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Agential Pluralism

A Philosophy of Fundamental Rights

Actor Pluralisme

Een Filosofie van Fundamentele Rechten

(met een samenvatting in het Nederlands)

Proefschrift

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Jurriën Matthijs Hamer

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Promotor:	Prof. dr. M. Düwell
Copromotor:	Dr. R.J.G. Claassen

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Contents

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Introduction

1. An urgent conundrum

In a battle of words, few weapons are stronger than fundamental rights.

"Ted, let me ask you a question," said United States Senator Bernie Sanders to fellow Senator Ted Cruz. "Is every American *entitled*, and I underline that word, to healthcare as a *right* of being an American? Yes or No?" Senator Cruz replied that Sanders "used the word 'right' a lot" and that the only right Americans really had was a right to "access to healthcare".[1] Sanders then said: "Access doesn't mean a damn thing. What [a right] means is that people can afford it. [That they] [c]an get the healthcare that they need."

This exchange is typical of political discussions. Whether we debate wars, climate change, refugees or healthcare, it always seems to boil down to figuring out *who* has an important right to *what*. Politicians present themselves as champions who respect and secure people's rights, and characterize their opponents as villains who violate them. One would therefore think we have a clear idea what these crucial rights standards entail – but one would be wrong. We debate the meaning of rights as much as we debate who actually violates them.

In his discussion with Senator Sanders, Senator Cruz took the American Declaration of Independence as the origin of all valid rights claims, while Senator Sanders ridiculed his comment and urged that people have a moral right to healthcare. This kind of confusing disagreement is widespread. The National Security Agency (NSA) offers a

[1]See the CNN exchange at https://www.youtube.com/watch?v=1Y7nchytFSQ.

very different view on the right to privacy from its whistle-blower Edward Snowden.[2] And while some hold that protection against torture constitutes an absolute right that governments may never interfere with, others, such as the president of the United States, argue torture is indispensable to battling terrorism.[3] We may use the same words in debating political issues, but a shared terminology does not necessarily imply any substantive agreement.

But are there not shared laws? Have we not, as Senator Cruz implies, agreed upon norms and set them down in declarations, treaties and constitutions? Indeed we have, but they only take us so far in understanding rights. Rights documents often feature very general words that are susceptible to a host of different interpretations. For example, how does one interpret "inhuman treatment" or the "highest attainable standard of physical and mental health"?[4] There are no obvious answers to these questions. Indeed, perhaps fundamental rights are "essentially contested concepts" we can never agree on.[5] More importantly, even if the laws were clear, legal documents do not equal moral truths. The agreements of the past may well be mistaken, and the challenges of the future may well necessitate change.

When one looks closely, fundamental rights do not offer a trusted and straightforward method for resolving our differences. They only offer a vast conundrum and an invitation to solve it. And solve it we must – it has rarely been so urgent. More and more, politicians are advocating that we abandon commitments to fundamental rights that were once accepted with pride.[6] More and more, fundamental rights schemes are seen as failures that should be replaced by, for instance, an economic notion of

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[2]See for an interactive overview of the NSA debate *The Guardian*'s NSA files at theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files.

[3]See an analysis at theguardian.com/us-news/2017/jan/26/donald-trump-torture-works.

[4]See the European Convention on Human Rights (ECHR) Art. 3, the International Covenant on Economic, Social and Cultural Rights, Art. 12, sub 1.

[5]W.B. Gallie defines "essentially contested concepts" as "concepts the proper use of which inevitably involves endless disputes about their proper use on the part of their users". See Gallie, W.B., "Essentially Contested Concepts", *Proceedings of the Aristotelian Society* 1956, Vol. 56, pp. 167-198, p. 169.

[6]For instance, Theresa May, now Prime Minister of the United Kingdom, previously advocated withdrawing from the ECHR. Her government now considers doing the same. See telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european.

welfare.[7] In these days of challenge and change, we need to find out *if*, and if so, *why*, fundamental rights matter. Therefore, this dissertation joins the work of many philosophers, lawyers and activists who have taken up this question, and offers a theory that helps us to grasp how we should think, argue and speak about fundamental rights.

2. The long road to understanding fundamental rights

The road to constructing and applying such a theory is long. This dissertation travels along much of it – but not along all of it. I will describe this road as I understand it, and discuss which tasks this thesis performs.

Before presenting an account of fundamental rights, I will argue why it makes sense to pursue such a project in the first place. Chapter one discusses Jeremy Waldron's seminal theory of democracy, which holds that accounts of political institutions, including accounts of the political functions of fundamental rights, should not rely on controversial moral-philosophical theories.[8] As I will offer precisely such a theory to unlock the proper meaning of fundamental rights, his critique directly affects my proposal. I will argue that Waldron is wrong to dismiss moral theory, as it is impossible to make sense of deep questions of political authority without it. Indeed, I will submit that Waldron's theory misrepresents the practice of politics and fails to provide a compelling argument for accepting his vision of democracy. In order to propose a convincing perspective on understanding fundamental rights, we must return to moral theory, and start there.

Accordingly, my account begins by presenting an argument for accepting the validity of a certain conception of morality. In chapters two and three, I will explore and assess two prominent strands of contemporary transcendental justifications of morality: the discourse ethics proposed by Karl-Otto Apel and Jürgen Habermas and the theory of

[7]Posner, Eric, 'Human Welfare, not Human Rights', *Columbia Law Review* 2008, Vol. 108, pp. 1758-1802, pp. 1758-1763.
[8]Waldron, Jeremy, *Law and Disagreement*, Oxford University Press 1999.

agency submitted by Alan Gewirth.[9] I will argue that discourse theory fails to provide a satisfactory grounding of morality and that it offers an elaboration of its moral principles that ultimately loses sight of the interests that matter most to people. In contrast, I will submit that Gewirth's theory presents the right methodology for grounding a system of moral norms.

However, I also disagree with the way Gewirth operationalizes his theory: it suffers from pervasive ambiguity and does too little justice to the particular purposes humans pursue. Prompted by these difficulties, I will introduce a novel interpretation of Gewirth's argumentative structure, called *agential pluralism*, that puts people's particular commitments front and centre and *combines* these with the generic conditions of performing any action whatsoever. At this juncture the thesis provides an important innovation, as the interplay between particular purposes and generic purposes forms the key to understanding and grounding the broadening and flexible scope of fundamental rights and the relationship between such rights and other moral norms.

Moving along, the contents of a normative system need to be drawn out. At this stage the dissertation focuses on the context of politics, and the fourth chapter proposes an understanding of fundamental rights. Analysing the debate on Ronald Dworkin's seminal theory of rights, it critiques attempts to capture the essence of all fundamental rights in daring definitions and instead states that fundamental rights denote a group of goods, based on *prima facie* valid moral rights claims, that are of great moral importance.[10] Consequently, this general definition enables us to do justice to the complex *institutional differentiation* of fundamental rights. Indeed, it makes intelligible how fundamental rights inform decision makers in various political and adjudicative contexts, from inspiring citizens planning demonstrations to instructing judges reviewing legislative decisions. Furthermore, in elucidating these practices, the theory will pay special attention to the relation between fundamental rights and the procedure of majority decision-making.

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[9]Apel, Karl-Otto, *Towards a Transformation of Philosophy*, Transl. Adey, Glyn, Fisby, David, Marquette University Press 1980, Habermas, Jürgen, *Between Facts and Norms*, Transl. Rehg, William, Polity 1997, Gewirth, Alan, *Reason and Morality*, University of Chicago Press 1978.
[10]Dworkin, Ronald, *Justice for Hedgehogs*, Harvard University Press 2011.

Besides proposing an abstract theoretical understanding, the dissertation will also suggest a typology of fundamental rights. It will distinguish between four ways of arguing that a good should be recognized as the object of a fundamental right: it can be understood as a *basic good*, a *derivative good*, an *expressive good* and a *particular good*. Importantly, these categories can overlap. A good such as education can be recognized as having basic, derivative and particular importance. In this way, the thesis provides the avenues along which arguments about fundamental rights can proceed – but it will not stipulate a conclusive list of fundamental rights. Moreover, it will be shown how these avenues of justification bring flexibility to our understanding of fundamental rights, as it becomes intelligible how moral norms may sometimes be rightly seen as fundamental, while at other times such recognition is absent.

Travelling further down the road, the fifth chapter of the thesis enters the debate about the need for *specific* rights institutions. More precisely, arguably the strongest and most invasive method of rights institutionalization, the judicial review of legislative decision-making, will be investigated. Analysing the work of Alon Harel and Jeremy Waldron, the chapter will put forward a tentative justification of such review based on a philosophical discussion of its merits.[11] Furthermore, it will draw out the implications of the analysis of judicial review for evaluating other models of fundamental rights institutionalization.

Finally, in chapter six, the *interpretive methodology* of adjudicating fundamental rights is discussed. Having proposed a justification of morality, a political specification of fundamental rights and an institutional argument for judicial review, we still do not know how rights should be applied in practice. The most prominent example of interpreting constitutionally protected fundamental rights is the doctrine of proportionality. The thesis will investigate it and will argue that a specific interpretation of proportionality forms the best translation of agential pluralism. In doing so, it will be explained how and to what extent agential pluralism assembles moral norms in a

[11]Harel, Alon, *Why Law Matters*, Oxford University Press 2014, Waldron, Jeremy, 'The Core of the Case Against Judicial Review', *The Yale Law Journal* 2006, Vol. 115, pp. 1346-1360.

systematic hierarchy and how it answers concerns about boundless balancing and dangerous consequentialism.

At this point the dissertation ends. Evidently, in order to reach the end of the road to constructing and applying a theory of fundamental rights, one must do even more. To mention a few tasks: one would also need to apply the theory to a world structured by a plurality of states and to show how the interpretive methodology decides concrete cases. Undoubtedly, this dissertation raises as many questions as it answers. But it attempts to build a bridge between debates about moral justification, fundamental rights, political theory and legal methodology. Being both a philosopher and a lawyer, I am convinced that in order to find answers to the conundrum of fundamental rights, and to choose how to further develop liberal democracy, such bridges are essential.

3. A note on terminology

Thus far, I have used and cited the words 'fundamental rights', 'human rights' and 'constitutional rights', and to avoid any misunderstandings it is important to separate them. However, it is difficult to define these terms neutrally. As noted previously, scholars continually debate what these terms *should* mean. Ronald Dworkin, for instance, famously proposed understanding rights as trumps – in his late work he uses the term 'political rights'.[12] Some have contended that we should understand constitutional rights as elements of 'public reason', while others suggest that we should understand human rights as matters of 'international concern' that are part of a 'minimal morality'.[13] To stipulate the meaning of rights terminology is to take a stand in these debates. Therefore, I will employ the following strategy. When debating the proposals of other scholars I will, for the most part, critique their works using their own terms. When constructing my own account I will offer my own terminology and argue why I think it does the most justice to

[12]Dworkin 2011, p. 329.
[13]Beitz, Charles, *The Idea of Human Rights,* Oxford University Press 2009, pp. 141, 160, Kumm, Mattias, 'Institutionalizing Socratic Contestation: the Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review', *European Journal of Legal Studies* 2008, Vol. 1, pp. 153-183, p. 162.

the legal and moral phenomena I seek to study. I will present it briefly – the arguments supporting my scheme are provided in chapter four.

As introduced above, the core concept of this dissertation is that of *fundamental rights*: rights to goods that are of great moral importance. In the political context of a state, these rights are, among other applications, translated into laws. These laws in turn provide *legal rights*, which I understand as grounds for duties found in legal sources. These legal rights can be quite powerful, and can sometimes serve as grounds for reviewing laws made by parliament and government. Moreover, these powerful rights are often set down in the text that founds the state's legal order and its main political institutions: its constitution. Consequently, these rights are called *constitutional rights*. Perhaps most controversially, I will define *human rights* as the equivalent of moral rights: they are grounds for duties justified by the equal normative significance of each human being. As this reveals little, the term will play only a minor role in my arguments.

I hope these short remarks help to clarify the arguments that will be presented.

4. Top-down vs bottom-up

In articulating my account of fundamental rights, I will not discuss the international context. The reason for excluding it is simple: if my conception of the road to understanding fundamental rights makes sense, the international application comes at its end. Only when we understand how people should live together in a single society can we evaluate how we should cope with a world consisting of a plurality of states. Therefore, my approach in no way excludes an international application – it is just not feasible to provide it within the constraints of this thesis.

One might object to this by submitting that the road to understanding fundamental rights should be conceptualized quite differently. Instead of understanding the various rights practices, including the practice of international politics, as contexts of *application*, one could understand them as contexts of *origin*. Indeed, it is in these practices that fundamental rights rose to prominence. Therefore, one could argue, we should not opt for a *top-down* application of controversial moral theory, but elect a *bottom-up* approach that critically reconstructs existing political and legal practices. Over

the past few years this view has gained traction. In the international context it influenced the works of prominent scholars such as Charles Beitz, Allen Buchanan and James Griffin.[14] In the domestic context the work of Jeremy Waldron stands out as an example of critically reconstructing political practice.[15]

Although I will not engage directly with these human rights scholars, I will discuss Waldron's work and defend my project against his critique. This in no way provides a clear alternative to studying international human rights – presenting such an alternative demands an application this thesis does not provide. But the defence does clear the way for the following chapters, which set out and apply a theory of fundamental rights. Moreover, this thesis explicitly seeks to connect theory to practice. Given the focus on a single society, its applications relate closely to many practices of constitutional rights around the world.

I close the introduction by expressing the hope that this dissertation proves a worthwhile read to all the fellow travellers seeking to understand fundamental rights. I hope it shows the relevance of philosophy to lawyers, and the complexity of practice to philosophers. Combining both disciplines has been my academic pleasure – and I hope reading this dissertation is yours too.

[14]Beitz 2009, pp. 102-105, Buchanan, Alan, *The Heart of Human Rights*, Oxford University Press 2013, pp. 3-5, Griffin, James, *On Human Rights*, Oxford University Press 2008, p. 29.
[15]Waldron 1999, pp. 3-6.

Part 1: Critique

Chapter One

Disagreement and Moral Philosophy

1. A question of methodology

Constructing an account of fundamental rights requires a proper grasp of how such norms should function in a scheme of political institutions. We not only need to know which societal states of affairs such rights seek to secure, but also how these rights impact governmental decision-making processes. We therefore need to understand how a *moral-philosophical* perspective on fundamental rights corresponds with the functions such rights fulfil in *legal* and *political* contexts. It makes a big difference on the institutional level if, for example, fundamental rights are only aspirational ideals that legislators have a moral obligation to effectuate, or if they also necessitate constitutionally entrenched norms against which parliamentary statutes must be tested.

The question, of course, is according to what methodology these dimensions must be combined. The introduction already gave one answer to this question: one chooses a moral-philosophical perspective and applies it to an empirically informed understanding of the conditions of human society. For instance, one could admit to being a contractualist, and, following Hobbes, argue that given the world's scarce amount of resources and the nature of humans, all have an interest in setting up a certain kind of government and adhering to certain basic precepts.[16] Further questions about the specifics of such a state can consequently be answered by referring back to the justificatory theory. One could call this the traditional methodology. Note that this

[16]Hobbes, Thomas, *Leviathan*, Penguin Books 1985, Gauthier, David, *Morals by Agreement*, Clarendon Press 1986.

methodology is often worked out theoretically, leaving the institutional application ambiguous.[17]

Still, this methodology seems intuitively quite plausible: if one knows what is morally important, and thus which actions must be promoted and which must be discouraged, a normative framework can be derived that indicates which norms must be enforced to the degree that justifies governmental intervention, what principles should guide the distribution of power and what sort of moral ideas should inform everyday social interactions, etc. Of course, to come to any definitive conclusions, the moral theory needs to be complemented with as much insight into the empirical workings of human society as possible. But because by definition morality considers what we *must* do, it will provide the guidelines we need. It is therefore unsurprising that philosophers tend to put a lot of emphasis on discussing the various moral-philosophical options – think of the impressive amount of justice literature generated over the past forty years.[18]

However, this practice and methodology has not been uncontroversial. One particularly interesting way of questioning the traditional methodology was presented by Jeremy Waldron's seminal book, *Law and Disagreement*.[19] In it, he argued that philosophers should distinguish between debates about politics and debates about justice:

> "So there are at least two tasks for political philosophy: (i) theorizing about justice (and rights and the common good etc.), and (ii) theorizing about politics. […] I believe that philosophers of public affairs should spend less time with theorists of justice, and more time in the company of theorists of authority and theorists of democracy, reflecting on the purposes for which, and the procedures by which, communities settle on a single set of institutions even in the face of disagreement about so much that we rightly regard as so important."[20]

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[17]See for instance Christine Korsgaard's work. She wrote amply on the justification of morality, e.g. *The Sources of Normativity*, Cambridge University Press 1996, as well as on numerous concrete moral issues, such as the significance of animals, see Korsgaard 1996, pp. 153-160, but never submitted a political institutional translation of her justificatory methodology.
[18]See for example Rawls, John, *A Theory of Justice*, Harvard University Press 1971, Sandel, Michael J., *Justice: What's the Right Thing to Do?*, Farrar, Straus and Giroux 2009, Sen, Amartya, *The Idea of Justice*, Harvard University Press 2009.
[19]Waldron 1999.
[20]Waldron 1999, p. 3.

In a more recent paper he splits the second task into two: theorizing about institutions and theorizing about the virtues of institutional actors.[21]

Debates about politics, according to Waldron, require a different methodology from the traditional one: instead of focusing on the 'right' set of moral views, a philosopher of politics should investigate humanity's fundamental political condition: taking decisions in circumstances of pervasive *disagreement*.[22] For how can you, in the face of such disagreement, still realistically say that all disagreeing parties should simply abandon their own views and commit to yours?

This chapter will respond to Waldron's challenge and seek to defend the traditional methodology against Waldron's critique. After presenting his main views, I will evaluate Waldron's methodology and argue that no defence of either democracy or any other institutional set-up can solely rely on Waldron's reconstructive approach. Instead, it must put forward a properly grounded account of moral norms. Indeed, although Waldron is right to emphasize the importance of studying the actual practices of politics, such as parliamentary decision-making and constitutional adjudication, my main message is that it is the actual ambition to evaluate these institutional practices that requires fundamental moral theory.

The rest of the chapter will be devoted to explicating what the demand for such a grounding theory entails and setting the agenda for the next chapters. I will propose that we should choose a theoretical route that puts forward a set of transcendental arguments that all rational humans must necessarily accept. I will close the chapter by translating this methodological shift to the debate about the political role of philosophy. Given the direction in which I take this dissertation, how should political philosophy be understood: is it humble advice, the basis for philosopher-kingship, or something else entirely? I will argue that the responsibility for both constitutional argument and moral theory falls to all citizens and that the philosopher merely travels a road that, ideally, *all* should explore.

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[21]Waldron, Jeremy, 'Political Political Theory: An Inaugural Lecture', *The Journal of Philosophy* 2013, pp. 1-23, p. 5.
[22]Waldron 1999, p. 102.

2. The argument in *Law and Disagreement*

Waldron begins his account of political authority by arguing that the reality of politics has not been sufficiently appreciated by political philosophers.[23] Referring to Roberto Unger, Waldron states that the 'dirty little secret' many political and legal philosophers barely hide is that the procedure of majority decision-making, characteristic of political democracies, is frowned upon.[24] Allegedly, this disdain is mainly based on the opinion that majority decision-making is very much liable to produce bad outcomes, precisely because of its democratic nature. In principle and practice, it does not privilege the critical-minded and independent citizen over the ill-informed and biased one. Indeed, among other sins, legislative assemblies fall prey to "deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling – […] anything, indeed, except principled political decision-making".[25] Democracy is understood as the lesser evil, not as an institution to proud of.

Hence, according to Waldron, *adjudication,* and especially judicial review, a practice that explicitly restrains majority decision-making, has received much more academic attention.[26] Waldron wants to correct this imbalance, present a more nuanced understanding of democratic decision-making and construct "a philosophy of law that pays something more than lip-service to the ideal of self-government; a philosophy of law which indeed puts that ideal to work […] in its account of the nature of law, the basis of legitimacy, the task of interpretation, and the respective responsibilities of legislatures, citizens, and courts".[27]

Crucial to this ideal of self-government is what Waldron calls the 'circumstances of politics', a variation on Rawls' 'circumstances of justice'.[28] Waldron states that "we may say […] that the felt need among the members of a certain group for a common

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[23]Waldron 1999, pp. 8-10.
[24]Unger, Roberto Mangabeira, 'What Should Legal Analysis Become?', *Verso* 1996, pp. 71-73. See for a critical overview of arguments in favour of majority rule Risse, Mathias, 'Arguing for Majority Rule', *The Journal of Political Philosophy* 2004, Vol. 12, pp. 41-64, 43-50.
[25]Waldron 1999, p. 2.
[26]Waldron 1999, pp. 8-11.
[27]Ibid., p. 9.
[28]Rawls, John, *A Theory of Justice*, Harvard University Press 1971, pp. 126-130.

framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are *the circumstances of politics*".[29]

Waldron asks us to recognize that a democratic collective needs to take decisions and coordinate its action *in the face of disagreement.* This disagreement is pervasive: people are at odds about religious questions, conceptions of what makes life worthwhile and even conceptions of what sort of government is morally right.[30] Importantly, Waldron thinks these disagreements are *reasonable* – parties usually hold their views in good faith – and that in heated debates there seems to be no clear way to decide which party is right and which is not. The question is, of course, what normative consequences this enormous reasonable disagreement ought to have. Waldron suggests that given the disagreement, we cannot rely on controversial accounts of just outcomes to grasp the authority of democratic decision-making – and is there an account of justice we *do not* argue about?[31]

Waldron continues by concluding that reaching any decision in such dire circumstances of disagreement can rightly be regarded as an impressive feat.[32] People need to come together and compromise, however large the differences, in order to take decisions that *must* be taken to coordinate society. Compromise is simply necessary: to endlessly insist upon one's views would only be counterproductive. Indeed, given these circumstances, Waldron believes there really is but one ideal we can turn to: a procedure that exhibits mutual *equal respect*.[33] For even though we disagree on so many issues, we all have an *equal right to choose*. According to Waldron, this commitment is best expressed by a procedure of majority rule.[34] For, Waldron argues, only such a procedure counts each vote as one, and no vote as more than one.

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[29]Waldron 1999, p. 101.
[30]Ibid., pp. 158-162. His conception of the reasonable goes significantly further than Rawls', see Rawls, John, *Political Liberalism*, Columbia University Press 2005, pp. 48-53.
[31]Waldron 1999, pp. 158-162.
[32]Ibid., p. 108.
[33]Ibid., pp. 108-112.
[34]Ibid., pp. 113-116.

Of course, Waldron admits that a notion of equal respect can never *only* serve as a justification for majority decisions.[35] To accept that others matter equally seems to imply much more, such as rules, for instance concerning democratic rights, which might actually *restrain or set aside* parliamentary decision-making. Perhaps parliament may not take decisions that violate the ideal of equal respect. However, according to Waldron, such broader understandings of equality are immediately controversial.[36] Thus Waldron concludes that

> "[…] in the circumstances of politics, all one *can* work with is the 'implausibly narrow understanding' of equal respect; and I suspect […] that majority-decision is the only decision-procedure consistent with equal respect in this necessarily impoverished sense".[37]

In politics, the only uncontroversial moral imperative we have is to give all an equal say.

Summing up, Waldron argues that if you *need* to come to an agreement (he calls this the *constraint*), and if you respect others equally (Waldron calls this *respectfulness*), you need to agree to a decision procedure that, at least formally, gives each participant an equal say.[38] Waldron then suggests that taking a vote according to a majority decision, in which each vote is counted equally, should be understood as the *most uncontroversial* solution to the problem of disagreement. The authority of the procedure is construed similarly. In the circumstances of politics, majority rule exhibits a uniquely uncontroversial moral importance that should command our allegiance. Indeed, denying that allegiance would once again privilege one's own views over another's – an action that, according to Waldron's scheme, expresses disrespect.[39]

From this understanding of the authority of majority decision-making flow the positions Waldron defends in more concrete debates. On interpretations of statutes, he argues that searching for the intent of the legislator is rather peculiar in circumstances of disagreement.[40] In such circumstances, politicians agree on a *text*, but not on all kinds of

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[35]Idem.
[36]Idem.
[37]Waldron 1999, p. 116.
[38]Ibid., p. 118.
[39]Ibid., pp. 108-114.
[40]Ibid., pp. 129-131.

underlying views – the intention only goes as far as the explicit compromise. Also, his criticism of judicial review of parliamentary decisions rests crucially on the idea that one cannot override parliamentary authority through invoking an interpretation of rights that is somehow more true.[41] The latter position will be discussed further in chapter five.

3. Waldron's method of reconstruction

Before evaluating Waldron's account, I think it's worth analysing the methodology he employs. Throughout his work, Waldron has employed what he has sometimes called a reconstructive approach.[42] In my interpretation, this means that he has consistently examined certain practices and traditions of thought in order to draw out the most important norms and values enshrined in them. Waldron once offered the metaphor of providing *one view of the cathedral* – which implies that we are all looking at the same building, composed of the same materials.[43] Waldron then reconstructs these materials into their most appealing form. For instance, in an early article about the foundations of liberalism, Waldron made the case for understanding liberalism as the tradition that most emphasized legitimizing political authority through hypothetical or actual consent.[44] His argument for this characterization was that compared to conservatives and socialists, writers associated with liberalism simply stood out in their affirmation of legitimacy through consent: this description best reflected the tradition of liberal scholarship.[45]

Waldron thus did not have the ambition to refute conservatism or socialism and prove liberalism right. He wanted to describe the main lines of liberal thought and thereby reconstruct the practice of liberalism. By showing dominant strands, aberrations are also revealed, and slowly an argument forms that says: considering the most prevalent characteristics of the practice, in order to be true to its character it should develop in direction x. Waldron's description is therefore not without normative bite. His exegesis

[41]Ibid., pp. 278-282.
[42]Waldron, Jeremy, 'Theoretical Foundations of Liberalism', *Philosophical Quarterly* 1987, Vol. 37, pp. 127-150, p. 128.
[43]Idem.
[44]Waldron 1987, pp. 138-144.
[45]Waldron 1987, pp. 137-143.

of liberalism was about the *foundations* of liberalism, and a coherent theoretical model is mindful of those foundations.

Indeed, Waldron not only reconstructs traditions to lay bare their most central content, but he also advises on how to employ traditions to reach normative conclusions. His more recent work on human dignity shows this clearly. In his lectures, Waldron argues that we should understand human dignity in terms of elevated *rank*, instead of understanding it, as happens often in human rights discourse, as a *worth* that grounds human rights.[46] The argument driving this criticism is that the worth interpretation poorly reflects the tradition of thinking in terms of dignity – a very old tradition that can be found in colloquial sayings and legal proceedings throughout history.[47] Waldron tries to show that dignity describes a certain rank and thereby indicates a specific set of rights and duties belonging to the holder of this rank.[48] Consequently, he argues that out of a very hierarchical understanding of such ranks, a modern notion of human dignity developed that accorded each individual with an elevated position.[49]

Interestingly, Waldron does not deny that a certain kind of worth may justify human rights claims.[50] He only maintains that the concept of human dignity must not be used to fulfil that function, as it belongs to an older tradition and has its own specific normative consequences.[51] So, if we want to show respect for the linguistic, juridical and philosophical practices we know today, we *should* accept Waldron's account of the various concepts. Waldron's normative analyses are thus fuelled by an allegiance to dominant practices in Western society. And this brings us back to the contemporary practice of political decision-making.

In his political outlook, Waldron combines two positions that one can only make sense of from the perspective of a reconstructive effort. It has already been explained above that Waldron argues that denying the legitimacy of democratic decision-

[46]Waldron, Jeremy, *Dignity, Rank, and Rights*, Oxford University Press 2012, pp. 30-35.
[47]Waldron 2012, pp. 30-50.
[48]Idem.
[49]Idem.
[50]Waldron 2012, pp. 15-22.
[51]Waldron, Jeremy, 'How Law Protects Dignity', *Cambridge Law Journal* 2012, Vol. 71, pp. 200-222, pp. 205-210.

making is disrespectful to those holding opposing views. To endlessly insist on one's own philosophical account and force it upon others misunderstands the circumstances of politics. However, Waldron does not go as far as Rawls did in his *Political Liberalism*. Rawls argued that those involved in politics should reason *publicly* and forsake reliance on any comprehensive view of life, such as Christianity and Islam, but also Kantianism.[52] Indeed, Rawls argued that the *reasonableness* of doctrines was defined by their ability to support a *freestanding* view.[53] So, to the extent that doctrines did not support the public reason informed by Rawls' freestanding view, they had to be left outside of political discussion.

Strikingly, Waldron denies this.[54] Waldron holds both that politicians should put forward and act on their controversial normative views *and* that they should respect the legitimacy of majority rule, even if their own controversial view would disagree with such respect.[55] These two claims are prone to conflict: according to many comprehensive views, some norms deserve a constitutional entrenchment that restricts the democratic process of majority voting. A Christian could, for instance, coherently argue for a constitutional ban on gay marriage. So how can Waldron claim that these two claims are both valid?

I think the answer lies in his methodology. In daily political life, we often see politicians relying on their comprehensive normative views *and* in the same breath adhering to the procedure of majority rule. When faced with pervasive disagreement, they admit that in the circumstances of politics one has to compromise and that the only hard and fast rule of politics is that in the end issues are fairly voted upon. I think Waldron's intuition is that adequately redescribing such a practice requires both refuting the restrictions on political argument proposed by Rawls and affirming the overriding legitimacy of majority voting. Even though they potentially conflict, these views are both

[52]Rawls 2005, pp. 220-222, 441-445
[53]Rawls 2005, pp. 11-13.
[54]Waldron, Jeremy, 'Isolating Public Reasons', in Brooks, Thomas, Nussbaum, Martha (eds.), *Rawls's Political Liberalism*, Columbia University Press 2015, pp. 125-130.
[55]Idem.

the hallmarks of Western democratic tradition. Therefore, a proper reconstruction of that political practice should not remove possible conflicts, but rather embrace them.

I think this reasoning also applies to Waldron's proposal to separate theories about political institutions and virtues from theories of justice. Theories of justice are about the sort of controversial claims brought forward by politicians, while theories about political institutions and virtues make sense of the allegiance to democratic decision-making politicians exhibit, *despite* the views about justice they may hold. As a consequence, academic theory should be based on the same substantive tensions that characterize political life.

4. A critique of *Law and Disagreement*

Let us turn to evaluating Waldron's account. I believe his strategy of divorcing debates about justice from an understanding of political authority runs into several serious problems. Through discussing them, I hope to uncover and bring together some of the elements necessary for a satisfactory account of democratic authority and fundamental rights. In sum, I believe his line of argument suffers from four interconnected difficulties: (A) his account does not adequately describe political practice, (B) it does not provide any real argumentative guidance to institutional actors, such as members of parliament and citizens, (C) his account is unable to specify and consequently justify the procedural conditions of democracy itself and, finally, (D) his isolation of considerations of politics begs the question. I will discuss them in this order.

(A) As discussed, in his reconstruction of political practice Waldron combines a commitment to controversial moral positions with a commitment to the democratic procedure of majority voting. Consequently, according to Waldron's view it is natural to relativize one's moral beliefs and surrender them to a voting process in which, at least formally, each participant wields equal influence. I think this reconstruction fails to credit the actual practices of *resisting* ongoing democratic processes and the attempts to *use* democratic processes to restrict and guide legislative authority. Prominent exemplars of the former are the various kinds of courts that have been continuously restricting the authority of parliaments, fuelling *debate* about the question of precisely how much

discretion majority decision-making has. A striking example of how invasive such decisions can be is the recent Dutch *Urgenda*-case, in which a district court had to decide whether it could brush aside the position of parliament and government on cutting greenhouse gas emissions – the court ordered the Dutch government to cut them by 25% by 2020.[56] But there are many other reviewing bodies in liberal jurisdictions across the world. Indeed, Kai Möller has argued that judicial review by constitutional courts is a dominant and global feature of liberal democracies.[57]

Furthermore, besides often being bound to constitutional restraints, parliaments restrict their own authority.[58] They can set up advisory bodies whose advice must be published publicly and can only be set aside through public argument. Furthermore, the rules of order and procedure that structure a democratic practice not only guide such a practice, but also restrict it. Parliamentarians need to decide on how questions are posed, how they are answered and how much time certain speakers are allotted. These rules can be decisive for the substance of the decisions that are made. For example, in contemporary politics it is crucial whether a democratic procedure is publicly broadcast or takes place behind closed doors – politicians are careful with their public reputations and can behave quite differently when the cameras are turned on.

Other institutional actors sometimes also resist processes of majority decision-making. By exercising civil disobedience, citizens regularly express disagreement with parliamentary decisions and attempt to cripple effective enforcement or inflict costs on society to force a repeal. Driven by their concerns, people regularly stand up to government, even when it is fully democratically authorized. And think also of democratic congregations that resist representative gatherings positioned at a higher level in the constitutional hierarchy. In Catalonia, Catalonians voted in November 2015 on the question of whether Catalonia should be a state and, if so, whether it should be an

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[56]Rechtbank Den Haag 24-06-2015, case C/09/456689/HA ZA 13-1396. This decision was very controversial, see for instance, De Graaf, K.J., Jans, J.H., 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', *Journal of Environmental Law* 2015, Vol. 27, pp. 517-527, pp. 523-526. My point is these anti-majoritarian practices form a part of democratic culture.

[57]Möller, Kai, *The Global Model of Constitutional Rights*, Oxford University Press 2012, p. 2, 99.

[58]Of course, these constitutional restraints are usually imposed by large past majorities, who chose to limit the possibilities of majority rule in future. We will discuss this in more detail in chapter 5.

independent state – a process of majority voting the Spanish government has called illegitimate and unconstitutional. In the most extreme cases, citizens even choose to revolt and reshape their government through force, because sometimes governmental practices – or governing elites – are deemed to be so wrong or evil that they should be removed outright, notwithstanding the societal upheaval such struggles cause. Throughout history, slavery was thought to be such a practice.

Given all these aspects, it would be more appropriate to conclude that democratic practices exhibit an ongoing discourse about the constitutional and practical shape of political institutions, in which both the primacy and the form of majority decision-making is as much doubted as it is affirmed. Countries regularly change the rules of their democracy: from regulations about voting districts to setting up constitutional courts. Moreover, people often resist the authority of a legislating body by demonstrating, going on strike, and so on. Such movements reflect criticisms of the procedural status quo and sometimes produce proposals for constitutional change. That change is of course mostly sought through democratic means – but not always. It can be necessary to give up on the ideal of majority decision-making when one is faced with a majority of political partners that violate the moral precepts one holds dearest. I think the looming possibility of such resistance also forms part of the democratic practice.

All of this is not meant to either encourage or abate such forms of criticism, of course. My point is rather that if we want to understand democratic political practices, we cannot separate discussions of justice and moral philosophy from questions of political legitimacy. The examples above reveal that actual political practice shows many instances of institutional actors curbing or trying to curb democratic power based on strong considerations of justice. Suggesting that the dominant democratic practice shows that arguments about justice have no bearing on the authority of democratic decisions misrepresents that practice.

(B) Because of his misrepresentation of political practice, Waldron fails to provide normative guidance to those who fulfil a certain institutional role. All institutional actors need to take certain decisions and thus need to find the right answers. Waldron would probably acknowledge this and point towards theories of justice, because

they are proposals of allegedly right answers. But institutional actors also need to decide what their stance is towards the political institution *as such*. For instance, a member of parliament needs to know what proposals and political strategies would violate the rightful place and function of parliament and which decisions would support it. The same goes for a citizen, who must choose whether and how to obey the laws set by the governing institutions. Considering these roles, Waldron's theory implies that if a person is convinced of the need for a collective solution, she should respect the authority of government and not attempt to undermine it. In that way, she acts with *integrity*.[59] But given the practice as described above, this guideline seems much too black and white.

Consider the case of a member of parliament. In determining her actions, she has more options to choose from than simply either rejecting the authority of majority decision-making or abiding by it. She can also propose all kinds of constitutional changes and reject the democratic authority of certain decisions – for example by supporting and coordinating civil disobedience. Furthermore, even if she accepts the authority of current democratic procedures, he can still choose between all kinds of approaches to such an institution: he can leak information to the press or be more discreet, betray political friends or remain loyal, make use of societal lobby groups or practice independence, and so on. All these choices depend on how a politician understands the function of democracy. Is it a search for fair compromises or a competitive game that is played to win? An account of the authority of democracy should provide answers to this question and take seriously the reflective process of those who *are* committed to realizing collective actions but at the same time have a lot of options to choose from.

Now Waldron could reply that such moral guidance requires a much more comprehensive understanding of morality and remind us that as such an account would be controversial it cannot be relied upon to grasp the authority of majority decision-making. At the same time, though, it is quite clear that a politician *needs* such an account to be able to determine his strategy. Waldron's theory thus fails in a significant way to help institutional actors traverse the troubling normative swamp politics often is. Moreover, we begin to see how central the separation of justice and politics is to this

[59]Waldron 1999, pp. 205-208.

difficulty. Where respect for majority decision-making and respect for other norms clash, one needs an overarching normative account to arrive at clear conclusions about what to do. Because of this separation, politicians who face such issues float around in a sort of normative limbo land: they cannot rely on their ideas of justice, but they receive no clear guidance from the mere authority of majority decision-making.

(C) The lack of guiding principles points to a major theoretical difficulty of Waldron's account of democracy. Explaining this difficulty, Thomas Cristiano writes,

> "[T]he trouble is that we ought to expect disagreement about the legitimacy of the collective decision procedures themselves in addition to the disagreement that animates the call for those procedures. So the argument from disagreement is self-defeating."[60]

Cristiano is correct here: people will tend to disagree about the form democracy itself must take. Should we prefer a first-past-the-post district voting system, or do we add up all votes on a national level? Are two chambers of parliament ideal, or one, or three? Do we set up any advisory bodies? These are not uncontroversial issues.

Admittedly, we cannot demand the impossible: a theory of political morality will, by itself, not be able to tell us whether a parliament should have 150 seats. Such a theory must be applied to specific circumstances to yield concrete results – and even then, a definitive answer may elude us. But the point is that a theory of political morality must hand us the principles and argumentative structures with which we can assess institutional questions. Waldron's theory cannot fulfil this task, as it misrepresents the political practice and simply refers to a very narrow principle of equality that supports majority voting.

Let's imagine we need to found a democracy. To do this, people need to come together at some kind of constitutional convention and make choices. These need not be final and can be amended later, but they need to stipulate *a* form according to which the first democratic decision can be made. Here our difficulty returns: how must they, according to Waldron's theory, take a decision on this constitutional level? If we can only rely on majority voting, we will need to decide again *which kind* of constitutional majority

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[60]Cristiano, Thomas, 'Waldron on Law and Disagreement', *Law and Philosophy* 2000, Vol. 19, pp. 513-543, 519-520.

voting we will employ, necessitating a preparatory convention that lays down the democratic rules guiding the constitutional convention. Obviously, an infinite regress sets in.

We have arrived at the founding paradox of democracy: democratic procedure can never, ultimately, be grounded in more foundational democratic decision-making.[61] At some point it requires that a *substantive* stand is taken on the question of which procedural rules are preferable as expressions of equal respect, and why. This requires a more extensive account of equal respect than Waldron provides. Without such a strong principle, just adhering to a kind of majority decision would be like wandering around in the dark: we would simply not *know* if the procedure we are following is actually the best one in a moral sense – although we *do* know this question is of significant moral relevance. But alas, in Waldron's scheme, such procedural considerations that are more detailed, requiring more extensive theorizing on equal respect, fall within the realm of the controversial, from which, for the purpose of understanding political authority, nothing useful can emerge. This is unfortunate, as a proper theory of democracy should enlighten procedural details, not obscure them.

Again, I am *not* advocating that we must find moral principles that can give all the needed guidance *on their own*. Moral principles will need to be combined with all available empirical data to reach the right answers in concrete cases, and it is an open question what sort of combination of knowledge suffices to ground and specify the right constitutional conditions of a democracy. Moreover, I do not deny that certain institutional choices are morally indifferent: sometimes moral theory will not be decisive and will regard different options as equally allowable. The point is simply that in the end, some substantive scheme of moral principles must be presented. Because Waldron does not provide it, he fails to provide a satisfactory theory.[62]

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[61]Cristiano 2000, p. 539, see also Michelman, Frank, 'Constitutional Authorship', in Larry, Alexander (ed.), *Constitutionalism, Philosophical Foundations*, Cambridge University Press 1998, and Honig, Bonnie, 'Between Decision and Deliberation: Political Paradox in Democratic Theory', *American Political Science Review* 2007, Vol. 101, pp. 1-17.

[62]Importantly, I would not deny that certain institutional choices are morally indifferent: sometimes moral theory will not be decisive and regard different options as equally allowable. However, as by definition choosing between them does not give rise to any moral difficulty, such

(D) The objections presented so far show that Waldron's theory misrepresents the actual practice, provides no proper theoretical guidance to institutional actors and offers no substantive ground for accepting a certain type of democracy. However, the crucial flaw is this: as Cristiano rightfully noted, Waldron does not succeed in explaining why the basic commitment to majority decision-making should *not* be understood as controversial, while all commitments to theories of justice *should*.[63] Whether they are right or not, many persons in the world would resist the idea that in circumstances of disagreement we should resort to a democratic procedure. Perhaps they think an aristocracy is the way forward, or an oligarchy, or a dictatorship. So why is majority-decision route superior to other political systems? To answer this question, Waldron needs to take a principled decision and claim that a democracy is simply *morally superior* to other systems of government – but this move does not seem available if he claims at the same time that all theories of justice, which in essence attempt to articulate the most morally important norms for institutions, are controversial.

Some stronger theoretical stance, involving claims that will spark disagreement, is necessary to defend the authority of democracy. Of course, we could construe Waldron's account as doing just that. He invokes the importance of coordination and a notion of equal respect, and we could understand those claims as the basis of a fully fledged moral theory that would then compete with other theories. But then the attempt to bypass controversial claims has failed and my criticism has been accepted: besides leading to a problematically incomplete account of democratic authority, refusing to engage in the debate about the *right* moral theory is simply question-begging.

Moreover, a very different and much more extensive account would be needed to the one Waldron provides in *Law and Disagreement*, as his narrowed-down claims about coordination and equal respect do not suffice to support the inferences he makes about judicial review, textual interpretation and the attitude of integrity of those involved in political institutions. He would need to show why these considerations *outweigh* other

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choices do not merit any consideration in this thesis. We need only know how to distinguish between the morally indifferent and the morally relevant choices.

[63]Cristiano 2000, 518-525, see also Enoch, David, 'Taking Disagreement Seriously, on Jeremy Waldron's Law and Disagreement', *Israel Law Review* 2006, vol. 39, pp. 22-35.

morally relevant reasons, and thus open up debate between different parts of moral theory instead of bracketing off 'politics'. It might very well be that the values enshrined in majority decision-making ultimately do outweigh others. For instance, it could be true that citizens should still faithfully adhere to unjust laws regulating a market economy, because the injustice is less important than the equal respect expressed in the right kind of democratic procedure. My point is that this needs to be *shown*.

5. Choosing a transcendental approach

Although Waldron's theory makes an important contribution to understanding the authority of political institutions, we must set it aside and learn from its deficiencies. By positively reformulating these criticisms, a normative perspective needs to be developed that (A) understands the political practice as partly defined by a discourse about the limits of majority decision-making, (B) provides guidance on the full range of issues institutional actors find themselves confronted with, and (C) provides a substantive normative grounding of democracy that is not (D) question-begging. The goal of this dissertation is to do precisely this: it will construct a theory of morality that does the best job of meeting these desiderata and it will apply that theory to debates about the meaning, institutionalization and interpretation of fundamental rights.

I will seek to fulfil the desiderata by constructing a justification of morality that all must universally follow. Evidently, in real life such a philosophical stance can come across as arrogant or even naïve. For is it likely that the fallible human mind can ever grasp norms of such elevated validity? And does that sober realism not relegate us back to the flawed but familiar practice of non-controversial reconstruction?

I do not believe so. The problems discussed above demand that alternatives are explored. Consequently, we cannot simply set aside theories claiming to proffer categorically valid norms as hubristic, but must investigate carefully whether they succeed. Moreover, in doing so we do not necessarily remove ourselves from ordinary moral debate. In everyday life many experience moral norms as categorical and talk about them as categorical. Indeed, in hindsight our most influential leaders, such as Martin Luther King, Winston Churchill or Franklin Delano Roosevelt, did not participate in

liberal democracy as relativists, holding their ideals as just one coherent conception among others – their words and acts suggest the availability of categorical justification. In everyday life, the role of the relativist is usually only occupied by the intellectual.

In this dissertation I defend a scheme of categorically valid moral norms as the basis for thinking about the right legal and moral political institutional set-up. I will do so by exploring two transcendental approaches to moral philosophy: Jürgen Habermas' and Karl-Otto Apel's discourse ethics and Alan Gewirth's theory of agency.[64] This choice is not necessarily the only one, as there are many other comprehensive theories of morality: one could, for instance, construct a contractarian account or adopt a moral realist perspective. I will not argue against these options, but instead present the reasons for opting for a transcendental approach.

The core idea of transcendental reasoning consists of unveiling the necessary presuppositions of statements and acts. Accordingly, in the sense I will use the term, X transcends Y if X must be presupposed to accept Y. Now, this might seem exactly akin to investigating the implications of concepts or what Kant termed analytical reasoning.[65] But transcendental reasoning is aimed at something else. Kant, arguably the most famous employer of transcendental arguments, submitted that they could serve to prove a *synthetic a priori* moral principle.[66] As *a priori*, such knowledge precedes all experience, but at the same time it is *not* analytic.

To clarify the distinction, the statement 'all bachelors are single' is *analytic a priori*, as it simply consists of drawing out the implications of the term 'bachelor'. In contrast, *synthetic* knowledge *a priori adds* information to a concept. For example, in his moral theory, Kant analysed common morality and argued that *if* any moral norm binds us, this presupposes the idea of acting from a *good will* and following the categorical imperative.[67] Crucially, neither the good will nor the categorical imperative can be

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[64]The main works of reference will be Apel's *Towards a Transformation of Philosophy*, Habermas' *Bewteen Facts and Norms* and Gewirth's *Reason and Morality*.
[65]Kant, Immanuel, Transl. Mertens, Thomas, *Fundering voor de metafysica van de zeden*, par. 417, Boom 1997.
[66]Ibid., pp. 23-26. See also Illies, Christian, *The Grounds of Ethical Judgment*, Clarendon Press 2003, chapter one.
[67]Kant 2005, pp. 1-6.

experienced empirically or forms a necessary part of the de facto shared morality.[68] However, Kant argued, if people understand themselves as morally bound and responsible, they must assume the possibility of a good will and the validity of the categorical imperative.

I will not attempt to further interpret or defend Kant's argument. What matters here is the ambition of this kind of reasoning: if successful, it yields knowledge that all subjects who make certain claims must accept. Accordingly, if there are claims all persons must *necessarily* make, the transcendental method brings out which presuppositions all must also *necessarily* accept. But are there such necessary claims? I think so. In short, being human, we exist in a certain way and possess certain features. Denying these would amount to denying what sort of beings we are. Consequently, our undeniable humanity serves as the bedrock upon which a transcendental theory of morality can be built that all humans, given their humanity, must accept.

Given its ambition to express necessary suppositions, a transcendental approach need not resign itself to reconstructing and improving various existing normative systems. On the contrary, the promise of transcendental moral philosophy lies in its attempt to articulate the normative self-understanding of an entity and thereby construct a normative scheme that *all relevant subjects should accept*. If successful, it yields precisely the sort of universally obligating normative system that can justify certain states of affairs even in the face of the most hardened moral sceptic. It therefore offers to perform the task a reconstructive perspective such as Waldron's failed to do: to justify a certain conception of political authority, even if others disagree with it. Indeed, if all must accept as transcendentally necessary that we should live in a constitutional democracy, people are justified to realize that vision of society.

However, it is crucial that this promise of universal justification does not lead us to disregard the difficulty of drawing concrete norms from theoretical justifications. The contents of a universally justified method of moral argument are far removed from concrete policy proposals. Principles must be applied to intricate practices that are often difficult to understand fully and that sometimes present us with challenging trade-offs.

[68]Ibid., pp. 20-30.

Norms derived from the universal account will often conflict. A pertinent example is the idea of imposing one's will on others, for instance by fining those who refuse to wear seatbelts. Even if one is right in arguing for a certain course of action, this does not mean one is authorized to enforce that position. Indeed, it might be true that the moral costs of enforcement are significantly higher than the moral benefits one seeks to achieve. As will be explored in chapter five, people have a right to decide things for themselves, even if they might take the wrong course. Having argued for a certain justification of morality, such thorny conundrums, ubiquitous in discussing political authority, must still be tackled.

Let us end this section on a positive note. In the course of this dissertation, the investigation into political authority is meant to produce an account of fundamental rights. Evidently, the universal character of transcendental approaches to moral philosophy connects to the discourse that understands all fundamental rights documents, be they international treaties or domestic constitutions, as parts of a universal moral tradition.[69] Therefore, by articulating a transcendental perspective, we will not turn away from but rather make intelligible practices of fundamental rights. Indeed, the account I will develop provides not a rejection but a *grounding* of some existing fundamental rights practices, such as constitutional rights entrenchment and judicial review. In this way, an approach that is characterized by a significant abstraction from practice may turn out to do the most justice to that practice.

All of these issues will be returned to later in much greater detail. However, before moving on, I think it is helpful to close this chapter with some reflections explaining how the arguments presented relate to the relationship between philosophy and democracy – and to whom the theory set out in this dissertation is addressed.

[69]Some of course doubt this, see for an overview Donnely, Jack, 'The Relative Universality of Human Rights', *Human Rights Quarterly* 2007, Vol. 29, pp. 281-306, pp. 284-286.

6. On philosophy and democracy

If we accept that the methodology of a political philosophy should be a transcendental one, how should political actors engage with philosophy? In his seminal essay 'Philosophy and Democracy', Michael Walzer draws a sharp contrast between those who practice philosophy and those engaged in the political domain:

> "but the philosopher fears fellowship, for the ties of history and sentiment corrupt his thinking. He needs to look at the world form a distance, freshly, like a total stranger".[70]

According to Walzer, the true philosopher is an independent hermit, isolated from the actual world of politics, who once in a while seeks an audience with the powerful and presents them with his gifts. Consequently, the democratic representatives freely choose to accept or ignore those philosophical gifts – they cannot craft such gifts themselves.

At the same time, the *demos* have particularistic knowledge, of their own culture and characteristic preferences, that philosophers, as outsiders, lack access to:

> "As there are many caves but only one sun, so political knowing is particular and pluralist in character, while philosophical knowing is universalist and singular."[71]

In other words, just as valid philosophical knowledge is opposed to particularism, political authority is opposed to universalist justifications. Consequently, Walzer argues, it is right that people govern themselves, as they have the right to express their particular interests, understandings and culture and base their political community on them.[72] Furthermore, if the philosopher claims a right to rule, he will have to submit to the habits of such a particular community and lay off his pretence of universality.[73] A philosopher who rules is no longer a philosopher.

Given my arguments so far, it will not be surprising that while I agree with ascribing a universalistic ambition to philosophy, I disagree with the rest of Walzer's account of the relationship between philosophy and democracy. Most importantly, I believe Walzer's strict separation of philosophers and democratic rulers is problematic.

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[70]Walzer, Michael, 'Philosophy and Democracy', *Political Theory* 1981, Vol. 9, pp. 379-399, p. 382.
[71]Ibid., p. 393.
[72]Walzer 1981, pp. 385, 393-394.
[73]Ibid., p. 397.

My criticism starts with a simple observation: the foregoing discussion is about how philosophy *should* relate to democracy. Therefore, if a transcendental justification of morality is correct, two claims must necessarily follow: (A) the legitimacy of a political system itself derives from this justification and (B) not only philosophers but *all* citizens have a responsibility to justify and understand their moral beliefs according to the transcendental account. Given my critique of separating moral philosophy from evaluating political institutions, the former claim need not be argued for here.

The latter claim follows directly from the ambition of transcendental theory: to justify moral claims to all relevant subjects – in our case, all humans. If such an attempt succeeds, all actors, from philosophers to politicians to regular citizens, must adhere to the moral norms it proposes. Of course, the content of such norms differs according to the social context – the actions of government are a different object of investigation from the action of a private citizen. But the moral theory applies to all actors and describes a thought process all should follow. Therefore, to the extent that the theory is understood, citizens, politicians and all other institutional actors should become philosophers.

Of course, the obvious response to this is as follows: as only trained experts – call them philosopher kings – can really understand the complex moral theory, all governing authority should be given to them, thereby disbanding democracy itself.[74] But this conclusion would be quite premature. There are many ways in which a transcendental morality can support democracy. It might well be true that the content of transcendental morality is best ascertained through a democratic process, because it is only then that vital information becomes available, that 'experts' cannot be trusted with some exclusive form of power, or that the transcendental approach justifies basic democratic rights – including a right to take wrong decisions.[75] Therefore, claiming the universal validity of a justification of morality is very far removed from claiming some kind of kingship. However, it is clear that we must investigate the relationship between the knowledge that arises from such an approach and the way a political society should be organized. And that is exactly what this dissertation sets out to do.

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[74]Ibid., p. 387.

[75]Waldron, Jeremy, 'A Right to do Wrong', *Ethics* 1981, Vol. 92, pp. 21-39, pp. 21-25. I think all of these arguments are correct – they will be explored further in chapters three, four and five.

The practical attitude of the philosophically informed politician is at this stage equally undetermined. It is yet undecided whether they should go around preaching about all their valid arguments or instead be silent about them. Describing the conditions of constructive parliamentary dialogue, Cass Sunstein underlines the importance of silence, arguing that

> "especially in a diverse society, silence – on something that may prove false, obtuse, or excessively contentious – can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense. What is said and resolved is no more important than what is left out."[76]

Sunstein is probably right here: one does not secure agreement with a disagreeing party by waving one's allegedly right moral theory in front of him. Indeed, it seems like the best way to disagree with another person, because you leave out *nothing* and demand a stance on *everything* – from the source of normativity itself to the smallest lack of virtuous behaviour.

Of course, this difficulty poses much-diminished dilemma for an *academic* political philosopher who only wants to be heard than for politicians who need to secure agreement. In that sense, the academic is much less affected by the circumstances of politics, and can advocate his moral theory unabashedly. But this distinction is much more superficial than Sunstein seems to suggest. As argued above, the responsibility of the practical philosopher is to illuminate the duties and rights of citizens, including those holding political offices. They need help reconciling moral theory with the necessities of political life. So a mature account of political morality will take the way people respond to comprehensive accounts into consideration. It will not deny the tension between particular identities and universally right arguments, but will *deal with it*.

Undoubtedly, the spectre of philosopher kings leads philosophers such as Walzer, Waldron and Sunstein to frown upon those ivory tower theorists who simply throw down a bit of undisputable truth whenever they feel like it. They want to provide politicians, judges and citizens with advice that is realistic and builds on a truly democratic practice. But these admirable ambitions actually do not require, on closer

[76]Sunstein, Cass, *Designing Democracy*, Oxford University Press 2001, pp. 58-60.

inspection, that we abandon the inevitably hubristic pursuit of philosophical truths. On the contrary, in the end everything hangs on the question of whether the moral claims we submit are actually justified or not. Without a proper justification, even the most empirically informed account lacks any normative strength. Therefore, the only possible answer is to *combine* moral philosophy with a realistic institutional understanding.

Chapter Two

Evaluating Discourse Ethics

1. Critiquing discourse ethics

This chapter begins our journey into the realm of transcendental philosophy. When moving from the debate about democracy and disagreement to transcendental moral philosophy, discourse theory presents itself naturally. As we shall see, it emphasizes both the irreplaceability of the actual, real discourse found in democratic proceedings and the conditions such discourse must fulfil to exhibit rationally appropriate arguments. Discourse ethics thus precisely deals with the struggle to place moral demands on democratic proceedings while at the same time understanding a discursive situation as one that not only needs to conform to externally imposed norms, but also, and perhaps primarily, *generates* and *identifies* such norms.

We will therefore examine discourse ethics' most influential proponent: Jürgen Habermas.[77] His work takes up the exact challenge we have put forward: toconstruct an account of political morality and fundamental rights that is both grounded satisfactorily in moral theory and applied insightfully to the political sphere. Indeed, having presented his discourse ethics, Habermas developed a philosophy of law tasked with drawing out the political implications of his moral thought. Importantly, Habermas' discourse ethics, in particular the justification of moral claims he set out in *Moral Consciousness and*

[77]I will chiefly draw on Habermas 1997, Habermas, Jürgen, *Moral Consciousness and Communicative Action*, Trans. Lenhardt, Christian, Nicholsen, Shierry Weber, Polity Press 1990 and Habermas, Jürgen, *Justification and Application*, Transl. Cronin, Ciaran, Polity Press 1995.

Communicative Action, relies significantly on the work of Karl-Otto Apel.[78] I will start by introducing Apel's account of moral justification and consequently introduce Habermas' own ideas, including the way they relate to the Appellian argument. Both will then be reviewed, concluding the first part of this chapter. In the second part, Habermas' political theory will be presented and evaluated.

The critique I will present is meant to be constructive. Although I do not think the discursive justification of morality succeeds and will argue that Habermas' political views are in some respects problematic, discourse theory is highly instructive to any transcendental attempt to construct a normative theory. Indeed, by appreciating its insights and laying bare its problems, we find a guide to constructing an improved version of transcendental morality. This version will then be presented in the third and fourth chapters. Importantly, given the purpose of the dissertation, we will not discuss all aspects of Habermas' thought in equal depth – the connection between political morality and fundamental rights takes centre stage. Moreover, during his long career Habermas regularly changed his mind: Joseph Heath separates a 'Kantian' from a 'Durkheimian' Habermas and distinguishes an early, a middle and a late period of thought.[79] For the most part, I will not engage in these interpretive debates and simply present the interpretation of his work that aligns most with the aim of constructing a transcendental perspective on political morality – I in no way claim to unveil the one true perspective on his vast body of work.

In short, the difficulties in Apel's and Habermas' accounts flow from the same basic idea: to derive normative contents from the *goal* of creating a proper discourse. For even though such a discourse is crucial to a well-functioning political state and indeed to people's general ability to assert themselves as equals, I will argue it cannot serve as the Archimedean point by which we understand moral obligations – Habermas' ideal of a communicative discourse cannot ground the obligation to respect others as equals.

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[78]Habermas 1990, pp. 82-88, my main guides here will be Apel's *Towards a Transformation of Philosophy* and Apel, Karl-Otto, 'The Problem of Philosophical Fundamental-Grounding In Light of a Transcendental Pragmatic of Language', Transl. Pavlovic, Richard, *Man and World* 1975, Vol. 8, pp. 237-275.

[79]See for instance Heath, Joseph, 'Rebooting Discourse Ethics', *Philosophy and Social Criticism* 2014, Vol. 40, pp. 829-866, pp. 829-835.

Moreover, the political aim of securing such a discourse should be seen as a single part of a collection of very important normative aims, not as the ultimate moral goal under which all others are subsumed. In the end, I will conclude that although we must incorporate its insights into the importance of communicative discourse and its implications for politics, law and fundamental rights, we need to take a different fundamental perspective on transcendental morality.

2. Apel's justificatory argument

The context in which Apel presented his discourse theory was different from and broader than the sphere of democratic political institutions. Indeed, Apel responded to what he perceived as a paradoxical societal predicament:

> "On the one hand, the need for a universal ethics […] was never so urgent as now […]. On the other hand, the philosophical task of rationally grounding a general ethics never seems to have been so difficult as it is in the scientific age. This is because in our time the notion of inter-subjective validity is also prejudged by science, namely by the scientistic notion of normatively neutral or value-free 'objectivity'."[80]

Let us unpack this statement. The first part of the paradox, the need for a universal ethics, seems clear enough after the last chapter's discussion – we need arguments binding to all to justify and determine how we should engage with others, politically and otherwise. The second part requires further explanation. Apel writes about a "scientific age" in which "inter-subjective validity is prejudged by science". What does that signify?

Importantly, the term "inter-subjective" indicates that Apel's understanding of science is *pragmatic*, which means that what is deemed to be valid scientific knowledge is in fact dependent on the conventions of the community of scientists.[81] According to Apel, scientists argue with one another according to specific rules, namely by putting forward propositions about nature that can be *empirically falsified*.[82] Consequently, if a scientific statement is taken to be a valid understanding of the factual world, no scientist has

[80] Apel 1980, p. 226.
[81] Apel 1975, pp. 254-260.
[82] Idem.

succeeded in falsifying the evidence verifying it, and thus all scientists, accepting the intersubjective rules of conducting science, accept the proposition. Scientists are thus by definition engaged in an intersubjective practice, science, in which they subscribe to certain rules – indeed, not subscribing to such rules would disqualify them as scientists.

This brings us to the problematic status of moral claims. Referring to Hume's is/ought fallacy, Apel argues that statements about moral norms can never be falsified, as a fact can never disprove the validity of a norm – assuming, of course, that the norm does not misrepresent the facts.[83] For instance, if I believe that the highest commandment in life holds that all humans should solely eat cows and only drink tea, no fact can prove that commandment to be false. The statement is therefore, according to Apel's definition, unscientific. This realization completes Apel's paradox, for how could we, in light of it, ever think a universally binding justification of moral norms is available?

Apel's solution lies in his understanding of the scientific intersubjective practice. He argues that by unravelling the presuppositions of that practice, we can find a rational basis for accepting moral claims that obligate us to behave in certain ways.[84] He states that

> "the logical validity of arguments cannot be tested without […] positing a community of scholars who are capable of both inter-subjective communication and reaching a consensus. Even the *de facto* solitary scholar can only explicate and test his line of argument in so far as he is able to internalize the dialogue of a potential community of argumentation […]."[85]

In short, one cannot practice science without at least imagining a community of arguing scientists.

Because such a scientific discourse presupposes all kinds of rules of conduct, Apel at this point introduces a normative component: research implies debate and debate implies letting each have a say and taking one another seriously.[86] A scientist thus has an obligation to respect his colleagues. Essentially, by pointing towards the *presuppositions* of a scientific discourse that of itself does not recognize moral statements as scientific,

[83]Apel 1980, pp. 228-230.
[84]Ibid., p. 258.
[85]Idem.
[86]Ibid., p. 259.

Apel believes that he has uncovered norms all participants must accept.[87] For one would no longer be a scientist if instead of seriously respecting the arguments and free academic practice of others one forcibly subjugated them. The actual practice of science thus presupposes a set of rules indicating how scientists should respect each other. This of course does not justify that *all humans* in *all discursive practices* should accept these norms of scientific discourse. Evidently, people can choose not to engage in scientific research or to only pretend to engage in it. If a practice is optional, its norms are not binding on all.

As noted, such a discourse must, somehow, be obligatory for all: Apel must connect his analysis of scientific practice with a practice that is inescapable to humans. He tries to accomplish this by moving from science to rational reasoning *about anything*.[88] Apel holds that to the extent that they consciously and coherently think about the world and themselves, all agents are engaged in an inter-subjective practice defined by certain standards of validity.[89] Indeed, through learning language and thus developing their potential for conscious thought, human agents internalize these standards.

To explain Apel's view, let us imagine a person who is preparing a culinary trip to Paris and is thinking about which restaurant to go to. If she chooses a certain area, say Montmartre, the validity of her reasoning would be compromised if someone else offered a convincing reason against that plan – such as that all the restaurants in Montmartre have burned down. To think rationally about her plans, this person must be open to such suggestions and accord the other appropriate respect, for her reasoning is only valid *if no other person can convincingly refute it*. According to Apel, to think and thus to deliberate about actions is to argue about them and to presuppose the validity standard of seeking a consensus with all other rational agents. And that implies all those agents merit an equal standing as discursive partners – *whatever* one's practical purpose may be.

Moreover, Apel believes this respect is connected to more than just deliberating about particular purposes. As language itself is an intersubjective practice that presupposes a communicative validity standard, every rational language user must accord

[87]Ibid., pp. 258-259.
[88]Apel 1980, pp. 256-260.
[89]Idem.

other language users - who are potentially capable of correcting one's understanding of language – appropriate respect.[90] By simply being a linguistic being, one is believed to be bound to the tenets of discourse ethics. Regarding others as discursive partners is therefore thought to be inescapable:

> "[T]he institution of the transcendental language game turns out to be rather different from the conventionally based institutions of the empirically describable 'language games' or 'forms of life' in the sense of Wittgenstein. Better, the institution could be characterized as the *meta-institution* of all possible human institutions, since it involves the conditions of the possibility of transparent and rational conventions […]. Man can withdraw from this institution only at the price of the loss of the possibility of self-identification as a meaningfully acting being, e.g., in suicide from existential despair or in the pathological process of paranoid-autistic loss of self."[91]

The transcendental methodology now becomes clear. Apel argues that rational agents *must add* the acknowledgement of the equal standing of others to their understanding of the world to see themselves as linguistic thinking beings. Consequently, the price of rejecting this intersubjective "meta-discipline" is that we *lose ourselves* and cannot make sense of who we are.[92] According to Apel, without implicitly accepting the validity standards of language, we cannot even make a meaningful choice.[93] Indeed, if we reject the standing of others and still argue with them, or even deliberate about some decision, Apel thinks we exhibit a *performative contradiction*: our arguing and our thinking *imply* that we accept the validity standards of language, and thus imply that we accept being part of an intersubjective community governed by discursive rules and aimed at consensus.[94]

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[90]Idem.
[91]Apel 1975, p. 268.
[92]Ibid., p. 248.
[93]Ibid., pp. 265-269.
[94]Idem.

3. Habermas' discourse principles

Interestingly, while Habermas accepts the transcendental argument Apel proposes, he denies its *implications*. Drawing on Kambartel, Habermas distinguishes two ways of understanding a transcendental argument: as an ultimate justification of morality, providing an "an absolutely secure basis of unerring knowledge", and as a "weak form of transcendental knowledge", providing only hypothetical statements that must be agreed with in order to engage in certain practices.[95] Habermas states that Apel regards his argument to be of the former type, while he sees it as only establishing weak transcendental knowledge.[96] However, at the same time Habermas shares with Apel the conviction that the linguistic practices that necessitate certain discursive rules can only be escaped on pain of "suicide or serious mental illness".[97] This puts Habermas' relativizing remarks in a different perspective, as it seems such inescapability amounts to all one could really ask of a transcendental argument.

The same reasoning seems to apply to a further difference, namely that Habermas alleges that Apel mistakenly understands the presuppositions of pragmatic discourse as *moral* presuppositions.[98] Habermas argues that they articulate "a rule of argumentation" and cannot be employed as a moral norm – moral norms are only ever produced in *actual* discourses and cannot be derived externally by a single person.[99] However, if we are rationally committed to such discourses, and must consequently abide by these rules of argumentation on pain of misunderstanding what sort of beings we are, the difference between this kind of normativity and moral normativity seems purely terminological. The point of transcendental approaches is precisely to link moral obligation to the conditions of acting and thinking rationally. Consequently, at least in the context of Habermas' exposition in *Moral Consciousness and Communicative Action*, I see no practical difference in Habermas' position when compared to Apel's.

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[95]Habermas 1990, pp. 95-96. See for a critical discussion Heath 2014, pp. 830-835.
[96]Idem.
[97]Ibid., p. 100.
[98]Ibid., pp. 95-102, Heath 2014, pp. 839-841.
[99]Habermas 1990, pp. 95-102.

Building on the justificatory argument, Habermas fleshes out the rules of discourse. Importantly, Habermas stipulates that when a person follows these rules and is committed to reaching an understanding with others, he acts *communicatively*.[100] When he does not, but merely seeks to realize his own purposes, he acts *strategically*.[101] Therefore, one way of summarizing the argument thus far is by saying Habermas thinks it proves rational agents must necessarily be committed to acting communicatively. Or, as Habermas' *Discourse principle* (D) states:

> "Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse.*"[102]

But what does such a discourse consist of? Habermas distinguishes between rules aimed at securing a standard of "minimal logic", rules articulating "presuppositions […] necessary for a search for truth organized in the form of a competition" and rules enabling debates to be decided on "the force of the better argument".[103] Robert Alexy provides examples of all three categories, which Habermas in turn cites approvingly. The first category consists of rules such as "no speaker may contradict himself" and "different speakers may not use the same expression with different meanings", thus preventing arguments from becoming irrational or incomprehensible.[104] The second category features rules such as "every speaker may assert only what he really believes" and "a person who disputes a proposition not under discussion must provide a reason for wanting to do so", ensuring that participants discuss things with one another in good faith instead of frustrating the discussion with lies or diversions.[105] Finally, the third category consists of rules such as "every subject with the competence to speak and act is allowed to take part in a discourse" and "no speaker may be prevented, by internal or

[100]Ibid., p. 58.
[101]Idem.
[102]Habermas 1990, p. 66. There are several formulations of this principle D and the next one U. The differences are very small, although Joseph Heath argues later versions of the U principle are more clearly egalitarian. See Heath 2014, p. 846. I do not think these differences matter to my analysis.
[103]Ibid., pp. 87-89.
[104]Ibid., p. 87.
[105]Ibid., p. 88.

external coercion, from exercising his rights", ensuring all can participate equally and freely.[106]

Evidently, these rules make sense as conditions for reaching an understanding and applying a validity standard to all – lying, using force, changing topics and contradicting oneself all frustrate a genuine search for consensus. Moreover, we can see how these rules imply an equality between discursive participants, as they have equal rights to express themselves and not to be forced into accepting something, etc. Therefore, Habermas argues that communicative discourse implies an all-important principle of Universalization (U):

> "*All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation)."[107]

According to Habermas, this principle articulates the conditions under which moral norms can be produced.[108] Importantly, although the content of these moral norms may vary from time to time, the (U) principle expresses a transcendentally necessary validity.

In his theory of law, Habermas applies this scheme to government and formulates a political morality. However, before discussing his views I will evaluate the justification of discourse ethics as it has emerged so far.

4. Assessing the transcendental justification

Drawing on Rutger Claassen's instructive overview, the transcendental argument proposed by Apel and Habermas can be attacked in at least two ways.[109] First, one can seek to argue that rational agents are not necessarily committed to engaging in discursive practices, proving they can escape them *without* falling into severe forms of self-denial. Second, one could argue that even though some commitment to communicative action

[106]Ibid., p. 89.
[107]Habermas 1990, p. 65.
[108]Ibid., pp. 65-68.
[109]Claassen, Rutger, forthcoming manuscript.

has been established, this commitment does not justify a truly *egalitarian* valuation of all other rational humans. I will discuss the arguments in this order.

(1A) Christian Illies has argued that a discursive consensus need not necessarily be sought, as there are other conceptions of scientific and truth-seeking discourse available and that the related debate is by no means decided.[110] Accordingly, Habermas' and Apel's agreement with the pragmatists is controversial. Moreover, Illies believes justified concerns have been raised against a consensus approach to science, writing that

> "the main one is that it can […] be questioned whether consensus is *any* criterion of truth: the majority might simply be mistaken about some matter".[111]

He concludes that alternative theories, in particular those that understand valid claims to knowledge as claims supported by appropriate *evidence*, are preferable – which means the moral norms connected to reaching a consensus are groundless.[112]

I think this criticism can be refuted. Indeed, Illies misrepresents the position of discourse ethicists. Although Illies is right to criticize *his* presentation of the consensus approach, Apel's analysis can be applied to any conception of science. Consider the practice of presenting evidence. What counts as proper evidence is in practice determined by some shared understanding between scientists, which defines the practice of science. Accordingly, just as with other validity claims, all participants have standing to comment and correct each other's interpretations of what sort of evidence fulfils the set criteria. Again, each criterion of knowledge, be it fallibility or verifiability, will be employed by scientists who can and should scrutinize each other. As mutual scrutinizers, they presuppose each other's standing as potential sources of criticism and will regard the absence of such criticism – for instance, no one doubts the presented evidence – as the mark of knowledge. In each interpretation, the idea of achieving consensus is thus combined with a substantive criterion with which to judge scientific claims. Illies therefore fails to understand that discourse ethics bases itself on the *connection* between

[110]Illies 2003, chapter 2, p. 14.
[111]Ibid., chapter 2, p. 14-15.
[112]Illies 2003, chapter 2, pp. 10-15.

validity standards and the intersubjective operationalization of those standards. He reduces the former to the latter.

(1B) Although one may agree that discursive practices are necessarily consensus-based, one can still decide to simply cast aside the intersubjective world and its implicit validity standards – for instance by deciding to live as a hermit. Should a rational person still be committed to rules of discourse if he makes such choice? Importantly, I think Apel and Habermas would have little difficulty with someone deciding to leave human society. The point is that even if a person leaves, he cannot, rationally, deny the regard he should have for others as his discursive partners – such regard is bound up with being a linguistic agent capable of deliberating and making meaningful choices. This is because others could still, when encountered, intelligibly comment on those choices, and hold that person to validity standards he must, in order to be rational, accept. I think Apel and Habermas are right here. Whether one lives as a hermit or among one's fellows, being a rational human means accepting one's nature as a thinking, linguistic being committed to a practice that is deeply intersubjective.

But can't we opt out *some of the time*? Can't we deny the standing of others when it suits us, without losing access to the intersubjective practices on which so much depends? Importantly, Habermas has argued that such *strategic* actions are parasitic on *communicative* actions – but, as Jari Ilmari Niemi argues, this only applies when many people structurally decide to disrespect others.[113] Consider the example of lying: a person can lie to others without undermining his own understanding of language. It is only when many people start to lie that the linguistic practice itself breaks down. So why should everyone always be committed to supporting communicative practices? I do not think Apel and Habermas have a satisfactory answer here. Therefore, even if it is irrational for a person to reject his connection to all sorts of intersubjective practices, it is not irrational for him to, on occasion, set aside rules of discourse.

(2A) Let's move on to the allegation that Habermas and Apel do not justify a regard for each other as *moral equals*. Illies has submitted that because linguistic practices

[113]Niemi, Jari Ilmari, 'The Foundations of Jürgen Habermas's Discourse Ethics', *The Journal of Value Inquiry* 2008, Vol. 42, pp. 255-268, pp. 266-267.

are almost always *local*, rational humans can refuse to commit to a *universal* practice of shared standards of validity – denying many the standing of equals.[114] Of course, our globalized world might well feature such universal practices – but that is beside the point if a rational human being can intelligibly understand himself as being only a part of a small community. If that were possible, the rules of discourse would only apply to those in your own group and would thus not constitute a universally applicable normative system.

I think two responses are available here, one of which counters Illies' challenge. First, Habermas and Apel could refer to the practice of *investigating* linguistic practices.[115] Such a meta-practice presupposes links between all kinds of language and denies the idea of isolated pockets of understanding that are incommensurable. However, this meta-practice is clearly optional: language users need not necessarily engage in it.[116] Second, discourse ethicists could reason the following way: as all humans are situated in the same natural world, the communicative utterings of some humans are, in a very basic sense, potentially understandable to others. Notions of danger and pleasure and pain are necessarily part of the human condition, and as such all experiencing humans can – at least potentially – help others in making valid statements about this condition. Human thinking will reflect the human condition and, as a consequence, different pockets of humanity, such as Native Americans and European settlers, have always to some degree succeeded in communicating with one another. Humans are thus stuck together in a universal experiential web and can potentially always comment meaningfully on each other's understanding of the world. Apel is therefore right to conclude that all humans must rationally be committed to the same discourse.

[114]Illies 2003, chapter 2, pp. 16-17. In our globalized world, such universal practices probably do exist, but Apel's argument only works if humans *must* understand themselves as part of such a practice.
[115]Illies 2003, chapter 2, p. 16.
[116]Idem.

(2B) Many commentators have convincingly argued that in the justificatory sequence from (D) to (U), an egalitarian valuation of others is not *proven* but rather *assumed*.[117] James Gordon Finlayson writes,

> "[T]he […] problem […] lies in the difference between the indeterminate nature of the consensus, amenability to which is a necessary condition of validity according to (D), and the much richer notion of a consensus of interests, amenability to which is a necessary and sufficient condition of validity according (U)."[118]

In other words, the consensus strived for in argumentative discourses need not consist of a fair agreement on how everyone's *interests* are represented. In the discursive scheme, the reason we *must* value others is because they could raise objections vital to our pursuits or provide information vital to understanding the world – not because their own pursuits matter to us. The normative significance of others is thus both conditional and potentially unequal. For instance, we could imagine providing those who prove to be much better at generating knowledge with more rights and forcing those less fortunate to serve them. It is not hard to see that this kind of instrumentality is dangerous and could lead to unpleasant results.

I think this point hits the mark. Discourse may well be valuable in itself, but it is first and foremost a tool linked to our ability to understand the world. Respecting others as members of a truth-seeking community does not necessarily imply respecting them as full moral equals. Therefore, the idea of communicative action should not be understood as the basis of morality, but as an important avenue through which some moral aims can

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[117]Ibid., p. 17. See also Benhabib, Seyla, *Critique, Norm and Utopia, A Study of the Foundations of Critical Theory,* Columbia University Press 1986, p. 306, 'Gilabert, Paolo, 'A Substantivist Construal of Discourse Ethics', *International Journal of Philosophical Studies* 2005, Vol. 13, pp. 405-437, pp. 409-411, 415, Kelly, Erin, 'Habermas on Justification', *Social Theory and Practice* 2000, Vol. 26, pp. 223-249, pp. 235-236, Rehg, William, *Insight and Solidarity*, University of California Press 1994, pp. 66-69, Rawls, John, *Political Liberalism*, Columbia University Press 2005, pp. 424-427, Rummens, Stephan, 'Debate: The Co-Originality of Private and Public Autonomy in Deliberative Democracy', *Journal of Political Philosophy* 2006, Vol. 14, pp. 469-481, pp. 469-471.

[118]Finlayson, James Gordon, 'Modernity and Morality in Habermas' Discourse Ethics', in *Inquiry* 2000, Vol. 43, pp. 319-340, p. 330. See also Benhabib, Seyla, 'The Methodological Illusions of Modern Political Theory: the Case of Rawls and Habermas', *Neue Hefte Für Philosophie* 1982, Heft 21, pp. 47-74, pp. 57-59.

be reached. As a consequence, we cannot use it to justify any notion of fundamental rights remotely similar to our contemporary commitments.

I conclude that the justification of morality offered by Habermas and Apel is not satisfactory. It does not show why we are morally committed to always following the rules of discourse, nor why we should accept others as full moral equals when engaging in rational discourse. Therefore, we need a different justification of morality. However, before taking up that task, it is worthwhile exploring Habermas' rich political thought, as I believe discussing it will provide something of a roadmap to using a transcendental theory to formulate a political morality.[119]

5. Constituting democracy

To understand Habermas' broader political project, it is fruitful to start by analysing the problem he originally sought to solve. Habermas famously begins his philosophy of law by stating a fundamental tension between *facticity* and *validity*.[120] In short, he argues that since moving away from Christian-Aristotelian world views, our understanding of social reality as it objectively seems to function – *facticity* – no longer clearly corresponds with our rational beliefs about how the world *should* function – *validity*.[121] According to Habermas, in secular pluralistic modernity, it is no longer clear why the societal realities people are confronted with are normatively valid and not *simply oppressive*. Although some normatively trusted spheres of life still exist, for instance certain customary funeral practices, the old world governed by a single comprehensive teleological world view is gone, and an internally *differentiated* lifeworld has filled its place.[122]

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[119]Joseph Heath has argued it is methodologically untenable to interpret *Between Facts and Norms* according to the transcendental justification Habermas discussed in his earlier work *Moral Consciousness and Communicative Action*, as it presents a shift away from the analysis of speech acts, see Heath 2014, pp. 105-108. I am agnostic about this interpretation, because, as Heath admits, Habermas does not announce it explicitly and because at some points in *Between Facts and Norms*, he still refers to his earlier program, see for example Habermas 1997, pp. 104-108. Whatever may be the case, my critique of Habermas' political theory in the coming sections does not depend on interpreting his philosophy of law in terms of his earlier justificatory work.
[120]Habermas 1997, pp. 25-27.
[121]Idem.
[122]Idem.

Habermas argues that this rift between facticity and validity is problematic and that the two perspectives of viewing the world should be integrated in such a way that people perceive the society they live in as normatively valid and the authority of their government as *legitimate* instead of morally ambiguous.[123] Building on his discourse theory, Habermas then develops an account of the democratically legitimated state – the sole body that, according to Habermas, has the ability to integrate a pluralistic social order.[124] The focus on the state is telling, as it shows that Habermas is aware of the limitations of free discourse: we cannot simply expect people to automatically seek solutions that are respectful to all.[125] A proper discourse must be set up and protected, by force if necessary, and to this end people should organize government. To some extent, *free* discourse must be *enforced*.

In advocating his version of a morally *right* political society, Habermas exhibits both restraint and ambition.[126] One the one hand, he warned against too much philosophical involvement in democratic discourse.[127] On the other hand Habermas confidently employed his principles of D and U to describe the conditions of a decision-making procedure any proper democracy must conform to. In his own words:

> "Post-conventional morality provides no more than a procedure for impartially judging disputed questions. It cannot pick out a catalog of duties or even designate a list of hierarchically ordered norms, but it expects subjects to form their own judgments."[128]

Habermas thus seeks to derive the content of political morality by articulating the conditions of setting up a process aimed at communicative political deliberation. More specifically, he argues that the D principle gives rise to a special interpretation of the principle of popular sovereignty, which states that "all governmental authority derives

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[123]Idem.
[124]Ibid., pp. 132-136.
[125]Ibid., pp. 4-6.
[126]In discussing Habermas, I will focus on his writings in the philosophy of law constitutional theory. His latest contributions on human dignity are not included, because in those he pays much less attention to the constitutional complexities I want to discuss. See Habermas, Jürgen, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy* 2010, vol. 41, pp. 464-480.
[127]Habermas 1997, pp. 112-116.
[128]Habermas 1997, p. 114.

from the people".[129] This special interpretation can be separated into institutional requirements, such as binding the administration to parliamentary law, setting up an independent judiciary and articulating constitutional rights.[130]

These are all familiar givens of a democratic society, and it is not hard to see how they flow from the discourse principle. If we must deliberate collectively, we must somehow elect representatives who control government and make laws, and must set up guardians – judges – to apply those laws independently. Indeed, all the interesting *substantive* questions refer to *how precisely* these institutions are set up. Most importantly, exactly which rights deserve protection and are seen as constitutive elements of a rational discourse? And what does such protection entail?

Interestingly, at this point Habermas draws a line between the philosopher and the citizen. Essentially, he claims, these constitutional conditions must be concretized during the democratic process itself.[131] From understanding the discourse principle and the idea of governing by laws, certain abstract guiding conditions can be given, but no more.[132] Crucial to understanding this position is Habermas' differentiation of standards of validity.

Besides a universal standard of morality, given by the principle U, Habermas distinguishes two others: standards of ethical and of pragmatic knowledge.[133] Importantly, Habermas argues that these various validity standards describe discourses that *interpenetrate*, or are *interwoven*, in the political practice.[134] Ethical knowledge is concerned with the good life and thus the human desire to attain and socially reproduce certain identities.[135] We want to lead lives that take on certain inter-subjective meanings and consist of specific practices. Indeed, much of life is spent in the search to find and

[129]Ibid., p. 169.
[130]Ibid., pp. 120-125.
[131]Idem.
[132]Idem.
[133]Habermas, Jürgen, 'Three Normative Models of Democracy', *Constellations* 1994, Vol. 1, pp. 1-10, pp. 1-6. Habermas also identifies procedurally regulated bargaining, but bargaining does not represent a kind of knowledge but rather a procedural solution to disagreeing about ethical and pragmatic questions.
[134]Habermas 1994, pp. 4-8.
[135]Habermas 1997, pp. 160-164.

participate in those practices and environments that really *suit* a person's typical characteristics. Consequently, the validity of one's ethical reasoning is determined by the degree to which one's proposals correspond with the actual preferences and values people endorse.[136] Such a conversation can of course proceed in different ways: all too often talking about life preferences turns into a heated battle in which participants try to dominate others. That is why Habermas emphasizes the primacy of the moral principle of universalization: ethical discourse is subordinated to moral discourse.[137]

Indeed, conceptually, Habermas seeks to separate moral discourses from ethical discourses completely. He argues that moral discourses deal with interests that are universally generalizable: all rational humans must share them.[138] Consequently, he submits that on issues of morality, a rational consensus can, theoretically speaking, always be reached. In turn, ethical discourses concern only those interests and preferences some, but not all, have. These discourses can only be resolved rationally if, due to contingent historical circumstances, all discursive participants happen share them. If this is not the case, a resolution is simply out of reach and a stalemate follows. For example, Habermas suggested that the debate about abortion was still unresolved because it ultimately depended on answering a controversial *ethical* question.[139]

The last type of discourse, pragmatic discourse, also exhibits its own standard of validity. Pragmatic discourse is about correct instrumental reasoning, given the factual nature of the world.[140] Even if one understands how to balance each person's interests equally, measures need to cause the promised effects instead of surprising people with unforeseen and unintended consequences. The logic of pragmatic discourse is the most straightforward, and its difference with the other two is not hard to understand. The moral and the ethical perspectives provide assumptions about human nature that direct pragmatic reasoning. As we live in a real world where actions have certain consequences,

[136]Habermas 1997, pp. 160-164.
[137]Habermas 1994, pp. 4-8. See for further discussion Heath 2001, pp. 236-238.
[138]Habermas 1995, pp. 58-62.
[139]Ibid., pp. 59-60.
[140]Habermas 1997, pp. 159-161.

it is only natural that considerations of morality and ethics presuppose and are internally related to knowledge about the factual world.

Given these different standards, Habermas opposes the idea of directly deriving laws and political rights from the abstract principles of universal morality. Indeed, in Habermas' view the laws promulgated by parliament concern all three discourses of ethics, morality and pragmatics.[141] Simply reducing such a process or its conditions to a derivation of moral theory would neglect the nature of the other two kinds of validity claims. Furthermore, Habermas is careful not to articulate the content of both our ethical self-understanding and our generalizable interests in advance – these are simply not knowable to a single theorist external to a real deliberative process.[142] It would amount to hubris to propose some moral principle and dictate the contents of all relevant political norms.

Finally, and most importantly, discourses should be *enacted*: people need to deliberate with each other and govern themselves, not simply receive the demands of philosophers.[143] Consequently, the reason why Habermas refuses to subordinate law to morality lies not only in the epistemic difficulty of drafting the right laws, but also in the ambition to enable a discourse through which representatives of the people can take real decisions and shape their democracy – only they are the true sovereigns. For all these reasons, Habermas explicitly distances his position from John Rawls', claiming Rawls' theory allows a single person to employ the thought experiment of the original position to articulate principles of justice for all.[144] Habermas describes such a move as *monological*, as it bypasses the necessity of intersubjective discourse – his own theory is essentially *dialogical*.[145]

Before moving on, it is important to note that Habermas' validity standards consist of ideals we may never fully realize. We may never fully understand the factual consequences of our actions, determine the ethical conceptions best suited to us or find

[141]Habermas 1994, p. 1-6.
[142]Habermas 1990, p. 68.
[143]Habermas 1997, pp. 104-110, Habermas 1990, pp. 66-68.
[144]Habermas 1990, p. 66.
[145]Ibid., pp. 66-68.

the right compromise that serves all persons' interests equally. These validity standards are *regulative*: we should strive to meet them and employ them to criticize the rightness of our decision-making procedures and the results of such procedures. An inevitable tension exists between the principles themselves and the fallible people taking up the challenge of governing their democracy. As we will see, this tension gives rise to a need to seek guarantees – to make some moral norms independent from the discretion of discursive participants and to uphold those norms even if participating citizens disagree. This of course brings us to the norms often identified as deserving such a guarantee: constitutional rights.

6. Habermas' theory of constitutional rights

Habermas' political thought is vast, and we have as yet only scratched its surface. But the main ingredients of Habermas' theory of constitutional rights have now been assembled. According to Habermas, such rights are the necessary tools that safeguard the *right* kind of democracy – whether as legally enforceable norms or as guiding political principles, they serve to promote a truly communicative discourse. Rights thus form the legitimacy conditions of crafting laws and policies.[146] If during the discursive process rights are respected, the decisions produced by that process should also be respected.

Habermas therefore characterizes constitutional rights as being *Janus-faced*, or two-faced.[147] On the one hand, these rights are justified on the universal moral basis that *grounds* the right kind of democratic discourse.[148] Accordingly, if a majoritarian decision is taken in a way that conflicts with those rights, it is morally problematic. However, at the same time rights enable the process of law-making and are definitively articulated

[146]Habermas, Jürgen, 'Constitutional Democracy, a Paradoxical Union of Contradictory Principles?', *Political Theory* 2001, Vol. 29, pp. 766-781, p. 778.
[147]Habermas 1997, pp. 120-125. Of course, Habermas' idea of the co-originality of law and morality applies here, indicating that neither can be inferred from the other, and that only their combination results in giving concrete content to political morality. For reasons of space I will not discuss this idea in general terms here, but solely focus on Habermas' conception of constitutional rights.
[148]Idem. See also Flynn, Jeffrey, 'Habermas on Human Rights: Law, Morality and Intercultural Dialogue', *Social Theory and Practice* 2003, Vol. 29, pp. 431-457, pp. 432-438.

through the discursive process – their final form is decided by democratic majorities.[149] Both a legal and a moral dimension are therefore internal to the concept of a right, producing a tension that can never be fully resolved.

This duality is explicated in Habermas' writing on drafting constitutions. Mirroring social-contract theory, Habermas describes an original condition in which "an arbitrary number of persons freely enter into a constitution-making practice".[150] Crucially, these persons are imagined to be equally free, and their votes count equally as well – discourse ethics is taken to justify this.[151] Similar to the Rawlsian scenario, Habermas then distinguishes different stages, in his case two:

> "The first stage involves the conceptual explication of the language of individual rights in which the shared practice of a self-determining association of free and equal citizens can express itself - rights, thus, in which alone the principle of popular sovereignty can be embodied. The second stage involves the realization of this principle through the exercise [...] of this practice."[152]

In the first stage the participants find themselves behind some kind of veil of ignorance and they determine the meaning and shape of certain rights *in abstracto*.[153] Afterwards they are confronted with empirical reality and specify the appropriate rights so as to effectuate them. Accordingly, at the second stage the moment of intersubjective understanding takes place that offers up the information specific to the concerned individuals and their lifeworld and is vital to reaching a fair agreement about governmental norms. Habermas shows philosophical restraint, as only at the first stage, at which general conceptual matters are decided, is there room for morality to directly dictate the discourse.[154] During the second stage the specifications of abstract rights require knowledge only made available in the discursive process *itself*. As both stages

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[149]Habermas 1997, pp. 120-125. Habermas describes this internal tension as a tension between public autonomy and private autonomy: public autonomy describes a people's ability to rule themselves, while private autonomy describes the protection people should have against governmental abuse.
[150]Habermas 2001, p. 776.
[151]Ibid., pp. 775-778.
[152]Ibid., p. 778.
[153]Idem.
[154]Ibid., p. 776-778.

make up the process of constitution-making, any participant external to the discourse cannot prescribe a constitutional scheme.

Instead, Habermas mentions four categories of abstract rights the participants must necessarily accept if they want to regulate themselves legitimately by law:

1. "Basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to the greatest possible measure of equal individual freedom of action of each person;
2. Basic rights (whatever their concrete content) that result from the autonomous elaboration of the status of a member in a voluntary association of legal consociates;
3. Basic rights (whatever their concrete content) that result from the autonomous elaboration of each individual's right to equal protection under law, that is, that result from the actionability of individual rights;
4. Basic rights (whatever their concrete content) that emerge from the autonomous elaboration of the right to an equal opportunity to participate in political law-giving."[155]

Most of these abstract classes are familiar enough. 1 and 2 seem to correspond to a body of classic liberal rights, such as freedom of movement, bodily integrity, freedom of expression, the right not to be tortured and the right to a fair trial, etc., while 3 indicates something like a right to an effective legal remedy and 4 obviously refers to passive and active political rights. But Habermas would emphasize that these concrete inferences are fallible and historically contingent – only in their abstract formulation do the categories of rights attain universal validity.[156]

7. The methodology of rights review

However, Habermas does offer more insights into the methodology of tackling problems of applying constitutional rights. More specifically, he offers insightful comments on how legal rights should be understood and applied in the face of majoritarian decision-

[155]Habermas 2001, p. 777.
[156]Habermas 1997, pp. 122-125.

making. I will close the exposition of Habermas' views by discussing them, as his comments open up avenues which will be explored throughout the dissertation.

Habermas' way of connecting rights with democracy has already been mentioned, but it should not be underestimated. He argues that courts should only step in when they can *strengthen* parliamentary democratic proceedings and should never seek to replace them.[157] This, for instance, justifies the rule that a court may invalidate certain majoritarian decisions but should be very hesitant to *replace* those decisions with new ones – that responsibility remains with the legislator.[158] In my interpretation, this implies that if a certain moral wrong is committed that does not really affect the workings of democracy, the court should do nothing. Apparently, it is not tasked with preventing all egregious moral wrongs but only serves to safeguard the core elements of a rational democracy.

However, one can of course wonder whether terrible moral wrongs that do *not* affect a free discourse actually exist. If someone is assaulted, or threatened, or reduced to poverty, his discursive participation suffers – being scared of others or being economically inferior to others weakens a person's ability to debate on an equal footing. But what about a certain person's right to exercise his religious beliefs? What if a ban on the building of mosques was introduced? Would this really affect Muslims' ability to act politically? They can still vote, stand for office, participate in public debate and organize themselves politically. There is no direct connection between exercising religion and political ability. One could only derive a connection by suggesting that banning religious activities leads to the kind of civil disobedience and oppression that ultimately destabilizes normal democratic proceedings. But this is an uncertain empirical link, not a straightforward logical inference – we will come back to this point later on.

On a more theoretical level, Habermas also separates a constitutional rights review from what he calls *teleological* and *gradual* ways of deciding substantive questions:

> "Principles or higher-level norms, in the light of which other norms can be justified, have a deontological sense, whereas values are teleological. Valid norms of action obligate their

[157]Habermas 1997, pp. 262-270.
[158]Idem.

> addressees equally and without exception to satisfy certain behavioral expectations, whereas values are to be understood as intersubjectively shared preferences. Shared values express the preferability of goods that, in specific collectives, are considered worth striving for and can be required or realized through goal-directed action. Norms of action appear within a binary validity claim and are either valid or invalid; we can respond to normative sentences […] only by taking a yes or no decision or withholding judgment. By contrast, values set down preference relations telling us that certain goods are more attractive than others; hence we can assent to evaluative sentences to a greater or lesser degree."[159]

Habermas introduces many distinctions here, but, in sum, he draws a line between the accounts of ethical and moral thinking discussed above. Ethical thinking deals with goods that are preferred by some people but not necessarily by all – hence the reference to "specific collectives". A group of people likes, for instance, rap music and the same group also likes classical music. According to Habermas, these intersubjectively valuable goods are then ranked – people figure out whether they like rap more than classical and then decide how to spend their resources on both. A matter of degree is thus involved. Finally, ethically valuable goods are 'goals' which people try to optimize – they want to have their preferences satisfied optimally. This leads Habermas to characterize this thinking as teleological.

In short, Habermas disapproves of conducting rights review in an ethical fashion. The reason for this lies in the relative validity of Habermasian ethical statements – they do not reflect moral truths all should be bound by. As a consequence, judges cannot intervene in the legislators' decision-making on the basis of values. They may only do so on the basis of morally valid statements that are necessarily presupposed by a rational discourse. Such moral norms have, according to Habermas, the exact opposite characteristics: they do not refer to the values of some collective but to goods that should be approved by all.[160] Moreover, they do not refer to 'goals' that can be realized gradually but to concrete rules that either apply or do not apply – a 'yes-or-no' decision is warranted.[161] Habermas therefore concludes that these characteristics should determine

[159]Habermas 1997, p. 255.
[160]Habermas 1997., pp. 254-258.
[161]Idem.

the way rights review proceeds. Rights should be seen as unyielding "firewalls" that, when interfered with, simply stop certain goal-related arguments from being accepted.[162]

In the context of juridical debates about constitutional rights interpretation, Habermas' comments are highly significant. As we will explore in later chapters, the interpretative method of *balancing* and *proportionality* dominates current judicial practices – featuring precisely the kind of assessment of goods *in degrees* and the collective *goals* that Habermas disagrees with.[163] Indeed, his comments on rights interpretation stand precisely on the losing side of current judicial practice. If he is correct, his admittedly abstract proposals would still challenge the contemporary practice significantly. This topic will be investigated more deeply in chapter four, when the work of Ronald Dworkin is discussed, and this leads to an account of proportionality in chapter six.

For now, we conclude the exposition of Habermas' views and turn to evaluating them, in order to set the agenda for the account of morality presented in chapter three.

8. The tension between interests and discourse

A philosophical analysis has now been discussed that has a similar ambition to that of this dissertation: to present a justification of morality and draw out the consequences of accepting such a justification for understanding rights in their political context. It has become clear why this analysis should not simply be endorsed: the justificatory structure at the basis of the account of discourse is faulty – we will need to introduce a different ground for morality, and this will undoubtedly impact the way applicatory issues are then discussed. However, I think Habermas' political thought has shown us two interesting tensions that also need to be resolved. I will critique his work through discussing them.

The first tension lies between interests and discourse. In discussing the principles U and D, it became clear that the *point* of a free discourse is ultimately to secure fairly the interests of those participating in it. But the interests themselves remain obscure.

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[162]Idem.
[163]Möller 2012, pp. 2-15.

Indeed, Habermas and Apel consciously employ an indirect approach: it is up to the participants themselves to make their interests known, learn those of others and together resolve troubling issues. One could now say: let us be satisfied with such an indirect account. Indeed, in terms of the abstract rights and rules of discourse, Habermas provides the materials with which participants can perfect their democratic practice and that give them a guiding perspective on many policy issues. Indeed, perhaps no more should be asked from the perspective of a moral philosopher.

But such a response would be out of place. The previous chapter showed that participants in a democratic discourse must always ask themselves how they should behave vis-à-vis the discursive process itself. They have to determine whether they should simply offer their opinions and accept its conclusions, whether they should use the process itself to change the conditions of that process, or whether they should sabotage or resist the discursive practice. Now, I think that in order to answer these questions and determine their actions, people need to judge their democratic loyalty *from the perspective of the most morally important states of affairs*. They need to wonder whether a certain treatment of constitutional discourse improves the likelihood of securing people's most important goods.

For what is ultimately at stake in politics? The answer has to be, roughly, that the most morally significant states of affairs, however one defines them, are realized. Accordingly, the worth and form of a political system depend on its ability to secure these states of affairs. Of course, the political system itself *also* forms such a morally important good. Indeed, a political system that discriminates is morally wrong, even if its decisions do not lead other societal practices to be disenfranchising. But only the totality of significant states of affairs forms the ultimate point of reference for any decision pertaining to political action.

Clearly, discourse theory does not provide us with a theory indicating how we can draw out these morally important states of affairs. Rather, it provides us with ideas about the procedure of discussing them. But it seems to me that any credible account of decision-making must explicitly relate to a robust vision of the ultimately important states of affairs. Otherwise, we are not able to determine whether the discursive

conditions are really the correct ones, as that requires weighing *all* the relevant interests. Indeed, it should be part of the correctness of a constitution whether, for example, it is prone to disregard goods that are highly important to people's lives but less important to a certain rational discourse – think of the example of religious freedom discussed earlier. Moreover, even if the right conditions are in place, any discursive procedure can still fail. True freedom of deliberation always gives rise to the risk of bad decisions. We need to be able to fully identify such wrong calls and consequently weigh the importance of adhering to the right procedure against the wrongness of violating certain interests. This too requires a fuller grasp of the collection of fundamentally important states of affairs.

Therefore, Habermas fails to resolve the tension between interests and discourse. The flaw is one of *incompleteness* – although Habermas' theory offers many important insights. But to evaluate our attitude towards a certain democratic constitution correctly, we need to propose a political theory that focuses on all the central aspects of moral life. Indeed, only taking the discursive perspective seriously could even lead to strange results. For example, let's take two goods, eloquence and freedom from pain, and compare them from the perspective of a discourse among equals. Which good contributes the most to securing the right kind of discourse? Obviously, freedom from pain is important, as pain can be debilitating, but it is hard to see why persistent but not really dangerous aches impact one's ability to participate politically. In contrast, eloquence seems to be at the core of any attempt to balance the scales between political contestants – if a politician is always slightly more convincing than his peers, he might end up wielding significantly more influence. From the perspective of enabling an egalitarian discourse, investing in a person's eloquence seems more important than securing a completely pain-free existence. We can immediately see how one-sided this analysis is. People live in all kinds of contexts, and the significance of their interests should not be judged primarily in terms of their political ability. However crucial that ability is to securing all their other needs, it cannot dominate the way we evaluate how our politics operates.

Since Habermas introduced his political ideas in *Between Facts and Norms*, authors have taken up his model and expanded upon his political claims.[164] Focusing on the conditions of a free and equal discourse, arguments have been made to include almost all of the goods normally seen as part of governmental responsibility, from satisfactory working conditions to proper education.[165] But however insightful these analyses are, they will always be dangerously one-dimensional. For when push comes to shove and the prohibition of torture needs to be balanced against the right to bodily security, a decision should not solely depend on preserving the right political context – the right political context depends on carefully taking into account the totality of morally fundamental states of affairs.

Therefore, what is needed is an account that says more about vital human interests and introduces a convincing anthropology of what matters to rational humans. I will take up this difficult task in the next chapter – for, as Habermas convincingly argued, we must be careful not to mistake an optional ethical conception of the good life for a universally binding set of morally important goods. This brings us to the second tension.

9. The tension between morality and ethics

At first glance, Habermas succeeds in making an elegant distinction between morality and ethics. Everyone favours certain life projects and conceptions of what sort of existence is worthwhile, and it would be a grave mistake for a single person to absolutize *his* personal take and force it upon others. Therefore, Habermas separates discourses concerning universally generalizable interests from discourses concerning optional choices.[166] I doubt whether his conceptual scheme is correct. More specifically, I object to the way Habermas operationalizes the distinction in analysing rights interpretation, and

[164]See for instance Olson, Kevin, *Reflexive Democracy: Political Equality and the Welfare State*, MIT Press 2006, and Flynn 2003.
[165]Olson 2006, pp. 50-55, 100.
[166]Habermas 1995, pp. 58-62.

I wonder whether we should not also attach moral significance to those interests not universally shared.

Habermas argues that constitutional rights ought to be understood as norms that are good for all and that are produced by applying the moral principle of universalization. Therefore, in contrast to ethical values, constitutional rights are *deontological* and have a *binary* nature: they are not respected *to a certain extent*. Like a rule, a right either applies or does not apply; it is either set aside in favour of another rule or dictates the correct result.[167] I think this differentiation is much too rigid. Just like ethical values, moral norms must sometimes be respected gradually, and the language of collective goals often plays an important role in discussing them. The practice of constitutional rights bears this out precisely.

Imagine a right to privacy and a right to bodily integrity, and imagine also that stopping a bombing would require tapping phones and scouring a person's private emails. Clearly, in this situation the right to be protected from bodily harm conflicts with the right to private communication. Should one simply override one right to determine the outcome? Or should a compromise be found between these rights? The latter choice seems more plausible than the former. If an informed deal is struck, people will not be either without protection or without any privacy. In practice, therefore, some level of security is often given up in favour of retaining a form of privacy – and vice versa. Therefore, rights do not operate as complexes of binary rules at all, but are more like norms *that are respected to a certain degree*.[168] Moreover, the various rights in play are often discussed in terms of collective aims: promoting security, promoting democracy and promoting economic prosperity, etc. At least in terms of the conceptual language that is employed, both rights and collective goods figure prominently in practices of

[167]Importantly, Habermas does not argue moral norms, and thus constitutional rights, are absolute. They can be set aside and do not apply categorically. Only the universalization principle applies categorically. See Habermas 1995, pp. 58-63.

[168]Alexy, Robert, 'Constitutional Rights, Balancing and Rationality', *Ratio Juris* 2003, Vol. 16, pp. 131-140, pp. 135-140, and Alexy, Robert, 'Jürgen Habermas' Theory of Legal Discourse', *Cardozo Law Review* 1995, Vol. 17, pp. 1027-1034, pp. 1030-1033. See also Greer, Steven, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, *The Cambridge Law Journal* 2004, Vol. 63, pp. 412-434, pp. 432-434. We will come back to these points in chapters 4 and 6.

adjudication.[169] Of course, the adjudicatory practices could be wrong. But, as I seek to show in chapter four, the relationship between collective goods and fundamental rights is not done justice by simply superimposing deontological moral rights over teleological public goods.

Second, I do not find it plausible that constitutional rights, and moral norms in general, cannot contain an optional ethical substance. Note that I only express an intuition here that will be further argued for in the next chapter. The intuition consists simply of the belief that respecting a person also means respecting the fact that he values particular goods. At the very least, this means that people work together to create room for each other's life plans – but it may well mean more. It may mean that goods of enormous importance to a great many people are recognized as fundamental goods, worthy of constitutional protection. A fundamental right to education, for example, may owe part of its fundamental status to the essential role it plays in enabling a great many ethical conceptions of leading a good life. In the end, I think the categorical respect we must show towards one another can, when applied to the ethical content of our rational preferences, produce norms that are not good for all, but rather are good for many. As noted, I can only express the thought here – its further elaboration awaits in chapter three.

10. An agenda for a transcendental theory of morality

Let's take stock of the critique presented in both chapter one and chapter two. The analysis began by criticizing Waldron's attempt to ground political authority by reconstructing democratic practice. It was submitted that an appropriate justification of political morality cannot rely on some uncontroversial notion of equal respect, as this would misrepresent the political practice, fail to guide political participants, fail to ground the procedures of democracy and would ultimately beg the question.

Any proper account of political morality should accept that the constitutionality of current procedures is always questioned and that participants in democracies

[169]See for instance the limitation grounds mentioned in the European Convention on Human Rights.

structurally reflect on the adequacy of their institutional set-up. From arguing about judicial review to arguing about the rules of parliamentary procedure – thinking about all these institutions necessitates a better justification of political authority than referring to the elevated value of majority rule. Such justification is thus not just a philosophical matter that can be pondered whenever one feels like it. Citizens themselves need to apply proper theory to take up *their* part of the challenge of figuring out the set of political institutions that are morally required. *All* need guidance in tackling the institutional dimension of politics, as the burdens of political morality are inherently shared.

We've looked for guidance in discourse theory. At first glance, it seems to provide everything we need: a theory that offers a justification of political morality all people should necessarily accept, and an application of such a grounding account to the actual questions of political institutionalization – in particular the topic of fundamental rights. Indeed, discourse theory exhibits a substantive reach that is rare and impressive. But I conclude it also has its difficulties. The justification ultimately fails to prove why rational humans should *always* be committed to communicative discourses and why the kind of respect offered in such discourses needs to resemble the respect one has for a moral equal.

Moreover, in Habermas' political theory, people's interests are subsumed under the requirements of rational discourse instead of being articulated as part of an account of morally relevant goods. As a consequence, the inventory of such goods is incomplete and does not offer a proper critical overview that allows us to judge whether a democratic procedure is functioning correctly. We've seen how the instrumentalism of discourse theory causes problems for its guiding potential. If participants reflect on their discursive procedures *without* reference to a comprehensive account of interests, they cannot address constitutional issues adequately. Taking the example of judicial interference, one could argue that such interference is *not solely*, as Habermas suggests, based on securing the correct parliamentary procedure. Rather, it plays a vital role in safeguarding political *and non-political* interests. Clearly, in order to evaluate such a suggestion we once again need access to those vital interests. In not providing such access, discourse theory shows its one-sided nature.

Finally, the critique ended by noting the tension between Habermas' definition of the ethical and the moral and the actual interpretation practices of constitutional rights: these practices show how such rights are often interpreted gradually and are often weighed against each other. The distinction between morality and ethics is less absolute than Habermas imagines. Indeed, one could even argue that in categorically respecting others as moral equals, the optional ethical choices of those others attain a moral significance not captured by Habermas' conceptual scheme.

Considering all these remarks, what desiderata can we now formulate for a theory of political morality? I think all the pertinent elements can be captured by the following three. First, a satisfactory account of political morality should present an understanding of moral validity that transcends any contingent reconstruction and succeeds in justifying the equal moral significance of persons. Second, it must present a total picture of moral norms and interests, instead of restricting the viewpoint to one dimension of social and political life, and show how such a comprehensive overview of moral norms can be applied to the political domain, including an understanding of how participants should reflect on the constitutive conditions of political practice. Third and finally, in the course of this political application, the theory should find out if, and if so, how, an account of moral and legal rights should be proposed.

The next four chapters will be devoted to fulfilling these desiderata as much as possible. Chapter three will present an alternative account of moral validity, chapter four will offer a theory of fundamental rights, chapter five will discuss the institutional protection of such rights and chapter six will deal with the interpretation of rights

Part Two: Theory

Chapter Three

An Agential Pluralist Justification of Morality

1. Marrying pluralism and transcendentalism

The previous chapter closed by presenting three requirements of an account of political morality: it should justify a morality of equals in a way that transcends any contingent consensus, paint a *full* picture of morality that does not privilege any social context and provide an understanding of fundamental moral and legal rights. This chapter seeks to deliver on the first two desiderata. It will provide a theory of moral obligation that explains why we should respect each other and that explains what this respect consists of. Questions of politics and rights are discussed, but only when debating other authors – my own theory of fundamental rights is presented in the next chapter.

The account of morality, which I call *agential pluralism* (AP), will build strongly on Alan Gewirth's transcendental theory of agency. I support his strategy of grounding the validity of moral norms in the self-understanding of a rational agent.[170] However, my proposal also deviates from Gewirth's in an important respect: I believe the moral claims resulting from this inquiry should be understood differently. Roughly put, I believe Gewirth's formal argumentative structure is correct but must be given a novel interpretation. I disagree with Gewirth that we must in practice understand the moral significance of rational humans *solely* in terms of generic goods *all* rational agents must want.[171] Indeed, the very opposition between generic goods all must want and particular goods only some want seems wrong. I will argue that respecting others ultimately comes down to respecting and supporting the whole set of rational particular purposes those

[170]Gewirth, Alan, 'Reason and Morality', University of Chicago Press 1978, pp. 42-50.
[171]Ibid., pp. 48-52.

others have chosen. Agential pluralism thus places the vast *plurality* of human pursuits front and centre.

In other words, out of the universal condition of being humans capable of rational thought and action, a particularistic valuation of human nature follows. And this means we must somehow marry transcendentally necessary claims to the particular nature of individual humans – a sobering task that may urge us to abandon safely held beliefs about normative arrangements that are 'good for everyone'. Indeed, it is immediately clear that this objective poses problems in terms of the characteristics of political morality. If much of morality depends upon particular preferences, it becomes complicated to construct a proper inventory of those claims and provide uncontroversial guiding points for those engaged in constitutional reflection. Moreover, if so many particular pursuits deserve our consideration, how will we adjudicate between the various claims people will bring forward? How will we decide whether preserving musical culture is more important than safeguarding an environmental landmark – and whether these are constitutional issues or not? In short, put in the context of this dissertation, the question is to what extent the pluralism exhibited by the human condition dooms attempts to come up with universally binding norms we need to make sense of our moral and political arrangements.

In response to this predicament, I will argue that if the starting point of agential pluralism is correct, questions about the identification of moral norms and the adjudication of norms will need to rely on the notion of *rational self-conceptions*. This means that people themselves construct hierarchies of goods that they want, under the constraint that their proposals must fulfil the demands of rationality, i.e., the basics of inductive and deductive reasoning.[172] I think this conception provides the answer to the question of marrying pluralism with universalism, because within such rational conceptions one finds both the basic goods all should deem important and the more particular goods whose prominence varies from person to person. The chapter will close by introducing this idea. Its political translation follows in the next chapter.

[172]What it means to apply basic rational thinking to a self-conception will be explored in section 9.

2. Gewirth's transcendental strategy

In his central work, *Reason and Morality*, Alan Gewirth unambiguously sets out his goal: to formulate the "supreme moral principle" that provides "categorically binding" norms and answers the central questions of moral philosophy.[173] He attempts to do this by analysing *action,* a concept relevant to all possible moral considerations:

> "More specifically, the answers are provided by applying reason to the concept of action, where this concept represents the phenomena of human voluntary and purposive behaviour."[174]

Let us explore these terms. Gewirth takes reason to refer to the "canons of deductive and inductive rationality", by which he means the logical analysis of concepts and logical reasoning based on sense perception.[175] Using these forms of reason we must think about actions, but not just any actions: only actions in the morally relevant sense:

> "The word action is used in many different senses, but the sense relevant here is that which is the common object of all moral precepts […]. Amid the immense variety of such precepts, they have in common that the intention of the persons who set them forth is to guide […] the persons to whom they are directed […]. Hence it is assumed that the hearers can control their behaviour through their unforced choice […]. From this it follows that action […] has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality."[176]

These two generic elements of all morally relevant actions are crucial: moral prescriptions would make no sense if we could not control our own actions in an unforced fashion or if there were no states of affairs worthy of achievement. A moral practice presupposes that the agents participating in it act voluntarily and for certain purposes. Gewirth concludes that thinking about moral questions therefore means analysing these characteristics.[177]

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[173]Gewirth 1978, pp. 21-23.
[174]Ibid., pp. 21-22.
[175]What these categories entail precisely is of course the subject of extensive debate, but I will not go into this here and rely on our intuitive grasp of basic logical reasoning.
[176]Gewirth 1978, pp. 26-27. To Gewirth, a person who is able to act voluntarily is free, and a person who is generally able to achieve purposes or realize intentions possesses well-being.
[177]Ibid., pp. 21-30.

Furthermore, voluntariness and purposiveness not only characterize moral practices but also the actions of rational humans – those that consistently employ reason – generally. Rational humans want certain things and thus act for purposes, and these purposes can relate to hedonistic pleasures or to moral duties. This purposiveness is part of the human condition, as not having any purpose is unintelligible. If we are confronted with a human who acts randomly, we still ascribe a purpose to his behaviour – the purpose of wanting to act randomly – assume he has a purpose we do not understand or stop regarding him as a rational human. The feature of voluntariness is equally pervasive. We simply have a sense of control over our actions. This control can of course be violated and it is intelligible to submit to the will of another. But in both scenarios we can only understand what's happening when we assume that the potential for voluntary action exists – *something* must be violated and *something* is given up when we submit to others.

Starting with this acknowledgement of the nature of action, Gewirth gives an account of how agents characterized by the human condition must rationally accept they act with freedom and intentionality, and of how that basic commitment entails categorical other- and self-regarding obligations. We can already see the universal appeal here. By starting his account of morality with the generic features of action, Gewirth crafts an account each rational human should accept.

Importantly, the agents Gewirth discusses are *prospective* rational agents, in the sense that they realize their lives extend into the future and that they should consider how current decisions affect future circumstances.[178] This element might not seem crucial in the exposition of Gewirth's argument, but we will come back to it in discussing possible objections.

Before concretely discussing his arguments, it is helpful to consider the transcendental methodology with which Gewirth attempts to tease out the consequences of understanding oneself as a human agent. Gewirth employs what he terms "the dialectically necessary method".[179] He writes,

[178]Gewirth 1978, pp. 48-60.
[179]Gewrith 1978, pp. 43-44.

> "[T]he dialectically necessary method begins from statements or judgments that are necessarily attributable to every agent because they derive from the generic features that constitute the necessary structure of action."[180]

Gewirth argues that because a person is an agent, he must act, and that in acting he is faced with the necessary structure of acting: the fact that *his* actions are controlled by him and that actions have purposes. Now, the dialectically necessary method consists of describing what an agent so circumstanced, from the *subjective, first-personal* perspective of *being such an agent*, must accept insofar as he is thinking rationally. Certain judgments are thus necessary *to him*, given the circumstances he is in.

This means that if the generic features of agency are denied, a person is reasoning inconsistently and should, from the perspective of understanding himself, change his views. Note that such inconsistency might not amount to a severe loss in a person's ability to function. It regularly happens, of course, that a person is mostly reasoning consistently, except for specific sets of beliefs – for instance those having to do with onerous duties to others. A person can deny conclusions that he should dialectically necessarily accept. The price consists of this person either misunderstanding himself or knowingly acting irrationally. In the latter case the person realizes that rationally he *should* think or act differently.

So ultimately, a dialectical method lays bare how, given his nature, a creature should reason. Denying its claims means going against one's nature. One can see the transcendental structure here: a person's existence implies his holding beliefs that he cannot coherently deny. Gewirth hopes to prove that the validity of morality is necessarily implied by a rational understanding of agency, or, in other words, by what it means to be someone who can and must decide on the question of how to act.[181]

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[180]Idem.

[181]Not all those commonly – and rightly – understood as humans are or can be rational in the required sense. What consequences does this have for the regard such humans merit? Unfortunately, although this question is very important, I cannot do it justice in this dissertation. Suffice to say that even though some humans might not be able to reflect in the required fashion, this does not necessarily mean that those who can employ the dialectic method must disregard them. Indeed, it might well be the case that fully rational agents owe less rational beings considerable or equal consideration – intriguing arguments to that effect have been put forward. I will not discuss them in evaluating Gewirth's proposal or in building my own account. See Gewirth

3. An alternative to Waldron and Habermas

Having explained Gewirth's basic methodology, it becomes clear why his theory holds the promise of answering questions of political morality. In contrast to Waldron's theory, Gewirth's method promises to lay down a universally binding foundation for moral norms. Accordingly, if all people must rationally accept a principle, it may well justify political enforcement. Any who would resist the conclusions of such a theory would go against the precepts he, given *the kind of agent he is*, should accept. Clearly, such an argument does not guarantee that people will follow such a theory in practice – it is not a theory about the necessary structure of human motivation. But if a person seeks to justify his actions to all other humans, instead of simply attempting to overpower them according to his whim, Gewirth's theory provides an appealing perspective.

Moreover, it also promises to deliver normative content according to which political questions can be answered. When discussing Habermas, the criticism was put forward that Habermas says so little about vital human interests that the importance of the right kind of deliberative discourse could not be balanced according to an overall view of all morally important norms. Indeed, Habermas directs us to find solutions that recognize the interests of all equally, but does not give us a guide to weigh conflicting interests. Here too, Gewirth's methodology attempts to give answers. As we will see, it applies the notion of a rational self-understanding to human interests and consequently offers a hierarchy of morally relevant goods. I will seek to amend the application of this starting point. But its importance remains; it offers a possibility of grasping the *whole* moral sphere, and consequently of understanding the importance of democracy and human rights *within* such a whole. This corresponds with one of the most central ideas of this dissertation: only when the whole of morality is in view can we articulate which functions should be taken up by which norms.

Finally, I believe the justification of Gewirth's theory will prove better than Habermas' and Apel's. Ultimately, Apel's proposal was unsuccessful, as it sought the basis

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1978, pp. 120-125, Korsgaard, Christine M., 'A Kantian Case for Animal Rights', in Michel, Margot, Kühne, Daniela, Hänni, Julia, *Animal Law; Developments and Perspectives in the 21st Century*, DIKE 2012, and Kaldewaij, Frederike, *The Animal in Morality; Justifying Duties to Animals in Kantian Moral Philosophy*, Utrecht 2013.

of everyday morality in the communicative preconditions of the communal pursuit of truth. In contrast, Gewirth's theory goes to the core of human wants: it asks how, given the constellation of wants a person has, he must think about himself. Therefore, it combines a person's ability to think rationally with a person's given condition as an embodied and desiring human being. It thus embraces all of what it is to be human, and does not try to tease out a single aspect that is then found to present the morally decisive feature of humanity. Let us examine his argument in more detail.

4. Gewirth's justification of universal morality

It is time to present Gewirth's argument for accepting his principle of morality. As with all accounts that promise to justify moral norms, several objections have been raised against it.[182] These can be separated into two groups: arguments doubting the derivation of his central moral principle and arguments doubting whether Gewirth's principle can produce a usable and rich system of moral norms. I will not discuss the first kind of objections, as it would take up too much room and because I think a Gewirthian can refute them.[183] In the course of the exposition these debates will be referred to. In contrast, the second kind of objections will receive due attention, as my own account builds on these criticisms.

As discussed, Gewirth argues that humans are beings with the capacity for rational action who must necessarily understand themselves as acting to achieve certain purposes and as wanting to act voluntarily. What exactly follows from this basic realization? According to Gewirth, to act for purposes is to want certain things, and to want certain things is to have a pro-attitude towards those things. So, if I want an apple, I consider getting that apple to be a *good* thing.[184] Of course, I do not consider it to be morally good to get an apple – at this stage, others do not have an obligation to provide

[182]See for an overview of most objections and replies Beyleveld, Deryck, *Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency*, University of Chicago Press 1991.
[183]As my account builds on Gewirth's derivation of his moral principle, this means I do not provide a conclusive argumentation for accepting it. Instead, the chapter seeks to present a convincing perspective on a transcendental theory of morality.
[184]Gewirth 1978, pp. 48-60.

me with any apples. But given that I want an apple, I consider it to be of value to me. Indeed, if I suddenly deny valuing apples, my wanting becomes unintelligible. Therefore, wanting something means considering something to be good, and considering something to be good means having an implicit value judgment about that thing.

Gewirth's next move is to identify things that all rational agents must *necessarily* value as good. We all have various contingent purposes, such as playing sports or binge watching TV series, that are not shared by all and that we can rationally reject whenever we feel so disposed. But according to Gewirth, because we are rational agents in the human condition, we *must* accept the necessary importance of the two components of every action: our ability to control our actions and our ability to achieve purposes.[185] For we necessarily engage in actions characterized by those two dimensions. Indeed, Gewirth believes it would be unintelligible for a rational person to deny the goodness of his freedom and ability to achieve purposes. Such a denial would logically contradict the necessary beliefs of any rational being who simply wants things.[186]

Having established these claims, Gewirth continues by arguing that

> "[s]ince the agent regards as necessary goods the freedom and wellbeing that constitute the generic features of his successful action, he logically must also hold that he has rights to these generic features, and he implicitly makes a corresponding rights-claim".[187]

This inference might seem surprising given the fact that we merely seemed to be reflecting on a person's rational self-understanding. How could an examination of the kind of beings we are suddenly give rise to a rights claim? But the move becomes more understandable once we realize what is actually entailed by living in the human condition. In our lives, our ability to live freely and achieve purposes is always under threat.

Someone who wants to eat an apple might be severely injured by others, dashing all hopes for picking fruit. Others might take apples from him. And he might get sick all by himself. In our world of scarcity and competition, we are continually faced with situations in which our purposes might well never be fulfilled. Given our rational nature

[185]Idem.
[186]Gewirth 1978, pp. 75-78.
[187]Gewirth 1978, p. 63.

and our inescapable predicament of wanting things, how should we respond? Gewirth's answer is that we rationally have to claim that others have a duty to respect our freedom and purposiveness, in the sense that we demand of others that they refrain from harming our abilities and even support us when necessary.[188] The reason for claiming this is quite straightforward: if we do not hold others to be under a duty, we accept that it is perfectly fine for them to violate the generic conditions of our agency – and such acceptance logically contradicts our positive valuation of those generic conditions. If we believe something is valuable to us, we necessarily demand of others the freedom to pursue it. Moreover, the duty we stipulate is owed *to us* – their duty thus correlates with our *right*.

But why should one rational human accept the rights claims of another? It might well be true that all agents must claim all sorts of rights, but that does not mean those claims should be respected. Further argument is required to develop rights claims into *morally valid* rights claims, and Gewirth seeks to deliver it. Importantly, at this point we would not be satisfied with a Hobbesian answer stating that it is simply in people's interest to reach a contract indicating certain norms.[189] Such a contract could always be breached if upholding it no longer aligns with one's self-interest. We seek a stronger commitment to morality that does not depend on circumstantial self-interest. We seek an account that proves that rational agents must necessarily accept certain claims of others and cannot deny the normative significance of others on pain of misunderstanding what it means to be a human agent.

Gewirth attempts to ground this commitment by discussing the normative basis of rights claims. Clearly, when a rational agent claims that others should respect his

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[188]Ibid., pp. 63-80.

[189]Hobbes, Thomas, 'Leviathan', Oxford World's Classics 1998, Chapter XIII. Some commentators have suggested Gewirth only shows why claiming rights is in our self-interest – instead of showing why we are dialectally committed to reason according to our self-interest. See De Maagt, Sem, *Constructing Morality, Transcendental Arguments in Ethics*, Utrecht 2017, pp. 228-233, see also Illies 2003, pp. 122-124, Korsgaard, Christine, *The Sources of Normativity*, Cambridge University Press 1996, p. 133, Habermas 1990, p. 101, McIntyre, Alasdair, *After Virtue*, vol. 2nd, Duckworth 1985, p. 80, Williams, Bernard, *Ethics and the Limits of Philosophy*, Harvard University Press 1986, p. 61. See in reply Beyleveld, Deryck, Bos, Gerhard, 'The Foundational Role of the Principle of Instrumental Reason in Gewirth's argument for the Principle of Generic Consistency: A Response to Andrew Chitty', *King's Law Journal* 2009, Vol. 20, pp. 1-20, pp. 2-4, and Beyleveld, Deryck, 'Korsgaard v. Gewirth on Universalization: Why Gewirthians are Kantians and Kantians ought to be Gewirthians', *Journal of Moral Philosophy* 2015, Vol. 12, pp. 573-597, p. 584.

freedom and purposive abilities, this means an agent ascribes some significance to himself – there must be a reason *why* his rights need to be respected. Accordingly, Gewirth asks the question why an agent should believe he possesses this significance. An agent could submit all kinds of reasons at this point. He could assert he deserves respect because he has a friendly disposition or works very hard. But Gewirth, presenting his argument from sufficiency of agency, states that

> "the justifying reason for every agent's claim to generic rights must […] refer to […] [the fact] that he is a prospective agent who has purposes he wants to fulfil. This description […] is also a sufficient condition of the reason he must adduce for his having generic rights. If the agent were to maintain that his reason must add some qualifying restriction to this description […] then he can be shown to contradict himself."[190]

Imagine the agent asserts that his rights must be respected because he is generally a friendly chap. Gewirth suggests that this person should be asked the following question: would you claim generic rights if you were *not* a friendly person? Now, if the person denies this, he would contradict himself. For if you are a human capable of rational agency, you need to claim rights to freedom and well-being – even if you are not a friendly person. If he accepts that he is an agent, but refuses this implication, he does not understand what it means to be an agent. Therefore, insofar as he is an agent he must accept that agents necessarily claim freedom and well-being, quite apart from a criterion of friendliness. He must regard agency as both a necessary and a *sufficient* condition for holding rights to the generic features of agency.

The road to justifying universal obligations is now clear. If humans must necessarily accept they hold rights because they are capable of being rational agents, they must, on pain of contradicting themselves, admit that *all rational agents are justified in claiming such rights*.[191] So if they attribute moral significance to themselves, they only reason consistently when they attribute the same to all other agents. As a consequence,

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[190]Gewirth 1978, p. 110. See for criticisms Williams 1986, pp. 66-70, Scheuermann, James, 'Gewirth's Concept of Prudential Rights', *The Philosophical Quarterly* 1987, Vol. 37, pp. 291-304, p. 304, and for (anticipated) replies Gewirth 1978, pp. 116-119, Beyleveld 1991, pp. 288-300 and Beyleveld, Deryck, 'Williams' False Dilemma: How to Give Categorically Binding Impartial Reasons to Real Agents', *Journal of Moral Philosophy* Vol. 10, pp. 204-226, p. 220..
[191]Gewrirth 1978, pp. 129-140.

both the justifying ground of morality and the content of morality are laid bare: rational agency is the ground of morality, for it is the necessary and sufficient justifying reason for claims to moral significance. In addition, the content of morality is also clarified: morality consists of the generic rights associated with rational agency. In the words of Gewirth's Principle of Generic Consistency (PGC):

> "Act in accord with the generic rights of your recipients as well as of yourself."[192]

5. The ambiguity objection

Gewirth's methodology presents a major step in the right direction. He is right to favour an approach that assesses beliefs that rational humans dialectically must accept and that focuses on an analysis of action. However, in elaborating his moral principle, Gewirth's account runs into two interrelated difficulties. First, it is unclear how he specifies and justifies the range of morally relevant goods. Second, Gewirth does not appropriately respect the *particular* nature of actual people. Let us call the first 'the ambiguity objection' and the second 'the particularity objection'. I will discuss them in this order.

The ambiguity of the content of normative claims connected to the PGC is revealed when we consider the system of moral norms Gewirth proposes. As we saw, Gewirth argues that agents necessarily want to act freely and achieve their purposes – they must want to be *successful* agents.[193] Consequently, Gewirth attempts to identify the rights claims connected to freedom and purposiveness. This means he analyses which goods are *necessary conditions* for achieving purposes we choose freely. Importantly, Gewirth distinguishes between a "particular-occurrent" and a "generic-dispositional" interpretation of conditions of agency.[194] Particular-occurrent agency consists of having a specific purpose and having the conditions to realize it successfully, e.g., one wants to bake bread and has all the necessary tools and abilities. In contrast, generic-dispositional agency is not concerned with the conditions for performing specific purposes, but with the conditions of acting successfully *at all.* In the words of Beyleveld, "their content does

[192]Ibid., p. 135.
[193]Ibid. p. 56.
[194]Ibid., pp. 58-64.

not depend on the content of my particular-occurrent purposes, only my having such purposes".[195] In other words, what goods do we need to perform any action whatsoever?[196]

In articulating these generic-dispositional goods, Gewirth separates goods related to freedom from goods related to purposiveness. The generic content of freedom is found to consist of conditions such as freedom from manipulation, freedom from coercion and a right to appropriate information.[197] Consequently, Gewirth submits that these are conditions that must be fulfilled to perform *any* action successfully. Yet, this does not seem to be the case. I could, for instance, think of an action that does *not* involve other people needing to provide any information, such as jumping into the air. Accordingly, I do not need a right to information *whatever* action I might want to perform.[198] I must claim a right to information in those circumstances in which the success of my action depends on such information, for instance when I want to jump as high as I can but worry about maintaining a healthy body. This simple example shows that some rights Gewirth understands as *generically necessary* do not apply to all possible actions.

The same criticism applies to many of the rights Gewirth derives from purposiveness. Gewirth distinguishes between basic, non-subtractive and additive well-being.[199] Rights claims connected to basic well-being have to do with the minimal conditions agents require to achieve purposes, such as rights to life, health and protections against bodily harm.[200] Non-subtractive well-being applies to instances of diminishing a person's ability to achieve purposes, such as being lied to or stolen from, which do not threaten a person's basic agency.[201] Finally, additive well-being describes goods that increase a person's purposive ability, such as self-confidence and a certain level

[195]Beyleveld 1991, p. 86.
[196]Gewirth 1978, pp. 50-60.
[197]Ibid., pp. 252-262.
[198]De Maagt 2017, pp. 296-308.
[199]Gewirth 1978, p. 211.
[200]Idem.
[201]Ibid., pp. 230-233.

of wealth, and forms the basis of, for instance, a claim to a certain income or to certain levels of education.[202]

Now, in each of these categories we can again identify rights that people would probably regularly claim, but which are not necessary for achieving *every* possible purposive action. Clearly, one can perform certain actions, such as reading a book, when one has little self-confidence. Equally, one can make friends when in poor health and eat nutritious food without having any privacy. Again, most of these rights claims connect to large groups of actions, but they do not apply to *all* actions. It is true that each action requires a certain level of freedom and well-being, but that level varies enormously according to a person's specific purposes and the circumstances he finds himself in.

So in what sense are we tracking generic-dispositional rights here? I think Gewirth's account of generic goods and rights seems stuck between two extremes. On the one hand, there is a very *minimal* sense of agency that is being explored, namely being able to act purposively and freely at all. Rights to life, to a very minimal degree of health and against manipulation and bodily assault seem part of such a description. But obviously, Gewirth argues that his account grounds *more* norms than only these. On the other hand, we can articulate a *maximal* account of moral norms by incorporating *all* claims rational agents would make regarding *all possible actions.* Such a list would be near endless, as it might well include claims to eating peculiar foods, travelling to Mars or becoming a rock star. Gewirth does not want to extend his list of moral rights to include such particular-occurrent wants and ambitions, and seeks to restrict the obligatory moral content to the ideal of supporting rational agency.[203] But it is simply unclear what that means precisely.

Gewirth has certainly offered arguments for extending his inventory of norms beyond the minimal interpretation. I will discuss them, and argue that although his arguments have merit, they do not succeed in extending the minimal account sufficiently. Importantly, at this point I want to set aside the question of which inventory of norms

[202]Ibid., pp. 240-245.
[203]Gewirth 1978., pp. 58-61.

Gewirth himself meant to propose. Rather, the question at hand is which norms can be understood as necessary conditions for any action whatsoever.

Looking at Gewirth's body of work, there seem to be at least two ways in which Gewirth provides support for extending the minimal account. The first is to stress the importance of *prospective* rational agency:

> "I have referred to a *prospective* agent who has purposes he wants to fulfil. For the agent claims […] rights not only in his present action with its particular purpose but in all his actions. To restrict to his present purpose his reason for claiming the rights of freedom and well-being would be to overlook the fact that he regards these as goods in respect of all his actions and purposes, not only his present one."[204]

Gewirth argues that because rational agents are aware that they exist throughout time, they should rationally reflect on their future prospects – both now and in future, their generic-dispositional rights must be guaranteed. Consequently, the inventory of rights broadens. Debating Donald Regan's example of a Baal-worshipper, who completely devotes himself to Baal and only claims those goods necessary for such devotion, Gewirth argues that even such a person should rationally consider the possibility of losing his faith and *at least* demand he have the opportunity to quit Baal-worshipping when he sees fit.[205] Prospectivity thus forms the basis of a claim to a more liberal society, which enables individuals to change their minds and pursue a wide variety of life options.

I think invoking prospectivity does indeed broaden the scope of necessary goods, as it makes clear that every rational agent must secure himself *now* against domination and suppression in later stages of his life – and such protection would probably include a right to be protected from religious oppression. However, the notion of prospectivity does not provide enough grounding for *all* Gewirth's controversial normative claims. Consider a right to education. Clearly, such a right will never, whether

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[204]Ibid., p. 111.

[205]See Regan, Donald, 'Necessary Goods: What is the Agent Committed to Valuing?', pp. 48-62 and Gewirth, Alan, 'Replies to my Colleagues', in Boylan, Michael, *Gewirth: Critical Studies on Action, Rationality and Community*, Rowman and Littlefield Publishers 1999. I think freedom of religion, when interpreted as a prohibition of enforcing a certain religion, is a necessity for all plans of action – for on the basis of religion, *any* action might be condemned and frustrated. In responding to Regan, Gewirth did not employ this line of argument.

now or in the future, be a precondition of acts of running or eating or sleeping. It is vital to an enormous array of actions, but not strictly necessary for the success of all. The moral validity of rights claims connected to such widely practised actions has therefore not been proven.

The second way to expand the inventory of rights is to stress the societal elaboration of a set of minimally oriented rights and to argue that in seeking to realize them, we must accept and implement all kinds of *derived* rights. Indeed, Gewirth distinguishes between *direct* and *indirect* applications of his supreme principle of morality:

> "In the indirect applications of the Principle of Generic Consistency, its requirements are imposed in the first instance not on individual agents and their actions but rather on certain social rules – rules of social activities, associations, or institutions."[206]

One category of such institutions consists, of course, of the political organizations through which people seek to govern themselves. Now, clearly, if one wants to take decisions on laws protecting humans from bodily harm, and thus seeks to realize the protection of a minimal right, one must think about *how* that political decision can be taken responsibly and fairly.[207] Consequently, that demand will entail more morally valid rights claims, such as claims to political rights but perhaps also to those goods necessary for the *fair value* of such rights.[208] Indeed, Gewirth argues that without proper education, people will not have the tools to reflect politically.[209] The right to education is thus universally necessary *given* its connection to the political realization of other rights.

Once again, this argumentative strategy has merit. Every set of initial rights claims allows for a host of derivations, and Gewirth rightly devoted much effort to thinking through the actualization of his abstract moral principles. However, these derivations are more limited than the initial rights claims. For example, if one argues that education is important as a necessary condition for political self-determination, one will justify quite a modest educational perspective compared to demanding a right to

[206]Gewirth 1978, p. 272.
[207]Gewirth 1998, p. 97.
[208]Rawls, John, *Political Liberalism*, Columbia University Press 2005, pp. 356-362.
[209]Gewirth 1998, pp. 90-100.

education based on a person's right to develop himself fully and lead his life according to his own conception of the good. In the same vein, linking the importance of work to providing basic needs warrants a more limited perspective on the right to work than also insisting on the importance of work as a form of individual self-expression. In a nutshell, when one only accepts a minimal set of rights, this minimalism is carried over to the instantiations of derived rights.

Importantly, this consideration does not invalidate the products of the second strategy of argumentation. If a certain rights claim is sufficiently connected to a morally valid right, the former should be acknowledged as equally morally valid as the latter. However, the derivation strategy does raise significant doubts about Gewirth's claim to justify appropriately broad rights to education, self-respect and a high standard of healthcare. For according to the derivation strategy, such rights are only important to the extent that they are necessitated by the goal of organizing a society in which the set of *minimal* rights are sufficiently protected. At the very least, the limited reach of the derivation strategy should urge us to explore other options. Is there a more straightforward way to expand the set of morally valid claims rational humans must necessarily recognize – or should we resign ourselves to elaborating the minimal account?

I believe such a way of expanding the inventory of moral norms exists and must be accepted. Moreover, I believe the total set of morally valid claims includes norms Gewirth explicitly does *not* seek to recognize.

6. The particularity objection

So what sort of claims does Gewirth refuse to recognize as morally valid? Remember that he distinguishes between generic goods supporting and increasing rational agency, captured in the notions of basic, non-subtractive and additive well-being, and contingent goods that rational agents may want, but need not necessarily want. As explained, this distinction is problematic, as not all the purposive goods Gewirth mentions seem to be generic-dispositional goods, but the meaning of the contingent group of goods is clear enough: it simply indicates those preferences *some* rational humans have, such as riding horses, climbing dangerously high mountains and organizing a *Star Wars* marathon (of

Episodes IV, V and VI, but that goes without saying). The reason for not wanting to include these goods as morally relevant is clear: such a list of goods would be endless. Again, depending on their preferences, rational humans may claim rights to spaceships, doughnuts and private Sting concerts. The amount of *prima facie* valid rights claims would explode, raising the question of how all these rights claims should be adjudicated.

However, the fact that a certain task challenges us does not mean we should refuse to take it up. We may *have* to engage in a tough moral exercise. Moreover, the broadening of initially morally valid claims also has its attractions, as by disregarding particular claims we seem to move away from ordinary moral discourse. In everyday life, ascribing moral significance to other persons often commits us to caring about the success of their particular actions. Imagine a terminally ill man who wants nothing more than to go skydiving. For him there is, in his final days, no more rewarding experience available in the world. Imagine also that such a man cannot afford the costs of skydiving – would it then not be a morally good thing to enable him to skydive? There seems to be something intuitively appealing about this idea. Like the diligent waiter who knows what it means when you order 'the usual', we instinctively understand that to appreciate someone else is to recognize and approve of the specific combination of features that makes that person who she is. Importantly, this does not mean we should suddenly start valuing skydiving or watching *Star Wars*. Rather, appreciating the fact that someone is capable of rational action seems to imply a respect for the *particular agent he is* – whatever this particularity consists of. Given all our particular natures, it seems odd to abstract from them so radically that only our "generic-dispositional" ability to act is left. Gewirth's theory thus faces an objection from particularity: his emphasis on generic goods of agency leads to a neglect of the specific nature all rational humans have.[210]

Does this objection stick? So far, I have only expressed an intuition – and I agree with Gewirth that intuitions are worth little if they are not backed up by rational argument. Therefore, I will seek to provide such an argument shortly. But before doing

[210]In the context of discussing feminism and communitarianism, a similar objection to Kantian universalist approaches was submitted by Seyla Benhabib, see Benhabib, Seyla, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Polity Press 1992, pp. 5-15.

so, several reasons must be addressed that support the assertion that Gewirth's theory *does* respect the particular nature of individuals.

A first reply can be found in his article 'Ethical Universalism and Particularism', in which Gewirth argues that people's particular projects, such as starting a family or setting up a sports organization, are justified by their rights to freedom.[211] In other words, Gewirth understands particular interests according to the basic point of a liberal society: protecting the conditions of successful agency lies in enabling agents to lead *their own* lives. Once they can count on their safety, their nourishment and their education, people can strike out into the world and be as particular as they like. Indeed, is it not the traditional liberal view that individual substantive conceptions of the good are thus separated from the general principles of government?[212]

Second, some particular forms in which people live together, such as a specific state or family unit, are actually necessary to securing the conditions of agency.[213] Without specific states it would be hard to organize security and healthcare, and without specific social units properly raising children would be hard to imagine. Therefore, particular ways of life can perform a supportive function and be valued as such. Of course, such lifestyles and organizations must not endanger the conditions of agency of some in order to boost the particular projects of others. But when a network of particular arrangements best helps the agency of all, such a network is justified.

Third, the particularity of agents also plays a central role in assessing their agential needs. A person who has cancer requires different treatment from someone suffering from depression, and a disabled person rightly demands a wholly different set of measures. The precise recipe for structurally securing the generic rights to freedom and

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[211]Gewirth 1988, pp. 298-302. Note that the background of the discussion was different from the one we are concerned with here. Gewirth defended particular projects from the allegation of *preferential treatment*. He recognized that states, voluntary organizations, families and other intimate partnerships do not provide equal benefits for all, but support some associated individuals and not others. As such preferences challenged the universality of his account, Gewirth sought to defend both it and those common practices. I will not discuss the challenge of preferential treatment here. However, Gewirth's response is relevant to my argument.

[212]The debate on governmental neutrality of course applies here. See Rawls, John, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs* 1985, Vol. 14, pp. 223-251 and Kymlicka, Will, 'Liberal Universalism and Liberal Neutrality', *Ethics* 1989, Vol. 4, pp. 883-905.

[213]Gewirth 1988, pp. 295-300.

well-being differ for each person. Accordingly, both individual persons and collectives are very much tasked with figuring out how people's natures differ, and how, given Gewirth's universal principles, they can be respected appropriately.

Fourth and finally, rational agents exert *control* over their rights – they can, in most situations, indicate whether they waive their rights or demand the correlative duties are performed. Accordingly, a person can accommodate his particular character by choosing how to employ his rights. To use a crude example, this means a masochist can waive his right to bodily integrity and thereby secure his masochistic interests.

Given all these considerations it does not seem justified to suggest that Gewirth *neglects* the particularity of persons. However, there are two responses to these arguments. Firstly, due to the problem of ambiguity, Gewirth himself does not convincingly show his liberal society to be necessarily right. Scrutiny of his argument showed that liberal ideas about, for instance, education, self-esteem and a high standard of health do not clearly correspond with transcendentally necessary conditions of agency. Rather, they seem to suit dominant societal ideas on how to live a worthwhile life. Therefore, to the extent that the recognition of particular wants is bound up with realizing not only *minimal* goods of agency but also *general* agential goods, we are still in need of a decisive justification of such goods.

Second, even *if* we accept the four arguments, significant moral claims would still be left unrecognized. Rational humans are not necessarily satisfied with a traditional liberal society. It might well be that a liberal society, with its competitive marketplace, does not give them enough opportunities to realize their personal ideals, and that they instead require a more straightforward recognition of and support for their preferences. Consider, for instance, environmental policies in a certain community. A person having an aesthetic connection with a specific environment will rarely be able to safeguard that environment without a lot of direct governmental assistance. Indeed, much of actual governmental policy is not only about securing liberal agential preconditions but also about directly shaping the world in such a way as to accommodate its inhabitants.

Admittedly, these objections do not refute Gewirth's arguments. They only point out that we have reason to examine whether a transcendental account is available that

ascribes importance to agents' particularity more directly and thereby also solves the troubles of ambiguity. I think amending Gewirth's theory can provide such an account: the solution is found by phrasing the commitment to people's particularity in a generic sense.

7. Universal particularity

In summary, Gewirth's account fails to offer a sufficiently precise account of the range of agential conditions that can serve as the basis for rights claims. Instead, it offers a cogent justification of a minimal set of conditions and a more dubious assertion of the validity of many other conditions seen as improving a person's ability to act successfully. Second, in its insistence to articulate *generic* rights of agency, Gewirth theory does not appreciate the *particular* nature of rational humans appropriately.

I think there is a way to connect these points: we could attempt to argue for an expansive range of *prima facie* valid rights claims, precisely by embracing *all* the particular features individual rational agents possess. Such a move would end the ambiguity produced by Gewirth's theory and suit our moral practices. But how can such a claim be transcendentally justified?

The argument of the sufficiency of agency is crucial here. As described above, Gewirth argues that a rational agent must necessarily admit that he only has valid rights claims *because he is a rational agent*. Therefore, rights claims based on particular-occurrent preferences cannot be justified. It is simply invalid to argue that because one values gardening, one has a right to be enabled to tend one's garden. Other rational agents who have no interests in gardening need not accept such a claim. Rights are intersubjectively valid because they support the need for successful agency shared by all rational actors.

However, there is another way to take particular concerns into account without abandoning Gewirth's formal structure. We must realize that *each* rational agent is not only an agent who acts for purposes, but an agent defined by striving for *particular* purposes that give meaning to his or her life. Consequently, such a rational agent will not

only claim that the conditions of his 'being able to act at all' are supported, but also that the conditions of expressing and realizing his particular nature are supported too. Importantly, in stating this I am not introducing a thick anthropology of what makes human life worthwhile – I am simply stating that each human is a rational agent who, like all such agents, is characterized by *some* set of particular wants, whatever it may consist of precisely.

Indeed, thicker anthropologies are always controversial – even if they are stated quite abstractly. For instance, one could argue that all humans are aesthetic beings and seek to open up the moral domain to include all the particular expressions of this quality. And one could adopt the same strategy in explicating our common sexuality or the desire to play and to have fun. In this way, a vast portion of all our particular pursuits could be subsumed under such a purportedly generic quality of our shared humanity. However, the problem with such qualities is that they are rarely shared absolutely. Some people lack sexual tendencies. Some have little to no aesthetic interest. And some have such a dour nature that the idea of play in any form seems ridiculous. Summing up these qualities is thus not a truly generic exercise, but merely a very general one. People are always left out. And as a consequence people can be asked to respect qualities they do not recognize as being of any moral interest. It is very hard to phrase a thicker anthropology without it being in some way faulty, prejudicing large majorities and neglecting the stranger personalities that are also there.

Besides the minimal requirements of agency, the only truly generic feature humans share is the *particularity* of being human. Consequently, this idea informs the transcendentally necessary conditions of living a rational human life. To be human is to demand respect for the particular person we all are – and to deny this respect is to contradict any rational understanding of what sort of being one is. In contrast to claiming respect for a certain specific purpose, claiming respect for *the fact that one has a specific set of purposes*, *whatever they may be*, can and must be rationally connected to the interests of every rational agent. Of course, this does not mean that if Albert is proud of his haircut, Bert should also be proud of it. We all may and should value particular pursuits as we see fit. But we must respect the moral significance of having these preferences. Accordingly, even if Bert genuinely dislikes Albert's haircut, it would be

morally bad for him to incessantly bother Albert with his opinion – he should both respect and support Albert's choices. Importantly, these choices must be *rational* choices: they must relate to a person's rational self-understanding. What this means will be explored further below.

For now, let us analyse my argument formally. Gewirth structures his argument according to three stages:

> "First, every agent implicitly makes evaluative judgments about the goodness of his purposes and hence about the necessary goodness of the freedom and wellbeing that are necessary conditions of his acting to achieve his purposes. Second, because of this necessary goodness, every agent implicitly makes a deontic judgment in which he claims that he has rights to freedom and well-being. Third, every agent must claim these rights for the sufficient reason that he is a prospective agent who has purposes he wants to fulfil, so that he logically must accept the generalization that all prospective purposive agents have rights to freedom and well-being."[214]

My argument focuses solely on adapting the first stage: it provides an interpretation of the goods of freedom and well-being an agent claims. Beyleveld has reconstructed this stage into four logical steps. The argument begins with the admission (1) "I do (or intend to do) X voluntarily for some purpose E".[215] In other words, a being admits he is a prospective purposive agent (PPA). Because he admits this, he must also admit that to him, (2) "E is good".[216] Furthermore, he realizes that (3) "freedom and wellbeing are generically necessary goods of his agency" and thus that (4) "his freedom and wellbeing are necessary goods".[217] My intervention takes place at (3), where a person realizes that the goods of freedom and well-being, *when interpreted according to his nature or specific set of purposes*, are necessary for him in order to achieve his purposes. Therefore, (4) freedom and well-being, understood as containing both the minimal goods of agency *and* a recognition of the importance of his particular purposes, are to him necessary goods.

[214]Gewirth 1978, p. 48.
[215]Beyleveld 1992, p. 14.
[216]Idem.
[217]Beyleveld 1992, p. 14.

Because each prospective purposive agent will have specific purposes, each PPA must claim (3) and (4) and consequently (5): I have a right to my *tailored* freedom and well-being. This means he claims that when applied to him, the conditions of living freely and being well are interpreted according to his rational understanding of the life he wants to live: his rational self-conception. I will explore this concept further below. Moving on, according to the argument of the sufficiency of agency, each PPA must admit that he demands this simply because he is a PPA, so the justification follows normally and we end up with the following ultimate moral principle: *Each PPA must act in accord with the tailored rights of his recipients as well as of himself.*

In the past, Beyleveld has defended the Gewirthian propositions against amendments and arguments similar to the one I present here.[218] However, these proposals stated that agents claim rights to their *particular purposes*. In response, Beyleveld quickly pointed out that because prospective purposive agents need not necessarily claim such rights, they ought not to be protected by Gewirth's Principle of Generic Consistency.[219] The difference in my approach lies in the abstraction from claiming respect for a specific set of purposes, such as skiing and reading fantasy novels, to demanding respect for *whatever purposes* an agent may have, or, in other words, for his *particularity*. In contrast to having some specific purpose, the fact that one has particular purposes is necessarily shared by all rational agents.

Crucially, the admission of the relevance of our shared particularity breaks open the restrictive idea of securing conditions to 'act at all'. We must not just claim the rights necessary to act at all – we must claim the rights necessary to express and pursue our particular life plans, whatever they may be. For indeed, one does not need to secure respect for the fact that one pursues particular purposes in order to act. One needs to claim this respect on occasions when the realization of concrete purposes one holds dear are threatened. When a municipality wants to run a highway through a forest one visits every week, one must claim such respect. When one works as a musician and culture subsidies are being cut, one must claim such respect. When one desires the best healthcare

[218]See for instance Beyleveld 1991, pp. 85-87.
[219]Idem.

in the world because pain in any form is unbearable, one must claim such respect. In all such cases, *not* claiming respect for the fact that one pursues particular purposes is irrational, as one must then admit that it is fine to be obstructed in achieving purposes one genuinely wants to achieve. In other words, the recognition of particularity replaces the reduction of enabling a person to act at all with the idea of enabling a person to live a life that, to him or her, is worthwhile.

Accordingly, if we accept my amendments, our set of morally relevant conditions of agency has grown significantly: everything rational humans want should potentially be supported. So where before we only needed to concern ourselves with the concrete conditions *every* agent had reason to want, we must now tailor our understanding of moral interests according to the particular make-up of individuals. That task is much more demanding. Indeed, it presents us with difficult epistemological problems: people often have no idea what they really want. We spend our lives looking for the purposes that really suit us. At the same time, this conclusion comes, at least in my perception, with a sense of vindication. Respecting each other *should* be a challenge, in which we are constantly insecure and must struggle to understand one another's interests and passions and are rarely able to neatly adjudicate the conflicts between what various people want. It is fitting that a moral theory systematizes these struggles and also makes their potential intractability and tragedy intelligible.

8. The advantages of appreciating particularity

Consider the example of a lonely person with few social skills, living in a well-organized welfare state. A minimalist ethics might well conclude that such a person presents no moral difficulty, as his conditions of agency are guaranteed. But we all immediately notice the tragedy of such a person. He fails to achieve a purpose that gives meaning to countless lives: he wants to have friends. The agential pluralism I propose shows the tragedy here. It states that the world would be morally better if the loner had friends. He has a *prima facie* valid right to friendship that correlates with a *prima facie* duty of others to be his friend. However, AP also finds that the desires of the loner must be balanced equally against the *prima facie* valid rights of all others – and those others will have a morally

relevant desire to develop *genuine* and *mutual* friendships. Accordingly, they might have to sacrifice an important want in order to befriend our socially unskilled loner. And this would also be tragic. AP thus recognizes the difficulty and sadness of these sorts of cases. It connects much better with our experience of those who fail to realize their purposes and suffer for it.

However, we must be careful to avoid getting carried away by the breadth of this new perspective. It must be noted that the wholesale endorsement of the relevance of all of the purposes of rational humans is only the starting point of constructing a political morality. The road from this vast field of *prima facie* valid claims to concrete moral and political duties is long. Rational humans who do not always want the same things must overcome even more differences than rational humans who share a minimalist agential morality. We still need to adjudicate these conflicts. And we won't always know what people actually want. Moreover, we also have a personal responsibility to achieve our purposes *ourselves*. As we will see, all these considerations complicate the sort of norms that can actually be understood as the concrete norms of a political morality. Consequently, the differences between my elaboration of the moral system and Gewirth's should not be overstated.

Because of these considerations, the norms AP ultimately produces will, at least for a large part, resemble the norms Gewirth offers. AP will also advocate a broad view of education, of fostering self-respect and of providing people with all the information necessary to take decisions about their lives. AP will also support Gewirth's categories of basic, non-subtractive and additive goods, and will strive to improve the general ability of humans to fulfil their purposes. It will also do more. As noted, if a particular purpose is not widely shared, and in no way contributes to a general improvement of agency, it should still be recognized, and, where possible, supported. But the similarities will probably outweigh the differences. Indeed, the core difference between AP and Gewirth's account is methodological: AP offers a different interpretation of rational agency that, in contrast to Gewirth's own writings, *succeeds* in extending the minimal account of moral rights.

9. The idea of a rational self-conception

This chapter will close by discussing the few restrictions to the collection of *prima facie* valid claims AP recognizes. One might argue that drafting such an inventory is straightforward: everything a human wants is important to her, and respecting her as an equal thus means respecting those wants equally. Accordingly, if a person wants to ride a bicycle, respecting her would entail enabling her to do so, for instance by giving her a bike or by enabling her to pay for it, by constructing roads, agreeing on traffic regulations, and so on. We could thus simply collect all of these preferences and then move on to the question of their respective importance. But there are at least four reasons why this picture is misguided, which together form the idea of *rational self-conception*.

First, relevant wants or desires are not just any wants or desires a rational human happens to have, but must be *feasible* wants or desires. Feasibility should be understood very broadly here: it does not mean that it should be reasonably possible to realize a certain purpose, but that it should not be *impossible* to do so. It makes no sense to ask others to support impossible goals, such as time travelling or squaring a circle, because such efforts would be entirely fruitless – one *can* of course ask others to waste time with you. As already mentioned, the same reasoning does not apply to wishes that are extremely hard to realize, such as curing all diseases or relocating to Mars – striving for ideals is fully intelligible and probably informs a lot of purposes people value most.

Second, wants must not only be feasible but also *intelligible*. A lack of intelligibility arises, for instance, when a person wants things that are contradictory, without consciously realizing it. A person could, for example, want to both punish criminals very harshly and live in a safer neighbourhood, while the circumstances are such that only leniency and second chances would reform criminals and improve neighbourhood safety. Now, there is no harm in wanting both these things and consciously being aware of their conflict – one then simply prioritizes one over the other or flips a coin. But wishes must be based on a proper understanding of the relevant facts of the case and be a part of a coherently explicated set of wants. Otherwise, randomly respecting some of the wants of a person might result in neglecting to realize those states of affairs most important to him.

Third, wants must be *genuine*. This means that a person must understand himself properly and realize what is actually of most importance to him. This requirement is as familiar as it is difficult. We spend our lives figuring out what circumstances suit us, and regularly make mistakes. But by definition, what one really wants informs what one rationally asks of others. We therefore cannot sidestep this difficulty but must face it squarely – and rightly, much philosophy has been devoted to just this question.[220] I will not discuss it here, aside from noting that this demand, as well as the demand for intelligibility, implies the availability of some opportunity to reflect on one's life and explore life options. In other words, discovering who we are and what we want implies claims to education and perhaps also a diversity of life options.[221]

Fourth and finally, claims must not directly conflict with the central tenets of AP. Ultimately, AP argues that each rational human is the moral equal of all other rational humans and that all have an equal right to live life according to *their* conception of what makes it worthwhile. Truly accepting this means accepting that claims based on the alleged inferiority of other rational conceptions of living a life must be rejected. To use Habermas' terms, moral norms may not rely on a rejection or an approval of ethical life conceptions. Moreover, claims based on the alleged moral inferiority of other rational beings also squarely conflict with the moral equality of all rational agents.

Consequently, if a man thinks being gay is wrong because it is ethically worthless, or that people of non-white descent are inferior, and *therefore* desires to yell at someone, such reasoning is not *prima facie* valid. It is of course possible to want to yell at a person for a valid reason, for instance because he or she broke a promise. Importantly, such a want must then be balanced against the desire not to be yelled at. But such reasoning is not rejected when all the *prima facie* valid claims are collected – at least if it also fulfils the other criteria set out above. In the next chapter we will come back to this point in discussing governmental moralism and the so-called 'wrong kind of reasons'.

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[220]See for instance Charles Taylor's work on authenticity and the tensions between individualism and community, Taylor, Charles, *Sources of the Self*, Cambridge University Press 1989.

[221]As will be discussed more in the next chapter, the strategy of referring to minimal agency and the strategy of referring to particularity partly overlap here. The difference is that through acknowledging the importance of particular wants, a more comprehensive education claim can be argued for.

Importantly, the final constraint does not exclude cases we usually, and understandably, reject as immoral. Think, for example, of the sexual drive of a paedophile. The paedophile's desires can cause abuse that damages children terribly, so we are therefore inclined to view these urges as tainted and evil. But we can also see that these urges do not rest on the notion that children are somehow morally inferior or have no right to live life as they want to. Accordingly, agential pluralism cannot discount the wants of a paedophile out of hand, but must recognize their *prima facie* significance. Consequently, the evil of child abuse must be argued for on the basis of the damage done to the child – it must be shown that this damage, which includes the horror of being forced to submit one's body to the will of another, outweighs the satisfaction sought by the paedophile.

Surely this argument can be made. Through his abuse, the paedophile superimposes his desires on the frail body and mind of a child, potentially inflicting damage the child will never really recover from. Moreover, in severely harming a child he also damages *his own purpose* of aiding and respecting others – he destroys his self-conception as much as he seeks to realize it.[222] Therefore, if we accept that the child and the abuser are each other's moral equals, such abuse may never happen. Indeed, it is justified to prohibit it and to penalize those who violate the law. But this is not the whole story. For if we place significance on the paedophile, we must help him live with his sexual desires and offer him treatment. We cannot simply demonize his sexual nature and attempt to ignore it. We must recognize the tragedy of having genuine desires that are so dangerous they may cause terrible pain.

If these four kinds of limitations are combined, the picture of a *rational* self-conception emerges. This is a conception that expresses and orders the purposes a rational person wants to fulfil. The importance of this conception cannot be understated, as I believe it is the key to adjudicating conflicts of interests. For if the purposes of a certain person, Abe, conflict with those of Bert, resolving that conflict depends to a large extent on figuring out whose purposes are most important, *given Abe's and Bert's rational self-*

[222]This argument plays an important role in adjudicating trade-offs between interests and will be expanded upon in chapter six.

conceptions. So, if Abe wants to steal food in order to spite Bert, this act of spiting probably hurts Bert's purposes more than it benefits Abe's. But the situation clearly changes when Abe seeks to steal food in order to stay alive.

Clearly, in adjudicating these conflicts the purposes of that conflict are *ranked*, based on the place they occupy in a person's rational self-conception. Now, the question is whether a rational person must necessarily rank certain goods very high, such as Gewirth's basic goods, and other goods very low, such as the purpose of annoying others, for instance. We will turn to this point in the coming chapters. For if we accept the tenets of agential pluralism, a crucial part of figuring out the meaning of fundamental rights lies in proving why, given a person's rational self-conception, they should understand these rights as fundamentally important.

I will end this chapter by noting that these various restrictions may not be the only elements of a rational self-conception and that all of them have thus far only been sketched roughly. By writing about 'genuine' desires and 'coherent' purposive structures, whole philosophical discourses are invited into the conversation. This should not be surprising. As previously noted, agential pluralism does not consist of a simple manual that can be used to find the right solutions, but attempts to do justice to the complexity of moral phenomena. The purpose of this dissertation lies in sketching this complex moral structure and drawing out its implications for crafting an account of fundamental rights. In order to achieve that purpose, in the coming chapters only those aspects of AP will be elaborated that are essential to a proper theory of fundamental rights.

Chapter Four
A Theory of Fundamental Rights

1. Entering the political domain

This dissertation promises to shed light on the meaning and institutional functions of fundamental rights. The first chapter began to answer this question by criticizing Waldron's reconstructive approach and made room for a transcendental methodology. This methodology has now been developed: a justification of moral norms has been presented. It is therefore time to apply this philosophical methodology to the questions with which the dissertation started.

However, we cannot simply move from moral theory to debates about the interpretation of fundamental rights texts. Indeed, before the legal sphere can be entered, the political itself must be clarified. Or rather, a theory of fundamental rights needs to be provided that relates such rights to the political environment they are a part of. Importantly, in the course of this investigation we must avoid overburdening ourselves with the vast literature dealing with the nature of the political domain and its relation to fundamental rights. In an attempt to ward off this danger the chapter therefore begins by briefly describing the character of an agential pluralist state and by indicating which questions about such a state will *not* be answered. This is unavoidable given the complexity of the spheres AP is applied to. Indeed, by departing from a very broad perspective of morality, the scope of the coming chapters will be increasingly specified.

After an agential pluralist state has been described, the discussion of theories of rights will be taken up. Concentrating on Ronald Dworkin's influential texts, two crucial interpretations of fundamental rights will be discussed: rights as "shielded interests" and rights as "a kind of reasons".[223] The argument will be submitted that according to AP, both interpretations are to an extent correct, but need to be subsumed under a broader understanding of fundamental rights. Crucially, this understanding articulates the complex relationship between a fundamental right and parliamentary decision-making – a connection that is of decisive import to defining and interpreting such rights. Using this definition, a scheme of fundamental rights will then be presented. The key to my proposal is the thought that fundamental rights play an essential role in both *guiding* and *questioning* the normal course of majoritarian democratic politics. Accordingly, to raise a matter as a fundamental right is to invoke an authority that overrides the concerns of everyday politics and raises the spectre of limiting the playing field of majoritarian politics. As a consequence, a proper account of fundamental rights demands an account of the norms that merit such authority.

Ultimately, the method of justifying fundamental rights will turn out to be a progressive one, expanding them beyond the realm of norms protecting against governmental abuse and that of norms enabling concrete goods *all* should value. If a good is very important to the rational self-conception of many people, a case for protecting it by way of articulating some fundamental right can be made – even if we are talking about goods such as preserving a language few still speak or protecting a historical landmark some people care nothing about. However, the collection of rights I present will be incomplete. The purpose of this chapter is to set out argumentative paths to justifying fundamental rights, not to present some definitive list. Moreover, given the incompleteness of the account of political morality offered here, the validity of many rights, most notably social-economic rights, remains up for discussion.

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[223]I shall mostly focus on Dworkin, Ronald, *Taking Rights Seriously*, Bloomsbury 2013, *Law's Empire*, Hart Publishing 1986 and *Justice for Hedgehogs*. The distinction between the two interpretations was introduced by Paul Yowell, see Yowell, Paul, 'A Critical Examination of Dworkin's Theory of Rights', *American Journal of Jurisprudence* 2007, vol. 52, No. 1, pp. 93-138. See also Möller 2012, p. 44.

2. An agential pluralist state

What sort of society would AP advocate? Clearly, all people have an obligation to respect and secure each other's moral rights – whatever their content turns out to be. Accordingly, they need to ask themselves whether it is necessary to set up a central authority to regulate their actions. Given the risks of individuals violating their moral duties and the need to act collectively to achieve more ambitious purposes, such as setting up a healthcare system or building infrastructure, such a government should be created. This of course gives rise to the real question: how should this government function?

The common answer to this question is that it should be governed *justly*.[224] Consequently, when society is ruled justly, there is no more to be desired of government. This only transfers the question of substance, of course, for how should justice be interpreted by AP? For the reasons given above, a few introductory remarks will have to suffice here. First, AP advocates a strong commitment to the equal moral significance of each human being – it shares this with all liberal approaches. People should be treated similarly in similar circumstances, and the distribution of goods should respect their fundamental equality.

Second, the goods themselves should be identified according to people's rational self-conceptions. All goods of moral importance should be adequately connected to these self-conceptions: if no rational person wants a certain state of affairs, it is worthless. Conversely, if everyone rationally wants some good, it is of great value. Importantly, I believe this feature already sets an agential pluralist government apart from the precepts of a lot of liberal political theories. Many theories work with a threshold conception of justice that identifies some set of goods governments should secure and further goods that people can choose to pursue using their own *discretion*.[225] The idea is that not all

[224]Rawls, John, A Theory of Justice, Harvard University Press 1971, pp. 3-8.

[225]See for a discussion of this distinction Claassen, Rutger, 'Public Goods, Mutual Benefits and Majority Rule', *Journal of Social Philosophy* 2013, Vol. 44, No. 3, pp. 270-290, pp. 275-280. See also Miller, David, 'Justice Democracy and Public Goods', in K. Dowding, R. Goodin and C. Pateman (ed.), *Justice and Democracy. Essays for Brian Barry*, Cambridge University Press 2004, pp. 127-149. See for instance examples of sufficientarian distributive ethics, see Frankfurt, Harry, 'Equality

things people value should be understood in terms of justice or governmental responsibility. In contrast, because of the driving notion of a rational self-conception, AP does not limit the goods justice is concerned with in such a way. If people rationally value something, whether it is playing sports, enjoying nature or pursuing art, that good matters morally, and it is justified to make a *prima facie* claim that a government should provide for this good. Consequently, the initial range of goods that should be distributed justly is broader than the range proposed by threshold conceptions.

Furthermore, I believe that aiming to secure such a wide variety of moral rights equally naturally leads to endorsing some form of liberal democracy. We should strive to give all an equal say in taking political decisions, as this expresses our mutual standing as equals and we need each person's input in order to do justice to his or her particular nature. At the same time, we must note the tension between the right to take decisions and the risk of using that power to violate rights – we will pick up this theme in discussing fundamental rights.

Finally, in understanding the novelty of AP, it is crucial to see that there is a difference between a *prima facie* claim and an all-things-considered conclusion about governmental responsibility or the requirements of justice. Major hurdles need to be overcome before we draw one thing from the other. First, we need to assess the importance of a good and compare it with the importance of other goods. Second, we must consider the separate costs of governmental interference. Third, the basic notion of personal responsibility needs to be taken into account. Starting with the first task, people's purposes conflict. As is often the case in our world of scarcity, one person's use of resources may make another person's plans impossible. Before taking any action, a government must therefore *weigh* the conflicting considerations. As to the second task, if a government acts this presents costs of its own; people may feel oppressed or overly burdened by a state that wields a monopoly on violence: these costs need to be weighed together with any moral benefits of a certain plan.

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as a Moral Ideal', Ethics 1987, Vol. 98, pp. 21-43, pp. 34-38, and Shields, Liam, 'The Prospects of Sufficientarianism', *Utilitas* 2012, Vol. 24, pp. 101-117, pp. 102-104.

In relation to the third consideration, it is commonly thought that people have a responsibility to achieve their own goals and contribute to the moral community. In this vein one could argue that a government need not step in when people can fend for themselves. Such arguments need to be weighed too, and this is not easy. The meaning and implications of personal responsibility have been hotly debated for decades.[226] Should we understand responsibility as being similar to stating an empirical fact, or is personal responsibility a subjective concept determined by the extent to which people *want* to be seen as responsible? These kinds of questions also need to be answered in order to produce an all-things-considered verdict on the extent of governmental responsibility.

It might be true that because of these factors, the concrete governmental responsibilities necessitated by AP are not very different to those required by a threshold conception of justice. It might be true that AP refuses to authorize governmental subsidies of football matches because people should take private responsibility for the sport, while a threshold conception argues that football is of no importance in the first place. So what difference does it make to explore AP? The foremost reason is that if one accepts the argument presented in chapter three, AP is grounded in a way that other theories are not. It provides conclusive reasons to obligate people to follow the norms it justifies and to construct a certain constitutional order. That feature alone makes it essential to explore how AP would affect the structures of a liberal democracy and to find out whether it not only differs in the justification it presents, but also in the norms it proposes. Moreover, there is reason to think AP does expand governmental responsibilities beyond threshold conceptions. In contrast to such conceptions, if the limitations set out above can be overcome, governments do have to provide for the particular pursuits usually thought to be outside their remit.

To avoid overburdening the account, two out of the three limitations grounds will not be investigated further in this dissertation: I will not assess the costs of

[226]See for instance Frankfurt, Harry, 'Alternate Possibilities and Moral Responsibility', *The Journal of Philosophy* 1969, Vol. 66, pp. 829-839, pp. 829-833, and McKenna, Michael, 'Moral Responsibility, Manipulation Arguments, and History: Assessing the Resilience of Nonhistorical Compatibilism', *The Journal of Ethics* 2012, Vol. 16, pp. 145-174, pp. 145-150.

governmental intervention nor present a satisfactory account of personal responsibility. Instead, I take up the topic of moral importance and use AP to construct an account of fundamental rights. This means that it is shown how fundamental rights can be argued for and how those rights relate to the background of *prima facie* valid moral claims from which they emerge. Admittedly, as all of the three topics of justice defined above are interrelated, answering this question does mean that we indicate how the two limitation grounds affect this question. In the end, the ambition is to piece together some, but not all, of the puzzle fundamental rights present.

3. Rights, trumps and shielded interests

Ronald Dworkin arguably wrote the most influential and most debated theory of fundamental rights in the post-WWII history of jurisprudence. His work forms an excellent backdrop against which AP's account of fundamental rights can be explained and justified. However, it would not do to simply introduce Dworkin's theory and evaluate it according to AP. There is simply too much debate on what Dworkin's theory entails to briefly present any uncontroversial account.[227] Indeed, Paul Yowell has argued, after reviewing the full body of Dworkin's work, that *two* theories of rights stand out: understanding rights as "shielded interests" and understanding them according to an "excluded reasons" approach.[228] Fortunately, I believe this controversy to be instructive of the diverse meanings of fundamental rights any satisfactory account needs to make intelligible. The approach in the coming sections is therefore to discuss the two strands of the interpretation of Dworkin and to show how AP's perspective is able to merge these into the account presented briefly above.

[227]See for instance the discussion between Richard Pildes and Jeremy Waldron, Pildes, Richard, 'Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism', *The Journal of Legal Studies* 1998, Vol. 27, No. S2, pp. 725-763 and Waldron, Jeremy, 'Pildes on Dworkin's theory of Rights', *The Journal of Legal Studies 2000*, Vol. 29, No 1, pp. 301-307.
[228]Yowell 2007, p. 93.

Starting with the notion of 'shielded interests', throughout his work Dworkin described rights as "trumps":

> "We might say […] that political rights are trumps over otherwise adequate justifications for political action. A policy is normally justified, for instance, if it would make the community safer by reducing violent crime: that is a good all-things-considered justification for increasing taxes to pay for more police. But increased safety is not an adequate justification for forbidding unpopular speeches on street corners or for locking up suspected terrorists indefinitely with no judicial review of the charges against them. Those latter policies violate political rights […]. The trump sense of a right is the political equivalent of the most familiar sense in which the idea is used in personal morality. I might say 'I know you could do more good for people if you broke your promise to me. But I have a right that you keep it nevertheless.'"[229]

Dworkin's usage of the term "political rights" is crucial. Political rights denote the moral rights of individuals that serve as powerful considerations, or in Dworkin's terms, as arguments of *principle*, in taking political decisions. Consequently, these political rights and duties can be translated into *either* a general legislative responsibility to see to a certain states of affairs, such as promoting a free press, or into creating legal rights, such as a constitutional right to free speech, defined as "those [rights] that people are entitled to enforce on demand, without further legislative intervention, in adjudicative institutions that direct the executive power […]".[230] Importantly, in political discourse these arguments of principle are combined with arguments of *policy*.[231] Dworkin argues that these are utilitarian in nature and are aimed at aggregating maximum well-being.[232] He submits that the bulk of political decision-making consists of such policy arguments. They serve collective *goals*, such as security or promoting an efficient infrastructure, that should be distinguished from political rights owed to individuals.

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[229]Dworkin 2011, p. 329.
[230]Dworkin 2011, p. 406.
[231]Dworkin 2013, pp. 106-120.
[232]Idem.

Crucially, political rights *trump*, in the sense of overrule, conflicting decisions made on the basis of arguments of *policy*. Hence Yowell's description of shielded interests: political rights isolate certain interests from the day-to-day decisions aimed at aggregate welfare.[233] Dworkin's approach is easily illustrated. Imagine one proposes to lock up all those suspected of committing a crime. Following a Dworkinian analysis, such a measure might be initially justified by appealing to increased public safety, which in turn secures an increase in aggregate well-being.[234] However, Dworkin would hold that the measure will always be unjustified, as locking up suspects without sufficient proof is in violation of the principle of the presumption of innocence – and that principle trumps utilitarian considerations. The world of Dworkinian politics is thus fairly straightforward: utilitarian goal-oriented policies are combined with superior rights-based principles to produce just decisions.

In past decades, this picture of individual, principled rights trumping collective, utilitarian goals attracted much criticism. Perhaps most importantly, Joseph Raz argued that Dworkin's separation of rights and policies breaks down, as policies are not conceptually separate from rights.[235] Noting that policies are focused on increasing welfare, Raz asks the following question: do we have a political right to our own and others' welfare?[236] It would be strange to deny this, as the goods protected by the political rights Dworkin recognizes, such as personal security, political participation and access to a fair trial, seem to lie at the heart of realizing people's welfare. Why then does Dworkin suggest political rights have a different subject matter from collective policies?

In a similar vein, Richard Pildes argues that the whole idea of an individual right *as opposed* to a collective goal is wrongheaded.[237] He writes that creating political rights individuals can lay claim to is often instrumental to safeguarding what he calls "a political

[233]Yowell 2007, pp. 95-100.
[234]In this case, one can of course seriously doubt whether such a harsh and oppressive measure makes anyone safer – let us simply assume it for the sake of argument.
[235]Raz, Joseph, 'Professor Dworkin's Theory of Rights', Political Studies 1978, Volume 26, No. 1, pp. 123-137, 127-129.
[236]Idem.
[237]Pildes 1998, pp. 725-735.

culture".[238] The right to freedom of expression, for example, is not only justified because it helps a single individual to share his views, but also because such a right fosters a marketplace of ideas, in which critical and original views can be developed and which is instrumental to people's ability to speak truth to power. Importantly, these collective states of affairs are not valued in themselves – they matter because they are important to individuals. But, according to Pildes, the significance of political rights must not be reduced to an atomized view of directly protecting individual interests.[239] It is precisely the interplay between individual claims and collective states of affairs that explains the great importance that should be attached to political rights.

I think Raz and Pildes are right to criticize Dworkin's conceptual proposals. Clearly, individual rights contribute to realizing collective affairs, and part of the importance of a political right lies in the *prima facie* valid moral right of individuals to live in a certain kind of society. Moreover, attempts to isolate certain interests from *any* interference seem at odds with almost all fundamental rights practices. Very few rights are respected absolutely, irrespective of the arguments supporting an interference – one does not get much further than freedom from torture and slavery.[240] Indeed, as will be discussed in chapter six, the European Convention on Human Rights explicitly mentions collective goods such as public order, security, health and economic welfare as valid grounds for limiting fundamental rights. Therefore, reasoning about those rights should not proceed by isolating some interests and ending the conversation. The protected interests must be *connected* to the interests served by the limitation grounds.

Finally, the whole idea of applying one moral perspective, utilitarianism, to a certain category of political decision-making, while reserving another category of principles for non-utilitarian reasoning, is hard to justify. In the end, moral claims are justified or not justified according to a certain grounding argument. Consequently, all moral norms must be appropriately related to this argument. One cannot simultaneously

[238]Pildes 1998, p. 730.
[239]Ibid., pp. 725-730.
[240]See for instance the absolute rights provisions in the European Convention on Human Rights, such as Art. 3.

accept two systems of norms with diverse and conflicting grounding mechanisms. Of course, Dworkin had his own thoughts on grounding moral norms and accepted a different perspective from the one in AP's scheme of rational necessity – he would not have accepted this short argument.[241] However, as I will not discuss those views, it will have to suffice to state that from the perspective of AP, a separate utilitarian category of norms would not be accepted. We must develop a single moral system that harmonizes the consequentialist nature of policy debates with a strong adherence to fundamental rights.

Let us end this section on a positive note. Even though the shielded interests approach is problematic, the idea of rights trumping the normal course of political debates is intriguing. For we do see rights having this effect. In particular, the institution of the judicial review of legislative decisions features a trumping moment, when fundamental rights form the ground of the rejection of democratically supported laws. Therefore, any theory of fundamental rights must make sense of the idea of rights as trumps. To my mind, the trick lies in not equating rights with trumps, but in seeing fundamental rights *as raising the question of trumps*. However, before exploring this thought further, we must turn to the second interpretation of Dworkin's theory: understanding rights through the idea of filtered preferences.

4. The filtered preferences approach

In a rebuttal of Pildes' attack, Jeremy Waldron argued that Dworkin has been misunderstood.[242] Dworkin did not really propose a shielded interests account but rather referred to certain reasons that should and shouldn't be used in taking political decisions.[243] As Dworkin himself wrote:

[241]See for instance his thoughts on the grounding method of reflective equilibrium, Dworkin 2013, pp. 185-222.
[242] Waldron 2000, pp. 302-304.
[243] Idem.

> "I wish to propose the following general theory of rights. The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals."[244]

The difference in the first approach can be put as follows: political rights no longer isolate certain interests from all utilitarian argument, but *cleanse* the input of utilitarian argument – it can no longer rely on *external preferences*.[245] Dworkin explains that *personal* preferences refer to preferences about how goods should be assigned to oneself: a person may desire to live in a mansion or to spend time in nature.[246] In contrast, *external* preferences refer to how goods should be assigned to others: I could, for instance, prefer someone else to have a car or to enjoy a heterosexual sex life.[247] In short, Dworkin argues that governmental decisions may only be based on personal preferences and not on external ones.[248] Accordingly, when the morally relevant claims are gathered, external preferences should be rejected.

Dworkin believed that a rejection of external preferences was an important part of respecting each other as equals.[249] For if a utilitarian calculus counts both the preferences persons have about themselves *and* the preferences they have concerning the lives of others, some people's wishes are counted twice. What's more, Dworkin argues that the heart of justice lies in a commitment to the freedom and responsibility each person has to lead life according to his conception of the good.[250] By only allowing preferences that denote what goods people want for themselves, Dworkin is suggesting

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[244] Dworkin 2013, pp. 331-332.
[245] Yowell 2007, pp. 99-110.
[246] Dworkin 2013, pp. 329-333.
[247] Idem.
[248]Dworkin 2013, pp. 329-333.
[249]Idem.
[250] Dworkin 2011, p. 2.

that this principle is respected. Indeed, he argues that in such a case the liberal thesis is a "consequence, not an enemy" of utilitarianism.[251]

So how do rights figure in this argument? Dworkin thought that political rights capture precisely those areas in which there is a danger of external preferences corrupting the debate.[252] The right to sexual freedom, for instance, could be infringed because some people deem it inappropriate or immoral to be gay. Such a belief would qualify as external, as such people not only refuse to engage in gay practices but also want others to refuse to do so. To Dworkin's mind, the function of a right is to protect the sphere of sexual freedom in such a way that external preferences, such as moralistic views on the good life, cannot be decisive.[253] Accordingly, if one wanted to ban gay sex, this would be impermissible *unless* one successfully argues that the interference is justified on reasons of *personal preference*. As Kai Möller argues, Dworkin thus employs fundamental rights in those areas where a *presumption* exists that external reasons are used to justify government policies.[254]

Similar to the shielded interests approach, there is both something to appreciate and something to criticize in Dworkin's filtered preference account. Starting with the latter, Möller convincingly argues that although Dworkin's analysis seems to provide a justification for some fundamental rights, it seems out of place when thinking about others.[255] Respecting people's bodily integrity, for instance, does not seem essentially tied to preventing moralistic policies – protecting people from crime or from overzealous police enforcement has little to with conceptions of the good life. In such situations, there are simply goods at stake that are so important that extra measures should be taken to protect them. Indeed, it would be strange to suggest that fundamental rights are not relevant to those kinds of abuses and that in a non-moralistic world in which some people's bodily integrity is sacrificed for the good of others, fundamental rights play no

[251]Dworkin 2013, p. 283.
[252]Ibid., pp. 330-333.
[253]Idem.
[254]Möller, Kai, The Global Model of Constitutional Rights, Oxford University Press 2012, pp. 49-51.
[255]Möller 2012, pp. 52-53.

role. Accordingly, the subject matter of fundamental rights does not equate with the subject matter of external reasons.

The work a filtered preference approach takes up is to cleanse a moral approach from wrong inputs – not to demarcate the goods of fundamental interest within the collection of *prima facie* morally valid claims.[256] Yet political rights seem to be precisely concerned with goods of special importance. It is that feature that is common between almost all classic examples of rights. The reason for this is not complicated: political rights are associated with the ability to trump majority decision-making. And given the significant value of such democratic procedures, rights that interfere with these procedures must be at least equally morally significant. Admittedly, it is plausible to argue that the freedom to lead one's life unconstrained by the external reasons of others is a part of the goods that are morally fundamental – but we need to tread carefully here. The term 'external preference' does not yet distinguish between moralism and paternalism, and while AP would reject moralism, it would accept a certain specification of paternalism. Let us therefore briefly look into these distinctions and their implications for evaluating Dworkin's proposals.

5. External preferences, moralism and paternalism

Would AP agree with Dworkin's usage of the distinction between internal and external reasons? Let's take the famous example of seatbelts. If the government argued that Bob should wear a seatbelt because it is safer *for him*, it would be employing an external reason – it does not rely on what Bob actually wants. Still, according to AP this argument has merit, as it is rational for Bob to take the required measures. He must necessarily value his physical safety as it is part of his minimal agency. Of course, in order to justify a mandatory legal rule more argument is needed: we must weigh conflicting goods and think about the cost of enforcement, etc. But as it is the government's duty to help people

[256]Ibid., pp. 52-58.

realize their rational self-conceptions, it is not only permitted but required to think about the bodily safety of its people – whether their consent is given or not. AP would thus reject a blanket prohibition on accepting external preferences as part of the justification of governmental action.

Interestingly, in his later work Dworkin offers a more nuanced distinction. In *Justice for Hedgehogs*, Dworkin argues that we should distinguish between "ethical paternalism" and "paternalism for other reasons".[257] Dworkin employs the term 'ethical' the same way Habermas does, indicating the optional conceptions of what makes life have value for a person.[258] He then argues for the paramount importance of people being ethically independent, meaning that governments should not frustrate the realization of the core parts of their conceptions of the good and do not attempt to impose one conception of the good on their subjects.[259] Accordingly, governments must be highly respectful of Bob's sex life, as it is likely to be of such importance to him, and must not impose a certain conception of sexuality on Bob. Would AP agree with this distinction?

I think so. Picking up on the discussion in chapter three, section 9, the point of AP is ultimately to equally enable rational humans to live out their conception of the good life – not to impose values on them that are foreign to such a conception. Indeed, the whole moral structure comes into play because rational agents are beings wanting to succeed in *their* ambitions. In other words, AP attaches importance to the particularity of each rational being, not to a certain thick and subjective interpretation of such particularity. AP is therefore opposed to what is usually called *moralism*: the idea that a government may privilege some conception of the good life rational agents need not necessarily accept. Importantly, this does not mean a government cannot seek to promote people's rational conceptions of good lives – the point is that it may not *ground* its actions on the ethical superiority or inferiority of one such rational conception. Instead, it should fairly distribute resources and opportunities in such a way that all rational agents are respected equally and can equally carry out their conceptions of a good life. Of course,

[257]Dworkin 2011, pp. 368-372.
[258]Idem.
[259]Idem.

how this should be done precisely is the subject of much debate.[260] I will not take a stand on it, but will come back to this point in chapter six.

Importantly, the fact that no optional conception of the good life may be imposed does not preclude aiding an agent in realizing *his* rational self-conception. Let's take the example of Cary, a person who is about to cross a derelict bridge. Crossing this bridge endangers her bodily safety, and therefore risks a *necessary* part of her rational self-conception. Does the government have a moral responsibility to intervene? We must distinguish between two forms of paternalism here. First, one could support *weak paternalism*, in the sense that governments should seek to inform Cary of the dangers involved in crossing the bridge. AP would support such interference, as providing factually correct information is a crucial part of supporting a person's ability to exercise her rational self-conception. Accordingly, Cary may only cross the bridge if she knows what she is doing. But does AP also support *strong paternalism,* which allows the government to obligate Cary to refrain from crossing – for instance by physically restraining her? AP would provide a mixed answer. On the one hand, as Cary must rationally value her bodily safety, a government would respect her by ensuring she does not risk it. However, if Cary wholeheartedly wishes to end her life or wishes to live life as adventurously as she can, the situation becomes complicated. For it seems these are purposes rational humans may hold. Accordingly, the question is whether she must rationally value her bodily safety *more* than her wish to die or to live adventurously. As will be discussed further in chapter six, this need not always be the case – as a consequence, governments do not necessarily have a responsibility to restrain Cary from crossing. But we can conclude that in some cases AP requires strong paternalism.

Where does this leave us with respect to Dworkin's second proposal? In short, although AP agrees with Dworkin's rejection of ethical paternalism, it would in turn reject the filtered preferences theory both as a basic theory of fundamental rights and as a specific account of the justification of rights connected to the prevention of moralism.

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[260]See for Dworkin's own proposals Dworkin, Ronald, 'What is Equality? Part 1: Equality of Welfare', *Philosophy and Public Affairs* 1981, Vol. 10, pp. 185-246 and 'What is Equality? Part 2: Equality of Resources', *Philosophy and Public Affairs* 1981, Vol. 10, pp. 283-345.

However, the connection Dworkin establishes between fundamental rights and using 'the wrong kind of reasons' is significant. It expresses the thought that part of respecting fundamental rights consists of employing only those arguments that cohere with the basic idea of living together as moral equals. Therefore, reasoning about fundamental rights not only involves the task of making correct trade-offs between morally valuable goods *but also* affects the *initial collection* of morally relevant goods and reasons: AP only recognizes those interests that are appropriately connected to rational self-conceptions, and rejects those based on moralism.

Importantly, this rejection ties in with the other elements of a rational self-conception mentioned in chapter three – including the rejection of interests that rely on factual errors. There is thus significant substance to the task of collecting the right kind of *prima facie* valid interests, and Dworkin rightly argues that any theory of fundamental rights should recognize this.

6. Fundamental rights desiderata

It is time to pull the threads together. Having discussed the two interpretations of Dworkin's theory of political rights, what desiderata emerge? What should we expect from a theory of fundamental rights? I will present my list of these criteria, and consequently seek to show how my proposal fulfils them.

The first desideratum holds that a theory of fundamental rights is able to show how public goods and actionable rights are related. Dworkin's shielded interests approach theorized this relationship inadequately: it did not explain or justify why certain rights claims form the basis of collective goods and it did not subsume both collective goods and political rights under one harmonizing system of morality. As a consequence, this Dworkinian approach fails to reconstruct the dominant fundamental rights practice and just seems implausible: clearly, it makes sense to say a fundamental right to bodily security functions both as a specific juridical norm and as the basis of all kinds of public goods.

Second, a proper theory of fundamental rights must be able to explain and justify why the set of fundamental rights is internally differentiated: in practice, some fundamental rights trump all other considerations absolutely, such as the rights against torture and slavery, other fundamental rights are weighed against public goods and only trump considerations of lesser import, and other fundamental rights have no automatic trumping quality, but simply guide democratic deliberation in various ways. The shielded interests approach cannot make sense of this differentiation, as it focuses solely on the idea of rights as extremely powerful trumps. This is incomplete and again unconvincing: fundamental rights are not simply continuously trumping collective goods but rather are a part of the *raison d'être* of these goods. Therefore, when these two categories collide, this conflict is not solved by invoking a trump – a complicated weighing of interests must take place.

Moving to the filtered preferences account, we can identify the third desiderata as the ability of a fundamental rights theory to incorporate a non-moralist view on government: it must appreciate the wrongness of imposing a conception of the good life on others. Clearly, the second Dworkinian perspective places this issue at the core of what fundamental rights are about. But we've also seen that the idea of prohibiting external reasons can go too far: a focus on rejecting moralism cannot result in a rejection of some forms of paternalism. Moreover, the rejection of governmental moralism must be part of a larger theory that shows why our resistance to moralism springs from the same justificatory source as our appreciation of other fundamental goods unrelated to moralism.

Finally, a theory of fundamental rights must take a stance on two apparently conflicting features of fundamental rights discourses: the emphasis on issues that are *fundamental* and the *broadness* of fundamental rights interpretation. This contrast appears when comparing the Dworkinian accounts: the perspective of shielded interests focuses on identifying a few very important goods, while the filtered preference account prohibits using certain reasons, *even if the concrete goods at stake are not important*. Importantly, this difference ties in with current literature on fundamental rights that

attacks the picture of identifying fundamental rights as very important goods.[261] In the context of judicial review, authors such as Kai Möller and Mattias Kumm have submitted that what defines rights is a general need for the justification of governmental acts, arguing that only such an approach can explain the cases in which courts ruled on issues of seemingly minor importance – such as the alleged right to feed birds in the park.[262] Any satisfactory account of fundamental rights must show whether their assessment is correct and how, if at all, the importance and the broadness of fundamental rights fit together.

This concludes my list of desiderata. Undoubtedly more can be thought of. Indeed, thus far we have taken a rather indirect route to introducing a theory of fundamental rights: all the desiderata are derived from the scholarly discussion of Ronald Dworkin's work, and not from a comprehensive insight into the fundamental rights practice itself. However, given the prominence of Dworkin's ideas and the essential issues it grapples with, I think this methodology was justified. As always, the proof of the pudding is in the eating. It must be worked out whether the theory I propose neglects to incorporate other important desiderata. For now, my purpose is simply to show how it improves on the major points of criticism we have raised against Dworkin, and why my theory is preferable to other alternatives.

7. The terminology of rights

The key to my theoretical proposal does not lie in articulating a concise description of *all* fundamental rights we should recognize, but in *refusing to do so*. Most fundamental rights theories formulate their essential insight in a few words: one follows 'the filtered preference approach' or sees 'rights as trumps' or adheres to the idea of 'fundamental rights as the contents of public reason'. The ambition is to cut through all the various

[261]Kumm, Mattias, 'Institutionalizing Socratic Contestation: the Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review', *European Journal of Legal Studies* 2008, Vol. 1, pp. 153-183, p. 162.
[262]Kumm 2008, p. 162, Möller 2012, pp. 126-133.

instantiations of the term 'fundamental rights' and to gather all its relevant expressions in one concise definition. But the problem is that all these approaches seem to leave something out. In both of Dworkin's proposals something of great importance was found, but both also suffered from incompleteness. Therefore, I do not think this discourse is improved by yet another daring perspective on fundamental rights that postulates a completeness that is unavailable. The practice of fundamental rights is just too complex and too multifaceted to allow for simple definitions. Instead, I will offer a very abstract definition of fundamental rights that can consequently accommodate the *functional differentiations* necessitated by any proper institutional application of such rights.

Articulating this abstract definition starts by pinning down the term 'right', of course, and here again we are faced with a discourse desperately trying to subsume each usage of the term 'right' under some complex definition. The main battles are fought out by 'will theorists' and 'interest theorists', one side claiming that rights are always justified by reference to the will of a rights bearer, and the other side claiming that rights are always at least partly justified by the interests of the rights bearer.[263] Consequently, one side claims there are examples of rights that do not fit the definition given by the opponent – will theorists allegedly struggle with the idea of animal rights while interest theorists have difficulty doing justice to the rights of certain officials.[264] I will commit to neither position, but only posit that having a moral right indicates that certain others have a certain duty *towards* the rights bearer – this duty does not only *regard* him, but is *owed* to him.[265]

Now, if AP is accepted, it must also be accepted that only agents carry moral significance. There is no objective moral order of values to which we owe our allegiance and no abstract community we must serve – only individuals matter. All moral duties are

[263]See the debate about the correct concept of rights, for instance, Raz, Joseph, 'The Nature of Rights', *Mind* 1984, Vol. 93, pp. 194-214 and Raz, Joseph, *Ethics in the Public Domain*, Oxford University Press 1994, pp. 44-50, or Hart, Herbert, 'Are there any Natural rights?', *Philosophical Review* 1955, Vol. 64, pp. 175-191.
[264]Cruft, Rowan, 'Rights: Beyond Interest Theory and Will Theory?', *Law and Philosophy* 2004, Vol. 23, pp 347-397, pp. 347-348.
[265]Even though it focuses on juridical usages, Hohfeld's overview is instructive here, see Hohfeld, Wesley, 'Fundamental Legal Conceptions As Applied in Judicial Reasoning', Yale Law School Legal Scholarship Repository, 1917, p. 710, digitalcommons.law.yale.edu, consulted at 21-11-2016.

therefore ultimately owed to such individuals and thus denote a moral right. In other words, according to AP the whole of morality is rights based. Admittedly, the relation between a duty and a rights holder can be very complex. It is often the case that one owes a duty not to one but to *all*, such as the duty to drive safely. Moreover, in many cases the relationship between the rights bearer and the duty bearer is indirect: we do our duty by serving some organization that in turn fulfils certain obligations to people.[266] The state is the main example here: we never have a duty to serve the state because the state carries some inherent moral significance – its significance is always connected to the individuals the state serves.

Furthermore, we can see why the term 'human right' is not very instructive in this context. If one has a right because one is a human, and if the significance of being human lies in being a kind of agent, *all moral rights are human rights*. Conceptually, it makes no sense to separate human rights from moral norms that are justified in some other way: there are no such norms. This may seem counterintuitive: for the human rights recognized in treaties and constitutions fulfil all kinds of important functions not fulfilled by moral rights such as the right to be treated politely. But the definition of a human right does not explain why some norms carry out such important tasks. Indeed, for this reason it makes much more conceptual sense to talk about 'fundamental' vs 'non-fundamental' moral rights than to talk about 'human' vs 'regular or less important' moral rights.

So the moral domain is completely made up of moral rights connected to duties, and these duties are in some way all justified by the moral significance of individual rational agents – in our case, rational humans. How then do these moral rights differ from 'political' or 'legal' rights? I think the answer can be found through looking at the division of labour: for who actually bears the duties connected to the moral rights? I think the question of this distribution is exactly the same as the question of what politics involves: when we decide on what the government should do, we also determine which moral duties it does not take on and thus rest solely with private citizens – and which duties overlap. Indeed, by answering the question about governmental responsibility we

[266]See also Alan Gewirth's distinction between direct and indirect applications of his moral principle, Gewirth 1978, pp. 199-271, 271-366.

stipulate the boundaries between and the contents of public and private affairs. Importantly, in doing so, *prima facie* valid moral rights claims are transformed into concrete moral rights, in the sense that a clearer understanding is produced of what duties our moral rights actually entail and who carries the burden of these duties.

For this reason, we should understand *prima facie* valid moral rights claims as the inputs of the political process. In the course of the political process, such rights are analysed and weighed, and a decision is made about the extent to which the task of guaranteeing the right is the responsibility of government. Consequently, only when this decision is taken do we have an idea of who the duty bearers are that correlate with a *prima facie* rights claim. Many scenarios are then possible. Perhaps the government has a duty to regulate and the public only has a duty to respect the law. Perhaps the picture is much more complicated – we all understand that a *prima facie* rights claim that others be honest to us translates into laws, political conventions, morals of good citizenship, ideas of proper friendships, and more. As said in the introduction, the route one follows from the initial inventory of *prima facie* valid claims to an end result of specifically regulated institutions is long and complex.

These different routes give meaning to the term 'legal rights'. Legal rights are grounds for duties expressed by the laws promulgated by the state.[267] This definition is broader than Dworkin's, as I do not exclude as rights legal norms people cannot enforce in court.[268] There has been much discussion about this distinction, but I set it aside here. The more general definition will suffice for discussing fundamental rights. Importantly, the term legal right is more descriptive than the term moral right. To say a person has a moral right to something is not to quote convention, but to present a moral conclusion. In contrast, one can cite a law providing a legal right without taking any moral stance – one simply refers to laws promulgated by the legislator. Finally, I reject Dworkin's usage

[267]Of course, much more can be said about how these laws differentiate from the system of moral norms and what we actually mean by 'the law' in the first place. I cannot go into these complexities here and must rely on our everyday understanding of the sources of law commonly recognized in society. See for instance Hart, Herbert, *The Concept of Law*, Oxford University Press 1994, pp. 79-80.

[268]See for a discussion on the meaning of legal rights Raz 1994, pp. 254-265.

of political rights. He used the term to denote those *prima facie* valid moral rights claims relevant to all political decision-making – but all such moral claims are relevant, as it is the boundary between the public and the private sphere that is determined politically. Little is therefore gained by separating political rights from moral rights.

8. The meaning of fundamental rights

But what should it mean to say that something must be recognized as a fundamental right? In sum, I will defend an interpretation that says, quite simply, that fundamental rights denote a group of goods, based on *prima facie* valid moral rights claims, that are of great moral importance. Given the scheme above, both moral and legal rights can be fundamental – they then either denote the fundamentally important *inputs* of the political process or a fundamentally important legal implementation of those inputs. Because of their importance, fundamental rights should play a decisive role in how society is governed and how, in turn, all branches of government are judged. Fundamental rights thus have an intimate connection to both the realization of a *just* society and the assessment of the *legitimacy* of governing bodies. In working out both elements, the implications of my approach to fundamental rights will become clear.

Given their importance, fundamental rights must be secured for all and secured equally. Consequently, according to AP, a failure to respect and secure them makes a society unjust. This brings us to the question of legitimacy, because if a governing body is about to make an unjust decision one may wonder whether it has the authority to legitimately take that decision. This goes back to the paradox of politics discussed in the first chapter. In a morally right society a system of government is set up that can be trusted to realize the right concrete states of affairs – a just society is the purpose of government. However, a *part* of realizing those right states of affairs lies in the creation of a political system of *self-government*, in which individuals are given equal power to decide the course of society. Consequently, those who have the right to rule can use that power to

take unjust decisions. The just way of distributing political power can conflict with the substance of just decisions.

Fundamental rights play a crucial role in resolving this tension between ruling legitimately and ruling justly. Importantly, they do so in *functionally different* ways. First, adhering to fundamental rights *removes* the tension between justice and legitimacy – there is no ground to criticize a ruler who justly came into power and used that power to realize the morally most important states of affairs. Fundamental rights thus *guide* politicians in taking their decisions. For this reason fundamental rights texts, especially constitutions, are seen as inspirational. They exhibit the values that are supposed to steer us through the murky waters of politics. Second, this guiding role is often expressed by giving fundamental rights a privileged role in democratic discourse – all kinds of advisory bodies are set up that publicly inform the government of the best ways of respecting fundamental rights.

Third, even if those in power misunderstand or overlook such advice, procedures can be set up to *enforce* fundamental rights, *even if those in power disagree*. There are many different relationships of scrutiny here. Some denote the ability of majorities to hold public officials to account for fundamental rights violations: depending on the precise system, citizens can democratically replace public officials who fail to uphold such rights and members of parliament can lose faith in officials in the executive branch. Others denote the ability to *go against current majorities*. A second chamber of parliament can be assigned a special responsibility to strike down laws drafted by the first chamber if they conflict with fundamental rights. And a special court overseeing a certain rights text can evaluate whether laws promulgated by all chambers of parliament comply with those rights.

Clearly, these last-mentioned ways of employing fundamental rights are more invasive than the first, in the sense that they do not merely guide but *limit* the power of democratic majorities to take decisions. At this point, it is an open question whether such limiting procedures can be justified – the next chapter will take up that topic. But in all cases the relationship between the authority to govern and the substance of just decisions

determines the form fundamental rights take – it determines what fundamental rights actually *do*. Are they merely guiding ideals or are they actionable legal norms that can bring a popular majority to its knees? Calling something a fundamental right does not answer this question. On the contrary, articulating such a right *raises* the question of what meaning the right should take and how it should be institutionalized. Accordingly, the job of a fundamental rights theory is not to put forward one specific understanding of all rights, but to explain these various roles and to argue which concrete rights, if any, deserve to perform which functions. Only when this is done do we truly have a clear understanding of what it means to speak of fundamental rights.

9. A typology of fundamental rights

Thus far, it has been argued that fundamental rights denote goods of such importance that a failure to secure them affects the prospect of building a just society and the legitimacy of government. Furthermore, we've seen how the various degrees of interfering with and guiding democratic decision-making tie in with different tasks performed by fundamental rights. What remains to be seen is which fundamental rights we should accept and how we then assign certain tasks to them. I will first answer the former question and then turn to the latter. Note that in answering these questions, we will encounter the restraints introduced at the beginning of this chapter. It will therefore not be possible to offer any complete theory indicating the fundamental rights we should accept. The ambition is rather to show how one argues about fundamental rights.

When does a good qualify as the object of a fundamental right? Clearly, the question presupposes that we must separate non-fundamental from fundamental goods – but that objective seems a bit simplistic. Overlooking the system of moral norms, a gradual scale of importance seems to be in order, not a binary one of considering something either as fundamental or as non-fundamental. At the same time, it is also true that a right either does or does not perform a certain task. It is either the case or not the case that a right is protected through judicial review, through a special advisory body or

entrenched in a guiding constitution. Therefore, given the fact that we *must choose* how to operationalize rights, it makes sense to describe rights that take on one or more of these functions as fundamental and separate them from other rights claims. At the same time, the gradual nature of the importance of moral norms should urge us to consider these categories flexibly. It might well be true that some fundamental rights are more essential than others, just as some non-fundamental concerns easily outweigh other non-fundamental concerns. Moreover, in certain societal circumstances a norm may grow or shrink in importance, pushing it across the boundary into or out of the fundamental category.

With these clarifications in mind, we can finally turn to the content of fundamental rights. As always, any moral content must be derived from the starting point of respecting rational self-conceptions. The goods that are of utmost importance are the goods rational persons would select as being of the utmost importance. Given this vantage point, I think we can distinguish between four groups of fundamental goods or rights: basic goods, derived goods, expressive goods and particularist goods. Note that in presenting these categories, we are drawing on the argumentative structure presented in the previous chapter.

Starting with basic goods, they are goods that, following Gewirth, are necessary for the performance of any action. Consequently, for the acceptance of basic goods it matters not whether a rational person desires to be a painter, a cobbler or a soldier – any plan of life he chooses will necessitate a claim to basic goods. As argued in the previous chapter, basic goods include goods such as bodily integrity, freedom from manipulation and basic health. Clearly, without these, no pursuit in life is remotely feasible. Each rational person should therefore accept their importance. However, the argument of the last chapter taught us there are not many of these basic goods: goods such as education, work and culture, dominant goods in today's societies, are not basic. But even if a lot of moral goods cannot be called basic, some of them can and should be understood as derived goods.

These derived goods are needed in order to realize the set of basic goods. A system of criminal law, for instance, is necessary to guarantee people's bodily integrity, just as some regulated system of financing is necessary to secure healthcare facilities. These goods in turn presuppose the existence of a state, in which decisions on these issues are taken according to some minimally rational procedure. And if we're talking about a state, we should ensure it is not a corrupt state, so we need accountability mechanisms, public transparency and the existence of independent media. Evidently, this list goes on and on. Indeed, perhaps in some way the importance of culture and education can also be seen as derived goods. But it is important to keep in mind these goods are not strictly or in all circumstances necessary for the success of any action – and sometimes the derived linkage is weak. Still, given their connection to the set of basic goods, all rational persons must necessarily attach a high moral significance to them.

Third, I think the moral reasoning of AP commits us to infer expressive goods. These goods prohibit states of affairs in which the equal significance or dignity of persons is denied – even if the concrete good in question is of small import. Discrimination is the hallmark example here. Whether based on race or culture or nationality, discrimination expresses the thought that some are worth less than others. It is rightly perceived as highly offensive, as rational persons should want their equal worth to be honoured. A different expressive right is the notion of right to justification. To be respected as a person of equal significance, you must be presented with adequate reasons when someone interferes with your life. If this does not occur, your status as an equal is again denied. Clearly, these are not strictly necessary goods for all actions – it is possible to act in circumstances of random intervention and discrimination. But because each rational agent is committed to the idea of his or her equal worth, any denial of such worth must be seen as wrong: it is thus necessary for all to recognize the significance of expressive harms.

As explained in the previous chapter, particularist goods refer to the respect for people's particular natures: the wishes and ambitions that are not necessary universally shared, but do denote core value commitments a person exhibits. Take the example of enjoying a precious natural site: safeguarding it does not express the significance of rational persons and is not necessary for the realization of basic goods. However, it can

be a vital element of the goods a rational person finds the most important. If this is the true, one can start making a case to understand the good as the object of a fundamental right. This is of course not easy. In contrast to the previous three categories, many people may not actually find the natural site very important. Accordingly, it might not be fair to them to have the good take such a prominent place in a government's moral deliberations. But it could also be true that the particularist good actually pervades society and is important to almost all. Perhaps a certain culture revolves around respecting and enjoying its biodiverse natural heritage, and many have an interest in its sustainable preservation. In such circumstances it becomes easier to argue for the good's fundamental importance. In any case, the point I want to make is that we should allow for this argumentative route in arguing for a fundamental right, even though due to its characteristic of particularity its justificatory prospects are weakened.

So what have we now accomplished? I think the four categories present the main arguments for proving some good is of fundamental importance. I have not yet shown whether some argumentative routes have priority over others – the question of hierarchy will be picked up in chapter six. Importantly, these routes do not exclude each other but can be combined to offer even more powerful justifications. Let's take the example of a right to education. The main reason we should consider it as fundamental lies in the role it plays as a derived good, for instance in teaching people to heal each other, to keep each other safe and to deliberate about their life choices. However, part of the worth of education also lies in enabling them to achieve the sort of life they wish to achieve: to enable people to follow their dreams of a good life. I think that ambition forms a part of a particularist respect for specific persons. Consequently, we see multiple justificatory strands linking to justify a right and to give more substance to that right. Indeed, rights to work, to a high – instead of a basic – standard of healthcare and also to cultural development all derive their worth through combining the different perspectives on what should matter most to rational persons.

Considering the discourse on human, constitutional and fundamental rights, it would be rare to come across a right that cannot be supported by one of the argumentative routes. However, this does not mean all these rights should directly be seen as

fundamental, nor does it tell us how they should be institutionalized. A definitive rights allocation requires that we consider issues of governmental enforcement and personal responsibility, which go beyond the scope of this dissertation. Therefore, although we can safely conclude that AP does not reject many proposals for fundamental rights, to conclusively accept a fundamental right a more comprehensive case must be presented – I will say more on this in section 12.

This concludes the overview of the kind of fundamental rights AP can justify. As noted, even though many examples have been given, no conclusive list of rights has been provided. But I hope to have established an attractive way of showing when a good is of fundamental importance.

10. Fulfilling the desiderata

Having put forward AP's account of fundamental rights, the question now is whether it fulfils the desiderata we set out above. Beginning with the first desideratum, AP's account of fundamental rights makes sense of the relationship between individual fundamental rights and collective goods. The moral system justified by AP shows how all moral norms are derived from the equal significance of rational humans. The basic materials of collective goods and individual rights provisions are precisely the same: individual interests. The only difference is the perspective from which morally relevant states of affairs are viewed: as goods offering benefits to many or as goods to which individuals have rights. Therefore, it is intelligible to say an individual has a right to a state of affairs that is also a collective good. For example, a right to privacy is both important to an individual rights holder as a protection of his personal life sphere and important to all in the way it fosters a collective way of living together. It would thus be a mistake to characterize the significance of fundamental rights solely from the perspective of a single

person – their worth must be determined in the context of *a collective of individuals*. Or in the words of Alan Gewirth, "a community of rights".[269]

Turning to the second desideratum, AP offers an appealing account of the functional differentiation of fundamental rights. According to this approach, fundamental rights denote goods the absence of which affects the legitimacy of democratic decision-making – but there are many differences in the *ways* in which the normal course of politics can be constrained. Let's take the example of the right to work and the availability of jobs in a country. Clearly, this good is so important that it merits a special discursive place in governmental decision-making: special agencies should be appointed that advise the state and the general public about the facts of the labour market and the ways in which its condition can be improved. Failure to support the labour market should lead to extensive scrutiny of public officials, and damaging the labour market can be a reason to replace them. Moreover, if available, an additional chamber of parliament can and should strongly scrutinize the adequacy of proposals for laws drafted by the government and the primary parliamentary chamber. Accordingly, in the internal workings of parliament and in the institutions set up around it, respect for the fundamental nature of the right to work and its relation to the authority to govern can and should be shown.

However, it might well be that a right to work is not suited to a stronger institutionalization, for instance by instituting a judicial review of parliamentary decision-making. One reason for this, that we will explore further below and in the next chapter, could be that a college of judges is just not more likely to find the right answers about the right to work than parliamentary decision makers. So even if a good deserves strong protection, such protection is just not available. This does not mean the right is less important or less fundamental – it is just less suited to a certain form of institutionalization. By focusing on multiple relations of guidance and interference with the course of politics, AP does justice to these important differences, and shows how within the inventory of fundamental rights a distribution of labour takes place. As a

[269]Gewirth, Alan, *The Community of Rights*, The University of Chicago Press 1996.

consequence, the real question about fundamental rights comes to the fore: how should we distribute the responsibility to guard goods of fundamental importance across the democratic institutional spectrum? The next chapter will take up this question.

Thirdly, AP can make sense of the danger of moralism. Recall that in the previous chapter the requirement of rationality was introduced: people should only base their claims on *rational* self-conceptions. This means that certain reasons have been eliminated: people must genuinely accept the equality of all persons and each person's right to live life according to his or her conception of the good. As a consequence, they cannot simply claim others should not behave in certain ways because they believe it is immoral. They must give reasons why, given their rational self-conception, they require others to stop doing certain things. Therefore, they must explain why, for instance, homosexual acts inconvenience their prospects to live their own lives.

Similar to Dworkin, I believe this requirement safeguards the liberal character of the theory of fundamental rights I propose. For if it is correct, people cannot just claim homosexuality is intuitively wrong – this provides no valid argument. They also cannot claim homosexuality should be banned because it is religiously prohibited – the only valid moral principle is given by AP. They must somehow find a real connection between homosexuality and what they should rationally want, for instance by arguing that homosexuality encourages the spread of HIV or that homosexuality encourages paedophilia. Evidently, such reasons must also be factually true. But conceptually, they fulfil AP's rationality standard – they connect with parts of people's rational self-conceptions. Clearly, these reasons are not moralistic, as they do not impose an optional conception of the good life on others. Their validity derives from the categorical obligation to respect rational self-conceptions. We can therefore conclude that the inventory stage of AP, in which the *prima facie* valid moral claims are presented, wards off moralism.

The obligation to stick to a valid inventory of *prima facie* claims also and especially applies to government. It must justify its actions in a way that exhibits a good faith adherence to AP, which not only means providing a proper weighing of

fundamental rights and interests – a topic to which we return below and in chapter 6 – but also ruling out all invalid reasons. This brings us to the *right to a proper justification*, in which moralistic reasons are not relied upon. I will take a bit more time in discussing it, given the influence this concept has had on contemporary discourses about rights. By showing the place of the right to justification in AP, I will also fulfil the fourth desideratum of taking a stance on the broadness of fundamental rights discourse.

11. The place of the right to justification

There are roughly two ways in which the idea of a right to justification has been presented in recent rights literature: as the *foundational* concept of the whole discourse of human rights and as the main *reconstructive* concept of constitutional rights. The main proponent of the former is Rainer Forst, while the latter perspective has been taken up by Mattias Kumm. I will discuss both briefly, and argue that AP neither understands the right to justification as the main foundational concept nor as the main reconstructive concept of its account of fundamental rights, but still assigns the right to justification an important place in its rights framework.

Forst's work forms part of the Frankfurt tradition of connecting social theory with moral philosophy. According to Forst, the challenge of any theory of human rights lies in responding to arguments of "cultural integrity".[270] Forst writes that proponents of Confucian or Islamic cultures can reasonably resist Western pleas for human rights adherence if *all* in their culture agree to the characteristics of a certain way of living.[271] However, in today's social reality this kind of integrity rarely exists. Indeed, Forst notes that cultures all around the world exhibit internal struggles – and in these internal struggles the moral grammar of human rights becomes apparent:

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[270]Forst, Rainer, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', *Constellations* 1999, Vol. 6, pp. 35-60, pp. 35-40.
[271]Idem.

> "In such a situation of internal conflicts there arises – not necessarily, but under certain conditions, and in our day as a rule – the demand for *human rights*: it arises 'from within' and is directed at something 'internal'. The demand is directed at the establishment of a social structure in which the definition of the character of the culture and society, the determination of the appropriate treatment of its members, and the answer to the question of who deserves what, are merely entrusted to a specific segment of the community. The demand springs up when people ask for *reasons*, for the *justification* of certain rules, laws, and institutions, and where the reasons that they receive no longer suffice; it arises where people believe that they are treated unjustly both as members of their culture and society and also simply *as human beings*."[272]

In a nutshell, Forst argues that from the internal demand for a justification, a discourse arises that adheres to principles of *reciprocity* and *generality* and that, in the context of a political state organized by law, concretizes a certain conception of fundamental rights.[273] Evidently, this means the right to a justification is the anchor which holds the theory together and forms the source from which normatively binding claims arise.

AP would not assign this concept such a place and doubts the justificatory structure of Forst's account. Although Forst distinguishes his account from that of Habermas at some points, and we cannot do his work justice in these short paragraphs, the arguments presented in chapter two seem to apply: why should the call for justification, or in Axel Honneth's terms, the call for recognition, be accepted in the first place?[274] The move from observing the social dynamic of a certain discourse to inferring normative conclusions requires further argument – and we've seen how difficult it is to prove rational agents are *necessarily* committed to a certain discourse. Furthermore, Forst's account joins the Habermasian tradition of not saying more about people's interests.[275] Like Habermas, he argues for structural principles that guide further

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[272]Ibid., p. 40.
[273]Ibid., pp. 41-45.
[274]Honneth, Axel, *The Struggle for Recognition*: *The Moral Grammar of Social Conflicts*, Polity Press, pp. 92-100. See for the relation between Forst and Habermas Flynn, Jeffrey, 'On the Nature and Status of the Right to Justification', *Political Theory* 2015, Vol. 43, pp. 777-837, pp. 797-798.
[275]See here Benhabib, Seyla, 'The Uses and Abuses of Kantian Rigorism: on Rainer Forst's Moral and Political Philosophy', *Political Theory* 2015, Vol. 43, pp. 777-837, pp. 785-786. See also Caney,

deliberation, but cannot offer a substantive account of how people can articulate the normatively significant goods politics must provide. Therefore, both as a route of justification and as a methodology of articulating substantive claims, AP puts Forst's theory aside.

AP just reiterates the point that from the perspective of a rational agent, it is necessarily in his interest that others justify their actions towards him. This respects his significance as an autonomous agent and invites him to reason with those who seek to affect his life. In this sense the right to a justification is of great moral importance and deserves institutionalization. But it does not deserve to be confused with the ground of moral norms: the potential for rational agency that characterizes humans. The question is how this institutionalization should take place, and this brings us to the second strand of thinking about the right to justification: understanding it as the main reconstructive model of modern fundamental rights practice.

The most prominent and certainly the most powerful way of institutionalizing fundamental rights is to protect them through a judicial review of parliamentary decisions. In this way, *even if* a democratic majority decides to violate a fundamental right, it can still be protected. Mattias Kumm has argued that this specific mechanism of rights protection can best be understood as a practice of demanding a justification, or in his words, Socratic contestation:

> "Human and constitutional rights adjudication, as it has developed in much of Europe, I will argue, is a form of legally institutionalized Socratic contestation. When individuals bring claims grounded in human or constitutional rights, they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the right-claimants are susceptible to plausible justification."[276]

Simon, 'Justice and the Basic Right to Justification' in: Forst, Rainer, *Justice, Democracy and the Right to Justification: Rainer Forst in Dialogue*, Bloomsbury 2014, pp. 148-150.
[276]Kumm 2007, pp. 1-32, p. 4.

According to Kumm, the whole practice of scrutinizing whether governments uphold fundamental rights thus boils down to assessing whether they took their decisions in a rational fashion, employing *public reason*.[277]

Kumm argues that this rationality requirement consists of the proportionality test employed by courts such as the German Constitutional Court and the European Court of Human Rights.[278] I will not discuss this here, as it will be discussed in depth in chapter six. Indeed, AP will turn out to support a certain interpretation of the proportionality test as a means of interpreting fundamental rights. But it will still resist Kumm's basic reconstructive message. For while Kumm is right in connecting the wide-ranging reach of fundamental rights with the right to justification, he is wrong in neglecting the essential role fundamental rights play in singling out those goods which are actually of *fundamental* moral importance.

Kumm observes that in the past decades, many courts have interpreted the range of fundamental right increasingly broadly, for instance by including very general rights to equality and liberty, that almost always apply.[279] Consider the German example of a man feeding pigeons in a park. Are his fundamental rights infringed when the government prohibits bird feeding without stating any reason? The German Constitutional Court thought this was the case, as people have, basically, a general liberty right to do as they please.[280] Interfering with such a right thus warrants an explicit justification. Obviously, this means that just about any action the government takes can be made subject to fundamental rights review.

The conclusion that Kumm draws from this phenomenon is to say that fundamental rights are not really fundamental. A right "merely serves as a trigger" to start a process of scrutiny in which such rights can be easily overturned by considerations of policy and public interest.[281] I draw a different conclusion: the right to a justification *just*

[277]Ibid., p. 155.
[278]Kumm 2007, p. 154.
[279]Ibid., p. 162.
[280]BverfGE 54, 143 (1980).
[281]Kumm 2007, p. 161.

is a good of fundamental importance, and it *joins* the list of other fundamental goods states enumerate in their constitutions and treaties. For it makes little sense to collapse the category of fundamental goods into simply morally relevant goods. To enumerate something as a fundamental right privileges it – such rights should not be overturned by simply *any* consideration of moral relevance. This reasoning lies behind only selecting some norms to form a constitution and only selecting some norms to function as the basis of judicial review. Consequently, by admitting a separate right to justification, this structure of importance can be salvaged and refined. Moreover, the concept of a right to justification can now connect the expansiveness of fundamental rights practice with its fundamental character – thus fulfilling the fourth desideratum set out above.

Of course, it remains to be seen how this right to justification is worked out precisely. For one thing, in some situations people have a responsibility to search for a justification – for instance by consulting the online site of a municipality or of the department overseeing taxes. Equally, if one's building is on fire, no justification needs to be given to douse the flames. And is it really true that a right to justification is completely independent of the content of the good at hand? It seems obvious to suppose that the slight of being ignored is felt more deeply when a person interferes with something that is highly valued. Therefore, it makes sense to suppose that when the good in question is valued very little, the importance of receiving a justification is diminished too. I cannot discuss these doubts any further here – suffice to say that in many circumstances, the absence of a justification adds importance to a slight that otherwise should not be regarded as fundamental.

12. Distributing fundamental rights

Although I have set out and defended the argumentative structure AP proposes, its institutional application remains. Which concrete formulations of fundamental rights should be recognized in practice, and which functions should these fulfil? In part, this question will be explored further in the next chapter, which focuses on the specific

justification of fundamental rights institutions. But the question also puts the limits of this dissertation into view. For in distributing the responsibility to protect fundamental rights, considerations of personal responsibility and the nature of governmental involvement come into view. The chapter will therefore close by discussing the impact they have on articulating the concrete functions of fundamental rights.

Let's take the example of the right to work. It is not hard to argue that work is a very important good in today's society: by doing all kinds of jobs our basic goods are secured, and taking on certain tasks forms part of executing a certain particular view of the good life. Thus, it makes sense to talk of a moral fundamental right to work. But what does this mean exactly? Should the government now secure jobs for everyone? Should there be a legal provision giving people an actionable right to a job – should this legal provision be protected even if a democratic majority disagrees with it? These questions determine what it actually means to have a right to work.

But in answering them we quickly move past the importance of work and must ponder other questions. For instance: is a government actually suited to securing jobs? Clearly, any answer to this question has been heavily contested.[282] Do we embrace neo-liberalism, arguing that a free market creates jobs and wealth, or do we resist it, emphasizing the importance of governmental involvement?[283] I have no idea what the right answer is here. But it seems we should know in order to assign a specific responsibility to the state.

Now, it might of course be fine if any precise answer eludes us, as it is the job of politics to democratically decide on these kinds of uncertainties. But what about the job of those empowered to guard fundamental rights against the will of these majorities? How

[282]See for instance this essay discussing the motivational bonus of working for the public good: Francois, Patrick, 'Public service motivation as an argument for government provision', *Journal of Public Economics* 2000, Vol. 78, pp. 275-299, pp. 276-279.
[283]See for a discussion of neo-liberalism Harvey, David, 'Neo-Liberalism as Creative Destruction', *The ANNALS of the American Academy of Political and Social Science* 2007, Vol. 610, pp. 21-44, pp. 22-23.

can they decide whether they should interfere with the democratic process?[284] To scrutinize anything, one needs a standard of what is ultimately a wrong interpretation of the protected good in question. But how can we single out a clearly wrong interpretation of the right to work if its content is so elusive?

This picture becomes even more muddled once considerations of personal responsibility enter the field. For it is often supposed that people have a private responsibility to secure a job. They should work hard in school, put effort into their applications and as a result be rewarded with a job. Government intervention could take this basic charge of responsibility away – and that might seem unfair. Some try harder to get a job than others. Do they not deserve the rewards they reap, and do the slackers not deserve some hardship? Again, I do not know the right answer. But it seems vital to assessing what the right to work actually amounts to, and to what extent experts can take clear decisions on what the government should do.

Of course, the example of the right to work is not accidental. Several socio-economic rights suffer from the uncertainties I have set out.[285] It is an educated guess that because of these difficulties they have not received the same kind of protection as civil and political rights. Indeed, in discussing those rights the hurdles of governmental capacity and personal responsibility seem less hard to overcome. Governments seem perfectly able to secure fair trials, safeguard the freedom of the press and set up a police force. And it seems wrong to suppose that people are solely privately responsible for the administration of justice, the freedom of their media and the organization of law enforcement. Still, I can offer no more than conjecture here. It could be that we have become socialized to make these distinctions, precisely because we have been living in

[284]One way of articulating this critique is by arguing socio-economic rights are not *justiciable*, see for a discussion Christiansen, Eric, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court', *Columbia Human Rights Law Review* 2007, Vol. 38, pp. 321-386, pp. 380-386.

[285]See for an interesting case study on the right to healthcare Liu, Ziyu, Buijsen, Martin, 'Reaffirming Individual Responsibility in Distributive Justice: A Case Study of the Chinese Healthcare System', *International Journal of Social Science Studies* 2017, Vol. 5, pp. 14-23, pp. 14-15.

states which prioritize civil and political rights. This dissertation will not answer these doubts.

However, it is clear that the extent to which answers can be formulated determines the institutional options that should be used. The more evident it is that the state should protect a right in a certain way, the better argument there is for scrutinizing legislatures and executives. In the end, considerations of epistemic clarity and moral importance together determine the precise contents of a fundamental right.

Having set out a theory proposing how we should conceptualize and argue about fundamental rights, it is time to turn to the specific ways of institutionalizing them. The next chapter will take up this task by analysing the philosophical debate on the justification of judicial review.

Part Three: Application

Chapter Five

Judicial Review Revisited

1. Evaluating judicial review

We ended the previous chapter with the conclusion that fundamental rights should be understood and concretized in terms of their various institutional roles. Such rights guide democratic processes and raise the question of to what extent certain moral norms deserve deliberative prominence and constitutional protection. As discussed, the political instantiations of fundamental rights can be placed on a gradual scale indicating the degree to which a normal majoritarian democratic process is interrupted and the power of a democratic body is limited. The objective of this chapter is to assess the moral permissibility of one of the severest forms of rights intervention: strong judicial review. As we will discuss the justification of such a court, we will move into legal territory. Moreover, the context of this discussion is that of a single nation or society – the analysis will therefore tie in with debates about constitutional courts and rights. As I will write about how fundamental rights *should* be translated to legal practice, I will sometimes refer to courts as applying and interpreting fundamental rights.

Strong judicial review, as I define it here, involves a court or courts with sufficiently independent judges who scrutinize the output of legislative and executive branches according to a text, such as a constitution, and who are empowered to strike down legislation drafted by the highest legislative authority usually a democratically elected parliament acting jointly with the executive.[286] For the sake of convenience, I will

[286]One could also organize a review of legislation *before* parliament can even legitimately decide. Arguably, this variant interferes with daily politics even more than the *ex post* option discussed in this chapter. The reason for choosing the *ex post* option is that this scheme is most influential in

refer to this kind of legislation as *parliamentary* legislation and will use the term 'the legislator' when referring to both actors legislating in concert. Accordingly, if any individual takes issue with a law, he can take his case to the judge and plead the law's unconstitutionality. If the judge decides to admit the complaint and to judge it on its merits, the relevant provisions of the law are declared invalid and the government is instructed to uphold this decision – which in practice means it must amend the law accordingly. Strong review differs from weaker forms on two points: in weaker cases, the judges are either not authorized to declare the law in question invalid and change the law, or cannot evaluate parliamentary legislation. In the first scenario, the legislator still retains the right to decide whether incompatible norms are also legally invalid. In the second situation, the legislator can react to the invalidation of lower decisions by drafting a parliamentary law that upholds the previously invalidated norms and simply overrules judicial condemnations of decisions made by lower bodies of government.[287]

However, the reviewing court is not completely out of parliamentary control. Its founding text has been adopted once by parliament, and can be changed by parliament. As in most countries, this is very difficult: some demanding political procedure must be performed – think of the requirement of winning multiple elections, organizing larger-than-normal majorities and/or convincing two parliamentary chambers. Whatever the precise details, in my scheme changing the constitutional document is hard and rarely occurs, guaranteeing an independent court that can confidently assert its powers. Moreover, the legislator plays a minor role in appointing the judges – for instance by having the ability to veto candidates selected by the judiciary itself.[288] We could, of course,

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practice. The judicial review carried out by the United States Supreme Court matches the 'strong' model. The practice of the European Court of Human Rights also resembles it, although there are major differences in terms of enforcement between it and constitutional courts.

[287]The first model exists in Great-Britain, the second resembles the Dutch prohibition of 'constitutional review' – in the Netherlands, this review can still occur indirectly via reference to international treaties. It should be noted that the first model is not necessarily without teeth – thus far, 'declarations of incompatibility' issued by the judiciary have been highly influential. See Bellamy, Richard, 'Political Constitutionalism and the Human Rights Act', *International Journal of Constitutional Law* 2011, Vol. 9, pp. 90-95 and Klug, Francesca, 'Judicial Deference under the Human Rights Act 1998, *European Human Rights Law Review* 2003, Vol. 2, pp. 125-133, pp. 132-133.

[288]The point here is of course to protect the court from the sort of political warfare over appointments that occurs in the United States.

stipulate many more details, but this general model suffices as a relevant object of investigation.

But what about the substance? Judicial review can enforce all kinds of norms, and the content of those norms surely matters for the justification of the institution. My focus in this chapter is on adjudicating the fundamental rights norms that are part of many constitutions around the world, and is not on, for example, constitutional norms detailing the operational specifics of a certain democracy. That still leaves open the differences between civil, political, social and other rights. However, given the limitations set out in chapter four, I will not argue for including a certain list of these rights in texts informing strong judicial review.

In sum, the chapter will seek to answer the question of whether strong judicial review should be supported, given the understanding of fundamental rights put forward by agential pluralism (AP). I will state a tentative case in favour of strong judicial review *based on AP*. I will not provide any unconditional answers – it might well be that in practice, judicial review is interpreted according to another moral doctrine. Moreover, the final justifiability of any interpretation of strong judicial review depends on various empirical political circumstances which are difficult to predict. Indeed, I will argue this is an unescapable feature of debating judicial review. Authors can only argue definitively for or against the institution in carefully crafted circumstances.[289] In order to avoid toying too much with such assumptions, and because of the problematic nature of some of them, I will not do this – hence the promise of making only a tentative case.[290]

Given the vast sprawl of this debate, I have selected two guides to frame the discussion: Alon Harel and Jeremy Waldron. In recent years, Harel has been one of the most vocal proponents of strong judicial review, while Waldron has been the institution's

[289]See for instance the discussion between Jeremy Waldron and Richard Fallon, see Fallon, Richard, 'The Core of an Uneasy Case For Judicial Review', *Harvard Law Review* 2008, vol. 121, pp. 1694-1736, pp. 1701-1703, and Waldron, Jeremy, 'The Case Against Judicial Review', *The Yale Law Journal* 2006, Vol. 115, pp. 1348-1406, pp. 1359-1368.

[290]Waldron, for example, assumes a widely shared good faith adherence to fundamental rights. Assumptions like that seem naïve in the time of Trumpism – it makes the analysis less relevant to contemporary circumstances. See Waldron 2006, pp. 1364-1365.

most central critic.[291] Discussed together, they give a good, although by no means complete, overview of the moral-philosophical debate on the permissibility of judicial review.

2. Structuring the arguments

A great many arguments have been put forward defending or rejecting strong judicial review, so before discussing them it makes sense to introduce some structure. There are at least two ways of doing so which are both much used in the debate: separating outcome from process arguments and separating instrumental from intrinsic considerations – Jeremy Waldron employs the former while Alon Harel relies on the latter.[292] I think Harel's scheme works better and I will use this section to explain why. Consequently, this chapter will first analyse the intrinsic arguments made in the debate and then move on to the instrumental ones. Ultimately, I will argue that intrinsic arguments cannot decide the issue – we must turn to *instrumental* considerations to definitively justify judicial review.

Let us start with Waldron's distinction. In short, outcome arguments prove that judicial review either does or does not help to realize a morally good society.[293] One could, for example, submit that because judges adjudicate specific cases, they develop an attuned feeling for combining the particulars of everyday situations with more abstract normative principles.[294] Therefore, the judicial review of such laws improves their quality – for instance by removing minor provisions causing major practical difficulties. But one could also argue the contrary, holding that judicial decisions are so bound up in legal technicalities that the important moral considerations are lost.[295] Whichever may be true, these arguments focus on the comparative ability of branches of the state to secure morally good states of affairs.

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[291]See for example Harel 2014, pp. 220-240 and Waldron, Jeremy, *Law and Disagreement*, Oxford University Press 1999, pp. 255-260.
[292]Waldron 2006, pp. 1369-1375, Elyon, Yuval, Harel, Alon, 'The Right to Judicial Review', Virginia Law Review 2006, Vol. 92, pp. 991-1022, pp. 997-999.
[293]Waldron 2006, pp. 1369-1375.
[294]Sager, Lawrence, *Justice in Plainclothes: A Theory of American Constitutional Practice*, New Haven: Yale University Press 2004, pp. 198-202.
[295]Waldron 2006, pp. 1382-1385.

In contrast, process arguments do not concern themselves with morally good states of affairs but with the process through which decisions about what is actually right are reached.[296] Accordingly, we could imagine an absolute ruler who only takes morally good decisions but implements them by threatening all others with force. Presumably, and all other things being equal, we would reject the authority of such a ruler if a fairer process of decision-making is available. We thus expect two things from our governing bodies: they should operate fairly and secure right outcomes. But what does it mean for something to feature a fair or right process? Here, again, many arguments await. Waldron himself argues that judicial review should be rejected, as it ultimately restrains the fairest way of taking decisions: the process of majority voting.[297] Alon Harel takes the opposite position and argues that because judicial review offers the possibility of a *fair hearing*, the decision-making procedure is actually improved.[298] These arguments will be explored further below.

Although Waldron's distinction helps to order many of the arguments used in debating judicial review, it is also problematic. For the process of decision-making is itself also an outcome. A procedure of majority voting constitutes a state of affairs that might be changed. Indeed, that outcome may be altered by a majority vote. Again, Waldron's theory makes too little allowance for the paradoxical nature of democracy.[299] For even if it is true that a procedure of majority voting unconstrained by strong judicial review is fairest, that in itself forms part of the argument for a judicial review of those provisions essential to majority voting. In other words, the process of majority voting may be understood as an outcome that deserves special protection. The question of the fairness of a political process cannot be discussed apart from considering the outcomes judicial review may be thought to protect.

I think Harel fixes this conceptual problem by offering a simpler distinction: that between states of affairs that are non-instrumentally important and states of affairs that

[296]Waldron 2006., pp. 1369-1375.
[297]Ibid., pp. 1406-1408.
[298]Harel 2014, pp. 202-215.
[299]See also chapter one, section 4.

are instrumentally important for creating such non-instrumental or intrinsic goods.[300] For it makes sense to submit that part of the instrumental importance of judicial review could lie in securing the intrinsically important good of majoritarian politics, e.g., by preventing it from sliding into a dictatorship. Furthermore, the importance of majoritarian politics *as such* could then be separated from the intrinsic importance of judicial review, i.e., the goods it creates *by merely existing*. One could argue that because it takes power away from parliament, the mere existence of judicial review is unfair, or, in contrast, that the mere existence of judicial review provides an important remedy to those who want to oppose some decision. Accordingly, the conceptual confusion is resolved.

Accepting this distinction, the question is whether the debate about judicial review can be decided by merely relying on its intrinsic quality: should we accept or reject strong judicial review, *irrespective of its instrumental role*? Much depends on this, as it is much harder to debate the instrumental functions of judicial review than to debate its intrinsic significance.[301] Instrumental relations are based on the fragile conjecture that if a certain review of a certain kind exists, certain consequences would happen. For instance, if judicial review forms part of a political system, one could submit that it in effect lessens the adherence to fundamental rights by politicians – given the fact of review, they do not worry about it as much as when they must carry the main responsibility for realizing fundamental rights. But how would one prove such a claim? A great many factors could be involved in understanding the practical adherence to fundamental rights in some particular political setting– and the factors might well differ for each right and for each judicial tradition. In any case, legal and moral scholars seem ill-equipped to provide a decisive answer to these complexities.

Intrinsic qualities, in contrast, present more fruitful terrain to the normative theorist. For now, he does not need to prove some consequence will probably occur, but only needs to assess the moral value something has *by merely existing*. This importance

[300]I use 'non-instrumental' and 'intrinsic' interchangeably and, for the sake of brevity, will hereafter mostly use intrinsic.
[301]Harel, Alon, Kahana, Tsvi, 'The Easy Core Case for Judicial Review', *Journal of Legal Analysis* 2010, Vol. 2, pp 227-253, pp. 236-238.

should follow more neatly from the moral system one endorses. One sets about collecting all the relevant pros and cons, and weighs them according to a normative standard. Obviously, this task may well be hard: we've seen the difficulty involved in ascertaining a proper moral standard. But one faces less empirical complexities. Moreover, if we only investigate intrinsic qualities, we need not stipulate the condition that the reviewing court functions according to a certain moral doctrine – in our case, according to AP. Such a stipulation only matters when assessing a court's ability to take morally correct decisions.

In sum, the debate about the intrinsic importance of judicial review seems like a debate a philosopher might actually *win*. It should therefore be no surprise that Harel employs a strategy of first bracketing the debate about instrumentality and then attempting to decide the debate about intrinsic importance.[302] Indeed, understanding process arguments as independent of empirical conjecture, and outcome arguments as dependent on it, Waldron attempts to do the same.[303]

I will follow in their footsteps but come to a different conclusion. In the following sections, I hope to prove that the debate about strong judicial review's intrinsic importance does not clearly favour accepting the institution. Consequently, its acceptability depends on its instrumental importance.

3. Is there any tension between political self-rule and strong judicial review?

Reviewing the debate, there really is only one clear argument that one could offer to claim that strong judicial review is intrinsically wrong: it takes power away from the legislator. When judges exercise such review, they may bar decisions supported by both the executive and the parliamentary majorities and thereby limit the range of issues the legislator can decide freely upon. According to Waldron's argument, this is bad, as majority rule constitutes the way to decide contentious issues that best expresses the people's right to rule themselves.[304] The right to self-government is considered to stand in opposition to the institute of strong judicial review. However, one may wonder if this

[302]Harel and Kahana 2010, p. 236.
[303]Waldron 2006, pp. 1359-1365
[304]Waldron 2006, pp. 1386-1390.

inference is correct. Some have argued that strong judicial review does not conflict with democratic self-rule, as it is established by *precommitment,* or the ability of people to commit themselves now to future constraints on their power to make decisions.[305] Let's explore this argument.

The strategy is best illustrated by the myth of Ulysses and the Sirens. In the well-known story, Ulysses is so fearful of the Sirens' seductive song that he instructs his crew to tie him to the mast while they sail past (why he did not join his crew and shove some cork in his ears is confounding). The point of the story is clear: it can be rational to take a decision now to prevent yourself from making a mistake in future. We may doubt ourselves, and be wary of how we react in certain circumstances – we might be prone to distraction, forgetfulness or even anger and bigotry. Therefore, *we* ourselves choose to impose limits on future choices.

One could apply this reasoning to strong judicial review, arguing that such an institution forms an instance of self-protection: a large majority chooses to erect a body that will scrutinize future decisions.[306] For indeed, like Ulysses, we may be afraid of the temptations brought on by the power politicians wield and the risks of making difficult decisions in confusing circumstances. Setting up judicial review is thus not an attack on the autonomous functioning of elected representatives, but an example of such functioning. It is not an external intervention in ordinary democratic proceedings, but a consciously performed self-guidance of those proceedings.

Admittedly, this picture does not necessarily reflect the origin of existing arrangements of judicial review – for instance because the initial drafting of the constitution was not done according to strict democratic procedures or was done at a time when women did not have much political power. But let us assume this did happen. Through a process of deliberation, the people's representatives chose to implement judicial review. Why shouldn't we then understand this as an instance of legislative autonomy?

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[305]Waldron 1999, pp. 257-260.
[306]Freeman, Samuel, 'Constitutional Democracy and the Legitimacy of Judicial Review', *Law and Philosophy* 1990, Vol. 9, pp. 327-370, pp. 350-355.

Relying on the work of Jon Elster, Waldron rightly points out that there is a difference between true self-constraint and the sort of constraint exhibited by strong judicial review.[307] It is the difference between setting an alarm clock and asking one's partner to perform that service. In the first example, none but we decide on the content of the restraint, while in the second example, we have submitted ourselves to the judgment of *others*. They can always decide that, considering how peaceful you are sleeping, you need not be wakened. The judgment of others will not always reflect our own, and as a consequence some of our self-control is lost when we assign powers to an independent group of judges. Indeed, Waldron points out that in the case of judicial review, the difference between our assessment and that of others can be especially significant.[308] Constitutional rights are notoriously open to large interpretative struggles. If a person decides to give another the task of 'protecting human dignity' or ensuring that no one receives 'unusual punishment', he might be very surprised by the results. I agree with Waldron: it is misleading to argue that strong judicial review is really but an extension of one's own decisions.

Moreover, in the general model we investigate, representatives setting up a judicial review system *now* will greatly influence the circumstances of future representatives. This is not a contingent point, as given the general form of strong judicial review, it is *always* hard to change. As a consequence, later generations find themselves in a political system in which the cards are stacked against legislative sovereignty. To such a state of affairs, the idea of autonomous precommitment no longer applies.

One could of course argue that parliamentary politics does not guarantee any autonomous political self-decision either, as a parliamentary structure also requires people to trust others with very weighty decisions. Moreover, these others are often part of political parties and other collectives that transform individual inputs into a broader agenda – does an individual really notice his influence in politics?[309] Still, a crucial

[307]Waldron 1999, pp. 258-262. See also Elster, Jon, 'Ulysses and the Sirens: studies in Rationality and Irrationality', Cambridge University Press 1984.
[308]Waldron 1999, pp. 258-262.
[309]This is for a large part an empirical question regarding the behaviour of political actors, such as party politicians, see Kitschelt, Herbert, 'Citizens, politicians, and party cartellization: Political

distinction should be drawn here. The debate about the best form of representation, whether by lottery, referenda or multiple parliamentary chambers, is still a debate about *representation*. At least part of it deals with the question of how the minds and wills of the people, whatever their contents, can best be transferred to the political arena.[310] In contrast, the main purpose of strong judicial review lies in hearing complaints and in protecting a given set of constitutional rights. Accordingly, when judges take certain decisions, it is of secondary consequence whether the litigators or the general public agree. If their will is contrary to the constitutional rights text, their will is set aside. Even though such a court may guard the rules that make present representation possible in the first place, it primarily serves the commands of the past. Therefore, I think it is only partly true to suggest that strong judicial review makes sure politicians *actually listen* to the people.[311] For that only applies if what the people now seem to want resembles what past large majorities have decided – and that need not be the case.

It also does not work to suggest, as Bruce Ackerman does, that *true* democratic self-decision occurs precisely at certain rare moments of *constitutional* politics.[312] The thought is that when people really come together in such majorities that constitutions are changed, they exercise their democratic rights much more powerfully and meaningfully than in the times between such moments, when politics is simply in the hands of politicians. For as important as those constitutional moments may be, it paints too bleak a picture of the representative function fulfilled by legislatures. They are chosen in elections and must regularly face the verdict of their voters. By definition, the representative link offered by an independent judge is far less strong.[313] Although in no way immune to public influences, strikes and academic activism, judges are consciously

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represenation and state failure in post-industrial democracies', *European Journal of Political Research* 2000, Vol. 37, pp. 149-179, pp. 149-155.

[310]Of course, debates about methods of representation also deal with the question which type of representation most improves the deliberative quality of decision-making and generates the best results, see for instance Stone, Peter, 'The Logic of Random Selection', *Political Theory* 2009, Vol. 37, pp. 375-397, pp. 376-380.

[311]Kyritsis, Dimitrios, 'Representation and Waldron's Objection to Judicial Review', *Oxford Journal of Legal Studies* 2006, Vol. 26, pp. 733-751, pp. 733-738.

[312]Ackerman, Bruce, 'Constitutional Politics/Constitutional Law', *The Yale Law Journal* 1989, Vol. 99, pp. 453-547, p. 456.

[313]This of course differs in countries which elect judges more directly.

put at a distance from the public. They need not answer the questions of journalists. They need not worry about their ratings in the polls. Parliamentary politics, as troubled as it can be, is responsive to the *actual exercise* of political rights in a way that is not the same for judicial decision-making – even if that decision-making is aimed at securing precisely those rights.

Finally, in this context Alon Harel has argued that the possibility of judicial review actually *enhances* citizens' right to participate politically.[314] Besides casting a vote in elections, most citizens are spectators to a political process carried out by their representatives. But if judicial review exists, they can decide to have their case debated at the highest possible level, participating in fundamental discussions that can shape a country's future. Therefore, their political autonomy is actually improved when such a remedy exists. I also think this defence misses the mark, because there is a difference between having the final say on an issue and submitting a case to a judge. The idea of representing the people rests on the first notion of ruling *on behalf of them.* People do not submit their case to a representative but *elect* a representative. Accordingly, as much as review litigation may enhance their political participation, it does not enhance their right to decide for themselves how society should be run. Harel's argument does not remove the tension between judicial review and political autonomy. However, it does offer an interesting *intrinsic* perspective on accepting it and will be discussed further below.

For now, I conclude that a measure of political autonomy is lost when the final say on important issues is handed to reviewing judges.

[314]Eylon and Harel 2006, pp. 1018-1020. In an early text, Harel also argued judicial review has a participatory nature because it incorporates social moral tendencies formed by the people themselves – it seems clear this differs too from the idea of conscious democratic self-decision. See here Harel, Alon, 'Rights-Based Judicial Review: A Democratic Justification', *Law and Philosophy* 2003, Vol. 22, pp. 247-276, pp. 261-270.

4. The intrinsic right to make wrong decisions

Strong judicial review thus has an unavoidable downside. When judges countermand orders given by the legislator, they interfere with the democratic right of citizens to decide weighty political questions for themselves. But is that actually morally wrong? In order to answer this question, we need to know to what extent the importance of the democratic rights of citizens is *independent* from their instrumental ability to make the right kind of decisions. Some have argued this, saying that *even if* judges are right and people are wrong, people have, through their legislators, *a sovereign right to make the wrong decision*. In the words of Michael Walzer:

> "[T]he fundamental argument can be put in an appropriately paradoxical form: it is a feature of democratic government that the people have a right to act wrongly – in much the same way that they have a right to act stupidly."[315]

Of course, the right to do wrong has an odd ring to it. How can it ever be good for a person to make a bad decision? But it is, as Waldron pointed out, not very mystifying once one realizes the difference between being entitled to do something and doing the right thing.[316] If Adam has a constitutional right to marry whomever he wishes, he is allowed to marry Eve, even if he only does so in order to spite Bert. Clearly, the right does not *justify* his sad behaviour. It simply prohibits the government and others from interfering with Adam's behaviour. A prohibition to interfere with an act differs from an endorsement of that act. So it is perfectly intelligible to submit that even if one completely disagrees with a politician's choice and believes it to be morally wrong, one still fully endorses the politician's right to decide.

The question is *why* one respects a certain right to do wrong. Why does one not interfere when a person makes a mistake? A somewhat patronizing answer says that people need to learn from their mistakes: if the ideal situation consists of legislators making the correct decisions, the path to reaching that situation might lie in letting them fail horribly first. The problem, of course, is that horrible *political* decisions can damage people severely. If parliament decides to allow torture and then, after discovering the costs

[315]Walzer 1981, p. 285.
[316]Waldron, Jeremy, 'A Right to do Wrong', *Ethics* 1981, Vol. 92, pp. 21-39, pp. 26-33.

do not justify the gains, bans it again, real people will have been severely hurt. Indeed, one might argue that legislators may initially fail on all things *except* on fundamental rights issues, precisely because of their importance.

A better reason for endorsing a right to do wrong states that taking away a person's right *diminishes* or *slights* that person; it expresses their inferiority.[317] It might seem to the legislators that they are deemed unfit or unworthy to represent the people, just like the people feel they are deemed unfit to make their own choices. Moreover, such a perception might well breed resentment. Indeed, if politicians are continuously afraid of being overruled by judges, they might attempt to break down the constitutional structure itself. Judges only have power within a democratic system if big legislative majorities allow it. Therefore, if they slight those legislators too often, this might damage the stability of the constitutional division of power itself.

We must be careful to pull apart two considerations here: the first is whether it is either empirically dangerous or advantageous, given the power and character of legislators, to remove their right to be wrong – this is obviously an instrumentalist way of thinking and will be discussed later on. The second is whether resentment at being treated as children is actually justified – whether it is *intrinsically wrong* to take away one's power to do bad things. Waldron thinks so, reminding us that the presupposition of respecting people's rights is to secure areas of life in which they can make decisions for themselves.[318] Importantly, such freedom is not only granted for epistemic reasons, in the sense that the people know best what's good for them and thus should decide themselves. Indeed, if it was only an epistemic issue, taking away a person's freedom is warranted when it is clear he will make morally bad decisions. Instead, respecting a person as an equal means respecting his authority to take decisions about his own life. So how would AP assess this view?

Note that the conclusions of AP are claimed to be *rationally necessary* to human agents. This means that when people, from their own perspective, reflect consistently on their place in the world, they should necessarily reach certain conclusions. Following

[317]Harel 2014, p. 157, Waldron 1999, pp. 249-251.
[318]Waldron 1999, pp. 249-251.

Gewirth's methodology, AP reveals an obligatory human self-understanding. Accordingly, if AP is absolutely clear about a certain norm being wrong or right, those who dissent from AP's position dissent from a proper understanding of themselves – from what is simply rational for them to believe. Consequently, judicial review genuinely and successfully based on AP would be markedly different from having norms imposed that people could rationally doubt.[319] While both impositions may go against the currently held will of a person, and thus have a forceful and unpleasant character, only the conclusions of AP are such that if one properly understands one's own nature, one would have to agree with the imposition. Whatever the contrasting opinion a legislator gives voice to, there is no conflict between the motivation of the intervention and his rational self-conception. Indeed, the hope can be had that if that person carefully reflects later on, he will come to realize his mistake and concur with past interventions. This is no more than a hope, of course, but it makes sense to have it. AP does not describe an ethics that is opposite or foreign to a particular human's nature – its point is to make proper sense of just that.

At the same time, however, AP also recognizes that forcing a person to submit to the rational solution comes with a cost: it invades the space a person usually, and rightly, rules himself. If only for a single decision, his will is made inferior to the will of others. As much as the interference is based on the equal respect persons owe each other, the instance of interference expresses inequality. Besides risking resentment, this seems intrinsically wrong. Experiences of forced submission violate his self-conception of being a person who counts as an equal. Therefore, AP's judgment of the idea of a right to be wrong seems mixed. In part, the power of such a right does depend on whether the interference is based on the right moral reasons. But if a less invasive procedure is available, this option should always be chosen; there is also an intrinsic reason for allowing each other as much discretion as possible in deciding how to live our lives and what political decisions we should take.

[319]Of course, it remains to be seen whether AP actually offers an exact formula to find the morally right solution – and whether that expertise can be reliably transferred to a court of judges. This is discussed further below.

5. Intrinsic justifications of judicial review

Summing up the discussion thus far, we've seen that setting up judicial review will always constrain the political autonomy of citizens, that there is no strong moral right to be wrong, and that we must still take care when interfering with a person's or a representative's ability to take his or her own decisions. Accordingly, there is an intrinsic case to be made against strong judicial review – but it is weaker than Waldron and Walzer submit. What about the arguments attempting to prove that setting up strong judicial review is intrinsically right?

Alon Harel has offered two allegedly non-instrumentalist arguments in favour of judicial review. Some interpretation is necessary here, as Harel's exposition of one is more extensive than his treatment of the other. The first argument concerns the need for public recognition of the validity of fundamental rights.[320] Harel provides this argument in a section endorsing not strong judicial review, but weaker forms of constitutional entrenchment of rights. Still, he notes the argument is relevant to accepting strong judicial review as well.[321] The second argument brings forth the right to a fair hearing and has been worked out in the context of judicial review.[322] Importantly, Harel explicitly says these arguments do not provide a conclusive case for strong judicial review but for something very similar to it – this nuance will be discussed further on.[323]

Harel argues that fundamental rights need to be publicly recognized, because "[f]ree citizens ought not to live 'at the mercy of' their legislators even if such legislators are good-hearted and are likely to protect their rights".[324] Harel fears a political environment in which the protection of fundamental rights is understood as something that is not *the duty* of legislators but is subject to their discretion. Therefore, a political environment must be created in which fundamental rights are not only effectively respected but also socially understood as giving rise to duties.[325] According to Harel, the entrenchment of rights in constitutional documents is an essential part of such a

[320]Harel 2014, pp. 183-190.
[321]Ibid., pp. 202-203.
[322]Ibid., pp. 224-228.
[323]Ibid., pp. 229-235.
[324]Ibid., p. 20.
[325]Ibid., pp. 190-195.

recognition.[326] This means that rights provisions are taken up in a constitutional text that is difficult to change, cementing their place in political life. Moreover, Harel thinks one could argue that strong judicial review is a part of such public recognition as well.[327]

Indeed, I think the argument can be made that for something to be securely recognized as a duty, constitutional entrenchment may not be enough. In the case of entrenchment without strong judicial review, members of parliament can easily disregard the constitution and decide what they want – no consequences necessarily follow. In the case of strong judicial review, this is different. Politicians realize that if they fail to protect constitutional rights, the court will step in and hold them to their duty. This of course reinforces the idea that they have limited discretion when dealing with constitutional rights. There is no clearer way of emphasizing the importance of certain rights.

But is this really an intrinsic argument? It might still be true that in the absence of judicial review, legislators take the responsibility for fundamental rights more seriously. In such a case, the idea behind public recognition would also be reached. In a nutshell, the existence of strong judicial review does not guarantee that those rights are actually *perceived* as of fundamental moral importance. It can only help garner such recognition, just as other rights practices can contribute to this. Therefore, I fail to see how this argument differs from general arguments stating judicial review is of instrumental importance to respect for rights – just as I fail to see how such respect for rights differs from what Harel purports to mean by public recognition of rights. Therefore, let's put Harel's remarks in the section on instrumental arguments, and move to his second argument: the right to a fair hearing.

Harel argues that even if courts do not contribute to effective rights realization, judicial review provides people with a right to a fair hearing that is incredibly valuable.[328] Harel states that

> "[t]here are three components of the right to a hearing: an opportunity for the victim of infringement to voice her grievance (to be heard), the provision of an explanation to the

[326]Ibid., pp. 180-200.
[327]Supra note 26.
[328]Harel 2014, pp. 215-220.

> victim of the infringement that addresses her grievance, and a principled willingness to honour the right if it transpires that the infringement is unjustified."[329]

Accordingly, if I take a decision that strongly affects another person, disregarding that person's comments or failing to give any explanation is offensive: it implies that the opinions and feelings of that person do not matter.[330] I think Harel is right here. If, as AP argues, we matter equally, we should not simply impose measures on others, but should listen to those affected and engage in meaningful conversation: this ties in naturally with the moral duty that others should justify their actions.[331] Importantly, Harel argues, correctly to my mind, that it does not matter whether one's good is infringed in a justifiable way – even if this is the case, one still deserves an explanation for what's happened and an opportunity to stand up for one's good.[332]

Harel believes this right is necessarily bound up with the institution of a court, as it constitutes a place where one can lodge complaints and where judges listen and explicitly motivate their decisions.[333] Interestingly, throughout the course of his work, Harel has become more nuanced on this point. In an earlier article, he strongly separated legislators and courts, arguing that legislators are *by the nature of their function* not suited to hear complaints: they are focused on the drafting of general laws applicable to all and cannot lose themselves in the circumstances of individual cases.[334] In contrast, judges do adjudicate particular cases raised by concrete individuals – courts therefore form a much more appropriate forum where a complaint can be lodged and an individual can be heard. However, one wonders whether a parliament cannot also, at least to an extent, fulfil these functions. Public hearings can be organized at which people may lodge complaints. Procedures can be established in which these complaints are substantively answered. And perhaps these procedures can form the basis of a reconsideration.

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[329]Harel 2014, p. 218.
[330]Ibid., pp. 218-222.
[331]See chapter four, section 9.
[332]Eylon, Harel 2006, pp. 999-1001.
[333]Harel 2014, pp. 224-228.
[334]Eylon, Harel 2006, pp. 997-998.

In more recent writings, Harel agrees parliament could organize the first and second of these elements.[335] However, he believes that to really enable officials to substantively reconsider a decision, all kinds of safeguards should be in place.[336] For to be able to reconsider a decision, one needs to distance oneself from it and not be entangled in the pressures and politics that formed it in the first place. A procedure would need to be set up in which a committee of politicians who are sufficiently independent review some hard-fought compromise. And to be sufficiently independent, that committee should presumably be based on a set of laws that is hard to change. Therefore, Harel concludes that parliament can only truly respect the right to a fair hearing if it transforms itself into something very similar to a court empowered to exercise strong judicial review.[337]

I agree with Harel's conclusion. In the end, parliamentary politics is designed to draft general laws, not too endlessly immerse itself in individual cases. Similarly, strong judicial review is designed to evaluate governmental practices through the lens of individual cases. Turning one into the other would mean compromising both. Harel's analysis shows that the right to a fair hearing is a powerful reason to accept strong judicial review.

On reviewing the past sections, and taking the perspective of AP, I conclude that the debate about the intrinsic significance of strong judicial review presents a mixed bag. On the one hand, submitting people to the will of others always comes with a cost – but it is a smaller cost than some authors make out. On the other hand, Harel argues that there is an intrinsic *virtue* to strong judicial review, given the forum it provides for those who seek a fair hearing.[338] Interestingly, both considerations have an expressive dimension: limiting a person's ability to decide things for himself slights him, just as

[335]Harel 2014, p. 234.
[336]Ibid., pp. 234-238.
[337]Idem.
[338]Although I do not separate *ex ante* and *ex post* models of strong judicial review, supporting a right to a fair hearing clearly favours an ex post model. In an *Ex ante* system, for example the review conducted by the French Constitutional Council, laws are reviewing according to the rights text *before* their implementation. In an *ex post* system, citizens themselves seek a hearing on the admissibility of a certain enacted law. Only the latter model resembles a fair hearing – see also Harel 2006, p. 1014.

imposing norms on him without the possibility of a fair hearing slights him. Accordingly, is the one slight worse than the other from the perspective of a rational self-conception? I see no reason to conclude this. Both relate to the same expressive wrong of being ignored, of not being counted as an equal in a community of responsible agents capable of rational action. Hence, the intrinsic debate, although important, does not clearly favour either rejecting or supporting strong judicial review. Let us therefore turn to the instrumental debate.

6. Identifying suitable fundamental rights

Can we with any certainty argue that strong judicial review improves the practical adherence to fundamental rights? For different reasons, both Waldron and Harel do not believe so. I will respond to their doubts and argue that there are at least some good instrumentalist reasons to support a strong judicial review based on AP and that, on that condition, we should tentatively endorse the institution.

Harel offers three reasons for setting aside the instrumentalist debate, but I think none of them succeed in discrediting it. First, Harel and Kahana write that

> "we are skeptical as to whether instrumentalists can in fact make reliable assertions concerning the likely performance of courts versus legislatures or other institutions".[339]

Evidently, it cannot be denied that questions of empirical likelihood are hard to answer. But the fact that a debate is difficult to decide is no reason for denying its importance. Indeed, given our conclusion that the intrinsic debate does not clearly favour strong judicial review, its acceptability inevitably hinges on the likelihood that it contributes to a more rights-respecting society. We therefore have no choice but to assess this likelihood to the largest extent possible.

Second, Harel and Kahana, submit that

> "even if instrumentalist advocates of judicial review establish that courts are better in protecting constitutional rights or other constitutional values, it hardly follows that courts ought to be granted review powers. Participatory concerns are very likely to

[339]Harel and Kahana 2012, pp. 234-235.

> override or even annul the relevance of the concerns for a better decision-making process."[340]

Again, I disagree: we've already seen that on balance, the concern about democratic participation does not rule out strong judicial review, as it is offset by the provision of a right to a fair hearing. Moreover, even if such a right to a hearing were ignored, it does not seem obvious that democratic participation automatically trumps a better prospect of protecting fundamental rights. For one thing, that democratic participation may itself depend on the protective abilities of the court. For another, it seems at least plausible that a rational agent values his right to free expression or to privacy as much as the portion of democratic participation strong judicial review takes away.

Finally, Harel and Kahana argue that

> "instrumentalist arguments in general and institutional arguments in particular misconstrue the debate concerning judicial review; they conceptualize it as a technocratic debate about the likely quality of decision-making […]. But the real debate is a debate about political and moral institutional legitimacy. It is not about whether judicial review is efficient, stable, or effective in protecting substantive rights, but about what justifications citizens are entitled to when their rights […] are at stake."[341]

At this point Harel and Kahana draw a strange contrast between 'political morality' and 'technocratic debates about likelihoods'. It seems to me that the question of whether an institution makes societal affairs more or less morally good belongs at the heart of political morality. Indeed, there is no denying the importance of the question of whether the government serves as an effective instrument to secure the interests of its citizens.

We therefore have much reason to explore the instrumentalist debate. However, my contribution to it will be modest. I will not, for instance, assess whether strong judicial review is essential to the maintenance of democracy, to settling pervasive disputes or to

[340]Harel and Kahana of course argue that *instead* of arguing for an instrumental case we should decide the matter by introducing a right to a fair hearing. But, as my text shows, these two debates must be combined.
[341]Ibid., pp. 234-235.

rights realization in its broadest sense.[342] I will only respond to Waldron's criticisms and argue that AP offers norms worthy of strong review and that AP is receptive to a judicial translation. Accordingly, we have reason to support strong judicial review *based on AP*. Note that we do not have anything remotely resembling a decisive argument for strong judicial review based on AP – let alone a justification for strong judicial review based on a different normative perspective. Therefore, I will conclude that we should *tentatively* support strong judicial review based on AP – a conclusive empirical case against it may still turn the tables.

As discussed in the first chapter, Waldron argues fervently for accepting his *circumstances of politics*, with which we disagree in good faith about the precise meaning of fundamental rights. In the context of investigating the relationship between moral theory and political practice, I argued that while Waldron may be right in observing wide-ranging disagreements, we should not react to them by seeking out an uncontroversial starting point. Rather, in order to tackle fundamental political questions, we all have a responsibility to take a stand on the nature of moral truths and to base our politics on such convictions. Consequently, an account of morality has been presented and worked out that claims to be dialectically necessary – all should, on pain of being irrational, follow its tenets. Given this account, the mere existence of disagreement forms no bar to a judicial review inspired by its norms. For it is in principle justified to hold others to the norms espoused by AP, even if they disagree with them. However, the question is whether such a court can, in practice, improve upon the realization of a society inspired by AP. This is by no means certain, as it might be true that (A) we cannot concretely identify fundamental rights and (B) the tenets of AP cannot be transferred properly to a judicial practice.[343] I think AP can overcome both obstacles.

As concerns the identification, the previous chapter showed that an inventory of fundamental rights can be deduced from the rationally necessary self-conception of humans. From the perspective of AP, there can be no reasonable disagreement about the

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[342]See for instance Sager 2004, Ely, John, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press 1980, and Alexander, Larry, Schauer, Frederick, 'On Extrajudicial Constitutional Interpretation', *Harvard Law Review* 1997, Vol. 110, pp. 1359-1387.
[343]Waldron 1999, pp. 211-220, pp. 175-186.

statement that, for instance, it is morally wrong to take away someone's right to vote because he worships gods and you do not. Or that it is wrong to throw a person in jail without offering any justification. Or that it is wrong that people are bereft of legal aid, or that they are starving. The categories of basic, derived, expressive and particularistic rights follow naturally from the account of AP. Of course, determining the precise contents of these rights is harder than phrasing them abstractly – signalling a complete lack of justification is much easier than evaluating a vaguely formulated justification.

Moreover, disagreement may well exist as to which rights are actually fundamental, especially when considering particularist constructions and the kind of epistemic limitations the notions of personal responsibility and the cost of enforcement confront us with. I have already expressed the thought that, given these obstacles, it seems much harder to justify the governmental enforcement of social and economic rights than to justify a review of political and civil rights – much more work than this dissertation offers is needed to grasp these difficulties fully. But that is not all. Some rights have been deemed unfit for judicial adjudication – for instance because they relate to budgetary questions on which judges may claim little expertise. Although I cannot discuss these further complexities here, some substantive questions do seem more at home with the legislator or the executive than with the judge – any proposal for a rights provision needs to take this into account.

All the same, the categories of fundamental claims do allow a person to distinguish in many cases between important and unimportant norms, and between false and true inferences. This means it is untrue that every normative question is up for grabs and that we are perpetually lost in an interpretative struggle. The absolute truth about fundamental rights may be far out of our reach, but we can identify many norms and goods of such importance that we may scrutinize whether the government has taken them into proper account. What's more, AP offers ample opportunities to take strong judicial review beyond the ambition of protecting the proper operation of democracy itself. For this is how such review has been defended by some: interference with political self-decision is warranted *in the service* of representing all citizens.[344] But this need not be the

[344]Ely 1980, pp. 75-85.

case. There is no conceptual bar to admitting a right to healthcare as a right protected by strong judicial review. As noted, these rights may be hard to justify for other reasons. But all fundamental goods are potential candidates to be taken up by the rights text.

7. Transferring expertise

Waldron also notes that *even if* there are certain moral truths, none can claim expertise in articulating these truths.[345] Describing the philosophical struggle between moral realists and moral sceptics, he argues that being a moral realist does not provide one with a clear guide to solving moral difficulties. As a consequence, he argues that there is no moral expertise that can be taught to judges and can be expected from them. Again, AP disagrees. First, the question of expertise must be answered on the basis of a justification of morality – one cannot simply observe a discussion and claim no one has a sure way of presenting the right answers. Indeed, to make that assertion is to imply the claim that if people do actually agree on some conclusion, this would make their view the morally right one. Such a position is of course question-begging. There is no external perspective in debating moral questions.

More importantly, we have seen that from the perspective of AP, a certain set of moral norms *can* be straightforwardly identified. Therefore, on the construction of such an inventory of norms, transferable expertise can be claimed. Others can at least potentially follow the same reasoning process and reach the same conclusions. Indeed, the whole point of advancing accounts of morality is to convince people to educate themselves according to a certain theoretical proposal. Again: this education may be fraught with difficulty and result in different outlooks and convictions. But AP intelligibly and clearly closes off certain options. It features a fundamental core that can guide further decision-making processes. And it can offer constitutional essentials to a democracy thus *enabled* to discuss issues on which no certainty might ever arise.

Admittedly, instituting a court is about more than training judges in moral expertise. It is about creating a concrete text to which judges are bound. One could argue

[345]Ibid., pp. 175-186.

that even if norms can be identified and expertise can be transferred, it is still not viable to cast the moral norms in the form of a text. Indeed, it could be submitted that if moral reasoning must be one thing, it must be flexible. The world changes rapidly and asks for different solutions at different times. In the face of that change, it might seem hubristic to come up with a single list of all-important norms and to see to it that these are guarded especially. What if circumstances change and the norms lose their validity, or their importance? I think this worry is well-founded, but not decisive. Indeed, for the most part, the problem is not that certain norms lose their significance, but rather that they must, in time, be added to.

Let's take the case of freedom of speech. Variants of the norm 'people have the right to freedom of speech' raise the question of what behaviour actually qualifies as speech. Coherent sentences uttered by humans clearly qualify as 'speech', as do letters and advertisements. But is art speech? Giving an answer is not easy – defining 'art' is a challenge in itself. There is something *in* art, a message conveyed through someone's work, that deserves protection for the same reasons that speech is protected – think only of Ai Wei Wei's reconstructed walls or his crab display, which criticize the suppression of art by the Chinese authorities. However, it seems to stretch the meaning of speech to include all art. Indeed, would we not rather have an independent freedom to create art? Or simply a more general freedom of expression?

The example shows that the problem of rights texts does not primarily lie in changing our minds about something that has long been regarded as fundamental, but in extending the understanding we attach to certain norms. We are confronted with new fundamental goods and seek to capture their importance with old concepts. As the rights document isn't very flexible, this amounts to a problem, especially visible in the long history of old texts, such as the United States constitution. For instance, over the course of decades of jurisprudence, the norm dealing with 'due process' has been turned and twisted in highly creative ways.[346] Waldron rightly notes that an interpretative process that revolves around applying old-fashioned words in new ways is clearly disadvantaged

[346]Nourse, Victoria, 'A Tale of Two *Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights', *California Law Review* 2009, Vol. 97, pp. 751-799, pp. 796-799.

when compared to an open discussion in which all concepts and words are welcome.[347] Constitutions must be responsive to new challenges and will need to be updated – and this requires an ability to change that our courts, by definition, to a great degree do not possess.

There is no getting out of this predicament by stipulating norms that are so vague that they will always, somehow, be relevant. It does of course help to draft a rights text in basic terms such as expression, speech, trial and government. But if one abstracts even further, say by simply instructing a court to 'protect human dignity' or secure 'core democratic values', this would empower a court to decide on almost anything. This flatly contradicts the idea of *only* securing fundamental rights. Courts must be tethered to texts to guarantee they do not disturb the democratic process more than they must – and to ensure larger majorities can effectively shape the court's future.

We thus face a difficulty. However, the fact that old norms mostly seem to retain their relevance speaks in favour of strong judicial review's feasibility. Norms such as the right to vote, the right to stand for office and the right against arbitrary arrest do have a sufficient longevity. Their intimate connection with the bare necessities of being a rational human ensures they age well. We will always need to be alive and healthy, politically empowered and physically protected. Therefore, even though the very idea of a set text invites difficulties, this problem does not seem to be fatal.

8. Deference and scrutiny

Thus far, my instrumental case tentatively favours strong judicial review based on AP: AP offers an inventory of norms that can plausibly be set down in texts and a justificatory theory with which these texts can be interpreted and developed. However, one might demand more. One might argue that strong judicial review is only acceptable if we know with absolute certainty what the rights text should look like and how it should be applied: then there would be little room for reasonable disagreement. Clearly, this result has not been produced. In terms of the initial selection of rights, their textual articulation and

[347]Waldron 2006, pp. 1380-1385.

their concrete application, AP allows much room for discussion and for various conflicting but reasonable accounts.

However, we must not forget judicial review is not meant to solve all fundamental rights issues – it is meant to *scrutinize* the legislative and executive branches of power. It need not give the ultimate answer, but needs to ascertain whether officials from the other branches have seriously erred. As discussed, Mattias Kumm convincingly argues that judicial review is best understood through the idea of *Socratic contestation*.[348] Through asking a series of questions, the court determines whether parliament has taken constitutional rights seriously enough. It thus allows officials room to entertain their own vision of constitutional rights, and can even disagree with an official without immediately condemning his interpretation. In the next chapter this picture of rights interpretation, described as taking a proportionality test, will be worked out and defended further.

For now, it is important to observe that the uncertainties present in the process of constructing a constitutional rights practice go hand in hand with an appropriate attitude of judicial deference. When multiple valid views on a certain issue are possible, judges should leave the choices to the discretion of the other branches of power.[349] However, when constitutional rights are clearly interfered with and a government provides little explanation, a court should be as assertive as possible. Also, when officials do not try their hardest to prevent conflicts between fundamental goods, they should be made to do so – for instance when changing some minor applicatory measures effectively solves all problems. Of course, these remarks are still very abstract – more on deference will be said in the next chapter. For now, however, the point is that preserving a practice in which constitutional rights are respected differs from finding and upholding the ultimate truth about fundamental rights. Strong judicial review should seek to do the former, not the latter. Of course, there is no guarantee this will actually happen. We do not know for certain that judges will hold themselves to a sensible attitude of deference,

[348]Kumm 2007, p. 4.
[349]See for instance the 'margin of appreciation' doctrine employed by the European Court of Human Rights, see for a discussion Letsas, George, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies* 2006, Vol. 26, pp. 705-732.

or that the right kind of norms end up in rights texts. Rights practices may always go sour and can only be supported conditionally.

I conclude that *if* strong judicial review is based on AP, there is good reason to believe it will produce morally right outcomes and protect fundamental rights. I hope to have shown this statement is not circular: it could have been the case that AP did not produce morally valid and appropriately concrete norms and that its norms could not be translated to a judicial practice. But I only offer a highly conditional endorsement: it is uncertain whether the doctrine of AP can find the broad support necessary to shape a powerful political institution, both among politicians and among judges. And even then, circumstances can arise which make strong judicial review untenable. At the same time, in the aftermath of WWII many rights documents were signed to which AP is sympathetic. As argued in chapter four, it does not offer a radically different perspective on fundamental rights, but embraces familiar rights and offers room for innovation. Therefore, my conditional assessment gives no reason for scepticism – I merely cannot take any robust stance here on empirical likelihoods.

This concludes my investigation of strong judicial review. As the intrinsic debate did not favour supporting or rejecting it, and as the instrumental debate conditionally supported the institution, I have offered a tentative justification of strong judicial review.

9. Implications for other rights-protecting institutions

Let us end this chapter by drawing out some implications for other rights-protecting institutions. Take the scheme of constitutionally entrenching fundamental rights *without* setting up judicial review. In such a case, a constitution exists that is hard to change; it contains rights provisions, but cannot serve as a ground for declaring laws to be invalid: the effective power of parliament and government is left untouched. The constitution serves as a guide to public officials and forms a document of inspiration, but does not bend politicians to its will. Admittedly, it does stack the arguments a certain way, and privileges the place of certain ideals and norms in public debate. This steers the exercise of people's political rights and somewhat diminishes people's political autonomy. But its constraints are minor: the people's representatives remain free to decide issues however

they wish. As a consequence, constitutional entrenchment incurs a smaller intrinsic cost than strong judicial review. The same observation applies to publicly funded advisory bodies that influence debates: as their advice may always be set aside by lawmakers, it limits people's political autonomy only in small ways.

Evidently, a mere lack of objections does not itself justify a political institution. Indeed, as argued above, the intrinsic value of a constitution is also hard to prove – its worth seems wholly caught up in the effect it has on the realization of fundamental rights. It's the same with advisory bodies: the mere activity of advising anyone seems to have little value on its own. Such advice is valuable only when it engenders a fruitful debate that improves fundamental rights decisions. Therefore, it makes sense to offer the same conditional conclusion set out in the instrumentalist debate: constitutions and advisory bodies inspired by and based on AP should be wholeheartedly supported. Indeed, we have a moral obligation to uphold institutions that bring fundamental rights to prominence *without* seriously damaging people's political autonomy.

Of course, the field of fundamental rights instantiations consists of more than strong judicial review and weaker, optional, instantiations. One could also think of a secondary parliamentary chamber tasked with a special fundamental rights responsibility – as is the case in, for instance, the Netherlands.[350] In such a situation, senators hold each other to a special responsibility when legislation passed by the primary chamber presents a clear threat to certain fundamental rights.[351] They then engage in an especially critical scrutiny of the legislative proposal in question and can exercise their power to reject the drafted law – making it impossible to enact it. Importantly, their scrutiny resembles Kumm's idea of a rationality test: they tend to check whether there are ways to prevent a conflict of rights and to amend smaller harmful parts without reducing the law's effectiveness. The elegance of this model seems clear. People get to elect those who guard

[350]See for a short comparative overview Broeksteeg, Hansko, Knippenberg, Erik, 'The Role of the Senate in the Legislating Process', *Maastricht Journal of European and Comparative Law* 2006, Vol. 13, pp. 219-237, pp. 221-225.

[351]See for instance its scrutiny of the privacy issues related to energy policy and legislation, see Cuijpers, Colette, Koops, Bert-Jaap, 'Smart Metering and Privacy in Europe: Lessons from the Dutch Case' in: Gutwirth, S., Leenes, R.E., de Hert, P., and Poullet, Y., (Eds.), *European Data Protection: Coming of Age*, Springer 2013, pp. 269-275.

fundamental rights, instead of having to submit to the will of judges with less democratic credentials. At the same time, given its secondary nature, the chamber is removed from the daily pressures of politics and can review proposals calmly and rationally.

Of course, it is uncertain whether senators scrutinize legislative proposals insightfully, and as always, the institution's merit depends on the degree to which it is inspired by the norms AP proposes. Moreover, if the secondary chamber asserts itself too much, political parties may wish to 'own' both the primary and the secondary chambers. They may then discipline senators who stray from the party line and limit their independence. And indeed, to an extent this has happened in the Netherlands.[352] But at least in theory, this model offers quite a balanced way of respecting people's political autonomy and offering additional fundamental rights protection.

At the end of the day, the effectiveness of all fundamental rights institutions depends on the way they are used by the participants in political processes. Advisory bodies only have relevance if their advice makes sense and if there are politicians willing to listen to it. Constitutions only have meaning if they are continually employed as a means of reference and if their provisions reflect abiding moral ideals. We can always spoil an institution by using it badly or constructing it poorly. In practice, citizens and politicians alike should devote their attention to how the institutions they inherited can be used optimally. At the same time, they should be creative in devising new ways of helping themselves do justice to fundamental rights. In sum, AP demands and expects a deep understanding to be shared by all political actors of the importance of fundamental rights.

[352]Broeksteeg and Knippenberg 2006, p. 225.

Chapter Six

Proportionality According to AP

1. Proportionality and its interpretive stages

The previous chapters have offered a philosophically grounded account of fundamental rights and a tentative defence of strong judicial review as a central institutionalization of fundamental rights. However, they have not provided us with a method for *applying* fundamental rights. For instance, we have not discussed how we should reason about conflicts of fundamental goods – what should we do when the right to privacy conflicts with public safety? Clearly, we need to answer these applicatory questions in order to understand how we should employ fundamental rights. In order to guide the actions of politicians, citizens and judges, more is needed than a moral justification, a political conceptualization and a suggestion of routes of argumentation. We need to offer a guide to resolving concrete cases. Because of the importance of such a methodology for all rights practices, this final chapter will seek to articulate one.

In doing so, we will come across many challenging themes, such as the danger of using the wrong kinds of reasons, the alleged incommensurability of fundamental goods and the risks of an aggregative methodology of deciding moral conflicts. The chapter will make AP's position clear on all these issues. Therefore, it will not investigate and decide concrete cases – it will give answers to troubling questions of norm application. Of course, in taking up this task, examples will be used to illustrate AP's choices.[353]

[353]Some of these examples are cases decided by the European Court of Human Rights. This might seem strange, as it is an international institution. However, it has applied proportionality tests in

Furthermore, at least to an extent, the interpretive methodology a political actor should use is institution-specific: a judge that applies democratically drafted laws and intervenes in a process of democratic decision-making should argue differently from a politician who drafts those laws. Consequently, it makes little sense to propose one interpretive methodology for all institutional actors, as it would fail to do justice to the specifics of fulfilling a certain institutional role. Instead, this chapter focuses on the now familiar institution of strong judicial review. Accordingly, I will write about constitutionally protected fundamental rights and mostly use the term 'constitutional rights'. At the end of the chapter, I will briefly draw out some implications for other decision makers.

Over the past few decades, the judicial practices of interpreting constitutional and human rights have focused more and more on a single method of interpreting such rights: proportionality.[354] Indeed, some authors have argued that proportionality is the central element of a *global* model of constitutional rights.[355] Given the prominence and importance of proportionality reasoning, this chapter will explore whether AP should endorse it as the dominant interpretive methodology and how this methodology should be employed.

Proportionality is best explained as the second of three stages in deciding whether a certain policy proposal or law conflicts with constitutional rights.[356] In the first stage the *scope* of the right is assessed, and the question is answered as to whether the policy limits or interferes with any fundamental right *at all*.[357] This is sometimes easy to see, for instance when a government bans a book or allows people in custody to be beaten.

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many cases – this makes these cases instructive. Moreover, it performs a scrutinizing task similar to that of a constitutional court, even if some institutional circumstances differ.

[354]Huscroft, Grant, Miller, Bradley, Webber, Gergoire, 'Introduction', in Huscroft, Grant, Miller, Bradley, Webber, Gergoire (eds.), *Proportionality and the Rule of Law*, Cambridge University Press 2014, pp. 1-5.

[355]Möller, Kai, *The Global Model of Constitutional Rights*, Oxford University Press 2012, pp. 1-5.

[356]Barak, Aharon, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press 2012, pp. 2-6. As has been noted by Aharon Barak, the questions of scope, proportionality and remedy must be answered not only by constitutional rights courts, but by *any* institution or agent dealing with a fundamental rights question – the interpretation of some of these steps simply differs per institution, see Barak 2012, pp. 11-13.

[357]Idem.

In such cases it is easily argued that a fundamental good is seriously interfered with. But it gets harder when rights are interfered with more minimally or when rights are proposed that do not seem of fundamental moral significance. Generally stated, one can be more or less lenient in allowing situations and goods to fall within the scope of constitutional rights protection – I will develop AP's position on this point.

Once the question of scope is answered, we arrive at the second stage, at which the proportionality test kicks in. It consists of four questions, and although there is no single canonical statement of the proportionality test, a serviceable formulation is given by Huscroft, Miller and Webber:

> "1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
>
> 2. Are the means in service of the objective rationally connected (suitable) to the objective?
>
> 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
>
> 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effect on the limitation; in short, is there a fair balance between the public interest and the private right?"[358]

In short, the first step demands a *legitimate aim*, the second focuses on *suitability*, the third on *necessity* and the fourth on *balancing*, or proportionality *stricto sensu*.

Once all the questions of the proportionality test have been answered conclusively, a *definitive* judgment about constitutional rights emerges: we then know whether a right has been *wrongfully* infringed, or in other words, violated. This of course brings us to the final stage, in which a *remedy* must be found when a violation has been observed. In the context of a constitutional rights court, a possible remedy could amount to setting aside a law, declaring it invalid in a single instance or issuing a declaration of

[358]Huscroft et.al. 2014, p. 2. In some formulations the first step is left out, describing a three-pronged test of suitability, necessity and balancing, see for instance Tsakyrakis, Stavros, 'Proportionality: an assault on human rights?', *International Journal of Constitutional Law* 2009, Vol. 7, pp. 468-493, p. 468. As will be discussed, the reason for including the step of ascertaining a legitimate aim lies in its function to weed out morally invalid appeals to constitutional rights.

incompatibility – as discussed in the previous chapter, the availability of these remedies depends on the specific institutional set-up. Given the already hefty workload of this chapter, the remedy stage will not be discussed. However, some conclusions may already be drawn from the tentative justification of strong judicial review, as that justification addressed courts authorized to strike down legislation.

In the course of the investigation not every element will receive equal attention. To summarize, the scope stage, the question of legitimate aims and the question of balancing will be discussed extensively, while the questions of suitability and necessity, although often vital to concrete decisions, are not explored in depth. The reason for this difference lies in the potential contribution of AP's moral-philosophical perspective. While it clearly affects the former themes, it does not clearly add something to resolving issues about the latter. Furthermore, in the course of discussing the three elements, the criticisms raised against proportionality will be answered.

Having introduced proportionality, I will now briefly discuss alternatives to it and then explore proportionality in depth. Ultimately, I will conclude that proportionality, when understood according to AP, forms the right model to employ when understanding and applying constitutionally protected fundamental rights.

2. Alternatives to proportionality

It would beg the question to simply explore proportionality as the dominant method of understanding constitutional rights – there might be alternatives that fit better with AP's tenets. In discussing them, we also raise criticisms of proportionality, which will be discussed while investigating its stages below.

At least at first sight, it seems there is no alternative to proportionality. The proportionality test demands that we interfere with rights to the least extent possible, that we interfere only for good reasons and that we seek to balance out all the relevant considerations. How could anyone oppose such commonsense guidelines? Indeed, put

like this, it seems proportionality consists of reasoning properly, and merely chops up the big task of understanding rights into slightly more chewable portions.[359]

But this impression would be mistaken. There are two distinct elements to the proportionality test: stage 1, which distinguishes *legitimate and important* from *illegitimate and unimportant* grounds for interfering with constitutional rights, and stage 2, which invokes the *balancing metaphor*. The alternative to 1 is to argue that the stage is redundant: virtually all governmental aims suffice as a legitimate ground for interfering with constitutional rights. As this view is held by few scholars, and as it does not seek to replace the proportionality test but merely reduces it to stages 2, 3 and 4, it will not be discussed. The second criticism is the more important one. For there is a clear alternative to balancing: absolutely prioritizing one argument over another.

Evidently, the balancing metaphor suggests we should *balance* competing considerations. This in turn suggests that rather than basing our decision on *one* consideration, we must involve *all* of them. Hence we are inclined to use the metaphor of *weight* or of using scales. Balancing means weighing each consideration against the others and then opting for a solution that reflects each consideration's respective weight accurately. Remember the bombing case from chapter two: how do we reason about whether we need to decide to invade a suspect's privacy in order to locate a bomb? According to the balancing metaphor, we should weigh privacy against security. Consequently, presupposing the policy in question passes the stages of suitability and necessity; a judge can decide that, for instance, the physical safety of citizens outweighs privacy and justifies the invasion of privacy.

The alternative to this scheme would deny the idea of competing weights: it would suppose constitutional rights protection should function as an absolute. As far as I can see, there are at least two ways of understanding this claim to absoluteness. First, one can assume some specific rights are absolute: for instance the prohibition of slavery.[360]

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[359]See also Möller idea of ''balancing as reasoning'', Möller 2012, pp. 137-139.

[360]See for a discussion of the concept of an absolute right Gewirth, Alan, 'Are there Any Absolute Rights?', *Philosophical Quarterly* 1981, vol. 31, pp. 1-16. See also Bales, Kevin, Robbins, Peter T., '"No One Shall Be Held in Slavery or Servitude": A Critical Analysis of International Slavery Agreements and Concepts of Slavery', *Human Rights Review* 2001, Vol. 2, pp. 18-20.

One would therefore argue that if a government practises slavery of any kind, this practice should prohibited – irrespective of the possible weight or importance attached to this practice of slavery. Indeed, one could argue it is *dangerous* invoke the metaphor of competing weights, as this suggests that if the stakes are high enough, even slavery might be allowed. Second, one could argue that constitutional rights protection should be interpreted according to the idea of prohibiting 'the wrong kind of reasons'. Stavros Tsakyrakis makes this argument, arguing a court should simply refuse to take moralist reasons into account.[361] Accordingly, the court need not weigh anything – it need only ascertain whether the government reasons correctly. We have of course already discussed Dworkin's version of this approach in chapter four.

Although both ways of advocating an absolutist interpretation of constitutional rights have merit, they should not lead us to set aside the notion of balancing. As to the idea of specific absolute rights, most rights simply do not seem to qualify as such. It is plausible to think that in wartime, a right to life can be set aside in order to save the lives of many others. It is equally plausible to believe that freedom of expression may sometimes be set aside if it seriously risks public order and safety. However, this reasoning might not apply to all rights. Indeed, it is controversial to think there can ever be something like justified torture.[362] Therefore, a proper account of rights interpretation must at least be able to make sense of the idea of an absolute right. In sections 8–10, I will propose an interpretation of the balancing stage that combines absolute and overridable constitutional rights. Moreover, it will shed light on the general non-aggregative nature of constitutional rights – it will make clear why a government cannot, for instance, sacrifice people's right to a fair trial in order to make society safer.

As to the second strategy, we have already discredited the 'wrong kind of reasons' approach in chapter four. Even though AP should incorporate its insights, the approach cannot serve as a basis for understanding all fundamental rights. I will argue that the wrong kind of reasons element comes to the fore in the first stage of

[361]Tsakyrakis, Stavros, 'Proportionality: an Assault on Human Rights?', Vol. 7, pp. 468-493, pp. 474-475.
[362]Davis, Michael, 'The Moral Justifiability of Torture and Other Cruel, Inhuman or Degrading Treatment', *International Journal of Applied Philosophy* 2005, Vol. 19, pp. 161-178, pp. 167-169.

proportionality, in which the aims of governmental policies are assessed. For now, I conclude that the alternatives do not present attractive ways of interpreting rights, but rather raise points that should be included in the interpretation of proportionality.

Of course, even if a certain conception of proportionality does the most justice to AP's understanding of constitutional rights, one could raise a different kind of problem: proportionality might be too burdensome to employ in judicial decision-making. For judges are asked to do something very difficult: to compare norms that, at least at first sight, seem very hard to compare.[363] Indeed, some have suggested goods such as bodily safety and privacy are *incommensurable* – they cannot be weighed according to some unifying dimension. Arguably, we cannot say that being molested is worse, or better, or as bad as having all one's confidential medical information released to the public. So how could judges ever decide cases in which such goods conflict?

To make their jobs more manageable, judges and lawyers have constructed ways to avoid answering these questions.[364] For instance, Janneke Gerards argues that through evaluating the administrative *process* through which a decision is taken, instead of scrutinizing the decision itself, the substantive burden is lessened.[365] Equally, judges can hold on to previous decisions that delineate the meaning of certain rights in certain circumstances, and in time this builds up a framework that guides the interpretive process.[366] Still, however helpful these suggestions are, they cannot really free judges from dealing with tough substantive balancing questions. Whether a process evaluation or a certain categorizing precedent should be used depends on the kind of rights interference involved – if there is a serious rights interference, it will not do to merely look at procedures or to rely on previous cases. Instead, judges should bring their full power to bear and carefully examine whether the acts in question should be allowed. Both the observation of a serious interference and the consequent task of adjudicating such an

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[363]McHarg, Aileen, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review* 1999, vol. 62, pp. 671-696, pp. 671-673. See also Waldron 2006, pp. 1352-1354.
[364]See for an overview of such methods Gerards, Janneke, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal* 2010, Vol. 17, pp. 80-120, pp. 87-100.
[365]Gerards 2010, p. 87.
[366]This is called 'categorization', see for instance Sullivan, Kathleen, 'Foreword: The Justices of Rules and Standards', *Harvard Law Review* 1992, Vol. 106, pp. 22-123, pp. 56-68.

interference necessitate a proper understanding of the value and meaning of constitutional rights. If judges are tasked with protecting fundamental rights, there is no escaping the theoretical quandaries such rights carry with them.[367]

Therefore, in articulating a conception of proportionality, we must assess whether rights interpretation really is too burdensome for judges. In section 7, I will show that AP helps us to deal with the problem of incommensurability and shows the contours of a viable judicial practice.

3. The scope of constitutional rights

Having rejected alternatives to proportionality and raised the challenges a proper interpretive methodology must overcome, we turn to a closer analysis of the stages of rights interpretation. In exploring them, the work of Kai Möller will be my main guide – his reconstructive theory of the practice of constitutional rights resembles my theory in important respects. Indeed, my central idea of rational self-conception draws directly on Möller's ideas.[368] Hopefully, by showing how my account differs from his, an attractive interpretation of proportionality emerges.

As discussed, the first stage of interpreting constitutional rights, which precedes the proportionality test, consists of denoting the scope of the states of affairs these rights initially seek to protect. In Möller's view, courts should proceed in a very broad way, denoting any good remotely connected to the constitutional text as a constitutional right. Indeed, Möller argues that it is a mistake to understand constitutional rights, whatever their precise content, as more important or more special than policy considerations. He writes that

> "the point of rights is not to single out certain especially important interests for heightened protection. Rather, it is to show a particular form of respect for persons by insisting that each and every state measure that affects a person's ability to live her life

[367]For further argument on the need for substantive interpretation theories, see Letsas, George, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', *European Journal of International Law* 2004, Vol. 15, pp. 279-305, pp. 301-305.
[368]Möller 2012, pp. 73-75.

> according to her self-conception must take her autonomy interests adequately into account."[369]

Möller argues that the scope phase of rights interpretation should feature all the *autonomy interests* relevant to a certain person.[370] Importantly, these autonomy interests describe all the possible interests connected to whatever conception a person has of the life he or she wants to live. [371] This even includes a *prima facie* right to do evil things, such as murdering one's mother-in-law.[372] According to Möller, this need not upset anyone, as *prima facie* rights claims to do evil things will have to be rejected in the course of the proportionality test.[373] What matters from a moral point of view depends on the sort of things people, from their own autonomous perspective, regard as valuable to living their lives. This subject-oriented point of view precludes removing certain interests people genuinely have prematurely: one needs to show why the interests of others, whether formulated as a right or as a policy consideration, outbalance the interest deemed to be evil.

Moreover, criticizing James Griffin's account of human rights, Möller argues that any distinction between really important rights claims and 'other' rights claims that are not recognized as fundamental is problematic, as one would need to show a natural cut-off point.[374] For where does one draw the line between quite important and really important goods? Does it lie between the right to be taught reading and writing and the right to be taught mathematics? Indeed, how could a small difference between a very important and an important good ever justify such a great difference in judicial protection? Möller therefore concludes we should let go of the idea of constitutional rights as especially important rights and simply accept that all autonomy interests pass the scope phase.[375]

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[369]Möller, Kai, 'Proportionality and Rights Inflation', in Huscroft et al. 2014, p. 166.
[370]Ibid., pp. 164-166.
[371]Idem, see also Möller 2012, pp. 57-70.
[372]Möller 2012, pp. 57-70.
[373]Möller 2012, pp. 57-70.
[374]Möller 2012, pp. 75-77. See Griffin 2008, pp. 29-52.
[375]Möller 2012, pp. 74-79.

Note that this does not mean we should let go of the idea of list of rights. Möller argues that even though a constitutional right as such is not especially important, some rights *are*.[376] Therefore, these should be enumerated. Similarly, rights which are very unimportant need not be expressly included, in order to prevent the impression these will amount to much in the later stages of proportionality.[377] Finally, a list of specific rights will be understood much better by the general public than the alternative: a very vague and general 'right to autonomy'.[378] In sum, Möller concludes that in the scope phase, a list should be accepted that enumerates all the important rights and also enumerates a general right to liberty or privacy in order to include all the minor constitutional rights.[379]

As shown in chapter four, the agential pluralist account of fundamental rights is close to Möller's proposals. His idea of employing the idea of a person's self-conception as a broad foundation for constitutional rights was one of the main inspirations for my notion of a *rational* self-conception. At the same time, there are two differences between his account and mine, one of which affects the answer to the question of scope. First, and most importantly, in the context of constitutional rights adjudication, I think there is good sense in explicitly separating constitutionally protected fundamental rights from other morally valid claims, as such review may only be engaged in in order to protect those interests *whose importance justifies* interfering with the democratic process. Therefore, although I agree with Möller that the boundary between these categories is problematic, drawing such a boundary is warranted from an institutional perspective. At some point a decision simply needs to be made about which rights are included and which are not – at least if, contrary to Möller, one understands constitutional norms as norms of great importance. Accordingly, this scheme necessarily incurs the price of cutting off norms that are only somewhat less important.

In the context of the question of scope, this means that a severity check should be in place. It makes sense to tether a court to a list of rights in which norms are set out

[376]Ibid., pp. 89-90.
[377]Idem.
[378]Idem.
[379]Idem.

that *all* pass a threshold of importance.[380] Accordingly, if a claimant cannot base his claim on one of these enumerated rights, his claim need not be taken into consideration. This system prevents the appearance of a court authorized to guard any norm related to constitutional rights. Admittedly, this means it is of the greatest importance that each generation updates the rights texts and prevents them from becoming outdated. But this model is better than an alternative situation in which anything autonomy related can engage the scrutiny of a court. In my scheme, it is up to a qualified parliament, fulling the conditions for constitutional action, to draft laws that single out certain norms for protection, instead of leaving the determination of these norms wholly in the hands of an adjudicatory body that is concerned with all autonomy interests. A diverse set of political institutions thus necessitates a functional differentiation of rights thinking, in which only severe norms are selected for review. Note that, as argued in chapter four, I include the right to a justification as a severe norm – thus some of the broadening of rights interests described by Möller and Kumm is still incorporated into the list.

The second difference is given by the qualifier *rational*. In contrast to Möller's view, I see no reason, in any moral or legal context, to include elements of self-conceptions that are irrational. If I advocate a right to racially segregated schools, arguing that non-white races are inferior, my reasoning should be rejected because it conflicts with the basic claims to agential equality each person should rationally accept – these requirements were discussed in chapter four. However, at the scope stage this difference is purely theoretical: irrational claims should not be regarded as being of constitutional importance and are excluded anyway. The rationality requirement becomes more important in the next stage: determining whether the government pursued a legitimate aim.

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[380]One could imagine such a test both in terms of the kinds of rights literally enumerated in the rights document, and in terms of the interest people actually have when appealing to a right. I support the former – I am sympathetic to the latter, but will not discuss it further here. See Buyse, Antoine, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR', in McGonigle Leyh, Brianne, Haeck, Yves, Burbano Herrera, Clara, Contreras Garduno, Diana, (eds.), *The Realization of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, Intersentia 2013, pp. 107-124.

4. Rational legitimate aims

The legitimate aim stage forms the first step of the proportionality test and features the flip side of the question of scope. Having established whether a constitutionally protected fundamental right is infringed, we must now ascertain whether the infringement of this right served the realization of a legitimate aim. Consequently, just as the first stage demanded a determination of the scope of a constitutional right, this step demands a determination of the scope of possible limitations of that constitutional right. Importantly, even if such a legitimate ground of limitation is available, this does not mean the interference of a right was justified – the further steps of proportionality have to be followed to reach that conclusion.

Again, similar to the scope question, one can take a broader or a more limited approach to the availability of limitation grounds. To give an example, Art. 8 of the European Convention on Human Rights, the Article that protects private and family life, mentions as legitimate aims of limitation:

> "national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[381]

Would AP agree with drawing up such a list of possible legitimate aims of limiting constitutional rights? Two points must be discussed here. First, it has to be pondered whether a more encompassing or a more restricting take on available limitation clauses best suits the institution of strong judicial review. Second, as with the scope question, the notion of a rational self-understanding should be employed to scrutinize claims of legitimate aims.

Beginning with the former, should we, similar to the finite enumeration of rights protected by judicial review, also aim at a finite enumeration of grounds of limitation? Let us note first that the institutional relation is different here. If a government can bring forth any autonomy-related argument as a ground for limitation, this might lessen the strength of judicial rights protection – having just a few grounds for limitation conveys

[381] Article 8 § 2 ECHR.

the message that only in such cases is a restriction of constitutional rights possible. However, at the same time, such a structure is little more than symbolic when one mentions purposes such as 'the prevention of crime', 'health' and 'economic well-being'. These are all huge clauses that allow an appeal to very serious autonomy interests, such as preventing rape or securing stock market stability, and quite minor ones, such as preventing parking violations and encouraging daily exercise.

In the end, it seems unlikely that much hangs on the broadness of the limitation grounds, as the inferiority of certain public goods can be expressed and dealt with in the balancing stage. Indeed, the essential function of the legitimate goal stage lies in ascertaining whether the government is acting legitimately *at all*: can it provide a valid reason for interfering with a fundamental right? The distinction between valid and invalid reasons brings us back to chapters three and four: I argued that *prima facie* valid moral rights claims must be connected to rational self-conceptions. This requirement has consequences for the inventory of moral norms: infeasible and unintelligible claims and those that are not genuine should be rejected, as well as claims conflicting with the central egalitarian principle of AP. In practice, the fourth restriction matters most, as governmental aims will rarely be impossible to achieve or impossible to understand and as it is very difficult to assess a government's true intentions.

As indicated, the fourth restriction should be seen in relation to AP's prohibition of moralism. Individuals may not claim rights based on the ethical inferiority or superiority of a certain conception of a good life. Equally, they may not claim rights based on the alleged moral inferiority of other rational agents. Similarly, governments may not justify interfering with rights because they believe either some lifestyle or some being to be ethically worthless or superior. It may not ban gay sex because of its unchristian nature or restrict free speech because a person's language is too crude.[382] This interpretation matches Möller's. Referring to Dworkin's notion of equal respect, he also draws out the elements of ethical worthlessness and unequal moral worth and criticizes government decisions grounded on these ideas.[383] Interestingly, he argues that in many cases

[382]See here ECtHR, *Dudgeon v. United Kingdom*, October 1981, (Appl. No.: 7525/76).
[383]Möller 2012, pp. 184-185.

governments do not directly appeal to moralist or inegalitarian reasons but construct arguments that seem autonomy related, for instance arguing that the army can ban gay people because their presence diminishes its fighting capacity – clearly, such capacity is morally relevant.[384] Ultimately, Möller concludes these arguments are fine, so long as they are not ultimately based on *ethical dislike*:

> "The proper way of dealing with the problem of whether to acknowledge harm flowing from ethical dislike is straightforward: it must not be accorded any weight in a political community committed to personal freedom. While, to repeat, the loss in autonomy may be real, the price to pay for a commitment to freedom must be that others use their freedom in ways which one finds ethically wrong."[385]

It is in dealing with ethical dislike that Möller's theory and mine diverge. Möller submits that ethical dislike constitutes a loss of autonomy: one is bothered by behaviour one disapproves of. This may be so, but I find it hard to imagine how ethical dislike causes any disadvantage to carrying out a rational self-conception. Remember that part of such a self-conception consists of the genuine belief that each person has an equal right to live life according to his or her ethical views. Can we imagine a person actually holding this belief and still disapproving of the ethical choices other rational agents make? I do not think so. I would therefore rephrase Möller's claim: suppressing our ethical dislikes is not part of the price of living in a free society, but part of the conditions of living life as a rational human being.

We have now clarified AP's theoretical understanding of the legitimate aim phase – it is useful to illustrate it by briefly discussing two examples.

5. Public morality and religious feelings

Both examples are drawn from the ECtHR's jurisprudence. Note that my ambition is not to decide these cases, but to show how we should reason about them. The cases relate to

[384]See here EctHR, *Smith and Grady v. The United Kingdom*, September 1999, (Appl. Nos. 33985/96 and 33986/96).
[385]Möller 2012, p. 189.

two troubling limitation grounds: the protection of morals and the protection of the right not to have one's religious feelings insulted.[386] I will discuss them in turn.

The uneasiness with the public morality clause starts when one notes the difference between protecting morality, and protecting public order and guaranteeing healthcare: the last two are concrete states of affairs while the first is somehow more abstract, as if it belongs to a different category. Indeed, morality is never about securing morality, but about securing concrete states of affairs. So what does an additional morality clause really add here? In practice, the norm does not seem to perform one clear task, but rather responds to several concerns. Most are visible in the famous *Handyside* case, which dealt with Mr. Handyside, the publisher of an English translation of the originally Danish *Little Red School Book*.[387] This book contained a 26-page section on 'Sex', and discussed among other things masturbation and abortion.[388] On the grounds that the book would deprave and corrupt youngsters with an obscene text, the British government decided to seize the book and, ultimately, a case was brought before the ECtHR.[389] The government defended its actions by referring to the public morals limitation, while the applicant argued that his right to freedom of expression was violated.[390] In the end the court upheld the decision of the British government, but that need not concern us here.[391] What matters is the way public morality was interpreted.

Public morality was invoked to stop the "corruption" of the character of schoolchildren.[392] Consequently, the public morality clause can be understood as having a *preventative* nature: it provides a basis for seizing literature that, ultimately, could inspire wrong acts. But which acts are wrong? In a telling paragraph, the British court complained that

> "looking at the book as a whole, marriage was very largely ignored. Mixing a very one-sided opinion with fact and purporting to be a book of reference, it would tend to

[386]Art. 8 § 2 ECHR. The protection of religious feelings falls under the clause of protecting the rights of others.
[387]ECtHR, *Handyside vs. The United Kingdom*, December 1976 (Appl. No.: 5493/72), par. 9-19.
[388]Ibid., par. 20-25.
[389]Ibid., par. 23-28.
[390]Ibid., par. 42, 46.
[391]Ibid., par. 67.
[392]Ibid., par. 33, 38.

> undermine, for a very considerable proportion of children, many of the influences, such as those of parents, the Churches and youth organizations, which might otherwise provide the restraint and sense of responsibility for oneself which found inadequate expression in the book."[393]

The court thus argued that part of the corrupting nature of the book lies in its dismissal of marriage. Accordingly, it seems as if refusing to get married was one of the wrongful acts that needed preventing. Given the analysis above, such an argument would not be supported by AP. A preventative interpretation of public morality seems fine, as long as the acts sought to be prevented are objectionable from the point of view of rational self-conceptions. In the case of *Handyside*, this means that it must be proven that the book in question made it more likely for youngsters to engage in harmful actions such as sexual abuse – not whether they were inspired to engage in holy matrimony. Given the rejection of moralism, the government may not rely on an implicit endorsement of an optional conception of the good – such as marriage – in taking its decisions.

Summing up, the public morality clause risks serious misinterpretation and opens the door to employing invalid reasons for limiting constitutional rights. That does not mean it should be removed from the limitation clauses, as there are ways in which it conforms to AP. The question is rather whether those interpreting constitutional rights will be capable enough to recognize the correct usage, and whether, especially in the context of a court, we should guard against the risk of misinterpretation. A definitive answer would thus have to rely on an investigation of concrete cases and cannot be provided here.

Let us therefore turn to the other problematic limitation ground: protecting the right of others not to be have their religious feelings insulted. In the *Otto-Preminger-Institut* case, the Otto-Preminger Institute organized and announced six showings of the movie *Das Liebeskonzil*, in which, in the words of the Austrian Regional Court:

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[393]Ibid., par. 31.

> "God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression […]".[394]

The Austrian authorities banned the film, arguing that it ridiculed and attacked the Christian faith and was primarily intended to provoke Christians, offending their religious feelings.[395] The institute sought to defend its artistic freedom and alleged a violation of its freedom of expression.[396]

Should AP allow the prevention of offence to religious feelings to serve as a valid legitimate aim for governmental action? This depends on a further question: is it part of a rational self-conception to consider being shocked and offended as a wrong thing? This is a thorny issue, as emotional experiences are subjective and as people can also be shocked by wonderful things, such as a Martin Luther King speech or having a black man elected as president of the United States. At the same time, feelings of shock or offence are, of themselves, highly uncomfortable and disruptive, and we rightly attempt not to upset one another in daily discourse. Should it therefore still be taken into account?

This matter depends on the connection between irrational beliefs and shock or offence. Would someone who has shaken off his racism still be offended by a black man being elected president? Would someone who believes in the right of all persons to lead their life autonomously still be shocked at the existence of a movie that ridicules a faith? Clearly there is a linkage here. Consequently, AP would suggest that shock or offence unrelated to irrational beliefs or ethical dislike is morally relevant and can provide a limitation ground.

Taking this line, it would, for instance, be legitimate to complain about an enormous advert beside a highway ridiculing the Christian faith. In such a situation, one's offence is not dependent on the irrational belief that all people should be Christians – it rests on the belief that one should not be actively subjected to ridicule. As the sign occupies a public place, it subjects those passing by to its message. It seems valid to

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[394]EctHR, *Otto-Preminger Institut vs. Austria*, September 1994 (Appl. No. 13470/87), par. 1-16.
[395]Idem.
[396]Ibid., par. 42.

demand that in public spaces, people have a responsibly to treat each other's choices with respect and to engender an atmosphere in which people feel secure and positive about their rational self-conceptions. But it seems hard to argue on these grounds that the mere fact that a movie is viewed somewhere counts as offence – such a movie does not subject anyone to anything, as people choose to view it freely.

This concludes my analysis of the legitimate aim stage. I hope to have shown how it relates to the prevention of moralism and wrong kinds of reasons and thereby ensures that the goods that need to be weighed in the final balancing stage are supported by morally valid considerations.

6. Balancing and incommensurability

As previously stated, no special attention will be paid to the second and third steps of the proportionality scheme, the questions of suitability and necessity. This is not due to their unimportance – they are highly important – but because there is little to gain in applying normative philosophy to them. The questions of suitability and necessity are empirical: would the measure have factually achieved a certain end, and was there another less invasive measure available? It cannot be stressed enough how crucial these questions are to making governments answer for their policies.[397] A blatant disregard for factual truth all too often characterizes dysfunctional and even oppressive governments.[398] Moreover, properly applying the suitability and necessity steps may save the court the trouble of having to take difficult balancing decisions.[399] But moral philosophy can contribute little to answering them.

Now, one could of course argue that the necessity requirement does rely on moral philosophy, as a 'less invasive' option still needs to be identified according to some normative standard. But the option of less importance is usually not problematic, as it

[397]See for instance Gerards, Janneke, 'How to Improve the Necessity Test of the European Court of Human Rights', *The International Journal of Constitutional Law* 2013, Vol. 11, pp. 466-490, pp. 470-475.
[398]Especially in the days of Trump administrations.
[399]Gerards 2012, pp. 472-473.

does not deal with shifting moral costs from one morally important good to another – thus giving rise to tough questions of comparison – but with achieving the same purpose without harming the good in question as much, in the same way as one would choose a quicker but equally safe travel route. Moreover, to the extent that the question of necessity demands a comparison of the moral costs of two methods, it constitutes a *balancing* question. Therefore, discussing the fourth and last step also contributes to understanding what moral concerns there are about necessity.

We can thus turn to balancing, or proportionality *stricto sensu*. Let's say we find ourselves in a situation in which a constitutionally protected fundamental right has been infringed for the sake of some truly legitimate aim, and so we must decide how to strike a balance between these considerations. Indeed, we cannot escape weighing the importance of both by suggesting a practical solution that can avoid any conflict – those options have already been explored when dealing with suitability and necessity. We must now arrive at a decision. But how should we make this choice? I will present AP's perspective by discussing the two criticisms of balancing introduced above: that balancing seeks to perform the difficult task of adjudicating incommensurable goods and that balancing makes both absolute rights and the non-aggregative application of constitutional rights unintelligible.[400] Importantly, in debating these topics I will also say more about whether in applying constitutionally protected rights, certain fundamentally important goods are more important than other fundamental goods – thus far, in the course of chapter four, we have only described categories of goods that should be understood as being of fundamental moral importance.

Starting with the issue of incommensurability, according to Joseph Raz:

> "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."[401]

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[400]See for an overview of the criticisms of proportionality Klatt, Matthias, Meister, Moritz, 'The Constitutional Structure of Proportionality', Oxford University Press 2012, pp. 45-71. See also Endicott, Timothy, 'Proportionality and Incommensurability', in Huscroft et al. 2012, pp. 311-313, and Kumm, Mattias, Walen, Alec, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing', in Huscroft et al. 2012, pp. 67-71.

[401]Raz, Joseph, 'The Morality of Freedom', Oxford University Press 1986, p. 322. See also Anderson, Elizabeth, 'Practical Reason and Incommensurable Goods', in Chang, Ruth (ed.),

In other words, no precise dimension of moral significance exists in which both A and B can be scaled. It is the precise opposite of, for instance, measuring the speed with which two objects fall, or weighing their mass or assessing their density. Accordingly, Raz points out that even if we introduced an option, C, that outdoes B, it still would not necessarily be better than A.[402] So, if I enjoy both apple pies and cheesecakes, I need not prefer cheesecakes over apple pies, *even if* I discover the ultimate cheesecake recipe. I might just say that there is no scale on which both can be compared.

The question is to what extent fundamental rights and goods are incommensurable. For instance, when privacy collides with freedom of expression, can we really commensurate both goods according to some single scale of importance? One might think this is impossible, arguing that the intrinsic value of having privacy, and the harm of losing such privacy, is simply of a different kind of value than being able to speak freely and participate in public debate. The two goods relate to different practices and are connected to different feelings and experiences. So how could we ever *weigh* them against each other? Indeed, the same argument could be made for comparing healthcare with education or for comparing protecting the environment with securing fair trials – don't they all present different values?

In a seminal article, Elizabeth Anderson argues that the solution to the problem of incommensurability lies in relating the things we value to our *practical reason*: goods are only valuable because, after some reflection, people *attach* value to them.[403] Privacy is valuable because it should rationally be valued *by us*. If, for some reason, rational humans would not value privacy, it would be without any moral significance. Therefore, according to Anderson, we should not be tempted by the idea of aggregating as much value as possible, or the idea of weighing piles of valuable goods against each other.[404] The crucial question is not aggregative but distributive: what distribution of goods respects the equal standing of rational persons the most?[405]

Incommensurability, Incomparability, and Practical reason, Harvard University Press 1997, pp. 90-109.

[402]Ibid., p. 325.

[403]Anderson 1997, pp. 91-95.

[404]Anderson 1997, pp. 104-106.

[405]Ibid., pp. 97-98.

Reasoning from this perspective, Anderson offers two helpful answers to the challenge of incommensurability. The first is that if two goods are incommensurable, this does not mean one can simply flip a coin. Depending on their moods, life choices people have already made, or other aspects of their personality, people may still prefer one to the other.[406] Indeed, people may still *rank* incommensurable goods according to what they want most out of life. Second, people may endorse a *hierarchical incommensurability*.[407] They might find that some good is not a bit more important than another, but simply belongs to a different league of importance altogether. For example, privacy, no matter in what quantities and qualities it is made available, may never be valuable to a person the way bodily safety is valuable to a person – a person may believe privacy is hierarchically inferior in a way that can never be compensated. Therefore, people can rank incommensurable goods by privileging some as hierarchically superior.

I think Anderson is on the right track here. By focusing on practical reason, we can uncover structures that help us choose between incommensurable goods. But, and this is crucial, we must understand the process of endorsing something as valuable in the context of rational agency. It is not only true that people can and should rank goods based on the self-conception they have developed over the course of their lives.[408] They should also rationally appreciate the necessary conditions of their agency, such as their health and their freedom of movement. One can hardly live a full life as an artist or a carpenter if one is constantly ill or confined to a prison. Therefore, the way we deal with goods that are hard to compare is not solely dependent on our reflective personalities – it must be structured according to the principles we should rationally accept. Contrary to Anderson's terminology, this means it does make sense to say that goods that seem incommensurable can be weighed according to a common scale: the rational personalities people constitute. The question is, however, in what way the generic necessary goods of

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[406]Ibid., p. 100.

[407]Ibid., pp. 104-108. See also Pildes, Richard, Anderson, Elizabeth, 'Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, *Columbia Law Review* 1990, Vol. 90, pp. 2121-2214, pp. 2147-2150.

[408]Möller 2012, pp. 173-175. See also Raz 1986, pp. 340-342, Alexander, Larry, 'Banishing the Bogey of Incommensurability', *University of Pennsylvania Law Review* 1998, Vol. 146, pp. 1641-1650, pp. 1643-1644.

agency are combined with the particular goods a person values in constructing a normative hierarchy.

7. Hierarchies of fundamental goods?

As discussed, Gewirth proposes to rank agential goods according to their *necessity for action*.[409] For instance, in his scheme basic goods outrank additive goods.[410] However, chapter three criticized Gewirth's account and established that we should distinguish between minimal agential or basic goods, derived agential goods, expressive goods and particularist goods – all of which can form the basis of a valid moral claim. To recapitulate, basic goods are necessary for the success of any action, such as protection against slavery, derived goods are necessary to realize basic goods, such as the right to a fair trial, expressive goods secure that our standing as moral equals is recognized, such as a right to justification, and particularist goods simply denote those goods that many, if not necessarily all, rational humans highly value in their lives, such as the good of enjoying natural landmarks. Importantly, these categories may overlap: a good such as education is important because it helps realize basic reflection on actions, supports a vibrant democracy and forms a platform from which students develop their particular interests. The question now is whether we should accept a certain hierarchical ordering of these goods.

Similar to Gewirth, we might argue that goods necessary for all actions – basic goods – outrank goods that are often, but not absolutely, necessary for all actions – derived goods. Equally, we might argue that these two categories should be prioritized over expressive goods – these are never essential to performing all possible actions. Indeed, even though a right not to be discriminated against helps one act successfully in numerous social contexts, the fact that one is disadvantaged when compared to others might not preclude one from performing all kinds of acts successfully. Finally, one could think particularist goods will need to come last, as they often denote specific activities –

[409]Gewirth 1978, pp. 343-344.
[410]Idem.

such as playing football or painting. The conditions for becoming a painter have little bearing on one's ability to succeed in a different career.

I think this strategy is useful as a rule of thumb, but not categorically correct. Because oppression, hunger, torture and confinement interfere so dramatically with people's lives, depriving them of an enormous range of actions and hampering their healthy development as agents, they need to be prevented first. To take an example, say a beautiful wild animal lives in a forest, and assume it poses a threat to villagers living nearby. And say a choice has to be made between shooting it, protecting the villagers, or allowing it to live, facilitating the limited group of people who are delighted by the animal's savage beauty. The rational choice here is to shoot the animal, because of the deep threat it poses to the minimal agency of all the villagers. Accordingly, the basic concern for physical safety trumps a particularist attachment to an animal. But this does not seem to be a *categorical* rule.

This is because if, say, there are now only two villagers, both completely enamored with the majestic animal, witnessing it is their greatest and most meaningful delight. Should they kill the animal because of the threat it poses, or leave it to prowl? Is it straightforwardly irrational for the villagers to choose to preserve the beast? It is true that if they are killed by the beast, they will no longer be able to enjoy its esthetic gifts. But it is also true that by killing it, they will go against the greatest of their own wishes. I do not think one can easily decide this dilemma. If some particular purpose seems to form the heart of a rational human's life, it might rightfully motivate him to take great risks in order to achieve it. Evidently, each possible measure should be sought to remove the sting of the dilemma, and to enjoy the beast safely – they should be as careful and as smart as possible. But the demands of rationality seem to end there.

We can thus conclude that basic goods do not categorically trump particular goods. Moreover, it matters greatly what concrete goods collide: is one giving up private information in order to prevent a terrorist attack, or is one allowing CCTV monitoring in order to prevent a drunken brawl? These conflicts cannot be assessed by thinking only in terms of the basic good of bodily integrity and the, in my interpretation, derived and particular good of privacy. Finally, as argued in chapter four, the four classes of goods

denote argumentative paths, not goods that are necessarily separate. For instance, the right to participate politically is not only a derivative good, necessary for setting up a government that secures minimal agency, but may also be an important particular good highly valued by many people, *and* a good central to expressing people's fundamental equality. In concrete situations, we may not always be able to separate goods neatly according to the various categories, but must recognize the multi-categorical importance of many goods.

So where do these comments leave us? First, the Gewirthian scheme of priority does not remove all incommensurability: within the categories of agential rights, goods can be incommensurable. It is neither worse nor better to be tortured until one is out of one's mind than to suffer from terrible hunger. It is neither worse nor better to have no privacy than to have no voting rights. Second, the Gewirthian hierarchy is much too rigid: although it is generally correct to understand minimal agency as trumping the other categories, for the reasons stated above this inference cannot be made categorically. The Gewirthian scheme does not do enough justice to the personalities, and related preferences, rational persons may develop.

Does this mean judicial decision-making is impossible? I don't think so. The fact that it is hard to make general statements about the priority of goods does not mean we cannot, in concrete situations, determine a certain priority. People develop distinct personalities, and by reasoning consistently about them they can realize how they should make tough decisions – even if those decisions come down to flipping a coin. As AP takes rational self-conceptions as its starting point, it can still be used to solve moral problems: it all comes down to establishing the rational self-conceptions concrete individuals should formulate.

But can judges (or any person) do this? Are they equipped to simultaneously understand the rational self-conceptions of all the individuals involved in and affected by a concrete case? Probably not. But besides ascertaining whether a proper decision-making process was followed, and scrutinizing the previous steps of the proportionality test, a court can at least perform a constructive balancing assessment and guard against clearly unbalanced fundamental rights reasoning. I will briefly discuss this and will then move

on to the second objection raised against balancing: its alleged inability to include an absolutist understanding of rights.

8. Core rights and the margin of appreciation

In searching for an answer to the difficulty of incommensurability, I think we can draw inspiration from the ECtHR's margin of appreciation doctrine. This doctrine, which expresses when member states to the treaty have more discretion and when they have less in resolving constitutional rights matters, contains a lot of different elements.[411] Some relate specifically to the context of an international court, for instance the notion that member states are 'better placed' to take a decision or that there should be 'common ground' between the member states on some issue. But one element is relevant to us here: the seriousness of the interference.

In many cases, the ECtHR has argued that the rights it seeks to protect contain a 'core', or an 'essence', and a 'periphery'.[412] For example, the protection of political speech belongs more to the core of the right to freedom of expression, while articles in gossip magazines belong to its periphery. Furthermore, in some cases the ECtHR connects the core of a right to its function in realizing the convention's objective of safeguarding a democratic society and upholding 'human dignity' and 'human freedom'.[413] In sum, if a court finds such a connection, or determines on some other ground that an interference touches the core of a protected right, it engages in a more critical examination of a government's actions.

I think AP would support this methodology, provided that the goal of protecting and securing rational agency determines what goods form the core of constitutional rights. Importantly, AP need not replace notions such as human dignity, human freedom

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[411]See for an overview Gerards 2011, pp. 102-110. See for critical discussions Itzocovich, Giulio, 'One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case', *Human Rights Law Review* 2013, Vol. 13, pp. 287-308, pp. 292-298 and Letsas, George, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies* 2006, Vol. 26, pp. 705-732, pp. 705-715.
[412]Gerards 2011, pp. 112-113.
[413]Idem.

and democracy, but should rather inform the way these are interpreted. AP thus fully endorses, for instance, regarding sexual life to be an essential part of a person's private life, given the important place sexuality takes in many rational humans' self-conceptions. The idea of a core captures the *severity* necessary for judicial intervention, while also being indicative of the good that is *certainly* of great moral importance. It is therefore a useful conceptual tool for interpreting constitutional rights.

However, once the level of scrutiny has been decided, the substantive decision still needs to be taken. At this point incommensurability rears its head again. For how should judges proceed? Take the example of Robert Alexy's famous law of balancing:

> "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other."[414]

In other words, when a fundamental right is interfered with on the grounds of protecting a certain interest, one ascertains whether and to what extent the normative core of the right and the interest are actually at stake. Accordingly, if one finds the right is encroached upon heavily in order to secure a slight improvement of some public good, the interference is not justified. In contrast, if both interferences are equally serious, it is much harder for a court to conclude a rights violation.

Given the analysis above, we can imagine a lot of cases in which this methodology would be wrong. Alexy's law of balancing presupposes that all constitutional rights are of similar importance. But we've seen that rights, depending on the rational self-conceptions of all the people involved and affected, often need to be ordered in a hierarchy. Accordingly, the core of the right to privacy is not necessarily more important than a more peripheral element of bodily safety – this all depends on the circumstances. Whether judges should defer to the legislator depends on how well these circumstances can be read. Sometimes this won't be difficult, for instance when a peripheral good – preventing some small offence to religious sensibilities – is secured

[414]Alexy, Robert (Transl. Rivers, Julian), *A Theory of Constitutional Rights*, Oxford University Press 2002, p. 102. See also Alexy 2003, p. 136, and for a critical discussion Möller, Kai, 'Balancing and the Structure of Constitutional Rights', International Journal of Constitutional Law 2007, vol. 5, pp. 453-468, pp. 456-460.

while sacrificing a core right – political speech – and no indication can be found that the peripheral right is especially valued. Sometimes the circumstances will be complex, and deference is required.

This concludes the general philosophical analysis of the problem of incommensurability – to say more would demand an in-depth consideration of concrete cases. However, this chapter will support one further interpretive method of applying constitutional rights: recognizing the specific relationship between the parties involved in a conflict of rights.[415] To elaborate it, we must turn to the other objection against balancing: its allegedly aggregative nature.

9. Troubling cases and forms of balancing

We have now discussed the first of the objections against balancing raised above. In addition, one might also allege that the method of balancing implies an *aggregative* approach to answering normative questions. In other words, because when balancing considerations are always weighed against each other, we can justify *any* action, however heinous, simply by adding enough weight to one side of the scales. I will discuss Möller's reply to this objection, and consequently introduce the idea of damaging one's self-conception in order to further substantiate Möller's scheme.

In explicating the problem of aggregative balancing, we should be careful to distinguish three kinds of cases, two of which apply to AP's interpretation of balancing. In the first kind of case, one attempts to maximize the total number of fundamental goods people enjoy. Accordingly, one could obligate people to have as many children as possible, thereby sacrificing their procreative autonomy in order to maximize the amount of lives that are being respected. Clearly, this silly example does not apply to AP's interpretation of balancing, as AP is not primarily concerned with maximizing a good, but with respecting all rational agents' rights equally.

In the second kind of case, one attempts to divide the scarce set of fundamental goods fairly by severely harming a few to promote the fundamental goods of many, for

[415]Möller 2012, p. 144.

instance by torturing one man in order to save five lives. I think this gruesome situation presents a challenge to AP, as the reason for torturing the man does not lie in trying to maximize a good, but in realizing a distribution of goods that is ultimately *fair* – do five lives not balance out one horrendous experience of torture? In many constitutional rights practices, torture is absolutely forbidden. It is an *absolute right* that, by definition, may never be interfered with.[416] But does AP support such rights?

Third, the reasoning behind the torture case also applies to situations involving rights that are not seen as absolute: what about refusing individuals a fair trial in order to make society significantly safer? Again, the point here is not maximizing safety but distributing the goods fairly in a situation where the rights of all to physical safety conflict with the rights of all to a fair trial. Intuitively, most people would recoil at this proposal, and constitutional rights practice would surely rebel against it. But why exactly? Can AP justify that these sorts of balancing acts are wrong?

Möller attempts to answer these questions by integrating so-called deontological elements.[417] He distinguishes between four kinds of balancing: autonomy maximization, interest balancing, formal balancing and balancing as reasoning.[418] He describes them as forming concentric circles, indicating that balancing as reasoning contains all the other three forms, that formal balancing includes interest balancing and autonomy maximization, and so on.[419] Only formal balancing is relevant to our discussion here, as it describes Möller's attempt to rid balancing of the troubling aggregative cases introduced above.

Möller argues that *formal* balancing introduces moral principles that can almost wholly set aside the idea of weighing one good against another. His first principle states that

> "with the exception of extreme cases and possibly of cases requiring accommodation, the state is justified in denying, and indeed is required to deny, one person the pursuit of his

[416]See for a discussion Gewirth 1981, pp. 1-16.
[417]Möller 2012, Kum 2014.
[418]Möller 2012, pp. 134-160.
[419]Ibid., pp. 137-150.

> project if this would involve harming others (without their consent) in a way which uses them as a means".[420]

His second principle states that

> "the state is normally justified in prohibiting an agent's activity which, while not using another person as a means, imposes harm or risk of harm on others, even if the gain that the agent can derive for his autonomy outweighs the harm to the autonomy of others".[421]

Here lies Möller's central key to preventing aggregative outcomes of an autonomy utilitarianism: he presents a set of principles that should guide the way we balance considerations. Importantly, the principles reflect the thought that what should matter in balancing is not primarily the weight of the goods being balanced, but "the *specific relationship* which the activity in question creates between the agent and other persons".[422] By consciously and severely harming another, I cross a moral line that affects how the interests in question need to be weighed.

Let's apply Möller's principles to our examples. In the torture case, a person is clearly used as a means and harmed severely in order secure the lives of others. Note that using a person as a means is only allowed when there is an extreme disparity between the costs and benefits, i.e., the moral benefits are much higher than the moral costs. I think it is now much harder to approve the torture – the moral costs of a policy of torture seem to be very great, and it is difficult to imagine what sort of enormous benefits would ever greatly outweigh these costs. In the second and third examples, the same reasoning applies: the harm of refusing fair trials and the right to demonstrate is not greatly outweighed by increased safety or increased public order. Accordingly, the principles that Möller introduces help us to object to counterintuitive applications of constitutional rights doctrine.

Möller tries to support his principles by appealing to intuitions: he discusses several troubling examples, among which are the famous trolley cases, in order to show

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[420]Möller 2012, p. 147. Möller mentions more principles than these two, but they are less central to my analysis.
[421]Ibid., p. 151.
[422]Ibid, p. 144

how his principles produce outcomes that satisfy our moral inclinations.[423] Obviously, this methodology is at odds with the transcendental strategy offered in chapter three. Therefore, I will not seek to outdo Möller in grasping the truths trolley cases may offer us, but will attempt to show how AP can make sense of his conclusions.

10. Damaging rational self-conceptions

We can of course debate how AP would interpret the term 'harm' and to what extent the harms it identifies match Möller's own proposals.[424] But I think it is more helpful to wonder how AP could incorporate the central thought that seems to animate Möller's analysis: that it is wrong to consciously choose to damage another, even if one at the same time secures a great moral good. I submit that the answer can be found in the idea of damaging one's rational self-conception.

Remember that all rational persons have a certain self-conception, denoting a collection of purposes they would like to pursue and states of affairs they would like to realize. I think that if such a person commits acts which go directly against beliefs he must deeply hold, he damages himself. Metaphorically speaking, he dirties his hands and smudges his life. For when he reflects on things he has done, he must, to the extent he reflects rationally, admit that some of them, even if they were performed in the service of a higher cause, were deeply tragic, spoiling the sort of life he should want to lead. Like a soldier traumatized by war, a person who has done horrible things affects the conception he has of himself. The point is thus that harming the fundamental interests of others comes with enormous costs, not only to others but also to yourself. Your autonomy to live your life as you must rationally want it has been heavily impaired.

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[423]Evidently, Möller touches upon a huge literature here, which I cannot explore. See for a critical overview Fried, Barbara, 'What *Does* Matter? The Case for Killing the Trolley Problem (Or Letting It Die)', *The Philosophical Quarterly* 2012, Vol. 62, pp. 505-529, pp. 505-510. See also Walen, Alec, 'Doing, Allowing and Disabling: Some Principles Concerning Deontological Restrictions', *Philosophical Studies* 1995, Vol. 80, pp. 183-215, pp. 195-200. See also Kum and Walen 2014, pp. 71-80.

[424]By itself the term 'harm' reveals little – it needs further substantiation according to some moral scheme. See for a critical discussion Holtug, Nils, 'The Harm Principle', *Ethical Theory and Moral Practice* 2002, Vol. 5, pp. 357-389, pp. 363-365.

I think this explains why we are so hesitant to sacrifice the fundamental interest of a single person in order to secure higher benefits for some, or lesser benefits for many. In any legal or moral context, the wrongness of the rights violation would and should wreck the sense of self of all involved. Because we must be deeply committed to the moral standing of others, to the extent we think rationally about ourselves, we cannot bear to deny a person his fundamental rights and to regard him as just one single factor within a larger calculus. Importantly, this is not a matter of weak sensibilities, but of a great clash between the basic acts of respect we are committed to and the wrongs that stand in the way of significant gains. Moreover, this sense of self-destruction is only greater when a law is made through a democratic process. In that instance, *all* are a part of wrongness when it allows horrific acts to occur. If a government is allowed to torture people, its citizens share the evil of that torture: all proponents have become torture endorsers and so all face a clash between that belief and all the kind-hearted values they should rationally embrace. In short, as a collective, we cannot do certain things because it would dehumanize us *all*.

This risk of dehumanization supports absolute prohibitions, such as those against torture and slavery. Committing such acts disgraces us, even if they are the only way to prevent enormous human suffering or even death. Indeed, the damage to our sense of self can be so great that saving lives is no longer worth it. We must want to live life the right way, even if that means risking an end to such a life. Ultimately, an absolute refusal to allow torture expresses the thought that consciously and brutally harming others is worse than death. The importance of staying true to one's rational self-conception thus gives us a strong reason to endorse constraints within the balancing process. We have reason to think it is wrong to sacrifice fundamental rights for the sake of lesser ones, in any numerical circumstances. And we have reason to think some few acts may never happen, even if they enable the realization of other fundamental rights.

In sum, I think I've shown that, from the perspective of AP, the idea of damaging one's self-conception motivates and gives reason to absolute prohibitions and a prioritization of fundamental goods. But does it also succeed in justifying these constraints on balancing conclusively? That is a very hard question to answer. Should it be forbidden for a police officer to slap a man once in order to obtain information that

may rescue thousands? Shouldn't we, in rare circumstances, accept that we do not have the luxury of living a morally clean life? I am afraid I do not know the answers to these questions. I can provide no transcendentally necessary justification for absolute rights, or for an absolute priority of fundamental rights. I can only conclude that we have a powerful reason to hold on to these constraints.

Moreover, if the harms in question are less severe, this argument quickly loses its strength. If we take consciously inflicting harm to mean consciously diminishing another's ability to achieve some purpose, daily life is riddled with harms: refusing to meet with a friend harms him, obligating someone to pay a tax for a service he does not benefit from harms him, throwing a loud party harms the neighbours. In these situations, we do not think such harms are only justified when there is an extreme disparity between moral costs and benefits. Rather, it is part of living together that we continually impose and absorb small harms in order to pursue purposes.[425] Therefore, the notion of damaging one's self-conception seems mostly relevant to the sort of fundamental goods judicial review is concerned with – not to moral life in general. In the same vein, this will be less relevant to peripheral rights interferences than to core rights interferences.

Finally, it also matters whether the person whose rights are interfered with is innocent. To take the example of restricting privacy in order to combat crime, in most countries law enforcement officers are authorized to invade a person's privacy – by tapping phones or hacking into emails – when such a person is suspected of having committed a crime. Evidently, in such a case the police consciously and seriously harm the person in question, while the gains of such treatment are uncertain. Someone else might have committed the crime. Should we then, following the reasoning thus far, prohibit these privacy measures until, somehow, the law enforcement authority knows *for sure* the person has committed a crime? This seems implausible – especially since the only way of establishing the person's guilt often consists of invading his privacy. I think situations of risk and uncertainty soften the damage one does to one's rational self-conception – it is simply unclear whether what one is doing is morally obligatory or wrong. Therefore, it makes sense to allow certain rights interferences in these cases. Of

[425]Möller refers here to 'accommodation', see Möller 2012, pp. 152-154.

course, the interference must be proportional to the grounds for suspicion and the seriousness of the offence – and there are still acts, notably torture, that seem impermissible no matter how strong the suspicion and how serious the crime.

Undoubtedly, not all relevant factors have been discussed. My ambition here is only to present a way of reasoning about rights inferences. In sum, in the context of judicial practice, I conclude the following: given the importance of living a life in which we respect the rights of others and support their purpose-fulfilment, we have reason to defend some absolute rights. Furthermore, when applying the balancing test, judges should not only look at the weight of the competing interests but also, following Möller, should consider the relationship between the involved parties. When a fundamental right of an innocent person is consciously and severely interfered with in order to secure some other fundamental good, this is in principle unacceptable, unless the moral gains are far greater than the moral costs.

In most cases this principle won't be relevant, as liberal governments are, usually, not in the business of sacrificing the rights of innocents for the greater good. But an example here is the German *Aviation Security Act* case, in which the German Constitutional Court had to decide whether it is a violation of constitutional rights to authorize armed forces to shoot down a plane intended to be used against citizens.[426] In such a case, innocents would be consciously killed in order to prevent even more deaths. Given the harm such actions would cause to citizens' rational self-conceptions, AP would have grave concerns about such a policy and would forbid it – unless it can be shown that shooting down the plane would prevent a human catastrophe many times worse than killing a plane full of innocents. Such tragic circumstances are perhaps not impossible, but they are hard to imagine.

This concludes my account of proportionality as the methodology of judicial rights interpretation. Although many questions remain, I hope to have shown that by interpreting the stages of scope, legitimate aim and balancing according to AP, it forms an attractive judicial methodology for understanding constitutional rights. The scope stage can emphasize the importance of constitutional rights and relate judicial scrutiny

[426]BVerfGE 115,118.

appropriately to democratic decision-making. The legitimate aim stage can incorporate AP's rejection of moralism and weed out invalid reasons for interference. Finally, the balancing stage can do justice to the fundamental goods mentioned both in the rights clauses and in the limitation clauses, while taking into account AP's reasons for accepting absolute rights and for avoiding counterintuitive aggregative scenarios.

11. Proportionality and politicians

As argued at the beginning of this chapter, the proportionality scheme is not only relevant to judges applying constitutionally protected fundamental rights but also to any who seek to understand and apply fundamental rights. Let us therefore close this chapter by briefly describing their circumstances. Evidently, the context in which fundamental rights are applied matters greatly. Politicians and regular citizens are not bound by the restrictions of a constitutional rights court – they need not justify intervening with the democratic process, as they participate in it. Therefore, the proportionality scheme they should follow differs from the one expounded thus far: in particular, the scope stage, the limitation stage and the balancing stage of the analysis are different. Moreover, political actors have much more discretion when it comes to possible remedies.

In the scope stage they need not just concern themselves with the constitutional rights set out by previous majorities, but can openly explore ways of changing the status quo. For instance, one could argue that given the enormity of the challenge of climate change, the constitutional rights regime must be changed – perhaps it should incorporate an actionable right to a sustainable climate. As discussed in the theory of fundamental rights AP proposes, new circumstances might well call for new rights provisions. It is the task of politicians and citizens alike to reflect on the needs of the future, and to debate institutional changes. As much as judges may offer innovative interpretations and develop current regimes in consecutive cases, serious change to both constitutional rights adjudication and fundamental rights policies in a broader sense depends on democratic decision-making. This of course also applies to the limitation stage: if the content of fundamental goods may change, so may the content of valid limitation grounds.

Furthermore, during the balancing stage all the actors in the democratic process are faced with a tenacious problem: they cannot defer judgment to anyone else. They may of course attempt to do so – politicians regularly state that they simply seek to carry out the will of the people, while citizens may submit that they feel the majority should be listened to. But such deference would be wrong. As argued in chapter one, all democratic actors must make choices and must justify these choices. They cannot escape the responsibility of formulating the contents of a just and morally right society. Evidently, these choices will sometimes be hard to make, and all political actors will regularly fail in finding the right answers. But a society must be ruled; collective action must be coordinated. And such rule presupposes substantive choices. These choices inevitably fill the gap left by moral theories. As discussed, AP cannot definitively make out whether a right not to be tortured is truly absolute. Moreover, following the justificatory methods AP presents, it may not always be clear whether a good should be regarded as fundamental or not. One must simply decide, experiment and reevaluate the call later on. AP does not stipulate the judgment that should take place.

Finally, when political actors, and in particular politicians, determine that a policy violates fundamental rights, they bear the primary responsibility for formulating a remedy. A judge can, at most, declare a certain policy to be a violation of a right, strike down a legal provision as invalid, demand compensation and ask for the underlying problem to be solved. But the solution itself must be presented by the politician. Again, AP may not always clearly prefer one scenario over another, and judgment will inevitably have to be exercised.

All in all, substantively, politicians, citizens and advisory political actors face a tougher challenge than judges – they are not bound to laws the way judges are, and have no possibility to defer. This makes it all the more essential that they reflect on how they should make their choices, and that they are open to the kinds of theories that attempt to show how they should understand the goods that are of fundamental importance – such as the theory offered in this dissertation.

Concluding Remarks

1. Fundamental rights according to AP

This dissertation began by asking *if*, and if so, *why*, fundamental rights matter. By way of conclusion, I will sum up my answer and discuss some future research prospects.

According to my theory, which I have called agential pluralism, fundamental rights matter because they are rights to goods central to people's rational self-conceptions. Every day of their lives, people elect purposes they want to pursue, and to the extent that they reflect rationally about themselves and the world they live in, they must claim fundamental rights. These claims are dialectically necessary – if they do not demand that others help them to secure their rights, by curing their illness or protecting them from assault, they fail to understand what sort of beings they are. Crucially, they must also suppose the ground for claiming these rights consists of nothing more, and nothing less, than being an agent with the capacity for rational action. This means that all such agents have an equal right to see their fundamental goods realized.

However, in articulating fundamental rights, we must be careful not to reduce a particular human to a being 'who simply wants to act'. Particular beings have particular natures, featuring specific combinations of inclinations and purposes they seek to fulfil. Some persons value natural landmarks, others value art and others want nothing more than to dress up as a wizard and run across a field yelling 'MAGIC!'. AP argues that rational agents should not only respect each other as beings who want to act, but also as beings who have such a particular nature. This does not mean they should value each other's purposes. Rather, they should respect the fact that others have such purposes, and support them when they can.

These remarks do not distinguish fundamental rights from other moral rights: all morally valid rights are derived from people's rational self-conceptions, and indicate purposes that persons, on pain of misunderstanding themselves, must want. The difference between non-fundamental and fundamental rights lies in their importance to realizing rational self-conceptions: fundamental rights matter more than other moral rights. Admittedly, this scale of importance is gradual, not binary: some non-fundamental rights are more important than others and some fundamental rights are more important than other fundamental rights. But this binary distinction is necessitated by the political instantiations of fundamental rights: we must decide which norms fulfil which tasks in political society.

There are various roles fundamental rights should fulfil, from grounding and informing governmental responsibilities to serving as norms with which courts can scrutinize legislative proposals. In these various roles, fundamental rights should both guide and restrict processes of majority decision-making. How they should do so must be decided in concrete cases and depends upon empirical circumstances. But fundamental rights should prompt us to consider whether a public official who violates them should be voted out of office and whether a parliament that violates them should be restricted in its discretion. In this context, I have argued that we have good reason to accept strong judicial review, as well as weaker instantiations of fundamental rights, *if* the legislative and interpretive schemes that constitute such institutions are based on AP.

But what fundamental rights should we accept? I have argued that we should employ four strategies for justifying fundamental rights: arguing a good is a *basic good* strictly necessary for acting at all, arguing a good is a *derivative good* supporting the realization of basic goods, arguing a good is an *expressive good* denoting the equal significance of rational agents and arguing a good is a *particular good* highly important to the realization of many people's rational self-conceptions. Importantly, these strategies overlap, as a single good can be supported by various argumentative routes, enhancing its importance. Furthermore, a quick examination shows that these categories provide support for most of the fundamental rights featured in the discourses on human and constitutional rights.

Importantly, I have not provided a *definitive* argument for accepting that a certain right should be regarded as fundamental and perform a specific political function. Such an argument would need to take considerations into account I have not discussed, such as the notion of personal responsibility and the moral costs of governmental enforcement. Ultimately, this dissertation attempted to give a part, and not the whole, of the answer to constructing and applying an account of fundamental rights.

Finally, these fundamental rights must be applied in concrete cases. When discussing the method of proportionality, I have argued that it forms an attractive scheme of applying AP to judicial cases. However, proportionality must be interpreted according to AP. This means that the scope stage, which precedes the steps of proportionality, must include a severity test, and that the legitimate aim stage must include a rationality test. As to the balancing stage, even though the idea of a rational self-conception makes moral goods commensurable, it also gives rise to shifting hierarchies of such goods. Only concrete cases reveal how fundamental goods should be prioritized. Moreover, the idea of damaging one's self-conception gives a reason to hold on to certain absolute rights and to rebel against policies that consciously sacrifice the fundamental goods of innocents in order to achieve some greater moral benefit.

This is what I have argued – so which questions are left?

2. Avenues for future research

I will discuss some further questions here, but undoubtedly will leave out many.

The first possibility that reveals itself is to remove the limitations imposed on this thesis and to present an account of personal responsibility and an account of governmental interference. The former would require delving into deeply contentious issues about the ability of people to motivate themselves to act and the concept of making free choices. Politicians have debated for years whether, for instance, asylum seekers are victims or culprits, or whether drug users are helpless addicts or lazy disturbers of the peace. Considering the theory proposed thus far, it seems especially important to determine to what extent assigning responsibility is a question of facts and to what extent

it is a question of preferences – we might simply like carrying certain burdens of responsibility to a greater or lesser degree.

The latter question of governmental enforcement is somewhat more empirical. We cannot ask a government to do things it cannot do, or which would come at too great a cost. For instance, we can debate whether, and in what form, governmentally mandated healthcare is affordable – is it feasible to give people a healthcare guarantee? Equally importantly, we must wonder how damaging it is to tax a person, or restrict his purposes in some other way, in order to secure moral goods. Libertarians make much of such restrictions, using them as an argument for only allowing the most minimal sort of government. Building on the account of morality presented thus far, we must determine if they are right, and what sort of governmental intervention can be justified.

By tackling these debates, governmental responsibilities can be assigned much more precisely and we can make clear which fundamental right needs to perform which functions. In this context, economic and social rights are of course especially at stake – they are most often accused of disregarding people's own responsibility and presenting unworkable demands on political institutions.

Furthermore, this thesis has excluded the international dimension from its scope. By adding a theory of international relations, as well as a keen understanding of international law, AP can be used to evaluate current international rights practices. Although I can only hint at its potential here, it seems AP is particularly suited to making sense of the enormous variety of fundamental rights instantiations found in the international field: rights appear in disputes about water provision, military interventions, economic sanctions and religious practices, for example. Due to the broad moral framework it proposes, AP might help in connecting all these issues, and locate the moral threads that bind the human rights discourse together.

I have also said little about morality in the private sphere. AP purports to justify *all* moral norms, so it also seeks to regulate how we interact with each other *within* the confines of the law. What does it have to say on the moral dimension of family relationships, friendships and the workplace? Arguably, by appealing to the importance of people's particular natures, it expands the boundaries of what we usually associate with

morality – I have argued that if a rational person genuinely desires to have friends, others have a moral responsibility to support this wish. It would therefore be worthwhile to expand on this perspective and describe the contours of a private sphere inspired by AP.

Finally, aside from employing concrete cases to illustrate a certain point, I have made no attempt to adjudicate them conclusively. This must, of course, be done. Indeed, moral life relentlessly confronts us with concrete decisions, and we have no choice but to make up our minds and act. I hope to take part in making these judgments in the future by delving in depth into a few of the moral challenges society faces and by employing the structural insights gained while writing this dissertation.

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Samenvatting

Als je het nieuws afstruint slaan discussies over rechten je al snel om de oren. Senator Bernie Sanders strijdt in Amerika voor het erkennen van een moreel recht op zorg. Rusland kampt al jaren met economische sancties vanwege mensenrechtenschendingen. En de Orde van Advocaten waarschuwde vlak voor de verkiezingen van maart 2017 dat de programma's van partijen als de PVV, de VVD en het CDA constitutionele rechten onder druk zetten. Maar wat bedoelen we eigenlijk met deze termen? Wat betekent het om een mensenrecht, of een fundamenteel recht, op te eisen? Gezien de aanwezigheid van rechten in ons denken en onze politieke besluitvorming is het belangrijk deze vragen helder en overtuigend te beantwoorden.

Dit proefschrift doet daartoe een poging, en introduceert een theorie van fundamentele rechten, genaamd *agential pluralism*, vrij vertaald: Actor Pluralisme. Om de theorie te ontwikkelen en toe te passen, doorkruist het proefschrift debatten in de moraalfilosofie, politieke filosofie en rechtsfilosofie.

In het eerste deel van het proefschrift worden twee perspectieven op fundamentele rechten en hun politieke rol becommentarieerd. Hoofdstuk 1 bespreekt Jeremy Waldron's theorie van democratie, waarin hij beargumenteert dat als we de politieke plaats van fundamentele rechten willen begrijpen, we controversiële moraalfilosofie achterwege moeten laten. Ik betoog dat Waldron ongelijk heeft, en dat het onmogelijk is om zonder diepgravende moraalfilosofie vragen over politieke autoriteit en fundamentele rechten te beantwoorden. Waldron's theorie doet geen recht aan de politieke praktijk en hij geeft geen overtuigende redenen om zijn visie van democratie te ondersteunen. Ik concludeer daarom dat een theorie van fundamentele rechten de moraalfilosofie niet moet overslaan, maar juist als basis dient te nemen.

Hoofdstuk 2 onderzoekt vervolgens een theorie van fundamentele rechten die aan deze eis voldoet: de discoursethiek van Karl-Otto Apel en Jürgen Habermas. Zij

beargumenteren dat de juiste moraal gevonden kan worden in het juiste discours: de communicatieve handeling. Habermas werkt dit idee vervolgens uit in een omvangrijke politieke theorie. Ik betoog dat hun methodologie er niet in slaagt morele uitspraken te rechtvaardigen, en dat Habermas' politieke theorie uiteindelijk de menselijke belangen die het meest belangrijk zijn uit het zicht verliest.

In hoofdstuk 3 en 4 wordt mijn eigen theorie opgebouwd. Hoofdstuk 3 begint met een bespreking van de moraalfilosofie van Alan Gewirth, die voorstelde morele uitspraken te gronden in de noodzakelijke veronderstellingen van actorschap. Met andere woorden: welke opvattingen dien ik, als handelend wezen, en in zoverre ik rationeel over mezelf nadenk, te accepteren? Ik zal beargumenteren dat deze methodologie hout snijdt, maar dat de normenstructuur die Gewirth erop baseert aangepast moet worden. Gewirth's theorie is op centrale punten ambigue, en doet te weinig recht aan de belangrijkheid van de specifieke doelen die mensen in hun levens nastreven.

In een poging de theorie te verbeteren, stel ik een andere interpretatie ervan voor, die ik *agential pluralism* noem. AP benadrukt juist het belang van het respecteren van de particuliere eigenschappen van mensen, en combineert dit respect met een erkenning van de generieke condities van succesvol handelen. Hier vindt een significante innovatie plaats, omdat het samenspel van de generieke en particuliere doelen de sleutel vormt waarmee zowel de brede en flexibele inhoud van fundamentele rechten, als de relatie tussen fundamentele rechten en andere morele normen, begrepen kan worden.

Hoofdstuk 4 werkt AP verder uit, en spitst de theorie toe op fundamentele rechten en hun politieke institutionalisering. Het hoofdstuk analyseert het debat rondom Ronald Dworkin's invloedrijke theorie van rechten, en bekritiseert pogingen om de essentie van fundamentele rechten te vatten in gedurfde definities. In tegenstelling tot deze pogingen definieer ik fundamentele rechten als rechten die betrekking hebben op een groep goederen, die vanwege de *prima facie* valide morele claims van individuen van groot belang zijn. Ik betoog dat deze definitie ons in staat stelt recht te doen aan de complexe institutionele rollen die fundamentele rechten vervullen. Het maakt inzichtelijk hoe fundamentele rechten niet alleen politici informeren, maar ook als grond dienen voor gerechtshoven, demonstranten inspireren, etc. In deze context geeft het proefschrift

speciale aandacht aan de relatie tussen fundamentele rechten en de procedure van meerderheidsbeslissing.

De dissertatie biedt ook een typologie van fundamentele rechten. Ik zal vier manieren onderscheiden waarop men kan beredeneren dat een goed de basis zou moeten vormen voor een fundamenteel recht: het goed kan begrepen worden als een *basaal* goed, een *afgeleid* goed, een *expressief* goed en een *particulier* goed. Deze categorieën kunnen overlappen – een goed als onderwijs is mijns inziens bijvoorbeeld een *basaal*, *afgeleid* en *particulier* goed. Het proefschrift laat dus zien *hoe* fundamentele rechten onderbouwd kunnen worden, maar voorziet zelf niet in een definitieve lijst.

Hoofdstuk 5 en 6 passen de ontwikkelde theorie toe op debatten over de rechtvaardiging van constitutionele toetsing en de interpretatie van fundamentele rechten. In hoofdstuk 5 onderzoek ik de krachtigste en meest invasieve methode om rechten te institutionaliseren, de rechterlijke toetsing van parlementaire wetten. Op basis van een analyse van het werk van Alon Harel en Jeremy Waldron, presenteert het hoofdstuk een gekwalificeerde rechtvaardiging van rechterlijke toetsing.

In hoofdstuk 6 wordt tenslotte besproken volgens welke methode fundamentele rechten geïnterpreteerd zouden moeten worden. Het presenteert een interpretatie van proportionaliteitstoetsing, een bij gerechtshoven invloedrijke interpretatiewijze. Ik beargumenteer dat deze interpretatie de beste vertaling vormt van de inzichten van AP. Het hoofdstuk legt ook uit in hoeverre AP morele normen verzamelt in een systematische hiërarchie, en hoe het zorgen over gevaarlijke vormen van consequentialisme kan wegnemen.

Op dit punt besluit ik het proefschrift. Ongetwijfeld stelt dit werk evenveel vragen als het beantwoordt, bijvoorbeeld over het uitleggen van fundamentele rechten in concrete rechtszaken en het inpassen van fundamentele rechten in een internationale politieke en juridische orde. Maar het bouwt een brug tussen debatten over morele rechtvaardiging, fundamentele rechten, politieke theorie en rechtsinterpretatie. Als filosoof en jurist ben ik ervan overtuigd dat om het raadsel van fundamentele rechten op te lossen, zulke bruggen essentieel zijn.

Curriculum Vitae

Jurriën Hamer (1988) received his Bachelor's degree in law (2009), a Research Master's degree in law (2012, *cum laude*) and a Master's degree in philosophy (2013, *cum laude*) from Utrecht University. Jurriën wrote his PhD thesis at the Ethics Institute of Utrecht University (2013-2017). His thesis was supervised by Prof. dr. Marcus Düwell and Dr. Rutger Claassen. While writing his PhD thesis, Jurriën spent a term at the London School of Economics (2015). At present, he is a researcher at the Rathenau Instituut, and investigates the relationship between digitalization and fundamental rights and the rise of offensive cyber capacities.

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