinal belief is not one’s own subjective insight or direct perception of the truth of the matter, but rather a conviction that the matter is so because God has revealed it to be so.<sup>58</sup> Although some of these particular matters revealed by God may also be known by human reason, faith and reason cannot be regarded as identical in nature or mode. In keeping with this traditional account, holding a particular belief as a matter

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<sup>56</sup>See generally THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 607 (Robert Audi ed., 1995) (“To be sure, such traditions typically affirm that faith goes beyond mere doctrinal belief to include an attitude of profound trust in God. On most accounts, however, faith involves doctrinal belief, and so there is a contrast within the religious domain itself between faith and reason.”).

<sup>57</sup>Of course, even this concept, in its specific explication, finds diverse meanings among various religious groups and even within sub-groups of a single religion.

<sup>58</sup>See 2 THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, q. 4, art. 1, at 1190 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947) (1265-73). St. Thomas Aquinas states:

The relationship of the act of faith to the object of the intellect, considered as the object of faith, is indicated by the words, *evidence of things that appear not*, where *evidence* is taken for the result of evidence. For evidence induces the intellect to adhere to a truth, wherefore the firm adhesion of the intellect to the non-apparent truth of faith is called *evidence* here. Hence another reading has *conviction*, because, to wit, the intellect of the believer is convinced by Divine authority, so as to assent to what it sees not. Accordingly if anyone would reduce the [Apostle’s description] to the form of a definition, he may say that *faith is a habit of the mind, whereby eternal life is begun in us, making the intellect assent to what is non-apparent.*

*Id.*

of faith and knowing it by natural knowledge are mutually exclusive.<sup>59</sup> Vision or “understanding” of a truth excludes having “faith” in it.<sup>60</sup>

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<sup>59</sup>See 2 THOMAS AQUINAS, THE DISPUTED QUESTIONS ON TRUTH q. 14, art. 9, at 250 (James V. McGlynn trans., 1953) (1256-59), available at <http://www.diafrica.org/nigeriaop/kenny/CDtexts/QDdeVer14.htm>. St. Thomas explains:

[A] thing can be the object of belief in two ways. In one it is such absolutely, that is, it exceeds the intellectual capacity of all men who exist in this life, for instance, that there is trinity and unity in God, and so on. Now, it is impossible for any man to have scientific knowledge of these. Rather, every believer assents to such doctrines because of the testimony of God to whom these things are present and by whom they are known.

A thing is, however, an object of belief not absolutely, but in some respect, when it does not exceed the capacity of all men, but only of some men. In this class are those things which we can know about God by means of a demonstration, as that God exists, or is one, or has no body, and so forth. There is nothing to prevent those who have scientific proofs of these things from knowing them scientifically, and others who do not understand the proofs from believing them. *But it is impossible for the same person to know and believe them.*

*Id.* (emphasis added).

<sup>60</sup>This general account is clearly reflected in John Paul II, *Fides Et Ratio* (Sept. 14, 1998), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_15101998\\_fides-et-ratio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html) (encyclical letter to the bishops of the Catholic Church on the relationship between faith and reason):

The First Vatican Council teaches, then, that the truth attained by philosophy and the truth of Revelation are neither identical nor mutually exclusive: “There exists a twofold order of knowledge, distinct not only as regards their source, but also as regards their object. With regard to the source, because we know in one by natural reason, in the other by divine faith. With regard to the object, because besides those things which natural reason can attain, there are proposed for our belief mysteries hidden in God which, unless they are divinely revealed, cannot be known.” Based upon God's testimony and enjoying the supernatural assistance of grace, faith is of an order other than philosophical knowledge which depends upon sense perception and experience and which advances by the light of the intellect alone. Philosophy and the sciences function within the order of natural reason; while faith, enlightened and guided by the Spirit, recognizes in the message of salvation the “full[ness] of grace and truth” which God has willed to reveal in history and definitively through his Son, Jesus Christ.

*Id.* at 9 (footnote and citations omitted) (quoting DOGMATIC CONSTITUTION ON THE CATHOLIC FAITH *DEI FILIUS* IV (1870), and *John* 1:14).

Given this clear contrast between the nature of faith and reason, reflecting at least one dominant historical approach, efforts to solve the political question of the role of religious beliefs simply by dismissing the controversy seem unfruitful. See, e.g., Michael W. McConnell, Leary Lecture, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639 (1999). McConnell states:

The distinction between accessible arguments and arguments based on religion rests on a controversial view of epistemology that has been sharply disputed by some theorists. These theorists contend that religious beliefs rest on the same sorts of experience, and can be evaluated according to the same criteria of evidence, as any other beliefs—or, conversely, that seemingly objective forms of knowledge, like science, rest ultimately on the same sort of faith claims that undergird religious beliefs.

*Id.* at 651-52 (footnote omitted).

Such a view is supported by Brian Leiter in the context of questioning what, if any, principled argument may exist for governmental toleration of religion *qua* religion. In developing his thought, Leiter argues that tolerance historically extended to religious belief has not been granted as a result of principled epistemic grounds that recognize religion as worthy of toleration.<sup>61</sup> Drawing upon the work of Canadian legal philosopher Timothy Macklem, Leiter instead identifies as one of the properties of religious beliefs the fact that they, unlike other rationales, “do not answer to *evidence* and *reasons*.”<sup>62</sup> Religious beliefs are “based on faith,” and “are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science.”<sup>63</sup>

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Carrying this misunderstanding further, McConnell suggests that evidence of the lack of a distinction between religious belief and natural knowledge is reflected in examples of the Catholic Church’s appeal to the natural law in its political teachings and in misguided denials of the universal accessibility of biblical propositions:

The Roman Catholic tradition, for example, typically participates in public debate on the basis of some version of natural law, which is perceived through the application of reason to nature. There is nothing inaccessible about that. The fundamentalist tradition typically presents arguments based on the Holy Bible, rejecting arguments based on emotion, tradition, or extrabiblical revelation to religious authorities. It is difficult to imagine a more accessible view. To be sure, not everyone agrees with the Bible, just as not everyone believes in Keynesian economics. But the Bible is available to everyone. All you have to do is pick it up and read. The argument for exclusion of inaccessible justifications does not take us very far toward an argument for exclusion of religious justifications if it does not apply to Roman Catholicism or fundamentalism—the two religious views most secular liberals are most concerned about.

*Id.* at 653 (footnote omitted).

McConnell’s argument here, however, appears to be founded upon two serious misconceptions. First, the entire point of the “natural” law being based on “natural” reason is to signify precisely that it is *not* derived from “religious justifications” though it may be consistent with them. *See infra* note 63 and accompanying text. Second, objections to the enactment of laws based on the Bible do not depend, as McConnell seems to suggest, upon the assumption that its written propositions are inaccessible. *See infra* note 69 and 70. Rather, such objections are based on the fact that the *truth* of those propositions as religious truths is accessible only to those who accept them on the basis of divine inspiration, and not unaided reason. *That* is what is not accessible to those without faith. Rather than supporting McConnell’s conclusion that there is no relevant distinction between religious and non-religious foundations, these examples actually confirm the propriety of that distinction.

<sup>61</sup>Brian Leiter, *Why Tolerate Religion* 1 (University of Texas Public Law and Legal Theory Research Paper Series, Paper No. 100, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=904640](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904640).

<sup>62</sup>*Id.* at 17.

<sup>63</sup>*Id.* at 15-16 (citing Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L.J. 1, 33 (2000)). Macklem asserts:

At its most basic level, the concept of faith describes the manner in which a particular belief or set of beliefs may be subscribed to by human beings. In that sense of the word, faith exists as a type of rival to reason. When we say that we believe in something as a matter of faith, . . . we express a commitment to that which cannot be established by reason . . .

*Id.* Leiter reiterates:

Thus, even though matters of faith may reference specific cognitive content, as matters held by faith they are not to be understood as assented to as a result of natural reasoning processes. The “truth” of such content is not warranted by appeal to the type of direct or inferential bases generally accessible and familiar to human knowers employing “unaided” natural reason. Implicit in this is the view that “evidence” sufficient for natural knowledge is constituted precisely because an object is grasped by the human mind in a way that either directly or indirectly carries its own warrant. Faith propositions are assented to precisely on the ground that their truth has been revealed, i.e., has been vouched for by God.

The “acceptance,” however, of certain truths as *divinely revealed* and thus reliable and trustworthy of belief can, in turn, itself not be considered a product of simple natural reasoning. Because the scope of human natural knowledge is not identical with the scope of divine knowledge, knowing things as *divinely revealed* is not an inherently natural consequence of human knowing. The very concept of faith as a *conviction* about *revealed* truths, intrinsically involves appeal to a religious truth, that is, something not attainable by natural reason on its own. Generally, faith in this respect is held to be a “gift” and involves the operation of supernatural “grace.”<sup>64</sup>

In sum, any affirmative view concerning the character, accessibility, or legitimacy of “faith” as a mode of “knowing” presupposes, at least on the traditional account, the assent of the human mind to cognitive beliefs that are not the result of a

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Religious beliefs do not answer to *evidence* and *reasons*, as evidence and reasons are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on “faith,” are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science.

*Id.* at 17.

Although traditional religious accounts might quibble that Macklem’s and Leiter’s statements could be taken to exclude the possibility of grasping truths by reason that can also be matters of faith, they would agree that such matters cannot be established by reason *and* still be matters of faith, or vice versa. Thus, Leiter’s and Macklem’s view generally captures the notion of faith as it has theologically been understood by major religious traditions. *See supra* notes 59-63 and accompanying text; *see infra* notes 64-67 and accompanying text.

<sup>64</sup>*See Faith*, in *New Advent*, The Catholic Encyclopedia, <http://www.newadvent.org/cathen/05752c.htm> (last visited Jan. 24, 2007). The encyclopedia states:

For Divine faith is supernatural both in the principle which elicits the acts and in the objects or truths upon which it falls. The principle which elicits assent to a truth which is beyond the grasp of the human mind must be that same mind illumined by a light superior to the light of reason, viz. the light of faith, and since, even with this light of faith, the intellect remains human, and the truth to be believed remains still obscure, the final assent of the intellect must come from the will assisted by Divine grace, as seen above. But both this Divine light and this Divine grace are pure gifts of God, and are consequently only bestowed at His good pleasure.

*Id.* As Wolterstorff observes:

Not only is it not the case that one must hold one’s religious beliefs for reasons of the Lockean sort to be entitled to them, it is not, in general, necessary that one hold them for any reasons at all. Something about the belief, the person, and the situation brings it about that the person is entitled to the belief. But that need not be another belief whose propositional content functions as reason for the religious belief.

AUDI & WOLTERSTORFF, *supra* note 36, at 87.

“natural” mode of the mind’s operation.<sup>65</sup> Rather, positive claims about the *possibility* of faith-knowledge must, for their own justification, inevitably depend upon the positing of a *super*-natural mode of cognition.<sup>66</sup> Although diverse religious groups sharing a general concept of this traditional conception of faith may dispute just how such revelation is communicated and the specific conditions required for its acceptance,<sup>67</sup> it seems undeniable that the affirmation of “faith” as a possible, valid form of knowledge constitutes itself an intrinsically religious belief, inaccessible to natural reason standing alone.

Wolterstorff’s acceptance of the religious-content restraint on laws in the end appears to corroborate this fundamental distinction between faith and reason and therefore supports the reasonableness of legal constraints against lawmaking based directly on religious beliefs. In response to Wolterstorff’s skeptical questioning of the purported difference between secular and religious rationales that renders the former a legitimate basis for lawmaking but not the latter, the following response is possible: secular rationales depend upon natural reason and are thereby at least remotely, if not proximately, accessible to every human person capable of exercising natural reason. Religious beliefs, however, at least on traditional understandings, both in respect to their content and the conditions required for assent to that content, are not accessible to natural reasoning operating on its own either proximately or remotely.<sup>68</sup>

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<sup>65</sup>Again, this view does not deny that sometimes rational arguments can be forwarded against attempts to disprove matters of faith. Further, probable arguments about the truth of many matters of faith may be available. Matters of faith may be related from a variety of reasonable points of view in important and challenging ways with many acute problems of human existence.

<sup>66</sup>Whether religious beliefs are themselves rational admits to much variation among religious groups. While some distinguish between beliefs that could also be understood naturally (e.g., prohibitions against murder, rape, etc.) and those that could not (e.g., trinity, incarnation etc.), others maintain differing positions. See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 56, at 607 (“Theists disagree about how such exclusive objects of faith are related to reason. One prominent view is that, although they go beyond reason, they are in harmony with it; another is that they are contrary to reason.”).

<sup>67</sup>*Id.* (“Theists disagree about how such divine disclosures occur; the main candidates for vehicles of revelation include religious experience, the teachings of an inspired religious leader, the sacred scriptures of a religious community, and the traditions of a particular Church.”).

<sup>68</sup>Recognition of this distinction is, for example, expressly reflected in Christopher Eberle’s concession that knowledge by faith arises from a type of cognitive experience distinct from the experiential basis of non-faith-based understanding. See CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS 239-46 (2002). While all human persons, in virtue of being just such, share a “standard package” of cognitive abilities (sense perception, memory, introspection, inductive and deductive inference), faith as a special mode of knowing depends upon a distinct form of perception, and whose validity and reliability depends upon that perception. *Id.*

From these premises, Eberle correctly observes that participants in the standard package have no justified basis for dismissing as unreliable modes of knowing dependent upon doxastic practices that fall outside the standard package. *Id.* Judgments concerning the reliability of any particular doxastic practice inevitably entail self-referential reliance upon those same internal practices. Hence, while internal criteria may be employed in evaluating

To illustrate the point more clearly, it is useful to consider one possible response a religious adherent might propose in support of the contention that religious beliefs are as equally accessible as any attainable by natural reason. The proponent might refer specifically to a belief that God offers, at all times and to all persons, the possibility of faith. Thus, any appeal to a purported greater *accessibility* of natural reason over revealed truth would allegedly be groundless. Although they are distinct forms of knowing, both would be equally accessible, and no reason exists to exclude one or the other as a permissible basis for lawmaking.

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the reliability of a doxastic practice, it is inappropriate positively to dismiss one particular practice, e.g., knowledge by faith, as unreliable simply on the basis that it does not conform to the practices of another, distinct mode of knowledge, i.e., the standard package. Judgments about other doxastic practices are simply outside the expertise conferred by the standard package.

Based on this correct insight, however, Eberle erroneously concludes that he has established an argument for the legitimacy of religious belief as a basis for coercive political decision making:

Mystical perception is thoroughly democratic in the relevant sense: just as any citizen enjoys cognitive capacities he could have employed to understand and evaluate . . . scientific theories that bear on specific coercive laws even though he can't in fact, any citizen can perceive God in that he enjoys cognitive capacities that he can employ to perceive God even though he does not in fact.

*Id.* at 260.

This line of argument, in fact, confirms a conclusion opposite to that which Eberle draws. The valid distinction drawn between doxastic practices constituting the “standard package” and those underlying religious belief confirms the propriety of distinguishing the role proper to purely religious beliefs from the “natural” knowledge attained by the standard package that all humans come equipped with. On the basis of this distinction, it is entirely reasonable to conclude that religious beliefs formed as such should be excluded from direct political efficacy. This is so, not because religious beliefs should be rejected as intrinsically irrational, suspect, or false. Instead, they provide an inappropriate basis for direct imposition of coercive laws on non-believers because they depend, by Eberle's own admission, upon perceptions and experiences that are distinct from the shared doxastic practices of human persons just in virtue of being human. Even if it were true that all persons *could* have the doxastic practice of faith, it is not true that they actually have that doxastic practice in the same way that they possess the doxastic practice of the standard natural package.

Returning to Eberle's discussion of the perception of God in light of this observation, such a perception is admittedly not part and parcel of the standard package. Persons who do not share that divine perception thus have no practice by which they might verify the very possibility, must less the reliability, of that mode of knowledge. Prior to the experience of faith knowledge—i.e., insofar as they are human persons equipped with only the standard package of doxastic practices—they simply have no basis for trusting the reliability of claimed faith knowledge. The person who has attained knowledge according to the standard package can easily accept the possibility of its exercise with respect to other conclusions reached by such means, even if he or she has not carried out those lines of reasoning. To suggest that this provides any basis for asserting that a person equipped with the standard package therefore has a similar accessibility to faith based knowledge does not follow at all. Imposing on non-believers coercive standards of conduct based solely on doxastic practices proper to faith treats them as sub-human in so far as it attempts to direct their behavior by principles which they, as non-believers, are incapable of rationally adopting under their own existing doxastic practices. Limiting the direct epistemological basis of coercive laws to doxastic practices falling within the standard package—those practices available to all humans just as such—avoids this unfairness and manipulation of others.

The weakness of this argument, however, lies in its circularity. Unless the religious believer advocates that religious beliefs are self-authenticating both in content and mode of assent—an unorthodox view—no “natural” reason exists for the non-believer to acknowledge the validity of a faith-based cognitive mode. Non-believers, however, might recognize the possibility of other *natural* rational grounds that they have not personally developed, for example reference to natural knowledge based merely on the trustworthiness of the testimony of another.

In fact, precisely by reflecting upon Wolterstorff’s own argument against the existence of absolute independent foundations for knowledge, non-believers could consider the limited and conditioned nature of their own reflections and acknowledge the possibility of other forms that natural knowledge might take. Such an acknowledgment, however, would in no way entail recognition that faith in revealed matters is also a source of valid cognition. Such a concession would require reference to a class of knowledge that a person who has not attained faith simply has no access to. Nor would such a person be capable of presenting any plausible basis from which he might concede the recognition of such an appeal to be the product of natural reason alone. In short, recognition of the validity of religious beliefs accessed by faith is not an accessibility that a *non-believer* must naturally and rationally acknowledge. Faith cannot be rationally conceded as a legitimate mode of cognition *prior* to one’s having faith.<sup>69</sup>

Accordingly, any argument that posits that religious beliefs can be reduced to a type of belief that possesses an equally legitimate claim in lawmaking necessarily runs up against the recognition of the difference between religious beliefs and secular beliefs articulated by those very religious belief systems themselves. As a

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<sup>69</sup>Leiter has expressed this point in another context, stating: “There is no reason to think . . . that . . . beliefs that are *insulated* from evidence and reasons—that is, insulated from *epistemically relevant* considerations—will promote knowledge of the truth.” Leiter, *supra* note 61, at 25. As noted above, “insulated from evidence and reasons” need not imply that such truths are incapable of being known by reason, but simply that they cannot be known as such and still be matters of faith. See *supra* note 63 and accompanying text.

Also, it is important to note that this point does not entail that secular reason has any ground to deny, in a *positive* fashion, the possibility of knowledge by faith. Rather, the scope of knowledge by faith is simply a method of knowing that is beyond the competence of natural reason to judge directly about. Thus, while natural reason need not acknowledge the validity of knowing by faith prior to attaining such faith, it does not follow that knowledge by faith is therefore an impossibility.

Furthermore, such a position does not exclude the possibility that some beliefs bearing on “religious” content may also be accessible by natural reason. Belief in the existence of a supreme being, for example, while certainly a preamble, if not part and parcel, of knowledge by faith, has been regarded throughout much of Western history, from ancient Greece onward, as a possible object of knowledge attained by natural reason. While admittedly such conclusions are not without controversy, it is undeniable that they suggest a distinction between rational arguments, probable or demonstrative, about the existence of God, and assertions about God’s existence or other truth offered directly as a matter of revelation. See *Edwards v. Aguillard*, 482 U.S. 578, 629-30 (1987) (“[T]o posit a past creator is not to posit the eternal and personal God who is the object of religious veneration. Indeed, it is not even to posit the ‘*unmoved mover*’ hypothesized by Aristotle and other notably nonfundamentalist philosophers.”); see also John Finnis, *Religion and State: Some Main Issues and Sources*, 51 AM. J. JURIS. 107 (2006) (arguing on a philosophical basis for the rationality of affirming the existence of God and the relevance of this affirmation to political considerations).

consequence, Wolterstorff's argument in favor of allowing religious reasons to be employed in lawmaking by attempting to collapse the relevant distinction between secular reasons and religious beliefs falters. Wolterstorff's view conflicts with traditional notions of the legal process as based on *some* sense of a shared natural rationality, even if, as he asserts, it is true that liberalism exaggerates the possibility of attaining a *single* shared set of rational principles.

In general then, good reason exists justifying the theoretical and legal distinction between religious beliefs and secular rationales, especially as it relates to enactment of coercive laws relating to matters of fundamental importance to fellow citizens.<sup>70</sup>

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<sup>70</sup>It is essential to note, however, as observed by Audi above, that this position does not exclude the possibility that religious beliefs as such can and should be causally instrumental in developing non-faith based rationales for political decision making by religious believers. See discussion *supra* Part I.B.1 on secular rationales and liberalism. For example, as Jürgen Habermas has argued:

A comprehensive view of state neutrality that at the same time is understood to guarantee similar freedoms for every citizen is irreconcilable with the reductive generalizing of a secularist viewpoint. Secularized citizens, insofar as they act in their role as such, should neither deny to religious standpoints the possibility of truth, nor contest the right of their believing fellow citizens to make contributions to public discourse in religious language. A liberal political culture can even expect from its secularized citizens that they will participate in efforts to translate relevant contributions from religious language into publicly accessible language.

Jürgen Habermas, *Stellungnahme*, <http://www.kath-akademie-bayern.de/contentserv/www.katholische.de/index.php?StoryID=195&PHPSESSID=f1a656418beff947dfecd567544e752a> (author's translation) (last visited Jan. 24, 2007).

Habermas's view here appears similar, at least in some general aspects, to that envisioned by the Vatican:

This is not a question of «confessional values» *per se*, because . . . ethical precepts are rooted in human nature itself and belong to the natural moral law. They do not require from those who defend them the profession of the Christian faith . . .

. . . .

. . . The fact that some of these truths may also be taught by the Church does not lessen the political legitimacy or the rightful «autonomy» of the contribution of those citizens who are committed to them, irrespective of the role that reasoned inquiry or confirmation by the Christian faith may have played in recognizing such truths. Such «autonomy» refers first of all to the attitude of the person who respects the truths that derive from natural knowledge regarding man's life in society, even if such truths may also be taught by a specific religion, because truth is one.

Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life* para. 5-6 (Nov. 21, 2002), *available at* [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20021124\\_politica\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html).

Some religious legal scholars, however, have objected to any demand for translation of religious thought into secular language as a basis for legitimate introduction of religious beliefs into coercive political conduct. Richard Garnett, for example, has commented concerning Habermas's view:

It sounds like, at the end of the day, the developments in Habermas's though[t] about religion have brought him only to the tired Rawlsian demand that religion translate itself, and remake itself, before it is admissible in public life. The author imposes a "criterion" for "religious belief systems" that hope to be "suitable players" in our new "universe[.]" To which we might respond, . . . "sez who?"

### 5. The Search for Public Reason

Assuming that the preceding discussion has provided at least a probable argument supporting the propriety of the epistemic restraint against the direct employment of religious beliefs in enacting coercive norms,<sup>71</sup> questions still exist about what type of secular rationales *can* adequately function as an appropriate basis for coercive laws.

#### a. *The Supreme Court's Mystery Passage*

In a certain sense, reflection upon the development of substantive due process analysis from *Griswold v. Connecticut* up through *Roe v. Wade* and beyond suggests that the Justices of the Supreme Court have not been deaf to political theory discussions concerning the demand to ground law in principles that must be acceptable to all rational citizens as such.

According to this account, it was finally in *Planned Parenthood of Se. Pa. v. Casey* that the Court succeeded in distilling in its pure form a non-debatable principle guiding substantive due process analysis, that is, the notion of “autonomy” or “liberty” as the pivotal concept encapsulating the essence of substantive due process rights. As the Court declared: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.”<sup>72</sup> Specifically referring to its prior case law, the Court noted that this liberty interest flows directly from its previous decisions.<sup>73</sup> It arises from the right of

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Habermas on Post-Secular Societies, [http://www.mirrorofjustice.com/mirrorofjustice/2005/09/habermas\\_on\\_pos.html](http://www.mirrorofjustice.com/mirrorofjustice/2005/09/habermas_on_pos.html) (Sept. 23, 2005, 10:29 EDT).

While one might respond first by observing that Garnett’s comments seem at odds with the general thrust of the Vatican Note indicating a distinction between religious beliefs as such and “natural ethics,” it may also be observed, in passing, that even if a demand for translation is old and “tired,” it is indubitably the case that, from a historical perspective, the only older and more tired demand would be that no translation be made, i.e., that religious convictions may be coercively imposed as such upon non-believing citizens.

<sup>71</sup>*See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (“Although a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”(footnote omitted)).

<sup>72</sup>*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>73</sup>*Id.*; *see also* CHARLES FRIED, *RIGHT AND WRONG* 146-47 (1978) (“What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person’s responsibility for the results of this self-determination we give substance to the concept of liberty.”); Charles Fried, *Correspondence, From Charles Fried*, 6 *PHIL. & PUB. AFF.* 288, 288 (1977) (stating that the concept of privacy embodies the “moral fact that a person belongs to himself and not to others nor to society as a whole”).

Likewise, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court stated:

That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman’s right to make that choice

human persons to make their own decisions about matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>74</sup>

Turning to the question of limitations applicable to such autonomous conduct, the *Casey* Court observed that if answers to the existential question facing each individual were dictated by the state—either positively or negatively—then the very nature of personal individuality and the rights that purportedly flow from it would be undermined: “Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.”<sup>75</sup>

Developing its thinking further about the conditions of autonomy and its permissible limitations, the Court in *Lawrence v. Texas* (arguably one of the most important substantive due process cases since *Casey*), described more particularly the sort of reasons that *cannot* function as a basis for limiting autonomy. In overruling its prior decision in *Bowers v. Hardwick* and striking down a Texas law prohibiting sodomy, the Court held not only that religious reasons must be excluded as a legitimate basis for enacting laws, but that non-religious, moral reasons are also an inappropriate basis for imposing limitations upon autonomy.

Although acknowledging that moral reasons proceed from “profound and deep convictions accepted as ethical and moral principles to which [persons] aspire and which thus determine the course of their lives,”<sup>76</sup> the Court held that such bases were improper because “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society . . . . ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”<sup>77</sup> In essence, moral reasons cannot justifiably be employed because citizens will inevitably reach contradictory positions about these matters. Since they are not in principle accessible to all, it is unfair to impose limitations on liberty based on such biased perspectives.

In sum, according to the *Casey-Lawrence* line of reasoning, although legal theorists, philosophers, and theologians may vehemently disagree about the purpose of human life or even about whether any such purpose exists, one principle that theorists in all fields would presumably agree upon is that human “persons,” as such, must be free to make decisions for themselves in these matters. Like Descartes’ “cogito ergo sum,” everything else may be doubted or denied, but the inherent natural connection between autonomy, personhood, and a right to self-determination cannot be rationally denied. Moral reasons, however, like religious reasons cannot be shared by all rational members of society, and thus provide an inappropriate basis for coercive limitation on others’ autonomy, at least with respect to matters of fundamental rights.

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freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

The Court of Appeals correctly invalidated the specified provisions of Pennsylvania’s 1982 Abortion Control Act. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

<sup>74</sup>*Casey*, 505 U.S. at 851.

<sup>75</sup>*Id.*

<sup>76</sup>*Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

<sup>77</sup>*Id.* (quoting *Casey*, 505 U.S. at 850).

*b. Rawls and Legitimate Reasons*

The operative philosophical underpinning of the statements in *Casey* and *Lawrence* thus parallels political conceptions similar to that developed by John Rawls in relation to his concept of public reason. Generally, such conceptions have been developed precisely in order to address the appropriate basis for determining “constitutional essentials” and delineating the parameters of “basic justice” in the context of a pluralistic society.

As Rawls describes his position, every institution has its own “reason,” i.e., a particular rational way of formulating its plans, putting its ends in an order of priority, and making decisions according to this ordering.<sup>78</sup> In a constitutional democracy, where the citizens themselves yield coercive political power over each other, Rawls proposes that such rational ordering must occur under a conception of “public” reason.<sup>79</sup>

The complication, however, is that an essential characteristic and goal of constitutional democracy itself is to preserve a plurality of incompatible “comprehensive doctrines.”<sup>80</sup> According to Rawls, the stability of the community in

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<sup>78</sup>JOHN RAWLS, *The Idea of Public Reason*, in POLITICAL LIBERALISM, *supra* note 1, at 212, 212-13 [hereinafter *The Idea of Public Reason*].

<sup>79</sup>*Id.* at 213. Public reason’s structure is definite and has five parts. These are, according to Rawls:

- (1) the fundamental political questions to which it applies; (2) the persons to whom it applies (government officials and candidates for public office); (3) its content as given by a family of reasonable political conceptions of justice; (4) the application of these conceptions in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; and (5) citizens’ checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity.

John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 767 (1997), reprinted in COLLECTED PAPERS 573, § 1.1, at 574-75 (Samuel Freeman ed., 1999) [hereinafter *The Idea of Public Reason Revisited*].

<sup>80</sup>See *The Idea of Public Reason Revisited*, *supra* note 79, at 766, reprinted in COLLECTED PAPERS, *supra* note 79, at 573. Rawls states:

The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some of these are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions.

*Fundamental Ideas*, *supra* note 1, at 3-4.

Distinguishing the treatment of religious belief, Rawls questions: “How is it possible for those holding religious doctrines, some based on religious authority, . . . to hold at the same time a reasonable political conception that supports a reasonable constitutional regime?” *The Idea of Public Reason Revisited*, *supra* note 79, at 780, reprinted in COLLECTED PAPERS, *supra* note 79, § 3.1, at 588. Compatibility demands that these religious doctrines accept a liberal political conception for the right reasons, and not merely as a *modus vivendi*. *Id.*, reprinted in COLLECTED PAPERS, *supra* note 79, § 3.1, at 588. Rawls holds that the constitutional regime is not stable if the adherents of religious doctrines accept democracy only as a *modus vivendi* to maintain civil peace, or if they accept the constitutional principles with only a very limited allegiance to them, prepared to disobey laws not in congruence with their positions. *Id.* at 780-81, reprinted in COLLECTED PAPERS, *supra* note 79, § 3.1, at 589. In order to achieve stability, adherents of religious doctrines must accept the fact that, except for endorsing a reasonable constitutional democracy, there is no other way to ensure the liberties of their own adherents.

such a situation depends upon the confidence of its members that they will be able to attain their own goals without imposition of divergent, comprehensive views of reality that they do not share. When such confidence erodes, the legitimacy of the state is put at risk. Citizens can no longer realize their own ideals as individuals but are unwillingly subjected to value systems that they hold to be directly repugnant to their own. To allow citizens to enact coercive laws based upon such incompatible comprehensive views would cut at the heart of the stability of the community itself and entail a type of enslavement or utilitarian subjection of the person.

The solution, according to Rawls, depends upon a theory of “political liberalism [which] applies the principle of toleration to philosophy itself.”<sup>81</sup> Rejecting the notion that in democratic voting one can virtuously vote in accordance with one’s own comprehensive view in all its particularity, Rawls notes that such a view fails to recognize the duty of civility owed to one’s fellow citizens based on an ideal of reciprocity. Reciprocity is understood as a “rights” theory because it gauges the quality of relations between citizens not in aggregate utilitarian terms, but by norms that define the free interaction of persons upon a reciprocal agreement concerning the benefits and burdens of the constitutional structure. The crux of this reciprocal agreement is that each citizen must be willing to impose upon others only those burdens that he or she would be reasonably willing to bear.<sup>82</sup>

Citizens, thus, are free and equal only to the extent that they agree to bear similarly the burdens and benefits of freedom. Reciprocity thus matches up with citizens’ awareness of a peculiar dilemma created by their comprehensive views. They recognize that comprehensive views involve beliefs and practices fundamental to their existence, that is, the very type of ideals they would desire the most freedom to implement into the structure of political life. At the same time, however, they recognize that they do not want their *own* freedom and comprehensive views impinged upon by others’ attempts to institutionalize their incompatible comprehensive ideals.<sup>83</sup>

Rawls believes that the only way to escape the inevitable conflict arising from the clash of incompatible views must be found in the development and employment of “public reason”:

[S]ince the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the

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They must recognize liberty of conscience and the principle of toleration, and Rawls suggests that these doctrines could formulate this idea by saying that such are the limits that God puts to our liberty. *Id.* at 782-83, reprinted in *COLLECTED PAPERS*, *supra* note 79, § 3.2, at 590-91.

<sup>81</sup>*Fundamental Ideas*, *supra* note 1, § 1.4, at 10.

<sup>82</sup>This, in general terms, captures Rawls notion of the “original position:” “[S]ome point of view, removed from and not distorted by the particular features and circumstances of the all-encompassing background frame-work, from which a fair agreement between persons regarded as free and equal can be reached.” *Id.* § 4.2, at 23.

<sup>83</sup>*See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies.”).

principles and policies they advocate and vote for can be supported by the political values of public reason.<sup>84</sup>

Specifically, Rawls limits the operation of “public reason” to those laws relating to “constitutional essentials” and questions of “basic justice” that arise out of an “overlapping consensus” of the community.<sup>85</sup> “[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”<sup>86</sup> Defining the character of these reasons more specifically, he states:

[On] matters of constitutional essentials and basic justice . . . we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial. . . .

. . . [I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth—nor to elaborate economic theories of general equilibrium, . . . if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, the political conception would not provide a public basis of justification.<sup>87</sup>

It is noteworthy that Rawls acknowledges that public reason need not be based only on those rational principals that all members of society actually *do* accept. Rather, it must be based on that set of rational principles that all member of society *would* accept as reasonable, that is, if the citizens acted on principles satisfying the test of public reason. Rawls summarizes this point as follows:

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<sup>84</sup>*Idea of Public Reason*, *supra* note 78, § 2.1, at 217.

<sup>85</sup>*Id.* § 2.1-.2, at 217-18. Rawls characterizes these political conceptions of justice as broadly liberal in character. By this he means three things: (1) they specify “certain basic rights, liberties, and opportunities;” (2) they assign a “special priority” to these rights, liberties, and opportunities; and (3) they affirm “measures” assuring “all citizens adequate all-purpose means to make effective use” of their basic liberties and opportunities. *Fundamental Ideas*, *supra* note 1, § 1.2, at 6. See also *The Idea of Public Reason Revisited*, *supra* note 79, at 776, reprinted in *COLLECTED PAPERS*, *supra* note 79, § 2.1, at 581-82.

Rawls also explains that these conceptions are “political” for three main reasons: (1) they are “framed to apply solely to the basic structure of society, its main political, social, and economic institutions as a unified scheme of social cooperation;” (2) they are “presented independently of any wider comprehensive religious or philosophical doctrine;” and (3) they are “elaborated in terms of fundamental political ideas viewed as implicit in the public political culture of a democratic society.” *The Idea of Public Reason*, *supra* note 78, § 4.1, at 223.

<sup>86</sup>*Id.* § 2.1, at 217.

<sup>87</sup>*Id.* § 4.3, at 224-25.

Democracy involves . . . an equal share in the coercive political power that citizens exercise over one another by voting and in other ways. As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another in terms each *could reasonably expect* that others might endorse as consistent with their freedom and equality.<sup>88</sup>

### C. Plato's Cave: The Good, and Public Reason

In important respects, the project of public reason, as mirrored in both of the Supreme Court's *Casey* and *Lawrence* opinions and the political theories of Audi and Rawls, follows a model of reasoning and political insight suggested by Plato in his *Republic*.

#### 1. The Philosopher King and the Ordered Polis

Consistent with his general theory of the separate forms and the participation of all beings in those forms, Plato maintained that once the universal, separate forms of things could be recognized apart from their determinate instantiation in individual things, those pure concepts, purged of all particularities, could then be applied to understand correctly the essence and proper functioning of all other individualized things.

In its most familiar articulation in *The Republic*, Plato explains this epistemological-metaphysical model in the context of his "divided line" analogy of reasoning and the concept of "dialectic." Observing a similarity between material things, their models, and their images, e.g., in sculptures and reflections in water and mirrors, Plato proposes that a similar analogy exists between concrete individual things understood as images and reflections of separate intelligible forms or ideas.<sup>89</sup> By a process of dialectical reasoning, the philosopher is able to move from mere reflections of things to the concrete things themselves, and then from the concrete entities up to the pure intelligible ideas from which all intelligibility originates as a first principle of all other things.<sup>90</sup>

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<sup>88</sup>*Id.* § 2.2, at 217-18 (emphasis added).

<sup>89</sup>See PLATO, *REPUBLIC* (c. 360 B.C.), reprinted in *THE COLLECTED DIALOGUES OF PLATO* 575, bk. VI, 510d-e, at 746 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., Princeton Univ. Press 1961) ("The very things which they mould and draw, which have shadows and images of themselves in water, these things they treat in their turn as only images, but what they really seek is to get sight of those realities which can be seen only by the mind.").

<sup>90</sup>*Id.* bk. VI, 510b, 511b-c, at 745-46. Plato asserts:

By the distinction that there is one section of it which the soul is compelled to investigate by treating as images the things imitated in the former division, and by means of assumptions from which it proceeds not up to a first principle but down to a conclusion, while there is another section in which it advances from its assumption to a beginning or principle that transcends assumption, and in which it makes no use of the images employed by the other section, relying on ideas only and progressing systematically through ideas. . . .

. . . .

Applying this dialectic model, Plato develops the famous “cave” analogy, wherein the philosopher purges himself from the vision of mere images by escaping into the sunlight of the day, whereupon he grasps the true form of the “Good.”<sup>91</sup> Having received that vision of the Good, the philosopher has the duty to return to the “cave” to order properly the reciprocal duties necessary for civic order:

It is the duty of us, the founders, . . . to compel the best natures to attain the knowledge which we pronounced the greatest, and to win to the vision of the good, to scale that ascent, and when they have reached the heights and taken an adequate view, we must not allow what is now permitted.

. . . .

That they should linger there . . . and refuse to go down again . . . and share their labors and honors . . . .

. . . .

. . . [T]he law is not concerned with the special happiness of any class in the state, but is trying to produce this condition in the city as a whole, harmonizing and adapting the citizens to one another . . . and requiring them to impart to one another any benefit which they are severally able to bestow upon the community, and that it itself creates such men in the state . . . with a view to using them for the binding together of the commonwealth.<sup>92</sup>

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. . . [B]y the other section of the intelligible, I mean that which the reason itself lays hold of by the power of dialectics, treating its assumptions not as absolute beginnings but literally as hypotheses, underpinnings, footings, and springboards so to speak, to enable it to rise to that which requires no assumption and is the starting point of all, and after attaining to that again taking hold of the first dependencies from it, so to proceed downward to the conclusion, making no use whatever of any object of sense but only of pure ideas moving on through ideas to ideas and ending with ideas.

*Id.*

<sup>91</sup>*Id.* bk. VII, 514a-517d, at 747-50 (providing a general description of the cave analogy).

In conclusion, Plato observes:

But, at any rate, my dream as it appears to me is that in the region of the known the last thing to be seen and hardly seen is the idea of good, and that when seen it must needs point us to the conclusion that this is indeed the cause for all things of all that is right and beautiful, giving birth in the visible world to light, and the author of light and itself in the intelligible world being the authentic source of truth and reason, and that anyone who is to act wisely in private or public must have caught sight of this.

*Id.* bk. VII, 517b-c, at 749-50.

<sup>92</sup>*Id.* bk. VII, 519d-520a, at 751-52. The philosopher states:

Down you must go then, each in his turn, to the habitation of the others and accustom yourselves to the observation of the obscure things there. For once habituated you will discern them infinitely better than the dwellers there, and you will know what each of the “idols” is and whereof it is a semblance, because you have seen the reality of the beautiful, the just and the good.

## 2. Autonomy as Public Reason: The Ideal Form of Civic Good

Consideration of constitutional substantive due process analysis as developed in *Casey* and *Lawrence* illustrates the logical connections between the Platonic model of political dialectic described above and the conception of public reason.

The notion of autonomy as a guiding principle of substantive due process is derived, on the one hand, from a recognition of the irreducible, differing ways in which human persons may exercise their freedom in the attempt to realize or discover meaning in their lives, and on the other, by considering the detrimental impact on that self-realization that results from coerced imposition on that freedom of disputed religious or philosophical conceptions of the meaning of life. By abstracting from all possible modes of human conduct, and idealizing them under the conception of autonomy, the Court identifies a property constitutive of every person's identity as such, that is, as a unique individual with governance over their own life and, in a particular sense, a *sui juris*.

Autonomy thereby becomes a formal property of civic respect when rooted in a notion of reciprocity whereby autonomy becomes the guiding norm of substantive due process. Limitations on such an ideal, however, when based on religious or moral grounds, unjustifiably interfere with civic reciprocity and formality. As Rawls observes in defining the scope of public reason in relation to constitutional essentials and basic justice: "we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth— . . . if these are in dispute. . . . Otherwise, the political conception would not provide a public basis of justification."<sup>93</sup>

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*Id.* bk. VII, 520c, at 752.

Echoing back to the early methodological plan of the *Republic*, Plato had explicitly formulated his methodology of political insight by seeking to understand the form of justice as it exists in the state, so that it would then be possible to arrive at a notion of justice applicable to individuals:

[I]f we found some larger thing that contained justice and viewed it there, we should more easily discover its nature in the individual man. And we agreed that this larger thing is the city, and so we constructed the best city in our power, well knowing that in the good city it would of course be found. What, then, we thought we saw there we must refer back to the individual and, if it is confirmed, all will be well. But if something different manifests itself in the individual, we will return again to the state and test it there and it may be that, by examining them side by side and rubbing them against one another, as it were from the fire sticks we may cause the spark of justice to flash forth, and when it is thus revealed confirm it in our own minds.

*Id.* bk. IV, 434d-435a, at 676.

This is possible, argued Plato, precisely because the existence of justice in the state must arise from its existence in the individuals who make up the polis:

Is it not . . . impossible for us to avoid admitting . . . that the same forms and qualities are to be found in each one of us that are in the state? They could not get there from any other source. It would be absurd to suppose that the element of high spirit was not derived in states from the private citizens who are reputed to have this quality . . . .

*Id.* bk. IV, 435e, at 677.

<sup>93</sup>*Idea of Public Reason*, *supra* note 78, § 4, at 224-25; *see also supra* note 87 and accompanying text.

Connecting the dots between *Casey* and *Lawrence* thus reveals a model of reasoning analogous to the conception of Platonic dialectic, moving from the variegated and divergent practices of human conduct to a pure form of autonomy embracing and explaining all those differences. Similar to the pure notion of the Good that Plato abstracts from all particulars in the dialectic, it is precisely the bare, formal notion of autonomy which beats at the heart of substantive due process, ordering the relations among citizens. Reflecting upon its holdings in prior cases, the court in *Casey* visualizes a set of prior assumptions that culminate in an overarching insight about the most fundamental character of the human person and a corresponding legal right to self-determination according to that personal nature.<sup>94</sup>

Having finally located the original source of this privacy right in the ideal of autonomy, and no longer encumbered with its manifestation in any particular concrete context, the Court is able to return to particular cases applying that universal and instantiating it. In *Lawrence*, the Court analyzes the particular form of conduct in light of the ideal of autonomy isolated in *Casey* and considers whether the practice instantiates a form of autonomous liberty, in which case the practice must be protected. Justice Kennedy reasons in *Lawrence*:

In explaining the respect the Constitution demands for the autonomy of the person . . . , we stated as follows:

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.<sup>95</sup>

As stated, the reasoning process reflects precisely the dialectic described by Plato:

[B]y . . . the intelligible I mean that which . . . reason itself lays hold of by the power of dialectics, treating its assumptions . . . as . . . springboards so to speak, to enable it to rise to that which requires no assumption and is the starting point of all, and after attaining to that . . . so to proceed downward to the conclusion, making no use whatever of any object of sense but only of pure ideas moving on through ideas to ideas and ending with ideas.<sup>96</sup>

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<sup>94</sup>See *supra* notes 73-75 and accompanying text.

<sup>95</sup>*Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>96</sup>PLATO, *supra* note 89, bk. VI, 511b-c, at 746. See also *supra* text accompanying notes 88-91 for a more detailed elaboration of “dialectic” in Plato.

Having attained in *Casey* the an unadulterated insight into the full nature of the substantive due process privacy right, Court is now able to apply reflexively that principle to this novel issue. Through insight into the fact that homosexual conduct itself constitutes simply another mode of autonomously defining one's existence and life's meaning, the Court holds that such conduct must be protected under substantive due process.

#### D. The Critique of Pure Public Reason

##### 1. Autonomy and "Ordered Liberty"

The preceding account of the dialectical employment of a constitutional "autonomy" principle, as isolated in *Casey* and applied in *Lawrence*, no doubt offers logical completeness, simplicity and coherence. Such a conception is naturally appealing to the extent that it offers an elegant foundation for the defense of important individual rights against governmental intrusion.<sup>97</sup>

Consideration of the etymological roots of the very concept of "autonomy" itself, however, suggests theoretical difficulties when applied as a principle of substantive due process. The term derives from the Greek adjective 'autonomos' which is, in turn, constructed from the notions of "self" (*autos*) and "law" (*nomos*).<sup>98</sup> In its functional linguistic reference, the concept denotes simply the operation of an entity exercising "control" over itself, i.e., a self-directing or self-guiding being.

The problem that immediately suggests itself is the inaptness of this term to serve as a descriptor for a political principle that purports to regulate a *set* (and a rather large set at that) of self-determining beings. It is not clear how the concept of "autonomy" standing alone offers any normative content applicable to the ordering of multiple individual "autonomies" with each other—each with their own potentially conflicting modes of self-directing conduct. The antinomy between the concept of a solitary "self" lying at the heart of the meaning of autonomy and its introduction as a principle of substantive due process "law" intended to guide the reciprocal relations of all citizens toward public order is, at a minimum, problematic if not an outright oxymoron.<sup>99</sup>

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<sup>97</sup>See, e.g., Nancy Levit, *Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality*, 71 CHI.-KENT L. REV. 947, 953 (1996). Levit states:

The criteria used herein to evaluate the innovative successes of critical theories . . . are criteria of rationality. These criteria for theory-building are generally accepted in the sciences and social sciences. The criteria include: the cumulative, comprehensive, and converging evidence[,] . . . explanatory power, depth or constructivity; fertility or exploratory power; verifiability and falsifiability; social-technical power; and simplicity or elegance.

. . . .

. . . [S]implicity or elegance refers to a theory being distinguished as systematically unified and unifying, one which brings together the general and the particular, and which is largely devoid of special circumstances.

*Id.* at 953-54.

<sup>98</sup>See 1 THE OXFORD ENGLISH DICTIONARY 807 (2d ed. 1989) ("autonomous . . . f. Gr. ['autonomos'] making or having one's own laws, independent (f. [auto]- self, own + [nomos] law) + -OUS").

<sup>99</sup>I am indebted to Thomas A. Cavanaugh for help in developing this line of argument.

In fact, the inability of the concept of autonomy alone to provide a functional standard of substantive due process is demonstrated when considered against the concept of “ordered liberty”—another constitutive ideal associated with substantive due process. As described by Justice Harlan, “ordered liberty” denotes the contours of substantive due process in an “organized society”; that is, it references that the extent of political liberty must be construed specifically as the synthesis between the right of an individual to act in accord with their own liberty with the necessary strictures imposed upon that right in view of the right of other citizens to pursue their liberty:

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . No formula could serve as a substitute, in this area, for judgment and restraint.

. . . .

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no “mechanical yardstick,” no “mechanical answer.” The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. . . .

“The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.”<sup>100</sup>

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<sup>100</sup>*Poe v. Ullman*, 367 U.S. 497, 542, 44-45 (1961) (Harlan, J., dissenting) (quoting *Rochin v. California*, 342 U.S. 165, 170-71 (1952); see also *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)). In *Romeo*, the Court stated:

In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance “the liberty of the individual” and “the demands of an organized society.” In seeking this balance in other cases, the Court has weighed the individual’s interest in liberty against the State’s asserted reasons for restraining individual liberty.

*Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

## 2. The Analytic Limits of Autonomy

Consistent with the demand of public reason, it is clear that limitations on autonomy would themselves be required to satisfy the criteria of public reason, i.e., they must be limitations that “all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”<sup>101</sup> As Audi echoes this point: “A liberal state exists in good part to accommodate a variety of people irrespective of their special preference for one kind of life over another; it thus allows coercion only where necessary to preserve civic order and not simply on the basis of majority preference.”<sup>102</sup> While the substantive due process autonomy principle of *Casey* and *Lawrence* gives rightful recognition to the importance of self-determination in the constitution of personhood—a right that indubitably should be in an appropriate way protected by the law—it is questionable whether the concept of “autonomy” can offer out of its own resources any limitation upon itself that is consistent with the conception of public reason and yet adequate for securing ordered liberty.

### a. Rawls' Liberty Principle

For Rawls, liberty stands as the first principle in his systematic political conception of justice as fairness. This first principle, which Rawls assumes would be chosen in the “original position,” is articulated in his *Theory of Justice*: “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>103</sup> In describing more particularly the mode to be employed in devising such limitations, he concedes that liberty can be limited only “by the common interest in public order and security.”<sup>104</sup> The determination is to be made only when “there is a reasonable expectation that not doing so will damage the public order.”<sup>105</sup>

Thus, at the foundation of Rawls' conception of liberty is the acknowledgement that it must be subject to limitation. Any such limits, however, argues Rawls, can only be made “for the sake of liberty itself.”<sup>106</sup> In applying this principle, he proposes that all “basic liberties must be assessed as a whole, as one system,”<sup>107</sup> wherein the parameters of any one basic liberty depends upon the specification of all the rest. Although recognizing the unavoidably abstract nature of his position,<sup>108</sup> Rawls argues that the limitation of basic liberty is only justifiable if done “to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way.”<sup>109</sup>

<sup>101</sup>*Idea of Public Reason*, *supra* note 78, § 2, at 217.

<sup>102</sup>AUDI & WOLTERSTORFF, *supra* note 36, at 16-17.

<sup>103</sup>JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

<sup>104</sup>*Id.* at 212.

<sup>105</sup>*Id.* at 213.

<sup>106</sup>*Id.* at 204.

<sup>107</sup>*Id.* at 203.

<sup>108</sup>*Id.* at 205 (“These remarks about the concept of liberty are unhappily abstract.”).

<sup>109</sup>*Id.* at 204.

Using liberty of conscience as an example, Rawls suggests that such determinations must be made from the “original position.”<sup>110</sup> Accordingly, in keeping with his general methodology, such limitations must themselves pass muster under public reason. Such limitations must be based only on “evidence and ways of reasoning acceptable to all.”<sup>111</sup> While matters of dogma or faith could never justify limitation on liberty—because these would not in principle be acceptable to all<sup>112</sup>—any limitation based on a comprehensive doctrine that cannot be reconciled with public reason must also be excluded.

*b. Kant’s Freedom Principle*

Rawls’ attempt proceeds generally according to an analytic mode of argument, that is, by means of a conceptual unpacking of the implications of “liberty” as a political ordering principle. Citizens in the original position are to distill an inherent limitation to its exercise based on principles that any rational citizen could accept regardless of the role they are to play in society. Specifically, the limitation on an individual’s exercise of autonomy is logically restricted whenever it unjustifiably interferes with the autonomy of another citizen. If autonomy is to serve as a comprehensive, overlapping account of our general relations, it is obvious that individual autonomy will necessarily come into direct conflict with the autonomy of others. Those competing “autonomies,” irrespective of their particular form, will thus have to be “conceptually” integrated with one another. Such an analysis introduces limitations upon the meaning of autonomy in its employment as a concept of public reason.

This attempt to describe the limitations upon autonomy required for public order, both in form and substance, appears to follow closely a Kantian model of practical thinking. In terms of form, it proceeds from a reflection on the logical implications of a concept of reason itself, rather than any “empirical” argument concerning what should limit autonomy. As Kant remarked concerning the method of any true theory of obligation: “[T]he ground of obligation . . . must . . . be sought . . . a priori solely in the concepts of pure reason . . .”<sup>113</sup> As to substance, of course, Kant believed that autonomy, as opposed to heteronomy, was the only mode of conduct appropriate for a rational being as such.<sup>114</sup> It is precisely the concept of an agent acting

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<sup>110</sup>*Id.* at 212-13.

<sup>111</sup>*Id.* at 213.

<sup>112</sup>*Id.* at 216 (“Where the suppression of liberty is based upon theological principles or matters of faith, no argument is possible. The one view recognizes the priority of principles which would be chosen in the original position whereas the other does not.”).

<sup>113</sup>IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 5 (Lewis White Beck trans., Macmillan Publ’g Co. 1985) (1785).

<sup>114</sup>By “autonomy,” Kant understands a person acting not from any conditional heteronomous principle, but a will acting according to its own maxim, namely, one that has as its object itself considered as giver of universal laws:

This principle of humanity and of every rational creature as an end in itself is the supreme limiting condition on freedom of the actions of each man. . . .

By this principle all maxims are rejected which are not consistent with the universal lawgiving of will. The will is thus not only subject to the law but subject in

autonomously that yields the categorical imperative:<sup>115</sup> a law governing autonomy that simultaneously demands integration with the concept of allowing for other's autonomy as rational agents or "ends."<sup>116</sup>

Specifically applying the categorical imperative to one's external conduct in a political community composed of other rational ends, Kant states: "[S]o act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."<sup>117</sup> Thus, clearing the road that Rawls would eventually follow, Kant posits an inherent delimitation of the contours of freedom based upon the analytic requirements of its conceptualization when applied to a corporate body of rational, free individuals. "[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws . . . , coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws . . . ."<sup>118</sup> Any interpretation of the meaning of autonomy that would allow for an interference with others' autonomy contradicts the categorical imperative to act according to universalized principles. Such "autonomous" conduct would properly be prohibited because it is not in keeping with the logical extension of the meaning of autonomy rationally understood as a law of persons.

An illustrative application is found in Kant's argument against suicide.<sup>119</sup> In committing suicide a person uses his or her autonomy or freedom in a way that destroys that very autonomy:

[I]f I kill myself, I use my powers to deprive myself of the faculty of using them. That freedom, the principle of the highest order of life, should annul itself and abrogate the use of itself conflicts with the fullest use of freedom. But freedom can only be in harmony with itself under certain conditions; otherwise it comes into collision with itself.<sup>120</sup>

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such a way that it must be regarded also as self-legislative and *only for this reason* as being subject to the law (of which it can regard itself as the author).

*Id.* at 49 (emphasis added).

<sup>115</sup>*Id.* at 39 ("There is, therefore, only one categorical imperative. It is: Act only according to that maxim by which you can at the same time will that it should become a universal law.").

<sup>116</sup>*Id.* at 53. Kant states:

Reason, therefore, relates every maxim of the will as giving universal laws to every other will and also to every action toward itself; it does so not for the sake of any other practical motive or future advantage but rather from the idea of the dignity of a rational being who obeys no law except that which he himself also gives.

*Id.*

<sup>117</sup>IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 56 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797), *quoted in* Richard W. Wright, *Right, Justice and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 159, 163 (David G. Owen ed., 1995).

<sup>118</sup>*Id.* at 57, *quoted in* Wright, *supra* note 117, at 164.

<sup>119</sup>*See* Michael J. Seidler, *Kant and the Stoics on Suicide*, 44 *J. HIST. IDEAS* 429 (1983) (providing discussion of varying arguments and their arguable weaknesses).

<sup>120</sup>IMMANUEL KANT, *LECTURES ON ETHICS* 123 (Louis Infield trans., Hackett Pub. 1963) (1924); *see also* Seidler, *supra* note 119, at 451 ("Kantian freedom is not merely the absence of internal or external constraints . . . in carrying out the moral law; rather, through its link (or

Suicide is thus analytically determined to be impermissible because it contradicts the fundamental maxim to act autonomously, i.e., to have as a maxim of your will an object that can be a universal law. Civic laws against “autonomously” destroying autonomy are rationally demanded because “coercion . . . (as a *hindering of a hindrance to freedom*) is consistent with freedom.”<sup>121</sup>

### 3. The Antinomy of Autonomy as Public Reason

Just as Rawls conception of the notion of autonomy parallels in relevant ways Kant’s analytic theory of liberty, so too the weakness of Rawls position falls subject to the familiar critique of Kantian ethics.<sup>122</sup> With perhaps the exception of suicide, the determination about whether any particular form of conduct would constitute “a use of freedom that is a hindrance to freedom,” or in Rawlsian terms, whether such a limit on autonomy was necessary for the “for the sake of liberty itself,” remains substantively underivable.

Hegel first articulated the “empty formalism” critique against Kant as follows:

However essential it is to give prominence to the pure unconditioned self-determination of the will . . . owing to the thought of its infinite autonomy, still . . . without . . . transition to . . . ethics, . . . this gain [is] an empty formalism . . . . From this point of view, no immanent doctrine of duties is possible . . . . [I]f the definition of duty is taken to be the absence of contradiction, formal correspondence with itself—which is nothing but abstract indeterminacy stabilized—then no transition is possible to the specification of particular duties nor, if some such particular content for acting comes under consideration, is there any criterion in that principle for deciding whether it is or is not a duty. On the contrary, by this means any wrong or immoral line of conduct may be justified.<sup>123</sup>

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identity) with rational autonomy, it is the very root or source of the moral law itself.”). Kant’s lectures date from 1775 to 1780.

<sup>121</sup>KANT, *supra* note 117, at 57, *quoted in* Wright, *supra* note 117, at 164.

<sup>122</sup>See G.C. Field, *Kant’s First Moral Principle*, 41 MIND 17, 19 (1932) (“The notion of the test of universalisation as a practical criterion has been unanimously rejected by the critics, and doubtless with good reason. The arguments against it are probably familiar to every student in the elementary stages of moral philosophy.”).

<sup>123</sup>GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT § 135, at 89 (T.M. Knox trans., Clarendon Press 1952) (1821) (Remark).

While . . . the outlook of Kant’s philosophy is a high one in that it propounds a correspondence between duty and rationality, still we must notice here that this point of view is defective in lacking all articulation. The proposition: ‘Act as if the maxim of thine action could be laid down as a universal principle’, would be admirable if we already had determinate principles of conduct. That is to say, to demand of a principle that it shall be able to serve in addition as a determinant of universal legislation is to presuppose that it already possesses a content. Given the content, then of course the application of the principle would be a simple matter. In Kant’s case, however, the principle itself is still not available and his criterion of non-contradiction is productive of nothing, since where there is nothing, there can be no contradiction either. *Id.* § 135, at 253 (Gans Addition).

Hegel observes that an analytical inquiry that professes to offer self-extracting, universally valid moral truths inevitably fails to offer any basis for developing specific norms for determining permissible action.

Along similar lines of critique, the quasi-analytic treatment of autonomy suggested by Rawls fails to yield an adequate account of the limitations upon autonomy that any concrete state of affairs would demand. Ordered liberty cannot be understood to be constituted in any practically relevant sense through a purely conceptual limitation on the abstract reciprocity of autonomy between citizens. No matter how obscure the language, to assert that liberty is permissible unless it interferes with liberty,<sup>124</sup> or that autonomy is permissible unless it interferes with autonomy,<sup>125</sup> is nothing more than a tautology, true but unhelpful. An adequate theory of ordered liberty must introduce independent normative content. It must identify specific sorts of autonomous actions that do or do not constitute legitimate burdens upon liberty, or impose unjustified harms to public order. Mere overlapping consensus with respect to a general rational conception of justice as fairness—where fairness is understood precisely as liberty *restrained* only by the naked “categorical” demands of public reason—would simply be vacuous as a standard for devising any actual, concrete public order.

The difficulty arises from the fact that any rational principle that *could* be forwarded as a valid *specific* limitation of autonomy would arguably violate the demands of public reason excluding all comprehensive, idiosyncratic views of what is good or bad.<sup>126</sup> Similar to the well-trod critiques of Kant’s categorical imperative founded upon the demand for universalizing norms, public reason seems unable to yield little, if anything, in terms of practical substantive content.

These considerations support the conclusion that the very ideal of public reason—as promising to furnish a conception of basic justice all citizens could agree with—inevitably begs the question about the meaning of ordered liberty from the beginning. Apart from public reason’s bald claim, no evident rationale supports its grandiose postulation that a reductive abstraction of all citizens’ rational political values and practices bearing on ordered liberty could yield a consensus that would, in any meaningful, i.e., *practical* way, be employed in bringing about such a state of affairs.<sup>127</sup>

The question of whether particular exercises of autonomy threaten civic order or not, inevitably demands introduction of particular normative principles; these are neither self-evident to all nor self-generating from the concepts of autonomy or liberty. Substantive due process decisions deal with specific forms of conduct, specific rights and obligations, specific benefits and harms, and, as such, inevitably draw in citizens’ comprehensive evaluations concerning how these diverse forms of conduct impact upon the conservation of public order. While undoubtedly some very general commonalities might be found among citizens’ varying conceptions of

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<sup>124</sup>See *supra* Part I.D.2.a for Rawls’ argument.

<sup>125</sup>See *supra* Part I.D.2.b for Kant’s argument.

<sup>126</sup>See *supra* note 87 and accompanying text for definition. For arguments against public reason, from a communitarian critique, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

<sup>127</sup>See *Idea of Public Reason*, *supra* note 78, § 5, at 227-30.

the paradigm of public order, such generalizations would, precisely in their abstraction, provide an insufficient basis for specifying *any* particular citizen's conception of ordered liberty, much less instantiating an actual public order that *all* citizens' could in principle agree upon.<sup>128</sup> Public order is not an abstract state of affairs, but a concrete, more or less determinate normative state of citizens' relative rights and obligations.

The attempt to draw out an adequate theory of substantive due process from a public reason concept of autonomy is destined to fail, both with respect to its pledge to furnish a foundation for civil rights and as a basis for limiting them.<sup>129</sup> Such an approach is deficient because it attempts from its implausible "original position" to describe conditions necessary for achieving a concrete political state of affairs (reciprocal autonomy and ordered liberty) by prescinding from all individualizing accounts. In so doing, however, it inexorably but erroneously ends up treating those states of affairs as if they *were* abstract ideals.

Conceptions of "autonomy" or "ordered liberty" must properly be understood to refer not to abstractions, but to differing determinate conceptions of civic order. These, of course, are inescapably subject to the selfsame clash of individual views as all other aspects of existence dependent upon comprehensive human views. Simply stated, public reason fails because it dismisses the depth and character of the very political pluralism which it purportedly mediates.<sup>130</sup> By attempting to refine the

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<sup>128</sup>This thesis does not exclude the conclusion that, from an objective point of view, optimal forms of conduct conducive to human flourishing exist, nor does it undercut arguments that a universal set of moral principles exist that are, in principle, knowable by all human persons. *See infra* note 130. The thesis does propose, however, that coming to "know" or "recognize" those specific forms of conduct and such moral norms is not intuitive, but demands satisfaction of a more complex and contingent set of conditions. *See, e.g.,* Martin Rhonheimer, *The Cognitive Structure of the Natural Law and the Truth of Subjectivity*, 67 THOMIST 1, 39-44 (2003) (discussing the complexity of knowing the particular propositions of the "natural law").

<sup>129</sup>*See supra* Part I.C.2 discussing the role of the conception of autonomy in both generating substantive due process rights and limiting those rights by extension of the concept based solely on the citizens' reciprocal autonomy.

<sup>130</sup>In critiquing and ultimately rejecting the concept of public reason, I limit my discussion primarily to Rawls' conceptions of public reason and its realization on a "populist" and not "ideal" understanding. As Joseph Raz observes: "[P]olitical principles must be accessible to people as they are. . . . Politics must take people as they come and be accessible to them, capable of commanding their consent without expecting them to change in any radical way." Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL & PUB. AFF. 3, 46 (1990). As Christopher Eberle describes this sense of public reason,

populist conceptions of public justification resist *idealizing* the members of the public: they resist identifying a public justification with what citizens *could* or *would* accept if they were to enjoy certain moral or epistemic desiderata, that is, if they found themselves circumstanced very differently from the way they do in fact.

EBERLE, *supra* note 68, at 200.

Thus, present discussion does not apply to descriptions of versions of *ideal* public reason that have been offered that avoid both the preceding critique of Rawls' overly vacuous conception of public good and that are not proposed as "populist" conceptions of public reason. My thesis does not require, and is in fact entirely consistent with, the possibility of an alternative form of practical public reason, i.e., with positing the existence of particular shared principles of specific principles of practical reason that all human persons would possess

conceptual meaning of ordered liberty to a level of purity satisfying the demands of public reason, Rawls idealizes “ordered liberty” out of existence. Public reason does not so much explain the conditions necessary for autonomy and ordered liberty as explain them away.

### III. PUBLIC OR PRACTICAL REASON?

#### A. Aristotle's Racetrack: The Good and Practical Reason

The preceding discussions have posited a theoretical connection between the Platonic dialectic and the insufficiency of public reason theories to provide an adequate account of political deliberation. In confirmation of this argument, and as a suggestive guide for development of a more adequate theory, the following section examines Aristotle's critique of the Platonic dialectic and his alternative theory of practical political reasoning.

#### 1. Rejection of the Ideal Form of Good

In the *Nicomachean Ethics*, Aristotle—though himself a member of Plato's Academy for many years—distances<sup>131</sup> himself from the *Republic's* model of practical dialectic as dependent upon a vision of the Ideal Form of the Good.<sup>132</sup> In questioning the particular good or end sought by political science (understood by Aristotle as the most comprehensive and important science),<sup>133</sup> he raises for consideration the view of some who propose that “there is another [good] which is

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under more or less *ideal* epistemic and formative circumstances. *See generally* Robert P. George & Christopher Wolfe, *Natural Law and Liberal Public Reason*, 42 AMER. J. JURIS. 31 (1997).

<sup>131</sup>Aristotle states:

We had perhaps better consider the universal good and discuss thoroughly what is meant by it, although such an inquiry is made an uphill one by the fact that the Forms have been introduced by friends of our own. Yet it would perhaps be thought to be better, indeed to be our duty, for the sake of maintaining the truth even to destroy what touches us closely, especially as we are philosophers; for, while both are dear, piety requires us to honour truth above our friends.

ARISTOTLE, *NICOMACHEAN ETHICS* (c. 350 B.C.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729, bk. I, ch. 6, 1096a11-16, at 1732 (Jonathan Barnes ed., W. D. Ross & J. O. Urmsen trans., Princeton Univ. Press 1984). *See, e.g.*, Hellmut Flashar, *The Critique of Plato's Theory of Ideas in Aristotle's Ethics* (1965), *reprinted in* 2 ARTICLES ON ARISTOTLE 1 (Jonathan Barnes et. al. eds., 1977).

<sup>132</sup>*See* discussion *supra* Part I.C.1 on the vision of the Good in Plato.

<sup>133</sup>Aristotle offers:

[S]ince politics uses the rest of the sciences, and since, again, it legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good for man. For even if the end is the same for a single man and for a state, that of the state seems at all events something greater and more complete both to attain and to preserve; for though it is worth while to attain the end merely for one man, it is finer and more godlike to attain it for a nation or for city-states. These, then, are the ends at which our inquiry, being concerned with politics, aims.

ARISTOTLE, *supra* note 131, bk. I, ch. 2, 1094b3-12, at 1729-30.

good in itself and causes the goodness of all these [other things] as well”<sup>134</sup> and who therefore propose that a proper ordering of political affairs requires a vision of that Idea.<sup>135</sup> Aristotle, though noting the position’s “plausibility,” observes that, as a matter of fact, it is contrary to actual practice. None of the sciences or arts proceeds on such a model.<sup>136</sup> Instead, each science and art has its own specific end and object of investigation, while none of them make use of the abstract “[I]dea [of] Good” in pursuing knowledge about its subject.<sup>137</sup>

To justify this fact, Aristotle observes that among the goods aimed at by human activity, some are sought for their own sakes (e.g., intelligence, vision, and certain other pleasures and honors), while others are sought as means to those objects. But, Aristotle observes, if actions thought to be goods in themselves are good only because they participate in *another* goodness, the “Form of Goodness,” then *that* idea must be the good in itself, and those other objects would be pursued only insofar as they participate in *it*. If this is true, however, Aristotle points out, the conception of the good would have no substantive content, and hence no meaning: “What sort of goods would one call good in themselves? . . . [I]s nothing other than the Idea good in itself? In that case the Form will be empty.”<sup>138</sup>

If, on the other hand, as appears to be the case in the sciences and arts, the other objects or actions are correctly judged to be goods in themselves, they cannot be understood *as* good by virtue of a single concept or Idea of Good. Rather, the meaning of “goodness” must be distinct and described with particularity for each art or inquiry. The general concept of the Good, even if it obtained, would be practically useless.<sup>139</sup>

<sup>134</sup>*Id.* bk. I, ch. 4, 1095a27-28, at 1731.

<sup>135</sup>“[S]ome one might think it worth while to have knowledge of it with a view to the goods that *are* attainable and achievable; for, having this as a sort of pattern we shall know better the goods that are good for us, and if we know them shall attain them.” *Id.* bk. I, ch. 6, 1096b35-1097a3, at 1733.

<sup>136</sup>“This argument . . . seems to clash with the procedure of the sciences . . . . Yet that all the exponents of the arts should be ignorant of, and should not even seek, so great an aid is not probable.” *Id.* bk. I, ch. 6, 1097a3-4, 6-7, at 1733.

<sup>137</sup>*Id.* bk. I, ch. 6, 1096b20, at 1733. Aristotle asserts:

[A]ll of these, though they aim at some good and seek to supply the deficiency of it, leave on one side the knowledge of *the* good. . . . It is hard . . . to see how a weaver or a carpenter will be benefited in regard to his own craft by knowing this ‘good itself’, or how the man who has viewed the Idea itself will be a better doctor or general thereby. For a doctor seems not even to study health in this way, but the health of man, or perhaps rather the health of a particular man; for it is individuals that he is healing.

*Id.* bk. I, ch. 6, 1097a4-13, at 1733-34.

<sup>138</sup>*Id.* bk. I, ch. 6, 1096b16-17, 20-21, at 1733-34.

<sup>139</sup>Aristotle explains:

But if the things we have named are also things good in themselves, the account of the good will have to appear as something identical in them all, as that of whiteness is identical in snow and in white lead. But of honour, wisdom, and pleasure, just in respect of their goodness, the accounts are distinct and diverse. The good, therefore, is not something common answering to one Idea.

*Id.* bk. I, ch. 6, 1096b21-26, at 1733.

## 2. The "Perception" of Good

While Plato proposed that the singular entities in the world—as mere images of the separate realities—could never be properly grasped until known *as* participations in universal, separate forms, Aristotle held that the grasp of things obtains, not through knowledge of *separate* forms, but rather precisely by a grasp of the intelligibility in the very things themselves.

In understanding the natures of particular things, Aristotle believed that the starting point requires an appropriate grasp of the particular itself, by means of which an actor is able to assimilate himself to the known, both in its formal and particular characteristics.<sup>140</sup> Once such knowledge is grasped, practical reasoning involves the process of forming judgments about new experiences in light of those known forms and principles. Accordingly, for Aristotle, the origin of the formal principles of knowing is heavily dependent upon the grasping of particular things through the formulation of one's sense of knowledge of particular objects.<sup>141</sup>

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<sup>140</sup>Aristotle remarks:

[T]he soul is in a way all existing things; for existing things are either sensible or thinkable, and knowledge is in a way what is knowable, and sensation is in a way what is sensible: in *what* way we must inquire.

. . . Within the soul the faculties of knowledge and sensation are *potentially* these objects, the one what is knowable, the other what is sensible. They must be either the things themselves or their forms. The former alternative is of course impossible: it is not the stone which is present in the soul but its form.

It follows that the soul is analogous to the hand; for as the hand is a tool of tools, so thought is the form of forms and sense the form of sensible things.

Since it seems that there is nothing outside and separate in existence from sensible spatial magnitudes, the objects of thought are in the sensible forms, viz. both the abstract objects and all the states and affections of sensible things. Hence, no one can learn or understand anything in the absence of sense . . . .

ARISTOTLE, *ON THE SOUL* (c. 350 B.C.), *reprinted in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 131, at 641, bk. III, 431b20-23, 431b26-432a7, at 686-87 (J.A. Smith trans.).

<sup>141</sup>Aristotle asserts:

[A]s in the case of the first principles; the fact is a primary thing or first principle. Now of first principles we see some by induction, some by perception, some by a certain habituation, and others too in other ways. But each set of principles we must try to investigate in the natural way, and we must take pains to determine them correctly, since they have a great influence on what follows. For the beginning is thought to be more than half of the whole, and many of the questions we ask are cleared up by it.

ARISTOTLE, *supra* note 131, bk. I, ch. 7, 1098b2-8, at 1736. The philosopher further states: Now all things which have to be done are included among particulars or ultimates; for not only must the man of practical wisdom know particular facts, but understanding and judgment are also concerned with things to be done, and these are ultimates. And comprehension is concerned with the ultimates in both directions; for both the primary definitions and the ultimates are objects of comprehension and not of argument, and in demonstrations comprehension grasps the unchangeable and primary definitions, while in practical reasonings it grasps the last and variable contingent fact . . . . For these are the starting-points of that for the sake of which, since the universals are reached from the particulars; of these therefore we must have perception, and this is comprehension.

*Id.* bk. VI, ch. 11, 1143a32-b6, at 1805-6.

Applied in the context of practical knowledge, Aristotle follows through on this line of reasoning by arguing, as noted above, that an actor's rational judgments about practical goods depends necessarily upon his or her prior dispositional states in relation to the experience of those objects.<sup>142</sup> While Aristotle accepts that certain types of conduct more fully actualize human faculties rather than other, he emphasizes that the grasping of objects *as* goods is not an intuitive process: "[A]bsolutely and in truth the good is the object of wish, but for each person the apparent good."<sup>143</sup>

Rather, judgments about objects as practical goods to be pursued or as evils to be avoided depends, to no small degree, upon the operation of performative dispositions of one's faculties which affect how one judges the particular:

[A]s in the case of bodies . . . the things that are in truth wholesome are wholesome for bodies which are in good condition, while for those that are diseased other things are wholesome—or bitter or sweet or hot or heavy . . . . For each state of character has its own ideas of the noble and the pleasant . . . .<sup>144</sup>

For Aristotle, ethical judgments about conduct presuppose the operation of a synthetic "feedback" model of practical knowledge. The practical principles one employs in making judgments about the objects of action depend in large part upon the actor's dispositional grasp of good and bad with respect to those goods. Applying general principles in the judging of new experiences presupposes the influence of prior dispositions affecting the determination of the principles through which one will "grasp" or "see" the new state of affairs. One's prior habituations and formed values then influence the very selection of the judgments and practical principles one views as relevant in evaluating the particular situation at hand.

In Aristotle's account, this *sui generis* aspect of practical reasoning, involves a unique form of practical "perception":

That practical wisdom is not knowledge is evident; for it is, as has been said, concerned with the ultimate particular fact, since the thing to be done is of this nature. It is opposed, then, to comprehension; for comprehension is of the definitions, for which no reason can be given, while practical wisdom is concerned with the ultimate particular, which is the object not of knowledge but of perception—not the perception of

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<sup>142</sup>Aristotle explains:

[I]n one word, states arise out of like activities. This is why the activities we exhibit must be of a certain kind . . . . It makes no small difference, then, whether we form habits of one kind or of another from our very youth; it makes a very great difference, or rather *all* the difference.

*Id.* bk. II, ch. 1, 1103b20-22, at 1743.

<sup>143</sup>*Id.* bk. III, ch. 4, 1113a23-24, at 1757. Aristotle continues:

[P]erhaps the good man differs from others most by seeing the truth in each class of things, being as it were the norm and measure of them. In most things the error seems to be due to pleasure; for it appears a good when it is not. We therefore choose the pleasant as a good, and avoid pain as an evil.

*Id.* bk. III, ch. 4, 1113a32-1113b1, at 1758.

<sup>144</sup>*Id.* bk. III, ch. 4, 1113a26-32, at 1757-58.

qualities peculiar to one sense but a perception akin to that by which we perceive that the particular figure before us is a triangle; for in that direction too there will be a limit. But this is rather perception than practical wisdom, though it is another kind of perception.<sup>145</sup>

Excluding practical reasoning as a type of “knowledge” (by which he means “science” or demonstrative unchanging knowledge), and also excluding its characterization as “comprehension” (by which he refers to self-evident principles that require no proof and which form the basis of all thinking), Aristotle reaffirms the particularity and contingency of practical judgments. By analogously describing practical knowledge as a type of perception or sensation, he draws attention to the fact that such judgments depend intimately upon the agent’s dispositional habituation toward particular states of affairs.

### 3. The Practical Dialectic

Plato, of course, had seen the key to practical insight concerning political order and good as culminating principally in a terminal grasp of the abstract, universal Form of Good. Only by a grasp of that universal could a philosopher king understand how to order the chaos of the world of reflections. Although Aristotle declines to follow Plato in positing a univocal, formal idea of goodness through which all realities can be grasped, he does, nonetheless, recognize the operation of a dialectical process in practical deliberation. Aristotle’s approach to practical reasoning, however, effectively inverts the emphasis of the Platonic dialectic.

In the context of his rejection of the Platonic Idea of the Good, Aristotle proposes the following description of practical reason’s methodology:

Let us not fail to notice, however, that there is a difference between arguments from and those to the first principles. For Plato, too, was right in raising this question and asking, as he used to do, ‘are we on the way from or to the first principles?’ There is a difference, as there is in a race-course between the course from the judges to the turning-point and the way back. For, while we must begin with what is familiar, things are so in two ways—some to us, some without qualification. Presumably, then, we must begin with things familiar to us. Hence any one who is to listen intelligently to lectures about what is noble and just and, generally, about the subjects of political science must have been brought up in good habits. For the facts are the starting-point, and if they are sufficiently plain to him, he will not need the reason as well; and the man who has been well brought up has or can easily get starting-points.<sup>146</sup>

Rather than positing a resolution to the problem of practical reasoning in the attainment of the ethereal universal and consequent redemptive deployment into the world of shadowy particular contingents, Aristotle asserts that the key to success in practical reasoning begins with the “perception” of concrete individual things as goods precisely by virtue of one’s habitual dispositions. For it is only based on such practical perceptions that the universal guiding principles of conduct can originally

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<sup>145</sup>*Id.* bk. VI, ch. 8, 1142a23-30, at 1803.

<sup>146</sup>*Id.* bk. I, ch. 4, 1095a-1095b, at 1731.

be derived at all, and, which in turn depend upon the operation of those dispositions in order to be effectively employed in subsequent practical deliberation and choices.<sup>147</sup> While for Plato the movement of practical reasoning is focused on a remote universal terminus, the focus, for Aristotle, of practical reasoning in both its beginning and end, is inherently rooted in a “perception” of the *particular*; it is concerned “with the ultimate particular fact, since the thing to be done is of this nature.”<sup>148</sup>

It is no accident that the analogy chosen by Aristotle for practical reasoning is a “racetrack” rather than a “cave.” Reference to the *perception* of “facts” functions both as the necessary starting line of all practical reasoning (as grasped through inchoate dispositional orientations), as well as the final goal or “finishing line” of such reasoning. As a result of this dialectical “movement” from the particular back to the particular, one no longer acts tentatively from inchoate habit, but exercises a fully reflective, deliberate choice of particular human goods.<sup>149</sup>

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<sup>147</sup> Aristotle explains:

[T]his eye of the soul acquires its formed state not without the aid of excellence . . . ; for inferences which deal with acts to be done are things which involve a starting-point, viz. ‘since the end, i.e. what is best, is of such and such a nature’, whatever it may be (let it for the sake of argument be what we please); and this is not evident except to the good man; for wickedness perverts us and causes us to be deceived about the starting-points of action.

*Id.* bk. VI, ch. 12, 1144a29-36, at 1807. One legal scholar describes the place of such dispositions with respect to its role in the genesis of practical judgments:

Character traits are psychological features of people that dispose them to regularly act in certain ways. They do this by guiding both our perception of and our response to the world around us. Depending upon the character traits a person has, different features of the world stand out to her; and, therefore, the world calls for certain responses from her. In other words, a person’s character traits define her evaluative perspective on the world, making some things matter more than others and inducing her to perform certain actions rather than others.

Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1438-39 (2000) (footnote omitted) “To a Virtuous person, certain actions are presented as practically necessary—as Kant might have put it—by his view of certain situations in which he finds himself.” John McDowell, *Are Moral Requirements Hypothetical Imperatives? I*, in [SUPPLEMENTARY VOLUME 52] THE ARISTOTELIAN SOCIETY 13, 14 (1978).

<sup>148</sup> ARISTOTLE, *supra* note 131, bk. VI, ch. 8, 1142a23-25, at 1803.

<sup>149</sup> Aristotle reasons:

It is possible to do something grammatical either by chance or under the guidance of another. A man will be proficient in grammar, then, only when he has both done something grammatical and done it grammatically; and this means doing it in accordance with the grammatical knowledge in himself.

Again, the case of the arts and that of the excellences are not similar; for the products of the arts have their goodness in themselves, so that it is enough that they should have a certain character, but if the acts that are in accordance with the excellences have themselves a certain character . . . . The agent also must be in a certain condition when he does them; in the first place he must have knowledge, secondly he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character.

*B. Prudence and Imprecision*

1. "Right Reason" as *Phronesis*

Before relating Aristotle's account of practical reasoning to a broader critique of the *Casey-Lawrence* conception of substantive due process as a "type" of public reason analysis, it is necessary to outline briefly Aristotle's more general account of the "practically wise man," the *phronimos*.

In contrast to Plato's view that the rational conception of the Form of Good provides a sufficient rational standard for judging particular instances, no such intellectual principle is forthcoming from Aristotle. With respect to the quality of excellence in human action, Aristotle proposes that goodness in conduct is achieved simply by acting according to "right reason."<sup>150</sup> Unlike Plato, however, Aristotle does not offer a formal abstract principle as the primary correlate of "right reason." Instead, he proposes his famous definition of virtue: Virtue "is a state concerned with choice, lying in a mean relative to us, this being determined by reason and in the way in which the man of practical wisdom would determine it."<sup>151</sup> Acting according to right reason (*orthos logos*) involves choosing a mean between excess and defect as the "phronimos," the person with "practical reason" would act.

The difficulty with such a view, to the chagrin of numberless students of philosophical ethics, is that it appears to be just as "empty" as the Platonic Idea of the Good. Philosophical dissatisfaction with Aristotle's definition of virtue has been voiced precisely on the ground that he never provides a definition of "right reason."<sup>152</sup> For example, nowhere does Aristotle state that a biological teleology or

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*Id.* bk. II, ch. 4, 1105a22-b1, at 1745-46. Also, in defining the difference between natural virtue and true virtue, Aristotle makes the following observation:

For all men think that each type of character belongs to its possessors in some sense by nature; for from the very moment of birth we are just or fitted for self-control or brave or have the other moral qualities; but yet we seek something else as that which is good in the strict sense—we seek for the presence of such qualities in another way. For both children and brutes have the natural dispositions to these qualities, but without thought these are evidently hurtful. Only we seem to see this much, that, while one may be led astray by them, as a strong body which moves without sight may stumble badly because of its lack of sight, still, if a man once acquires thought that makes a difference in action; and his state, while still like what it was, will then be excellence in the strict sense.

*Id.* bk. VI, ch. 13, at 1144b3-14, at 1807-08.

<sup>150</sup>*Id.* bk. VI, ch. 1, 1138b22-25, at 1797. "[T]here is a standard which determines the mean states which we say are intermediate between excess and defect, being in accordance with right reason." *Id.*

<sup>151</sup>*Id.* bk. II, ch. 6, 1106b36-1107a3, at 1748.

<sup>152</sup>Consider, for example, the typical critique as formulated by J.L. Ackrill:

Moral virtue, according to Aristotle, must be combined with practical wisdom (*phronesis*), the virtue of practical reasoning. This enables a man to decide on each particular occasion what would be fair or kind or generous—what would be the right thing to do. . . . But *how* does Aristotle suppose that the *phronimos* . . . decides on the appropriate thing to do? Does he calculate the possible consequences of alternative courses of action, or does he apply certain general rules? What is his final test or criterion of right action? If we want practical guidance about what to do in a difficult situation, Aristotle sensibly recommends us to ask a good and wise man for his advice.

empirical utility is to function as the defining ground of the reasonable and good. He nowhere specifies a definite set of principles by which the *phronimos* can determine what conduct is good and what is not, other than reiterating at different times and in different manners that acting according to “right reason” involves choosing a mean between excess and defect just as a man of “practical reason” would choose.<sup>153</sup>

While it can be argued that Aristotle, in fact, attempts to describe with more particularity the nature of what constitutes “right reason” and the standard that fixes it, there is no denying that his conception of practical reason ultimately provides no detailed analytic principle by which to judge what constitutes “right reason.” No “acid test” exists by which one might coherently deduce the permissibility of conduct by application of a logical principle, such as that attempted by Kant through the Categorical Imperative.<sup>154</sup>

Such a conclusion, however, is entirely consistent with Aristotle’s view that the grasp of human goods flows not as logical deductions from ideas, but upon perceptual insights that are dependent upon dispositional habituations of the actor and that can only be known as they play out in the context of contingent affairs subject to an infinite variety of possibilities. As Aristotle repeatedly asserts, in matters relating to practical choice, one cannot expect the same type of necessity that is found in scientific demonstration. Rather, practical discussions seek “as much clearness as the subject-matter admits of; for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts.”<sup>155</sup>

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. . . The moral philosopher, however, has an obligation to state what the aim or goal or criterion is, to which the *phronimos* looks in thinking out what should be done.

Aristotle recognizes that he has this obligation, but it is not clear that he fulfills it.

J.L. ACKRILL, *ARISTOTLE THE PHILOSOPHER* 138 (1981); *see also* WHITNEY J. OATES, *ARISTOTLE AND THE PROBLEM OF VALUE* 284-87 (1963). Feldman similarly asserts:

Within moral philosophy, virtue ethics has been vulnerable to the complaint that it lacks definitive prescriptivity because virtue ethics requires an interpreter—generally the virtuous person—to translate virtuous dispositions into specific actions. This has led some philosophers to argue that virtue ethics cannot supply a complete moral theory since a moral theory must not only tell us what character traits to have but also what actions to take.

Feldman, *supra* note 147, at 1450.

<sup>153</sup>Aristotle himself recognizes the general problem stating:

[W]e have previously said that one ought to choose that which is intermediate, not the excess nor the defect, and that the intermediate is determined by the dictates of reason, let us discuss this. . . . But such a statement, though true, is by no means illuminating; for in all other pursuits which are objects of knowledge it is indeed true to say that we must not exert ourselves nor relax our efforts too much or too little, but to an intermediate extent and as the right rule dictates; but if a man had only this knowledge he would be none the wiser—e.g. we should not know what sort of medicines to apply to our body if someone were to say ‘all those which the medical art prescribes, and which agree with the practice of one who possesses the art’. Hence it is necessary with regard to the states of the soul also not only that this true statement should be made, but also that it should be determined what right reason is and what is the standard that fixes it.

ARISTOTLE, *supra* note 131, bk. VI, ch. 1, 1138b18-20, 25-35, at 1797-98.

<sup>154</sup>*See* discussion *supra* Part I.D.2.b, 3.

<sup>155</sup>ARISTOTLE, *supra* note 131, bk. I, ch. 3, 1094b12-14, at 1730.

While such a position certainly cannot be taken as a simplistic basis for concluding that Aristotle is at bottom an ethical skeptic, it does imply that his conception of good conduct allows for wide variation given the variability of particular contingents.<sup>156</sup> Such a perspective, however, confirms Aristotle's view that alternative judgments about human conduct are constituted by and formed in the context of particularized perceptions of human goods: "But up to what point and to what extent a man must deviate before he becomes blameworthy it is not easy to determine by reasoning, any more than anything else that is perceived by the senses; such things depend on particular facts, and the decision rests with perception."<sup>157</sup>

While, at first glance, there may appear to be a similarity between Plato's and Aristotle's concepts of practical reason in their lack of specificity, a pivotal distinction is found in what each posits as the reference for filling in that potentiality. The Platonic dialectic offers with scant explanation a purely formal conception of the Good as an adequate basis for ascertaining the nature of all particular goods irrespective of their character. Aristotle rejects this conceptualization and argues that the Platonic dialectic fails because it does not recognize the irreducibly particular nature of the good. Rather, judgments concerning the goods of human life, whatever those judgments may be, can only arise from particular experiences of "a good," and *those* judgments in turn must be recognized to depend to a great degree upon habituation and dispositionally-influenced perceptions. No judgments of human good can be reduced to mere logical or rational formalities.

## 2. Practical Reasoning

A useful analogue for understanding this Aristotelian conceptualization of practical reasoning can be found in the substantial body of jurisprudential reflection given to the theory of negligence. As courts and scholars have observed, jury instructions dealing with a negligence cause of action have generally been articulated in the vaguest manner,<sup>158</sup> establishing the standard for "reasonableness" of conduct in the following succinct formulation: "Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. . . ."<sup>159</sup> In contrast to such a presentation, however, familiar academic articulation of the Learned Hand formulation provides what is regarded by some as a more precise analysis.<sup>160</sup> A finding of negligence involves

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<sup>156</sup>Now fine and just actions, which political science investigates, exhibit much variety and fluctuation [of opinion], so that they may be thought to exist only by convention, and not by nature." *Id.* bk. I, ch. 3, 1094b14-16, at 1730.

<sup>157</sup>*Id.* bk. II, ch. 9, 1109b20-23, at 1752.

<sup>158</sup>*See, e.g.,* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595 (2002).

<sup>159</sup>*Id.* (quoting N.Y. P.J.I. CIV. 2:10 (3d. ed. 2000)).

<sup>160</sup>*See, e.g.,* Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 885 (1999) (stating that some academics "use Learned Hand's well known formula for negligence . . ."); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 315 (2003) ("Learned Hand's well-known formula for . . . negligence brings this home . . ."). Feldman asserts:

consideration of three variables: 1) the probability of injury created by one's conduct; 2) the "gravity" or magnitude of injury should that probability obtain; and 3) the interest that the actor must sacrifice or the burden the actor must suffer to eliminate that risk.<sup>161</sup>

From a law and economics interpretation of the Hand formula (as popularized by Richard Posner and William Landes), these concepts are to be understood exclusively in economic terms and entail application of a utilitarian calculus.<sup>162</sup> Numerous scholars, however, have rejected such an interpretation, asserting that insofar as it conflicts with typical jury instructions, it is factually inconsistent with how negligence has been determined historically in the courts by juries, and further, that it fails to provide any adequate normative reading of how negligence *should* be applied.<sup>163</sup> In sum, these arguments propose through various avenues that a law and

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In the contemporary academy, many who deride the reasonable person standard criticize it for its supposed indeterminacy, its failure to provide a sufficiently formulaic guide to conduct. These critics tend to prefer an economic interpretation of negligence on the assumption that cost-benefit analyses or social welfare functions are more determinate than the reasonable person standard and therefore can guide conduct more specifically and concretely.

Feldman, *supra* note 147, at 1464.

<sup>161</sup>Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941) ("The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk."). Hand's model appears similar if not identical to the negligence standard of unreasonableness proposed in the influential *Restatement (Second) of Torts*:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

RESTATEMENT (SECOND) OF TORTS § 291 (1965); *see also* Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1605-06 (1997) ("The *Restatement (Second) of Torts*, published some eighteen years later, reflects the *Carroll Towing* standard, providing a risk-benefit test for unreasonable conduct and negligence.").

<sup>162</sup>*See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) ("[T]he common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation."). In fact, Landes and Posner go on to argue that not only negligence but also intentional tortious conduct is subject to a similar mathematical analysis. *Id.* at 153; *see also* Hegyes v. Unjian Enters., Inc., 286 Cal. Rptr. 85, 110 n.4 (Cal. Ct. App. 1991) (Johnson, J., dissenting) ("Most proponents of the economic approach to negligence use as a starting point the formulation of the negligence standard provided by Judge Learned Hand in *United States v. Carroll Towing Co.*").

<sup>163</sup>*See* Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 J. PHIL. & PUB. AFF. 317, 336 (1977) ("The purely economic man is indeed close to being a social moron."); *see also* Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 283-85 (1996) (critiquing efficiency cost-benefit utilitarian theories of negligence); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 152 (2003) (questioning the interpretation of Hand's formula); Green, *supra* note 161, at 1643 (critiquing the history and meaning of the Hand formula).

economics interpretation fails by attempting to reduce all human values to economic value.<sup>164</sup>

As an alternative understanding of the Hand negligence standard, numerous scholars have argued that in fact it was never intended to be taken in economic terms,<sup>165</sup> but was offered as an *analogy* or *metaphor* highlighting the demand in negligence analysis for consideration of a *variety* of relevant circumstances of concrete human conduct. Interpreted in this light, far from demanding a commensurating reduction as is entailed by law and economics theories, the Hand formula seeks to insure a *prudential, normative* answer to the question of when an unintended injury to human persons or goods is or is not permissible.<sup>166</sup>

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<sup>164</sup>J.M. Balkin states:

We may ask whether market behavior is not itself simply a special case of human behavior—whether it too, is only one of a number of different forms of human choice, which in turn depend upon many different forms of human valuation and motivation. Human values and goals may take wealth maximization into account, but they may not be exclusively or even primarily concerned with it. Human action and human decision may rest only in part on the type of reasoning acceptable to Landes' and Posner's reductive vision. Ironically, then, the greatest problem with wealth maximization as a theory of human practical reason may be that it is insufficiently rich.

J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1475-76 (1987) (reviewing LANDES & POSNER, *supra* note 162) (footnote omitted).

<sup>165</sup>*See, e.g., Villanova v. Abrams*, 972 F.2d 792 (7th Cir. 1992). In *Abrams*, Posner explains:

An algebraic formulation of legal rules . . . has value in expressing rules compactly, in clarifying complex relationships, in identifying parallels between diverse legal doctrines, and in directing attention to relevant variables that might otherwise be overlooked. It is not, however, a panacea for the travails of judicial decision-making. In practice, the application of standards that can be expressed in algebraic terms still requires the exercise of judgment, implying elements of inescapable subjectivity and intuition in the decisional calculus.

*Id.* at 796 (citation omitted).

<sup>166</sup>Hand, for example, expressly rejects the view that such determinations can be reached by mathematical calculus. In his earliest statement on the issue in *Conway*, Hand observes:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.

*Conway*, 111 F.2d at 612. As one court has observed citing *Conway*: "Judge Hand did not assign numbers to the variables or factors or attempt to apply the formula mathematically." *Krummel v. Bombardier Corp.*, 206 F.3d 548, 554 n.2 (5th Cir. 2000). Similarly, another court has stated:

Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors.

*U.S. Fid. & Guar. Co. v. Plovodba*, 683 F.2d 1022, 1026 (7th Cir. 1982).

In this way, the Hand formula can easily be reconciled with the generality of the open-ended negligence instruction: “Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.”<sup>167</sup> By means of such an instruction, the court directs a jury to consider everything that a reasonable person would consider in determining whether a defendant’s conduct was not simply economical, but *reasonable*. As one legal commentator expressed this common sense connection between the traditional character of the jury deliberative function and the Hand balancing test: “Stripped of rhetoric, . . . the so-called Hand factors are simply the core factors of any account of negligence. These factors will be present under any theoretical conception of the reasoning processes engaged in by jurors.”<sup>168</sup>

In keeping with this narrative of negligence theory, its connection to the Aristotelian conception of practical reason should be apparent. The proper formulation of negligence must be generic and abstract; it entails no intrinsic logical conceptions of good conduct, nor does it rely on any particular substantive value in predetermining what constitutes reasonable behavior. At the same time, however, it specifically references *prudent* and *reasonable* persons, along with their concrete decisions and practical judgments, as the criterion for judging reasonableness of conduct.

Virtue ethics can arrive at prescriptivity when it is operationalized. Even if there is no formulaic way to deduce appropriate actions from definitions of the virtues, tort law’s thought-experiment procedure for inferring specific prescriptions based on the possession of particular virtues in particular situations shows that virtue-based evaluative inquiry can yield specific prescriptions for or against particular acts.<sup>169</sup>

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For further development of this line of argument see Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm—The Principle of Double Effect in the Law of Negligence*, 3 GEO. J.L. & PUB. POL’Y 453, 469-81 (2005).

<sup>167</sup>CAL. B.A.J.I. CIV. 3.10 (2007). The Illinois and New York pattern jury instructions contain similar definitions:

When I use the word ‘negligence’ in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

ILL. P.J.I. CIV. 10.01 (2006).

Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

N.Y. P.J.I. CIV. 2:10 (2006). See generally Kelley & Wendt, *supra* note 158, at 629-30, 640-41, 658.

<sup>168</sup>Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 883 (2001).

<sup>169</sup>Feldman, *supra* note 147, at 1450.

Reference to prudence—understood as “virtuous” judgments about what constitutes good conduct—echoes a view of right action dependent upon performative habits and dispositional states of the actor that cannot be captured appropriately by merely descriptive universal concepts or reasons. The concept of reasonable action thus cannot be best understood to result from abstract considerations of human conduct in light of formulae that all citizens could rationally accept.<sup>170</sup> Rather, to understand the reasons of the prudent and reasonable person *as* reasons demands inherent reference to character traits, dispositions and experience.<sup>171</sup>

While discussions of the role of the jury in determining reasonability at common law will be touched upon again, this section seeks to illustrate that the concept of practical reasoning demands reference to “reasons” that cannot be derived adequately by consideration of universally accessible conceptualizations of value. Human goods, especially in the context of community life, are achieved by attaining particular objects and executing particular actions. Consequently, rational judgments about reasonable conduct and the demands of community order inevitably draw upon a concrete particularity that cannot be accounted for merely by reference to concepts developed under a standard of public reason.

The preceding discussion of negligence illustrates how an Aristotelian theory of practical reasoning can appropriately inform a substantive area of legal practice and theory. Specifically, it exemplifies how an account of the practical dialectic offered by Aristotle and captured by the concept of the “reasonable, prudent person” can justify the imposition upon all citizens of *particularized* legal standards of behavior that are thought to be necessary for preserving the order of civic life. Such restrictive determinations rooted in individualized judgments about particular matters of fact and values could, however, never satisfy the demands of Rawls’ concept of public reason.<sup>172</sup>

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<sup>170</sup>Feldman states:

Viewing the reasonable person standard as a thought-experiment apparatus, which people can use to arrive at conclusions about which acts are inspired or rejected by the virtues of reasonableness, prudence, and due care together, will disquiet those who seek a more reductionist definition of negligence. In general, virtue ethics opposes reductionist interpretations of moral and ethical concepts, denying that we can decide upon good or worthy conduct by applying formulas or algorithms.

*Id.* at 1433.

<sup>171</sup>See DAVID WIGGINS, *A Sensible Subjectivism?*, in *NEEDS, VALUES, TRUTH* 185, 194-202 (3d ed. 1998) (1987); see also Feldman, *supra* note 147, at 1438 n.13.

<sup>172</sup>See *Idea of Public Reason*, *supra* note 78 (Rawls’ conception of public reason). That negligence determinations resist analytic or purely rational resolution is supported by the strong aversion to adopt “rules of law” and the conditions under which they may be adopted. As Justice Cardozo remarked:

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. . . .

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.

*Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104-05 (1934). Thus while the adoption of rules of law in negligence is generally to be resisted, they can at times be appropriate but only when

## IV. PRACTICAL REASONING AND AMERICAN LAW

It can be argued along an analogous—if not identical—line of reasoning that a similar understanding of public practical reasoning is reflected in Supreme Court precedent dealing with the constitutional “ordered liberty.”

Contrary to the inference about the full character of substantive due process reasoning that might too easily be drawn from isolated consideration of the *Casey* and *Lawrence* holdings,<sup>173</sup> the Supreme Court’s full *corpus* of substantive due process analysis explicitly recognizes that the notion of “ordered liberty” cannot be captured by application of abstract concepts of autonomy. Rather, the Court has specifically articulated that to the extent it relates to substantive due process, the scope of ordered liberty must be defined with reference to specific historical practices and community based convictions regarding civic constitutional order.

A. *Liberty: Ideal or Action*1. *Washington v. Glucksberg*: The Reason of Fundamental Liberties

In *Glucksberg*, a decision reached after *Casey* but before (and oddly never discussed by) the majority in *Lawrence*, the Supreme Court laid out in clear detail the proper framework for analyzing legal claims to fundamental liberty interests asserted under the Due Process Clause. The Court predicated this discussion on two undisputed principles: (1) the Due Process Clause protects more than “fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint[.]”<sup>174</sup> and (2) assertions of governmental interference with anything other than a fundamental liberty interest will generally be subject only to a “rational basis” test.<sup>175</sup>

In answering the critical question of whether some claimed conduct is to be protected as a fundamental interest and thus entitled to a “compelling interest” standard of review,<sup>176</sup> the Court articulated two distinct, albeit interrelated, criteria. First, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”<sup>177</sup> Second, the Court “required in substantive-due-process cases a

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they are drawn from experience, “flower” naturally from customs and habits of conduct, and are not imposed artificially. For further discussion of this point in the context of substantive due process, see *infra* notes 269-82 and accompanying text.

<sup>173</sup>For such a reading, see *supra* Part I.B.5.

<sup>174</sup>*Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citations omitted). For a listing of major substantive due process cases and holdings, see *id* at 719-20.

<sup>175</sup>As, for example, Justice Souter notes in his concurring opinion in *Glucksberg*, “by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the ‘complex balancing’ that heightened scrutiny entails.” *Id.* at 767 n.9 (Souter, J., concurring in the judgment).

<sup>176</sup>“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Id.* at 721 (majority opinion) (alteration in original) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>177</sup>*Id.* at 720-21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 502, 503 (1977)).

'careful description' of the asserted fundamental liberty interest."<sup>178</sup> Summarizing the significance of these two principles, the Court observed:

[T]he development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.<sup>179</sup>

The issue in *Glucksberg* was a claimed fundamental substantive due process right to physician-assisted suicide, a practice prohibited under the general provisions against assisting in suicides under the Washington State criminal code.<sup>180</sup> In support of their claim, the plaintiffs argued that under prior Supreme Court precedent in *Casey* and *Cruzan*, such a practice constituted a fundamental liberty right unconstitutionally interfered with by state law.<sup>181</sup> The plaintiffs asserted that as articulated in those prior cases, the Due Process Clause guaranteed a right to "self-sovereignty"<sup>182</sup> and "basic and intimate exercises of personal autonomy."<sup>182</sup>

Consistent with this line of argument, the *Glucksberg* Court described the various ways in which the claimed right was portrayed by the Court of Appeals and the plaintiffs:

Turning to the claim at issue here, the Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death."<sup>183</sup>

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<sup>178</sup>*Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>179</sup>*Id.* at 722.

<sup>180</sup>See WASH. REV. CODE ANN. §§ 9A.36.060, 20.021(1)(c) (LexisNexis 2007). "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." § 9A.36.060(1). "Promoting a suicide attempt is a . . . felony," § 9A.36.060(2), punishable by "confinement [not exceeding] five years, or by a fine . . . of ten thousand dollars, or by both," § 9A.20.021(1)(c). See also *Glucksberg*, 521 U.S. at 707.

<sup>181</sup>Plaintiffs were physicians who practiced in Washington and treated terminally ill, suffering patients and asserted that they would assist such patients in ending their lives absent the ban on assisted-suicide. Also named as plaintiffs were three gravely ill, pseudonymous plaintiffs who died prior to the Supreme Court taking the case and the group "Compassion in Dying." See *Glucksberg*, 521 U.S. at 707-08.

<sup>182</sup>*Id.* at 724 (quoting Brief for Respondents at 10, 12, *Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 708925).

<sup>183</sup>*Id.* at 722 (citations omitted) (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 799, 801 (9th Cir. 1996), and Brief for Respondents, *supra* note 182, at 15, 18).

In short, the plaintiffs argued that the Court's "liberty jurisprudence, and the broad, individualistic principles it reflects, protects the 'liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference.'"<sup>184</sup>

Undertaking its own due process analysis, however, the Supreme Court rejected plaintiffs' argument. In particular, the Court focused on the second criterion, that is, the need for a "'careful description' of the asserted fundamental liberty interest" and its prior precedent.<sup>185</sup> In order to determine whether a particular practice constitutes part of the historical continuum, it is obviously appropriate to determine what the particular practice in question is.

Considering first its holding in *Cruzan*, the Court rejected the plaintiffs' attempt to describe the right found in that case as a broad right to "hasten one's death."<sup>186</sup> The Court noted that the narrow issue presented had been "whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistent vegetative state, 'ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment' at her parents' request."<sup>187</sup> Noting its reliance on traditional common law doctrines of battery and informed consent to justify its decision, the Court held that "'a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."<sup>188</sup>

Turning next to the plaintiffs' reliance on the *Casey* "mystery" passage,<sup>189</sup> the Court observed that both of the lower courts had found that specific language "'highly instructive'"<sup>190</sup> and "'almost prescriptive'"<sup>191</sup> in reaching their conclusion

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<sup>184</sup>*Id.* at 724 (quoting Brief for Respondents, *supra* note 182, at 10).

<sup>185</sup>*Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>186</sup>The Court stated:

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication." Similarly, the Court of Appeals concluded that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's own death."

*Id.* at 725 (alteration in original) (citations omitted) (quoting Brief for Respondents, *supra* note 182, at 23, 26, and *Compassion in Dying*, 79 F.3d at 816). See also *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

<sup>187</sup>*Glucksberg*, 521 U.S. at 724 (alteration in original) (quoting *Cruzan*, 497 U.S. at 269).

<sup>188</sup>*Id.* at 724-25 (quoting *Cruzan*, 497 U.S. at 278).

<sup>189</sup>"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 726-27 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>190</sup>*Id.* at 726 (second internal quotation marks omitted) (quoting *Compassion in Dying*, 79 F.3d at 813).

<sup>191</sup>*Id.* (second internal quotation marks omitted) (quoting *Compassion in Dying*, 79 F.3d at 813).

that the plaintiffs had a fundamental liberty interest in a “choice to commit suicide”.<sup>192</sup> “Like the decision of whether or not to have an abortion, the decision how and when to die is one of the most intimate and personal choices a person may make in a lifetime, a choice central to personal dignity and autonomy.”<sup>193</sup>

In response, the Court acknowledged that in *Casey* it had reaffirmed the basic holding of *Roe v. Wade* regarding abortion<sup>194</sup> based on a line of cases that involved matters of “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” and that it also noted that “many of those rights and liberties ‘involv[e] the most intimate and personal choices a person may make in a lifetime.’”<sup>195</sup>

The Court, however, then made it clear in no uncertain terms that such observations could not be taken to suggest that every exercise of autonomy with respect to an intimate personal matter *ipso facto* constitutes a fundamental substantive due process right:

By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that “though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*.” That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .<sup>196</sup>

As the Court suggested, such an interpretation would erroneously imply that substantive due process analysis was essentially a *philosophical exercise*, which, if so construed, would mischaracterize its nature.<sup>197</sup>

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<sup>192</sup>*Id.* (second internal quotation marks omitted) (quoting *Compassion in Dying*, 79 F.3d at 813).

<sup>193</sup>*Id.* (second internal quotation marks omitted) (quoting *Compassion in Dying*, 79 F.3d at 813-14).

<sup>194</sup>The Court acknowledged:

We held, first, that a woman has a right, before her fetus is viable, to an abortion “without undue interference from the State”; second, that States may restrict postviability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child.

*Id.* at 726 (quoting *Casey*, 505 U.S. at 846).

<sup>195</sup>*Id.* at 726 (alteration in original) (quoting *Casey*, 505 U.S. at 851).

<sup>196</sup>*Id.* at 727 (footnote and citation omitted) (quoting *Casey*, 505 U.S. at 852).

<sup>197</sup>The Court noted:

Respondents contend, however, that the liberty interest they assert *is* consistent with this Court's substantive-due-process line of cases, if not with this Nation's history

Explicitly applying this possible misreading of the *Casey* autonomy principle back to its prior holding in *Cruzan*, the Court pointed out that the liberty interest in refusing medical treatment was not “simply deduced from abstract concepts of personal autonomy,” but also demanded consideration of the “Nation’s history and constitutional traditions.”<sup>198</sup> Responding directly to the asserted autonomy argument, the Court stated: “The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.”<sup>199</sup>

## 2. The Logic of *Lawrence*

As numerous scholars agree,<sup>200</sup> however, strong grounds exist for interpreting the Supreme Court’s recent *Lawrence* decision as the exact type of *philosophical exercise* that the Court had explicitly rejected in *Glucksberg*. Although the *Lawrence* Court did offer a controversial interpretation of the historical treatment of sodomy—challenging the Court’s historical findings in *Bowers*—this revised history, on any reasonable reading, made no claim that acceptance of the practice of sodomy could be considered deeply rooted in the nation’s tradition and history.<sup>201</sup> Rather, the argument in *Lawrence* appears to be simply that because sodomy is an aspect of homosexual persons’ exercise of personal autonomy, it deserves protection under the Due Process Clause.<sup>202</sup>

In any event, even if one disagrees that this characterization correctly captures the majority’s reasoning in *Lawrence*, there is little doubt that it can be, and has

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and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of “self-sovereignty,” and as teaching that the “liberty” protected by the Due Process Clause includes “basic and intimate exercises of personal autonomy.”

*Id.* at 723-24 (citations omitted) (quoting Brief for Respondents, *supra* note 182, at 10, 12). The Court further states: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.” *Id.* at 727-28 (citation omitted).

<sup>198</sup>*Id.* at 725.

<sup>199</sup>*Id.* The Court continued by noting the definite distinction between withdrawal of medical treatment and assisted-suicide: “Indeed, the two acts are widely and reasonably regarded as quite distinct.” *Id.*; *see also*, Lyons, *supra* note 166.

<sup>200</sup>*See, e.g.*, David M. Wagner, *Hints, not Holdings: Use of Precedent in Lawrence v. Texas*, 18 BYU J. PUB. L. 681 (2004).

<sup>201</sup>The Court in *Lawrence* stated:

In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

*Lawrence v. Tex.*, 539 U.S. 558, 567-68 (2003) (citations omitted).

<sup>202</sup>*Id.* at 574.

been, so read by lower courts. In *Williams v. Pryor*,<sup>203</sup> the ACLU, representing various individual users and sellers of sexual devices, brought an action challenging on federal substantive due process grounds a state law prohibiting the commercial distribution of devices used primarily for the stimulation of human genitals.<sup>204</sup> Specifically, the ACLU argued that “[b]y restricting sales of these devices to plaintiffs, Alabama has acted in violation of the fundamental [due process] rights of privacy and personal autonomy that protect an individual’s lawful sexual practices guaranteed by the . . . United States Constitution.”<sup>205</sup>

Ruling in plaintiffs’ favor, the district court—after engaging in an elaborate disquisition on the history of sexual practices in the United States (stretching from the seventeenth century to the present)<sup>206</sup>—first concluded that the federal constitution guarantees a fundamental liberty interest in sexual privacy, or as it stated, demands “state *non-interference* with private, adult, consensual sexual relationships.”<sup>207</sup> In addition, the court went on to observe that “this right to sexual privacy cannot be limited to a mere right to ‘sex,’ when the decisions of the Supreme Court protecting abortion, contraception, and the right to privacy of our bodies are considered.”<sup>208</sup>

The court, applying this broad articulation of the right to sexual privacy, then questioned whether this general substantive due process right specifically included the “right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas distributed by the vendor plaintiffs[.]”<sup>209</sup> In answering this question affirmatively, the court found that “such sexual devices are used by individuals . . . to consummate the most private acts—whether they be medically, therapeutically, or sexually motivated.”<sup>210</sup> Further, it observed that “[t]he user plaintiffs all have averred that their own use of these devices is contained within the confines of their adult sexual relationships.”<sup>211</sup> Consistent with these conclusions, the court held that the plaintiffs’ fundamental due process right to sexual privacy included the use of such sexual devices.<sup>212</sup>

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<sup>203</sup>*Williams v. Pryor* (*Williams III*), 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev’d sub nom.* *Williams v. Attorney Gen. of Ala.* (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004), *on remand sub nom.* *Williams v. King* (*Williams V*), 420 F. Supp. 2d 1224 (N.D. Ala. 2005), *aff’d sub nom.* *Williams v. Morgan* (*Williams VI*), 478 F.3d 1316 (11th Cir. 2007), *petition for cert. filed* No. 06-1501 (U.S. May 14, 2007).

<sup>204</sup>ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis 2007).

<sup>205</sup>*Williams III*, 220 F. Supp. 2d at 1261 (quoting Amended Complaint ¶ 43, at 13-14, *Williams III*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (No. CIV.A.98-S-1938-NE)).

<sup>206</sup>*Id.* at 1277-94.

<sup>207</sup>*Id.* at 1296.

<sup>208</sup>*Id.*

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

On appeal, the Eleventh Circuit repudiated the reasoning and conclusion of the district court. In so doing, it gave considerable attention to a dissenting appellate judge's assertion that *Lawrence* demanded the conclusion that a fundamental due process right exists to sexual privacy, including the right to use sexual devices.<sup>213</sup> In her dissent, Judge Barkett observed that in *Lawrence*, the Supreme Court had explicitly rejected the reasoning in *Bowers*<sup>214</sup> which had framed the due process issue in terms of the right to engage in a *particular* type of sexual act, that is, sodomy.<sup>215</sup> Instead, the *Lawrence* Court considered the proper issue to be the *general* right implicated through particular sexual acts, i.e., the fundamental right to exercise one's autonomy and thus constitute one's personhood through sexual identity.<sup>216</sup>

Consistent, however, with its view that *Lawrence* could not properly be regarded as a *fundamental* liberty substantive due process case,<sup>217</sup> the court of appeals in

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<sup>213</sup>*Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1250 (11th Cir. 2004), *on remand sub nom. Williams v. King (Williams V)*, 420 F. Supp 2d 1224 (N.D. Ala. 2005), *aff'd sub nom. Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007), *petition for cert. filed* No. 06-1501 (U.S. May 14, 2007).

<sup>214</sup>*Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>215</sup>“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . . .” *Williams IV*, 378 F.3d at 1255 (Barkett, J., dissenting) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

<sup>216</sup>“*Bowers* departed from the proper inquiry by focusing on a particular sexual act instead of upon the right to sexual privacy, which encompasses acts of adult consensual sexual intimacy.” *Williams IV*, 378 F.3d at 1255. Referring specifically to the same argument offered in her dissent from a denial of rehearing en banc in *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir.), *reh’g denied*, 377 F.3d 1275 (11th Cir. 2004), Judge Barkett cites in defense of this conclusion directly to *Lawrence*’s reliance on *Casey*’s mystery passage:

In overruling *Bowers*, *Lawrence* explained that

“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . ‘These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.’”

*Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 377 F.3d 1275, 1306 n.46 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)). “The Court unequivocally stated that ‘[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.’” *Id.* (alteration in original) (quoting *Lawrence*, 539 U.S. at 574).

<sup>217</sup>The majority quoted *Lofton*:

“We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis. . . . That the Court declined the invitation is apparent from the absence of the ‘two primary features’ of fundamental-rights analysis in its opinion. . . . Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated

*Williams* rejected the reasoning of both Judge Barkett and the district court. Specifically, the Court rejected the asserted claim to a fundamental liberty interest in the use of sexual devices because it failed under the required analysis demanded by *Glucksberg*, that is, a “‘careful description’ of the asserted fundamental liberty interest” and a determination of whether such conduct was “‘deeply rooted in this Nation’s history and tradition.’”<sup>218</sup>

In rejecting the district court’s broad formulation of the right at issue, the court of appeals in *Williams* cited to the Supreme Court’s rejection of a similarly framed generalized right in *Glucksberg*. As noted, in *Glucksberg*, rather than limiting the issue to the question of a “right to commit suicide with another’s assistance,”<sup>219</sup> the plaintiffs had attempted erroneously to frame the issue as a broad “right to ‘control of one’s final days,’” “‘the right to choose a humane, dignified death,’” or “‘the liberty to shape death.’”<sup>220</sup> Similarly, the appellate court in *Williams* observed that although the district court had originally framed the issue properly as “‘whether the . . . right to privacy protects an individual’s liberty to use sexual devices when engaging in lawful, private, sexual activity,’”<sup>221</sup> its final determination inappropriately described the issue more broadly as a question simply of the “‘right to sexual privacy.’”<sup>222</sup>

Based on this overly broad description of the right at issue, the court of appeals found that the historical inquiry carried out by the district court was also overbroad.<sup>223</sup> Although the district court’s sweeping review of the history of a wide

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the Texas statute on rational-basis grounds, holding that it ‘furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.’”

*Williams IV*, 378 F.3d at 1236 n.6. (quoting *Lofton*, 358 F.3d at 816-17).

<sup>218</sup>*Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993), and *Moore v. City of E. Cleveland*, 431 U.S. 502, 503 (1977)).

<sup>219</sup>*Id.* at 724; *see also Williams IV*, 378 F.3d at 1241.

<sup>220</sup>*Glucksberg*, 521 U.S. at 722 (quoting Brief for Respondents, *supra* note 182, at 7, 15, 18). *See also* discussion *supra* notes 183-87 and accompanying text; *Williams IV*, 378 F.3d at 1240-41.

<sup>221</sup>*Williams IV*, 378 F.3d at 1239 (quoting *Williams v. Pryor (Williams II)*, 240 F.3d 944, 953 (11th Cir. 2001), *on remand to* 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev’d sub nom. Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004), *on remand sub nom. Williams v. King (Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2005), *aff’d sub nom. Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007), *petition for cert. filed* No. 06-1501 (U.S. May 14, 2007). Although the challenged Alabama statute prohibited only the commercial distribution of sexual devices, the majority in *Williams IV* conceded that such a prohibition for constitutional purposes “must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.” *Id.* at 1242.

<sup>222</sup>*Id.* at 1239 (quoting *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002), *rev’d sub nom. Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004), *on remand sub nom. Williams v. King (Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2005), *aff’d sub nom. Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007), *petition for cert. filed* No. 06-1501 (U.S. May 14, 2007)).

<sup>223</sup>The court of appeals stated:

variety of sexual practices predictably led it to the conclusion that a general right to “sexual privacy” existed,<sup>224</sup> the court of appeals found such a conclusion irrelevant to the narrow substantive due process issue before it, noting additionally with particular emphasis the weakness of the historical analysis due to its heavy reliance on *contemporary* historical practice.<sup>225</sup> Referencing *Glucksberg*’s admonition against courts drawing hasty substantive due process determinations,<sup>226</sup> as well as quoting a similar sentiment expressed by Justice Frankfurter,<sup>227</sup> the court of appeals held that the district court erred in concluding that the Due Process Clause protects as a fundamental liberty right the use of sexual devices.<sup>228</sup>

In support of its conclusion, the court of appeals specifically considered and rejected the argument that application of the principle of autonomy standing alone, whether as articulated in *Lawrence* or any other Supreme Court decision, could justify the demands of fundamental liberty analysis.<sup>229</sup> Citing its prior decision in

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Given this over-broad starting point, the district court’s subsequent inquiry, predictably, was likewise broader than called for by the facts of the case. The inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of *sexual devices* within that history and tradition.

*Id.* at 1242-43.

<sup>224</sup>The court of appeals observed:

The district court began its *Glucksberg*-mandated history and tradition inquiry by defining its task as one of determining whether to “recognize a fundamental right to sexual privacy.” After an extensive survey of the history of sex in American culture and law—replete with cites to the Kinsey studies and Michel Foucault—the district court concluded that “there exists a constitutionally inherent right to sexual privacy that firmly encompasses state non-interference with private, adult, consensual sexual relationships.”

*Id.* at 1242 (citation omitted) (quoting *Williams III*, 220 F. Supp. 2d at 1277, 1296).

<sup>225</sup>“While such evidence undoubtedly confirms the district court’s discovery of ‘the specter of a twentieth century sexual liberalism,’ its relevance under *Glucksberg* is scant.” *Id.* at 1243 (citation omitted) (quoting *Williams III*, 220 F. Supp. 2d at 1291).

<sup>226</sup>The court of appeals reiterated by quoting *Glucksberg*:

“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”

*Id.* at 1239 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

<sup>227</sup>The majority quoted Justice Frankfurter from *Dennis v. United States*:

“Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”

*Id.* at 1250 (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of the judgment)).

<sup>228</sup>*Id.*

<sup>229</sup>The court of appeals reasoned:

*Lofton v. Sec'y. of Dept. of Children and Family Servs.*, the court rejected the assertion that *Lawrence* or any other prior cases had announced a generalized fundamental liberty right to sexual privacy flowing from a right to autonomy.<sup>230</sup> Judge Birch, in connection with that denial of a petition for rehearing in *Lofton*, specifically noted that the abstract and imprecise reasoning of *Lawrence* could not be relied upon to derive a fundamental liberty interest in sexual privacy:

[T]he words, phrases, sentences, and paragraphs used in *Lawrence* reveals . . . language from which we might infer any number of new rights, or even a new mandate in conducting constitutional review. . . .

. . . .

. . . Of course, the Court will so depart from time to time . . . . And those decisions are typically accompanied with clear guideposts for applying the new rule. *Lawrence* does not appear to be such a case. We find in the opinion no . . . guideposts; . . . no description of the scope of this putative fundamental right, no standard of review for scrutinizing infringements on that right, no balancing test, and so on.<sup>231</sup>

### 3. "Doing an Action"

As J.L. Austin observed in his famous mid-20th century essay, "A Plea for Excuses":

The beginning of sense, not to say wisdom, is to realise that "doing an action", . . . is a highly abstract expression . . . . We treat the expression

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The ACLU invokes "privacy" and "personal autonomy" as if such phrases were constitutional talismans. In the abstract, however, there is no fundamental right to either. Undoubtedly, many fundamental rights currently recognized under Supreme Court precedent touch on matters of personal autonomy and privacy. However, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."

*Id.* at 1235 (citation omitted) (quoting *Glucksberg*, 521 U.S. at 725, 727).

<sup>230</sup>The court of appeals explained:

In *Lofton*, we addressed in some detail the "question of whether *Lawrence* identified a new fundamental right to private sexual intimacy." We concluded that, although *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"—whether to homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy.

*Id.* at 1236 (footnote and citation omitted) (quoting *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 815, 817 (11th Cir.), *reh'g denied*, 377 F.3d 1275 (11th Cir. 2004)).

<sup>231</sup>*Lofton v. Sec'y of Dep't of Children and Family Servs.*, 377 F.3d 1275, 1282-83 (Birch, J., specially concurring in the denial of rehearing en banc); *see also Williams IV*, 378 F.3d at 1236 n.5 (citing *Lofton*, 377 F.3d 1275 (Birch, J., specially concurring in the denial of rehearing en banc)).

“doing an action” . . . as a self-explanatory, ground-level description, one which brings adequately into the open the essential features of everything that comes, by simple inspection, under it. . . .

. . . [W]e need to ask how we decide what is the correct name for “the” action that somebody did—and what, indeed, are the rules for the use of “the” action, “an” action, “one” action . . . and the like. Further we need to realise that even the “simplest” named actions are not so simple—certainly are not the mere makings of physical movements . . . .<sup>232</sup>

The contrast in historical substantive due process analysis considered above captures with clarity the very point Austin intends to make. Depending upon the generality or specificity of description, the aspects of conduct that one chooses to focus on or ignore, and the axiological context of such judgments, discrete descriptions of human conduct are susceptible to an almost infinite multivalence. Given that the same form of human behavior can be understood to instantiate so many different, even contradictory, ideals it comes as little surprise that this same instability should be reflected in due process analysis.

By way of example, one need only consider the contrasting portrayals offered of homosexual conduct as described in *Bowers*<sup>233</sup> and *Lawrence*, respectively.<sup>234</sup> Although the factual, physical character of such conduct does not vary, each view proposes a significantly different evaluative conceptualization of that conduct. Similarly, despite *Lawrence*'s reliance on *Griswold* as a taproot for the pivotal *Casey* autonomy principle it employs in striking down laws against sodomy,<sup>235</sup> Justice Goldberg, in his concurring opinion in *Griswold* had specifically rejected any argument that the constitutional “privacy” right endorsed by the Court could be relied upon as a basis for legal protection of homosexual or extramarital sexual activity.<sup>236</sup>

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<sup>232</sup>J.L. Austin, *A Plea for Excuses*, in 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1, 4-5 (1957), reprinted in FREEDOM AND RESPONSIBILITY 6, 7-8 (Herbert Morris ed., Stanford Univ. Press 1961) (footnote omitted).

<sup>233</sup>See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>234</sup>See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>235</sup>*Id.* at 564 (“There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, . . . but the most pertinent beginning point is our decision in *Griswold v. Connecticut*.”).

<sup>236</sup>Justice Goldberg states:

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*,

“Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.”

*Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring) (citation omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

#### 4. Specificity and Extension of Due Process Rights

Austin's comments concerning the imprecise meaning of "an action" are thus quite germane to the substantive due process requirement that the conduct in question be defined at the proper level of specificity: "we need to ask how we decide what is the correct name for 'the' action that somebody did—and what, indeed, are the rules for the use of 'the' action."<sup>237</sup> As these reflections have illustrated, one of the difficulties in due process jurisprudence results from disagreements about which level of behavioral specification is the most appropriate locus for defining rights. At issue in such disputes is the desire to insure that the criteria for arriving at the appropriate level of description not be determined on the basis of ad hoc judicial whim, but based on some principled reason or methodology.

On one end of the spectrum is the solution offered by Justice Scalia in *Michael H. v. Gerald D.*<sup>238</sup> In ascertaining whether some form of conduct is accepted or rejected as a component of societal traditions and therefore presumably entitled to fundamental due process protection, Justice Scalia suggests that courts should match relevant established societal traditions with the particular claims of due process protection at the most specific level possible. Depending upon whether the traditions approve or disapprove of the specific conduct, substantive due process analysis should reach a corresponding decision to protect or deny constitutional protection. If no relevant tradition exists, of course, the Court would presumably conclude that no fundamental right of due process protection is appropriate because the practice would not be deeply ingrained in the nation's history and practice.<sup>239</sup>

Two important objections to Justice Scalia's approach are laid out in Justice Brennan's dissent. First, Scalia's view provides an overly optimistic picture of what is involved in determining "societal traditions." In fact, appeals to such traditions are themselves at times inevitably beset by complexities and controversies.<sup>240</sup> While Brennan's point may constitute an overly skeptical view of the ability to define

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<sup>237</sup>Austin, *supra* note 232, at 5, *reprinted in* FREEDOM AND RESPONSIBILITY, *supra* note 232, at 8.

<sup>238</sup>*Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>239</sup>*Id.* at 127 n.6. The Court stated:

We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.

*Id.*

<sup>240</sup>*Id.* at 137-41 (Brennan, J. dissenting). Justice Brennan argued:

Apparently oblivious to the fact that this concept can be as malleable and as elusive as "liberty" itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for "tradition" involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Yet, as Justice White observed . . .

"What the deeply rooted traditions of the country are is arguable."  
*Id.* at 137. (Brennan, J. dissenting) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting)).

traditions, it appropriately highlights the fact that often there will be a substantive dispute regarding the proper reading of history.<sup>241</sup> Brennan's argument is corroborated in light of the contrasting historical narratives regarding the societal treatment of sodomy found in *Bowers* and *Lawrence*.

Brennan's second objection is that Scalia's position in principle forecloses the possibility of extending fundamental liberty protection to novel forms of behavior that do not match societal traditions with sufficient specificity. He notes that such a standard would have precluded the holding in many of the Supreme Court's prior substantive due process cases.<sup>242</sup> He argues that Scalia's conception of due process analysis would be essentially redundant insofar as it functions merely to protect that which is already generally protected.<sup>243</sup> In short, Brennan asserts that Scalia's position is wrong because it conflicts in important ways with Justice Harlan's assertion that "novel" issues of substantive due process can and will arise that cannot be mechanically answered.<sup>244</sup>

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<sup>241</sup>For example, consider the disputed historical treatment of abortion in the United States and its impact on substantive due process decisions. See generally JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTIONS HISTORY* (2006); John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 *ISSUES L. & MED.* 3 (2006).

<sup>242</sup>*Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting) ("If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding 'no.'").

<sup>243</sup>*Id.* at 140-41 (Brennan, J., dissenting). Justice Brennan reasoned:

[B]y describing the decisive question as whether [the plaintiffs'] interest is one that has been "traditionally *protected by* our society," rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to "*discern* the society's views," the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.

*Id.* 140-41 (Brennan, J., dissenting) (citations omitted).

Scalia's response to this argument as evidence of his restrained approach to due process is worth noting: "Nor do we understand why our practice of limiting the Due Process Clause to traditionally protected interests turns the Clause 'into a redundancy.' Its purpose is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones." *Id.* at 122 n.2 (citation omitted).

<sup>244</sup>See *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). Justice Harlan maintained that:

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."

*Id.* (Harlan, J., dissenting) (alteration in original) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

On the other hand, as arguably occurred in *Glucksberg, Lawrence, Williams, and Lofton*, the attempt to characterize particular concrete forms of behavior under more abstract conceptualizations of constitutional rights (e.g., the attempt to describe suicide as a form of “death with dignity” constituting the exercise of self-autonomy guaranteed by *Casey* and *Cruzan*)<sup>245</sup> entails its own problems. Defining and protecting behavior as described under higher levels of abstraction has the obvious risk of inflating the right claimed, thus creating constitutional protection for a potentially wide range of conduct beyond that actually brought before the court in a specific case.<sup>246</sup>

In Justice Scalia’s view, the problem such abstraction creates is that it becomes unclear what normative or methodological basis can legitimately be introduced to limit the logical space created by these expanded concepts. In articulating this point, Justice Scalia notes Justice Brennan’s view in *Michael H.* that the constitutional meanings of “family” and “parenthood” should not be limited to their traditional historical connotation, although explicitly conceding that the resulting abstractions have no clear content: “[e]ven if we can agree, therefore, that ‘family’ and ‘parenthood’ are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.”<sup>247</sup> Scalia objects that the inevitable result of such an indefinite methodology inevitably cedes the right to define the unknown contours of those “rights” to future judicial *fiat*.<sup>248</sup>

### B. The Praxis of Ordered Liberty

The preceding section illustrates in broad strokes the dispute raging in Supreme Court due process analysis. Does some specific quality of past practice establish a due process right to certain forms of conduct? If such practices can be accurately ascertained, will the extension of such right be limited only to those specific practices? Is the entire effort to tie due process rights to past practices even a legitimate or appropriate methodology in light of a person’s right to autonomous self-determination?

#### 1. Experience and Knowledge of Civic Good

In a significant way, the very persistence of these incompatible views of substantive due process demands that heed be given to Aristotle’s observation that in

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<sup>245</sup>See *supra* Part III.A.1.

<sup>246</sup>Consider, for example, the broad implication of Brennan’s description of basic constitutional due process values:

“‘[L]iberty’ and ‘property’ are broad and majestic terms. They are among the ‘[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.’”  
*Michael H. v. Gerald D.*, 491 U.S. 110, 138 (1989) (Brennan, J., dissenting) (second, third, fourth, fifth, and sixth alterations in original) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972)).

<sup>247</sup>*Id.* at 141 (Brennan, J., dissenting).

<sup>248</sup>*Id.* at 128 n.6 (majority opinion) (“Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”).

matters of action one should only seek “as much clearness as the subject matter admits of; for precision is not to be sought for alike in all discussions.”<sup>249</sup> To take this warning seriously suggests that due process analysis ought to be viewed not so much as a process of pure logic, but as an exercise in practical perception.

As Aristotle observed about the concept of the Platonic Good,<sup>250</sup> and as has been recognized about the bare concept of autonomy as a principle of public reason,<sup>251</sup> such abstract concepts are, from a practical point of view, empty. Autonomy can describe virtually every self-directing form of behavior and standing alone it offers no rational basis for legally distinguishing among forms of personal conduct. If one applied Ronald Dworkin’s notion of the “gravitational force” of precedent<sup>252</sup> to the concept of *Casey* autonomy, it would have the pull of a “black hole”—dragging every form of conduct into its grasp and letting nothing escape.<sup>253</sup>

But application of a legal principle that provides no basis for drawing relevant distinctions epitomizes arbitrariness and capriciousness. Accordingly, because the whole point of due process analysis is precisely to avoid purely arbitrary decision-making, it must inevitably depend to some degree upon particular judgments concerning (relatively) specific forms of human behavior. Inevitably applying an Aristotelian approach in reaching these determinations, however, will necessarily entail an experience-based method. While there may be, as even Justice Brennan hypothesizes, a “good life” for a community of human persons, i.e., ordered liberty, the process through which society attempts to constitute that order can be derived from nothing other than reflection upon the experience of citizens’ human choices; choices that can have as their object only a good as perceived in a particular form, and as thus perceived, characterized at a particular level of specificity.

Rather than deducing rights by evaluating conduct in light of some purely abstract ideal (such as autonomy as a form of public reason), due process decisions, ultimately, are not about ideals but about human behaviors, and behavior is not an abstraction. Such determination may, of course, as in most other areas of law, be obtained in differing degrees. The exercise of some behaviors may be judged as necessarily demanded by the concept of public order and past practice, while others are judged utterly incompatible. With respect to other types of conduct, clear consensus might not exist and debate remains about whether public order requires, excludes, or is not affected by those forms of conduct.

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<sup>249</sup>ARISTOTLE, *supra* note 131, bk. I, ch. 3, 1094b12-13, at 1730.

<sup>250</sup>*Id.* bk. I, ch. 6, at 1732-34.

<sup>251</sup>*See* *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 377 F.3d 1275, 1309 (11th Cir. 2004).

<sup>252</sup>*See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) (“The gravitational force of a precedent may be explained by appeal . . . to the fairness of treating like cases alike. A precedent . . . provides some reason for deciding other cases in a similar way in the future.”).

<sup>253</sup>For use of the same analogy, see Michael B. W. Sinclair, *What is the “R” in “Irac”?*, 46 N.Y.L. SCH. L. REV. 457, 476 (2002).

2. Ordering as the End of *Phronesis*

As argued above,<sup>254</sup> the formulation of negligence law can be understood to represent a model of practical reasoning that tracks the Aristotelian model of practical reasoning. Based on this analogy, it can be argued in turn that a similar type of analysis might also be employed as a model for properly encapsulating the character of substantive due process analysis.

While this claim may initially appear implausible, it is striking how normative descriptions of negligence theory track language describing “ordered liberty.”<sup>255</sup> Consider, for example, Richard Wright’s description of negligence law understood as a form of justice:

[J]ustice requires that others who interact with you in ways that may affect your person or property do so in a way that is consistent with your right to equal negative freedom, and vice versa. It does not prohibit all adverse impacts, or risks thereof, on others’ persons and property. Such a prohibition would greatly decrease each person’s external freedom rather than enhancing it. It rather allows a person to engage in conduct which creates risks to others’ persons and property, but if and only if the allowance of such conduct by everyone in similar circumstances will increase everyone’s equal freedom, rather than increasing some persons’ external freedom at the expense of others’ external freedom.<sup>256</sup>

Arthur Ripstein makes a similar point describing the rationale for imposing restraints on freedom under the negligence standard:

[T]he reasonable person is the one who exercises appropriate restraint in light of the interests of others. The reasonable person is a construct to strike a balance between different interests. . . . Decisions about such matters invariably import substantive judgments about what is important to a person’s ability to lead a self-directing life. Such matters will occasionally be controversial, though most such interests—freedom of action and association on the one hand, and bodily security and security of possession on the other—will not.<sup>257</sup>

In fact, modest reflection on such texts reveals a clear commonality linking the two bodies of law. Each in its own domain seeks to provide a minimal net of legal principles that simultaneously constitute and protect civic order, and each does so precisely by defining the outer contours of individual freedom demanded by the recognition of a reciprocal freedom of other citizens. Freedom to act must be restricted whenever reasonable persons would view conduct as *unfairly* interfering with another citizen’s reasonable freedom to pursue his or her own ends.

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<sup>254</sup>See *supra* Part II.B.2.

<sup>255</sup>See *supra* Part I.D.1.

<sup>256</sup>Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 166 (2002).

<sup>257</sup>Arthur Ripstein, *Philosophy of Tort Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 656, 663 (Jules Coleman & Scott Shapiro eds., 2002).

Of course, as Ripstein points out, other than some basic rights and restrictions that everyone presumably agrees are absolutely necessary for civic order, the particular form that such ordering takes inevitably proves controversial and debatable. Human persons can disagree in so many ways about what constitutes the nature of civic order and what actions are necessary or detrimental to it.

### 3. “Rules of Law” and Reasonable Differences

It is in connection with this very last point, however, that the most suggestive parallel between negligence and due process analysis emerges. The foundation for this comparison depends upon the distinction in negligence cases between cases in which the judge instructs the jury with the ordinary “prudent, reasonable person” instruction, and the rarer type of negligence case in which the jury is supplied with a “rule of law” that describes in specific detail the behavior that characterizes the actions of a reasonable, prudent person.

Classic discussion of the distinction is found in *Pokora v. Wabash Railway Company*,<sup>258</sup> a case involving the issue of whether a driver who was injured by a locomotive was negligent in failing to comply with dictum of a prior Supreme Court case requiring that “[I]f a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle.”<sup>259</sup> Justice Cardozo, writing the opinion of the Court, rejected application of this “rule of law” holding that such a standard could not appropriately determine the standard of reasonableness required under all circumstances: “In such circumstances the question, we think, was for the jury . . . .”<sup>260</sup>

While not rejecting the possibility that rules of law defining the contours of reasonable behavior by human persons may at times be appropriate, he cautioned that such instances would be rare and could only be ascertained as a result of common experience:

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. . . .

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.<sup>261</sup>

Applying this negligence distinction to due process reasoning suggests a relevant analogy to the distinction between “rational basis” analysis and “fundamental liberty” analysis. In negligence cases that are left to the jury, the court recognizes that it is not in a position to state as a matter of law what constitutes the demands of

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<sup>258</sup>*Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934).

<sup>259</sup>*Id.* at 102 (quoting *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927)).

<sup>260</sup>*Id.* at 101.

<sup>261</sup>*Id.* at 104-05.

reasonable conduct required for public order. It leaves that decision to the prudential judgment of the jury applying its particularized standard of reasonability.<sup>262</sup>

Similarly, in cases involving garden variety substantive due process “rational basis” review, no constitutional rule fixes an appropriate ordering of civic conduct. Rather, substantive due process leaves that prudential decision to the states’ judgments, subject only to a requirement that it be supported by some rational state interest, that is, that it be reasonable.

This restrained assessment of the ability of courts to determine the requirement of due process liberty is reflected in *Glucksberg*. In view of the lack of traditional support for physician-assisted suicide, the Court denied the plaintiffs’ claim to constitutional due process protection under the bare notion of “autonomy” and held that the matter should be resolved by the democratic process. “Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>263</sup>

In negligence “rule of law” cases, however, courts are prepared to impose a standard of conduct that sets out in absolute terms the demands of reasonable civic conduct. As Justice Cardozo indicated, however, courts are reluctant to do this because such determinations admit of wide variation.<sup>264</sup> So too, in cases involving substantive due process fundamental liberty claims, courts are cautioned to be reluctant to determine new absolute rules of conduct establishing fundamental rights or prohibitions against conduct.<sup>265</sup> As articulated in *Glucksberg*, courts should only do so when the claimed right or prohibition satisfies the criteria of being rooted in history and defined specifically, that is, similar to the requirements in other legal contexts, when it is rationally justifiable to impose rules of conduct as a matter of law upon all citizens.

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<sup>262</sup>Jury verdicts are reviewed for rational basis, the operative question being whether the decision is supported by a reasonable interpretation of the evidence. A court’s “sole function is to ascertain whether there is a rational basis in the record for the jury’s verdict; [it is] forbidden to usurp the function of the jury by weighing the conflicting evidence and inferences and then reaching [its] own conclusion.” *Reyes v. Wyeth Lab.*, 498 F.2d 1264, 1288 (5th Cir. 1974).

<sup>263</sup>*Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>264</sup>*See supra* note 260 and accompanying text.

<sup>265</sup>*See Glucksberg*, 521 U.S. at 720. The Court stated:

[W]e “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. *Id.* (second alteration in original) (citations omitted) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”).

Justice Cardozo noted that absolute rules of conduct must “flower” from experience based upon practices rooted in common experience. As the same idea is described in *Glucksberg*: “Our Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decisionmaking,’ that direct and restrain our exposition of the Due Process Clause.”<sup>266</sup> Only when such criteria are satisfied can a standard of conduct avoid, in Cardozo’s words, being “artificial” and “imposed from without.”<sup>267</sup>

A consideration of *Cruzan* provides a helpful paradigm suggested by Cardozo’s reasoning. Reaching out to common historical practices and applying them to novel substantive due process claims raised by the withdrawal of life support, the Court was able to articulate a constitutional due process right to refuse such treatment based precisely on the historic legal traditions and practices associated with traditional doctrines of battery and informed consent.<sup>268</sup>

#### 4. Justice Souter: Due Process as Common Law

At least in its most general outline, the prudential approach suggested in the preceding section comports with Justice Souter’s description of substantive due process analysis in *Glucksberg*. Addressing the issue of the level of specificity by which conduct is to be evaluated in this process,<sup>269</sup> Souter rejects the view that reasonability could only be defined in terms specified in detail by prior practices.<sup>270</sup> As observed above, *Cruzan* itself illustrates that the relevance of past practices must have some “play” allowing them to be applied to novel circumstances. Construing cases of withdrawal of life support as instances of conduct subject to analysis under battery or informed consent does not match up perfectly with prior case law.

Noting that adjudication under due process demands case by case determinations,<sup>271</sup> Justice Souter acknowledges that it, “like any other instance of judgment[,] depend[s] on common-law method, being more or less persuasive according to the usual canons of critical discourse.”<sup>272</sup> Souter recognizes that the Court’s most basic function in substantive due process cases is not to replace states’ determinations with those of the Court, but rather to review those decisions for reasonableness: “[J]udicial review still has no warrant to substitute one reasonable

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<sup>266</sup>*Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125).

<sup>267</sup>See *supra* note 261.

<sup>268</sup>See discussion *supra* notes 186-90 and accompanying text.

<sup>269</sup>See discussion *supra* Part III.A.4 on levels of specificity and analysis of due process conduct.

<sup>270</sup>See *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring in the judgment) (“My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level.”).

<sup>271</sup>*Id.* at 760 (“‘We do not intend to hold that in no such case can the State exercise its police power,’ . . . but ‘when and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.’” (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897))).

<sup>272</sup>*Id.* at 769.

resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable.”<sup>273</sup>

In the context of due process analysis and specification of conduct, Justice Souter notes that an additional substantive limitation on the common-law method must be introduced; namely, the values taken into consideration by a court in making such determinations have to be confined “[t]o those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by ‘the traditions from which [the Nation] developed,’ or revealed by contrast with ‘the traditions from which it broke.’”<sup>274</sup>

In defining the relevant tradition and practices, Justice Souter recognizes that a single “strand” of conduct can be woven into the fabric of various historical traditions and practices.<sup>275</sup> Judges must therefore inevitably make “reasoned judgment[s] about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in the particular case.”<sup>276</sup>

Novel substantive due process issues, then, require an application of prudential analogy to prior cases and historical practices in determining the applicable standard of review and whether fundamental liberties may be at stake. And it is precisely in terms of avoiding either an absolutist abstract approach or an overly specific approach to due process analysis that the common law model of prudential judgment reveals itself as appropriate:

[I]n substantive due process cases . . . , the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. . . . Exact analysis and characterization of any due process claim are critical to the method and to the result.<sup>277</sup>

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<sup>273</sup>*Id.* at 764.

<sup>274</sup>*Id.* at 767 (alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

<sup>275</sup>*Id.* at 771 n.11 (Souter, J., concurring in the judgment) Justice Souter states:

[T]he task of determining whether the concrete right claimed by an individual in a particular case falls within the ambit of a more generalized protected liberty requires explicit analysis when what the individual wants to do could arguably be characterized as belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny.

*Id.*

<sup>276</sup>*Id.*

<sup>277</sup>*Id.* at 770.

In keeping with Cardozo's view that rules of law must "flower" from common experience to avoid being artificial or imposed, Souter's view confirms that the "uncovering" of fundamental due process rights—as a "rule of law" conferring almost absolute protection upon some form of conduct from state interference<sup>278</sup>—can properly result only from a process of prudential judgment and not simple logical deduction. In making this association between common law and due process analysis, Justice Souter cautions that the courts must avoid earlier historical mistakes made by adopting an "absolutist" approach to substantive due process,<sup>279</sup> and remarks: "[T]he business of such review is not the identification of extratextual absolutes [nor] a deduction from some first premise."<sup>280</sup> The determination of fundamental due process rights requires that the claimed right or prohibition be analyzed prudentially in the context of established practices and traditions.<sup>281</sup>

Due process analysis then in its very conception excludes derivation of rights from mere application of abstract principles. The further one strays from reference to particular traditional practices and the more reliance is put on abstract formulations of due process rights to justify a novel claim, the more suspect that it becomes.<sup>282</sup>

### 5. Ordered Liberty as a Free Choice

The preceding arguments illustrate that reading substantive due process analysis through *Casey* and *Lawrence* alone easily leads to the conclusion that the Court is engaged in an abstract philosophical exercise of creating rights through Platonic forms. On that model, constitutional conclusions follow ineluctably as necessary conclusions of analytic logic, available to all persons by virtue of the very rationality of the concepts themselves: "'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'

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<sup>278</sup>This is not to forget, however, that even these can be restricted for a compelling state interest. See *supra* note 179.

<sup>279</sup>See *Glucksberg*, 521 U.S. at 761 ("[W]hile the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.").

<sup>280</sup>*Id.* at 764.

<sup>281</sup>The nature of this process of reasoning appears to be accurately captured in the following description:

All language is the language of a community, be this a community bound by biological ties, or by the practice of a common discipline or technique. The terms used, their meaning, their definition, can only be understood in the context of the habits, ways of thought, methods, external circumstances, and traditions known to the users of those terms. A deviation from usage requires justification . . . .

CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 513 (John Wilkinson & Purcell Weaver trans., 1st paperback ed. 1971) (1958).

<sup>282</sup>As Justice Souter expressly recognized: "As in any process of rational argumentation, . . . when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed." *Glucksberg*, 521 U.S. at 770 (Souter, J., concurring in the judgment).

. . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>283</sup>

Consideration of the Aristotelian model of practical reasoning and a more robust view of constitutional due process analysis, as articulated most clearly in *Glucksberg*, however, establish that due process analysis carried out on such a model is untenable. Substantive process analysis must ultimately be regarded as a prudential effort designed to integrate each citizen’s individual autonomy into a set of conditions constituting ordered liberty. Such an effort necessarily introduces limitations upon unfettered human reason’s ability to devise modes of autonomous action.

But if such limitation is inevitable, the concrete meaning of restrained autonomy cannot simply be derived from bases meeting the formal criteria of “public reason.” In order to be integrated into a particular community at a particular time, it is inconceivable—under a proper philosophical account of practical reason or substantive due process—that appropriate limitations could be acceptable in principle to all rational persons simply as such. As Aristotle was aware, *those* sorts of determinations presuppose judgments of political good that cannot be reduced to matters of pure logic or reason, and that therefore could not in principle be accessible to all citizens.<sup>284</sup>

In light of the inevitably particularized and varied conceptions of the goods of political life—and of the particular good of “ordered liberty”—as incarnated in any historical state of affairs, the determination of what constitutes necessary constitutional limits upon autonomy and what constitutes ordered liberty will only be intelligible in reference to that community’s prior commitments by virtue of its practices and historical traditions. Ordered liberty cannot be conceived of apart from such questions: what specific burdens and rights, what goods and evils are necessary for ordered life in *that* community? Analogous to Aristotle’s conception of practical wisdom depending upon dispositional states, substantive due process questions can only be determined, as the Supreme Court recognized in *Glucksberg* and related cases, only by considering the practices and historical traditions as dispositional “principles” circumscribing substantive due process analysis. Such a model, however, is fundamentally inconsistent with the liberty analysis some assert can, and ought to, be derived from *the Casey* “autonomy principle” read as a public reason ground of rights.

This line of argument is corroborated by reflection upon the fact that every historical experiment aimed at ordered liberty is, in essence, a free choice made by a community of human persons; it is, in a real sense, the exercise of autonomy by a group of persons. As many have noted, however, the possibility of autonomous, non-deterministic human free choice depends upon the exercise of a specific type of reasoning.<sup>285</sup> In contrast to the demonstrative syllogistic asserted to be proper to public reason as rationally accessible to all, free choices can only result from a reasoning process that remains open to the possibility of different conclusions. It is

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<sup>283</sup>Lawrence v. Texas, 539 U.S. 558, 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

<sup>284</sup>See *supra* Part II.A.2, B.1.

<sup>285</sup>See generally Edward C. Lyons, *All the Freedom You Can Want: The Purported Collapse of the Problem of Free Will*, 22 ST. JOHN’S J. LEGAL COMMENT. (forthcoming 2007).

precisely this concept of dialectical reasoning that provides an appropriate model of all political and practical choices. As one group of scholars has described it:

Only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised. If freedom was no more than necessary adherence to a previously given natural order, it would exclude all possibility of choice; and if the exercise of freedom were not based on reasons, every choice would be irrational and would be reduced to an arbitrary decision operating in an intellectual void. It is because of the possibility of argumentation which provides reasons, but not compelling reasons, that it is possible to escape the dilemma.<sup>286</sup>

If this is correct, any attempt to ground substantive due process rights on demonstrative conceptions of public reason model must inevitably fail. Autonomy as a static ideal propagates limitless multiplicities of conduct. Public order, however, properly understood as a specific ordering and limitation of possibilities, must in some relevant way be specified by principles that are not self-evident and do not flow as corollaries from universal ideals. The possibility of freedom and choice—including the free choice of a particular state of the world constituting ordered liberty and distinguishing it from other possible orders—demands that it be founded upon reasons that are not necessarily so. Accordingly, as in all other matters of autonomous choice, the determination of the nature of civic order demands that a choice be made by the community based upon reasons that can be reasonably disputed.

Curiously, Justice Kennedy's majority opinion in *Lawrence*, gives lip-service to this traditional common-law bound process of political choice and growing insight based on experience:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>287</sup>

The Court here implicitly concedes that recognition of expanding components of substantive due process liberty can properly arise only as a result of the growing insight of the governed over time. This prophylactic quality of appropriate conception of practical political reason is also mirrored in Robert Audi's comments: "Liberalism is designed not to eliminate all disagreements but to nurture conditions that keep disagreements from tearing apart the fabric of civil life."<sup>288</sup> Rawls, too, makes a similar point when he proposes that the stability of civic life depends upon laws based on "public reason."

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<sup>286</sup>PERELMAN & OLBRECHTS-TYTECA, *supra* note 281, at 514.

<sup>287</sup>*Lawrence*, 539 U.S. at 578-79.

<sup>288</sup>AUDI & WOLTERSTORFF, *supra* note 36, at 133.

As a matter of historical fact, however, it seems that Supreme Court has honored this paradigm more in the breach than the observance. In decisions, such as *Roe v. Wade* and its progeny in *Casey* and *Lawrence*, the Court treats substantive due process liberty as if it were a free-floating concept of philosophical pedigree rather than a practical principle incarnated in history and practice. The still fiercely contested reception of these decisions in the public square provides indisputable evidence, more than any formal constitutional argument could, that the court has failed in its duty to connect its conclusions about liberty with the practices and history of the nation. It has not, in the words of Justice Harlan, based its decisions upon, “well-accepted principles and criteria” that allows the decision seamlessly to “take ‘its place in relation to what went before and further [cut] a channel for what is to come.’”<sup>289</sup> Paradoxically, then, it is decisions such as these—those most strongly rooted in the *Casey* ideals of public reason and bare autonomy—that represent the greatest threat to the fabric of civic order.

## V. CONCLUSION

The argument can be made that the decisions of the Supreme Court in *Casey* and *Lawrence* reflect a capitulation to and adoption of a view of political reasoning proposed by influential philosophers such as John Rawls and Robert Audi. Such theorists espouse the view that fundamental substantive due process liberty rights—in keeping with a concept of political fairness—must be founded upon a notion of personal autonomy that may only be restricted under principles that all rational persons could in principle accept, that is, by public reason. Any particular, comprehensive views of citizens which cannot be so understood must be rejected as an inappropriate basis for limiting personal autonomy.

This Article proposes that such a view inevitably fails as an adequate constitutional theory. It fundamentally misunderstands the nature of political practical reasoning and, for that reason, lacks the ability to articulate any coherent practical conception of “ordered liberty.” The plausibility of this conclusion has been supported by a variety of considerations.

The concept of “public reason” is offered as an epistemological resolution professing to mediate civic dilemmas created by incompatible, comprehensive views adopted by citizens in a diverse community. It purports to distill a set of principles that provide a shared basis for defending civic liberty and public order that can be assented to by all rational citizens in spite of the diversity of their individual comprehensive views about the goods of human life.

Such a position, however, succeeds only by begging the question about the meaning and character of the public order and ordered liberty that it purports to resolve. In a pluralistic society, it is inevitable that *reasonable* but irreconcilable views will exist about *all* fundamental values, including the nature of and conditions required for ordered liberty itself. The conception of ordered liberty, therefore, like any other practical matter that falls subject to society’s free choice, intrinsically entails the possibility of contradictory rational instantiations and understandings. Public reason, however, implausibly assumes that meaningful agreement about overlapping conditions that are able to secure public order can be captured by

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<sup>289</sup>Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (alteration in original) (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

insights that are not subject to such contrariety, but which are rationally acceptable to all citizens. The theory of public reason fails as an adequate descriptive or prescriptive constitutional theory because it fails to appreciate the depth of the very pluralism which it purportedly resolves.

Delving more deeply into the nature of public reason's error (and therefore the error of the Court following its siren's song), its implausibility can be traced primarily to the attempt to define as politically permissible only those types of arguments and conclusions that proceed in a quasi-demonstrative mode, that is, that can make a claim to being acceptable to all rational citizens simply as such. Specifically, in the context of substantive due process analysis as read through *Casey* and *Lawrence*, the employment of the concept of autonomy as a principle of public reason, promises (like the Platonic theory of the Good or the Kantian Categorical Imperative) to offer a conception of human liberty that all citizens can rationally agree upon, and which can successfully function as a basis for identifying and preserving basic civic rights and thus social order.

While it is true that some common notions might be generalized from varied choices of civic order, proponents of public reason offer no defense of their assumption that such distillations could adequately capture and secure the basic conditions necessary for actually bringing about a single determinate view of civic order, much less serving as a framework that would comport with *all* citizens' rational conceptions of public order. As evidenced in common critiques of Plato and Kant, no reason exists to believe that an appropriate account of the determinate conditions of public order can be arrived at by employment of such abstract conceptualizations.

Rather, the expectation in a pluralistic society, in opposition to the view espoused by public reason, would be that no adequate overlapping consensus regarding the nature of civic order could be accessible to all citizens by virtue of rational capacities alone. Instead, the necessarily particularized descriptions of the practices believed to constitute (or undermine) civic order depend upon common experience and could only be supported by dialectical arguments, that is, arguments that offer less than demonstrative rational proof of their validity and which by their nature then remain in principle disputable.

Drawing upon insights gleaned from Aristotle's critique of Plato's dialectic and well-known critiques of the Kantian project, numerous philosophers recognize that human perceptions of "goods," including the perception of that particular good "ordered liberty" itself, cannot be constituted merely through application of universal reasoning and logical deduction. Because "good" means something particular and individuated, it follows that ordered liberty, as the fundamental good of a community, can never be instantiated, still less protected, through a purely generic concept of order that all citizens could in principle accept. Rather, every conception of ordered liberty, as itself the object of a communal, autonomous free choice, must be constituted through choices of particular goods reflecting determinate beliefs about what specific forms of conduct comport with or destroy that determinate order. As both ancient and modern articulations of virtue theory recognize, such free choices inevitably depend upon the existence of *performatively*-conditioned cognitive and volitional dispositions, that is, the habits, traditions and practices of a community.

This view is corroborated and confirmed by a better reading of constitutional substantive due process analysis offered in *Glucksberg*. There the Court articulates

clearly that fundamental liberties cannot be derived merely from the bare concept of autonomy, but must be based on the nation's history and tradition and carefully described. As this arguably stronger and more comprehensive tradition of constitutional precedent envisions it, the basic freedoms of citizenship can only be ascertained by reference to the particular practices and traditions of a community, that is, by understanding the particular meanings of "freedom" and "order" as they have historically been incarnated. Only in reference to these practices can the meaning of autonomy and "order" take on constitutional significance and practical usefulness.

Obviously hitting upon the level of particularity and abstraction necessary to properly define substantive due process rights in the face of novel claims admits of no easy, demonstrative resolution. It must be based on historical practices and traditions, and it must employ a model of reasoning comparable, in a meaningful way, to that found in the common law, as for example reflected in the analogy of prudential negligence analysis. Ironically, however, the one thing that *is* or *should be* certain in principle to all rational persons as such, is that a reasonable conception of political autonomy and ordered liberty could never be derived from the ethereal demands of public reason.