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Public Reason and Constitutional Law

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PUBLIC REASON AND CONSTITUTIONAL LAW

By Wojciech Sadurski*

Abstract

The paper considers the applicability of the concept of public reason (PR), properly reinterpreted and recalibrated, to constitutional law. After the presentation of the general idea of PR as a legitimacy-conferring device, the paper discusses its proper scope (both in terms of its range and actors), and also attempts to rebut the main challenges to the idea of PR. It then undertakes a “translation” of the philosophical conception of PR into a constitutional doctrine of illicit legislative motivations, which taint the law with unconstitutionality, and then tests it by using a case study of US Supreme Court freedom of speech jurisprudence under the First Amendment.

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Introduction

In his essay revisiting the idea of public reason (henceforth: PR), John Rawls explained that “the idea of public reason is not a view about specific political institutions or policies” but, rather, “it is a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions”.¹ This is a nice characterization of the nature of the concept which will underlie this Working Paper. It is about the “kind of reasons” provided for laws and policies (rather than about the kind of laws and policies themselves), and it is about a *category* or a *class* of reasons, rather than specification of the legitimate reasons themselves. One useful way of looking at PR is to view it as a form of self-discipline that the citizens of a liberal-democratic polity should exercise, which must compel them to screen off many motives and reasons which they may be tempted to act upon. As Charles Larmore helpfully put it: “Many questions of an ethical or religious character, immensely important though they may be to people’s self-understanding, will have to be set aside if they are to determine the political principles by which they will live, for such questions cannot receive any commonly acceptable answer”.²

In this paper I will reflect about applicability of this concept to constitutional law. In Part 1, I will introduce the general idea of PR; in Part 2 I will discuss its proper scope, trying to reinterpret and recalibrate it in a way making it suitable to constitutional law; in Part 3 I will consider and try to rebut what I see as the main challenges to the idea of PR, and in particular those coming from a broadly liberal camp, as articulated by Ronald Dworkin and Jeremy Waldron; in Part 4 I will undertake to “translate” the philosophical conception of PR into a constitutional doctrine of illicit legislative motivations as tainting the law with unconstitutionality; in Part 5 I will apply this doctrine to a case study of freedom of speech under the First Amendment case law of the US Supreme Court. In Conclusions I will bring these various threads together.

¹ John Rawls, “The Idea of Public Reason Revisited”, in *The Law of Peoples* (Harvard University Press: Cambridge Mass 1999) at 165-66 [hereinafter Rawls, “The Idea of Public Reason”].

² Charles Larmore, *The Autonomy of Morality* (Cambridge University Press: New York 2008) at 213.

1. What Is Public Reason?

PR is about providing reasons, and about constraints on *what* reasons can be provided in the process of law-making. It is a characteristically *liberal* idea: “*Liberal* citizens must justify their political demands in terms that fellow citizens can understand and accept as consistent with their status as free and equal citizens. It requires a conscientious effort to distinguish those beliefs that are matters of private faith from those that are capable of public defence....”.³ A useful way of talking about reason-constraining approaches is by using a category of “exclusionary reasons”: second-order reasons which dismiss those first-order reasons which do not *compete* with other, legitimate reasons, but which must be disqualified at the outset even if, were they allowed to compete, they would have been pertinent to the decision in question and may have outweighed those other (eventually successful) reasons. In a classical discussion by Joseph Raz, exclusionary reasons are “second-order reason[s] to refrain from acting for some reason”,⁴ or, simply, “a reason for disregarding other reasons for action”.⁵ So non-public reasons which have to be set aside under the principle of PR, remain valid; they do not evaporate or vanish, but must be nevertheless disregarded whenever PR operates.

Second-order exclusionary reasons may operate in a strong and in a weak sense: the former ones, absolutely exclude acting on certain first-order reasons; the latter, remove some weight from those first-order reasons which they would otherwise have. At first blush, “weak” exclusionary reasons may be seen as a misnomer because they do not “exclude” but rather “weaken” the weight of certain reasons, in competition with others. Indeed, Raz himself seems to reject the very possibility of weak exclusionary rules: “The very point of exclusionary reasons is to bypass issues of weight by excluding consideration of the excluded reasons regardless of weight. If they have to compete in weight with the excluded reasons, they will only exclude reasons which they outweigh, and thus lose distinctiveness”.⁶ This is unconvincing, although in practical terms this weak sense may not have much significance because we usually establish the weakened weight of some first-order reasons on the basis that they eventually did not prevail, so

³ Will Kymlicka, *Politics in the Vernacular* (Oxford University Press: Oxford 2001) at 296-97, emphasis added.

⁴ Joseph Raz, *Practical Reasons and Norms* (Oxford University Press: Oxford 1999) at 39.

⁵ Raz, *id* at 38.

⁶ Raz, *id* at 190.

the effect is the same as in the exclusion. But it is only a practical point, not an analytical one, and “usually” does not mean “always”. Suppose you have a rule for a particular behaviour R1 which constitutes an exclusionary reason for not considering any option inconsistent with R1, *unless they are particularly compelling*. An exclusionary reason functions to deprive those reasons which are excluded of much of their weight that they would have in the absence of the exclusionary one, but sometimes their initial weight may be of such stringency in the first place that even an exclusionary reason will be incapable of overriding them. As an example consider a proposition by Fred Schauer that “one who exceeds the speed limit in order to rush an injured person to the hospital has not rejected the [exclusionary] rule, and may very well follow it in cases of slighter but still present reasons to disregard it”.⁷ We may then say that the person is not disregarding the exclusionary reason but only that the exclusionary reason is not strong enough to override particularly dramatic or urgent reasons not to follow it.

PR plays a special role in the context of the issue of legitimacy of political power, i.e. of the use of coercion towards individuals. In Rawls’s theory, PR is intimately tied up with the “liberal principle of legitimacy” which postulates that only those laws that are based upon arguments and reasons to which no members of the society have a rational reason to object can boast political legitimacy, and as such can be applied coercively even to those who actually disagree with them. In Rawls’s words: “Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason”.⁸ This, while formulated in positive terms, is based on a simple *negative* point: a law *cannot* claim any legitimacy towards me if it is based upon arguments and reasons that I have no reason to accept. For a good example of a negative formulation, consider Lawrence Solum’s proposition: “Reasonable citizens are under no obligation to regard themselves as legitimately bound by the authority of decisions that rest on deep premises that they cannot accept as reasonable. Given the fact of pluralism, many or most citizens will regard any legal decision that rests on deep and controversial

⁷ Frederick Schauer, *Playing by the Rules* (Oxford University Press: Oxford 1991) at 90.

⁸ John Rawls, *Political Liberalism* (Columbia University Press: New York 1993) at 137 [hereinafter: Rawls, *Political Liberalism*].

premises of religious or moral doctrines as illegitimate in the sense that it lacks reasonable justification”.⁹ The denial of legitimacy to such a law is based on the view that there must be *some* connection between the law and myself *qua* an addressee of the law – a connection that establishes some rational reasons to identify the good for myself in the law. The connection must be between the substance of the law and the preferences, desires, convictions or interests of each individual subjected to it. If, under rational examination, no such connection can be detected, then I have no reason to accept the law as legitimate. If, however, I disagree with the wisdom of a given law but would agree that it is based upon the sort of arguments that I can recognize as valid, then a *necessary* condition for its legitimacy has been met. As is clear, the category of PR serves to limit the range of rationales that can be invoked to justify (hence, legitimize) the proposed uses of coercion towards individuals. This requirement applies not only to politicians and legislators but also to all citizens because “ideally citizens are to think of themselves *as if* they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact”.¹⁰

The issue of legitimacy typically arises, from the individual citizen’s perspective, when she asks herself why she should comply with a directive issued by an authority even if she disagrees with the content of this directive. From this point of view, the concept of “legitimacy” serves as a marker to identify the point on a continuum between two extremes: the authoritarian position under which the very fact of authoritative enactment of a directive is a sufficient moral reason for compliance, and on the other side of the spectrum, an anarchistic position under which the fact of legal enactment does not add any weight to moral arguments for compliance, and compliance is always conditional upon our substantive moral approval for the directive. Under a liberal approach, the fact of legal enactment is *an* argument for compliance (and in this, the approach is partly aligned to the authoritarian position), but it is not a *sufficient* reason and the duty of compliance is not absolute (and in this, it is partly aligned with an anarchistic position). The intermediate space that is occupied by a liberal position implies that there is a duty to comply with at least some authoritative rules which are

⁹ Lawrence B. Solum, “Public Legal Reason”, *Virginia Law Review* 92 (2006): 1449-1502 at 1477.

¹⁰ Rawls, “The Idea of Public Reason”, at 135, footnote omitted.

not substantively accepted by a given person – and the task of this idea of legitimacy is to determine what are the criteria, grounds and scope of a moral duty to comply with those rules.

This sense of legitimacy resonates, I believe, though is not fully equivalent, with the approach to legitimacy sketched by Ronald Dworkin: legitimacy, he suggested, neither postulates that only just governments are legitimate (because no existing governments are perfectly just) nor that it is based on consent (this, in Dworkin's view, is also too strong) but rather on a recognition that the government treats citizens with equal respect. "A plausible theory of legitimacy ... must proceed on the ... assumption that when citizens are born into a political community or join that community later, they just have obligations to that community, including the obligation to respect its laws whether or not they explicitly or even tacitly accept those obligations. But they assume these political obligations only if and so long as the community's government respects their human dignity. ... I can have no obligation to a community that treats me as a second-class citizen..."¹¹ Note that Dworkin carefully associates legitimacy with a citizen's obligation "to respect" the law, which is a milder obligation than that of "obeying" or "complying with" it. I think that this is a wise choice of words, and elsewhere I argued at some length about why legitimacy gives rise to the duty of respect rather than compliance¹² – but for the present argument it is not relevant.

It is also important to reflect upon the legitimacy *of what* is at stake in the considerations related to PR. As the whole rationale of PR suggests, we are concerned about the legitimacy of laws, in terms of their content, rather than the legitimacy of the political authority, or of government. Why would that matter, and is it a meaningful distinction? One of the powerful critics of the idea of PR (without actually mentioning the term, but describing and criticizing a conception very much like PR), Joseph Raz, strongly rejected the aspiration of trying to find consensus within a stock of *reasonable* conceptions only, as one possible theoretical approach to dealing with moral diversity, and argued that for the purpose of legitimacy the unreasonable views and people should also be taken into account. (I will return to the question of exclusion of unreasonable doctrines shortly). As Raz says, referring explicitly to the ideas of Rawls and Nagel,

¹¹ Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press: Princeton 2006), at 96-97.

¹² Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press: Oxford 2009) at 12-17.

“every person counts” and “[t]he life and well-being of those with unreasonable views are just as likely to be affected by the actions of political authorities as the life and well-being of other people”.¹³ “[T]heir life and well-being are of moral consequence” – says Raz.¹⁴ This is certainly true, but it is relevant only when we inquire into political legitimacy of *the authorities* (or of the government), and the context of Raz’s critique shows that it is exactly what he has in mind: he explicitly refers to the legitimacy of authority, or legitimacy of government. But when we talk about PR, and posit the idea of exclusion of unreasonable doctrines (the idea which Raz refutes), we have in mind the legitimacy of *specific laws*: of specific exercises of political authority, rather than of a political regime as such. This is the only context in which PR is pertinent because the very principle of PR is meant to serve as a yardstick for evaluation of whether our support for a given coercive law is justified.

To be sure, we *may* have a conception of legitimacy which, *by definition*, ties up legitimacy of the government with that of specific laws, for instance by claiming that a government is legitimate when the laws it issues are, by and large, legitimate, or vice versa, that only (and all) those laws that are issued by a legitimate government are legitimate (with the criteria of legitimacy being content-independent). Under the former definitional convention, legitimacy of the government is accumulated through the issuance of legitimate laws; under the latter, the legitimacy of the government confers legitimacy upon the laws it enacts: the legitimacy of the government as such prefigures, so to speak, legitimacy of its individual acts. But either connection is unhelpful, as any definitional fiat. Legitimacy of the government is, intuitively, only indirectly tied up with the criteria of the content of laws that it issues: it has more to do with (what is usually called) “input legitimacy” in terms of its electoral pedigree, of acting always in accordance with constitutional rules (only some of which are about the substance of the laws), etc. And intuitively, the relationship between legitimacy of the government and the legitimacy of the specific laws is tenuous: neither is it true that all laws of an illegitimate government are necessarily illegitimate themselves, except by virtue of a definitional fiat, nor is it true that all laws of a legitimate authority are necessarily and always legitimate. There may be decisions taken by by-and-large legitimate authorities

¹³ J. Raz, “Disagreement in Politics”, *American Journal of Jurisprudence* 43 (1998): 25-52 at 33.

¹⁴ *Id* at 33.

that breach the principles of legitimacy, for instance due to procedural defects or violation of rights which the regime otherwise respects. As Pettit observes: “there is ... room for claiming in the same sense of the term that while a regime is generally legitimate, certain laws or appointments ... are illegitimate: they happen to breach conditions of legitimacy that the regime generally respects”.¹⁵

2. The Range of Applicability of Public Reason

In a canonical formulation of PR by John Rawls, it is meant to apply to basic justice and constitutional essentials only. “[T]he limits imposed by public reason do not apply to all political questions but only to those involving what we may call ‘constitutional essentials’ and questions of basic justice”, says Rawls.¹⁶ But this restrictive proviso, as a potential defence against some critics (for it allows a defence by saying that what they argue about are specific authoritative decisions rather than constitutional essentials) seems implausible. Rawls himself was vague about the criteria and reasons for the confinement of the scope of PR, saying that “[a] full account of public reason would take up” the question of how constitutional essentials differ from other political issues, “and why the restrictions imposed by public reason may not apply to them; or if they do, not in the same way, or so strictly”.¹⁷ Some Rawlsians undertook to provide such an account. T.M. Scanlon provided two arguments for restricting the use of PR to constitutional essentials and basic justice only, but none is convincing. First: constitutional essentials require special justification because on these matters citizens have a lower practical influence than on matters which are subject to regular legislation.¹⁸ But if citizens, in practice, have a greater chance to affect public decisions on non-basic matters, then it would argue for a *higher* rather than lower urgency of equipping them with some criteria as to which reasons for (advocating) collective action are proper and which are not. If citizens hardly ever can participate in constitutional decision-making, the practical role of the idea of PR with respect to these matters is low. Second, Scanlon

¹⁵ Philip Pettit: *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press: Cambridge 2012) at 139.

¹⁶ Rawls, *Political Liberalism* at 214.

¹⁷ Rawls, *Political Liberalism* at 214-15.

¹⁸ T.M. Scanlon, “Rawls on Justification”, in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge University Press: New York 2003): 139-67 at 163.

points out the “feasibility” issue: on various matters of collective decisions which call for taxpayers’ money it is very hard to expect citizens to make their arguments (e.g. about a construction of a highway) in ways which do not reflect their “competing reasons which ... reflect their comprehensive views”.¹⁹ It may well be that on such distributive issues, where the only aspect of using coercion is in a very thin and indirect way, through the power of taxation, all that matters for public decisions is that the decision corresponds to the distribution of preferences within the community. But still, *some* motives for decision will be excluded: imagine a person arguing that a new highway is necessary in order to serve only one, privileged ethnic group within the state, and that the poor or the unpopular group need not highways in their area. This would be a clear violation of the imperative of PR but will not apply to basic justice or constitutional essentials, and so will go under the radars of theory of legitimacy based on PR restricted to basic structure and constitutional essentials.

In addition, *what* constitutes part of the category of “constitutional essentials” is eminently question-begging, and surely cannot be resolved by appeal to some canonical constitutional texts. Is it a matter of importance, or generality, or abstractness, of a particular rule or directive? Or should we perhaps follow some canonical constitutional texts in deciding about what “essentials” are truly “constitutional”? For instance, Samuel Freeman takes it as obvious that “the abortion issue” is a “constitutional dispute”,²⁰ echoing Rawls himself who had used this issue as an instance to which PR may be applied.²¹ But why should it be so? Most constitutional documents do not resolve the matter in any determinate fashion. Is it because the Supreme Court of the United States determined access to abortion, under some conditions, as a matter of constitutional (though implied) right to privacy? But if this criterion were to be taken seriously, then the category of “constitutional essentials” would become counter-intuitively broad because a great number of sometimes very specific issues have been determined by the Supreme Court under constitutional provisions. And why would the case law of one country, even as important as the US, be a yardstick of what is a “constitutional

¹⁹ Id at 163

²⁰ Samuel Freeman, “Public Reason and Political Justifications”, *Fordham Law Review* 72 (2004): 2021-72 at at 2054 [hereinafter: Freeman, “Public Reason”].

²¹ Rawls, *Political Liberalism* at 243 n. 32.

essential” under a theory aimed at universality if in a number of other democracies the issues which are constitutionalized in the US are a matter for legislative decisions?

The point that I am making is not merely that the category of “constitutional essentials” is fuzzy at its borders but rather that we have no principled criteria at all to distinguish the essentials from non-essentials,²² and even if we had, there would be no good reason to reserve the requirement of PR to the former. If people are entitled to demand and receive public justification of the law which applies to them coercively, and if availability of such public justification is a condition of the legitimacy of these coercive laws, then the distinction between basic justice/constitutional essentials and statutes-based coercion is arbitrary. As Lawrence Solum observed, “most citizens encounter the state most directly and concretely through the coercive exercise of power. In a sense, the basic structure and constitutional liberties lie behind the scene”.²³

So far I have been concerned with the subject-matter scope of PR, and now I will move to the agent-relative scope: to a question about *to whom* the PR imperative applies. Rawls makes it clear that it applies primarily to judges, and then to legislators and citizens only when constitutional essentials are implicated; on non-essentials, political bodies are free to enforce their comprehensive doctrines: “Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do...”.²⁴ But this is puzzling. Suppose the legislature votes on a compulsory health insurance, and for the sake of argument, suppose that it does not implicate questions of constitutional essentials or basic justice. Shall we be happy to have legislators vote on the basis of their PR-incompatible comprehensive doctrines (for instance, refusing insurance to medical procedures which are condemned by their religion)? So when discussing the bearers of the PR-related obligations, I will assume that they fall upon all actors involved in the law-making: legislators and judges alike (as well as on citizens-voters) must live up to the demands of PR. I will adopt a deliberately indiscriminate approach, assuming that the PR (which may be seen as a quasi-

²² This argument is forcefully made by Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press: New York 1995) at 118-120.

²³ Lawrence B. Solum, “Constructing an Ideal of Public Reason”, *San Diego Law Review*: 30 (1993): 729-62 at 738.

²⁴ Rawls, *Political Liberalism* at 235.

constitutional principle), if normatively plausible, binds *all* actors of law-making in the same way.

But of course it is an obvious simplification, and we know that different actors are differently affected *by other constraints* in their choices when engaged in law-making: the constraints are most stringent and canonical in the case of judges, more lenient in the case of legislatures, and even *more* lax in the case of citizens-voters. Judges are so constrained by a duty to provide reasons in terms of legitimate legal sources which should guide their decisions (their understanding of the text of a constitution, of the statute, the force of precedent) that it may seem that no room is left for contemplating the force of other constraints, such as PR: considerations of the established sources of law seem to deplete any room for such moral-political constraints as that of PR. I disagree with this view when it is stated in such a strong way, though a weaker articulation (that judges are less free to resort to PR than are legislators) is eminently plausible: judges must consider how the established legal sources control a given matter, and only then fill the remaining space with the considerations of PR (and other moral-political reason-restraining principles, if applicable. Viewed in this way, Rawls clearly has it wrong when he makes a sweeping statement that “public reason is the sole reason the court exercises”.²⁵ And when he adds that “Beyond [applying public reason, the justices] are to go by what they think the constitutional cases, practices, and traditions, and constitutionally significant historical texts require”,²⁶ he has it the other way round: PR is exercised in these spaces which are left undetermined by the argument from text, precedent etc.

The unfortunate court-centredness of the Rawlsian theory of PR was thrown into sharp relief by Rawls’s insistence that, as a test, we might inquire as to whether a particular argument for a new law belongs to the category of “public reason” by considering whether it could be used in a written opinion of the Supreme Court.²⁷ An idea of the Supreme Court as “exemplar” of PR, in order to maintain its plausibility should be read as referring to an ideal model of the court, rather than an account of the US Supreme Court as it actually functions. As Freeman explains, Rawls “is not saying

²⁵ Rawls, *Political Liberalism* at 235

²⁶ *Id* at 235-36.

²⁷ *Id* at 254.

that the Supreme Court is an exemplar of public reason, but rather that it belongs to the office of a supreme court, as such, to be the exemplar of public reason”.²⁸ This may be a plausible construction of Rawls’s “exemplar” thesis but it has an unfortunate consequence of locating either an exclusive or predominant mission of being guided by PR in courts and taking away responsibility for argument in terms of PR from other political institutions and from citizens.

3. Challenges to Public Reason

As Ronald Dworkin observed, Rawls operates with two understandings of public reason which are not necessarily equivalent.²⁹ The first is revealed in the “equal endorseability by all” condition, and it seems to Dworkin to be too weak; the second is discerned in Rawls’s distinction between political and comprehensive conceptions, with the proviso that public reason must safely place itself within the former in order to fit the “overlapping consensus” – and this version of PR seems to be too strong. As to the first understanding, Dworkin has expressed doubts as to whether PR so understood (in Dworkin’s interpretation it is characterized as the “doctrine of reciprocity”), *excludes* anything at all. As Dworkin argues: “If I believe that a particular controversial moral position is plainly right ... then how can I not believe that other people in my community can reasonably accept the same view, whether or not it is likely that they will accept it?”³⁰ The second interpretation of public reason by Rawls is even more problematic, although for opposite reasons. This is the requirement of locating public reason within the arguments that can be properly considered “political” (hence, positioned within an overlapping consensus) as opposed to comprehensive. This, in turn, seems to be a much too rigorous requirement, compared to intuitively acceptable common practices: to consistently purge public debate from all political proposals made on (controversial) moral or religious grounds would lead to an undue erosion and impoverishment of public discourse, and would carry obvious discriminatory dangers.

²⁸ Freeman, “Public Reason” at 2066.

²⁹ Ronald Dworkin, *Justice in Robes* (Cambridge Mass, Harvard University Press, 2005) at 251-54 [hereinafter Dworkin, *Justice in Robes*].

³⁰ *Id* at 252.

So we have a dilemma: we may identify two alternative readings of PR, but the first reading (“reciprocity”) is much too lenient, certifying almost all views as complying with PR, while the second reading (“overlapping consensus”) is much too demanding, compared to our common sense understandings of reasonableness in public discourse. Does it fully disqualify the very idea of PR as playing a role in a test for the legitimacy of law? I do not think so. As to the first horn of the dilemma - that PR is a much too lenient test which will not be capable of disqualifying almost any regulations - it should be noted that the very fact that someone sincerely considers his or her publicly provided rationale as reasonable does not necessarily mean that this view is justified from a more objectified or interpersonal point of view. Consider again Rawls’s formula of reciprocity: “we must give [the other citizens] reasons they can not only understand ... but reasons we might reasonably expect that they, *as free and equal citizens*, might reasonably also accept”.³¹ The italicised proviso indicates an objectified ingredient to the condition of reciprocity: it is not good enough that proponents are subjectively convinced of the eminent reasonableness of their postulates, but these postulates, when implemented, must satisfy the conditions of free and equal citizenship for all. So it is not the case that citizens meet the reciprocity requirement merely when they sincerely believe that they express political values that others might be expected to endorse: such a belief should be, in addition, “objectively” reasonable.³²

“Reasonable” beliefs, in Rawls’s perspective, are those which are espoused by reasonable citizens (indeed, “reasonable citizens” are defined by their affirmation of reasonable beliefs),³³ and they are not all those who consider themselves reasonable (as Dworkin assumes for the purpose of his *reductio ad absurdum*) but those who have willingness to cooperate with others *on fair terms*, as free and equal, who recognize the consequences of the “burdens of judgment”, who have a sense of justice, etc. ³⁴ Reasonable citizens, Rawls says, “desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept”.³⁵ As Samuel Freeman notes, summarizing Rawls’s approach: “clearly unreasonable conceptions of the good –

³¹ Rawls, “The Idea of Public Reason” at 138, emphasis added.

³² See similarly Michael Baur, “On Actualizing Public Reason”, *Fordham L. Rev.* 72 (2003-2004): 2153-75 at 2159-60.

³³ This, as Rawls says, is an “assumption”, Rawls, *Political Liberalism* at 59.

³⁴ *Id* at 81. Those criteria are also scattered throughout the book, see e.g. *id* at 49-50.

³⁵ Rawls, *Political Liberalism* at 50.

intolerant, bigoted, or aggressive views – will be excluded from an overlapping consensus because their [*sic*] conceptions of the good are incompatible with liberal requirements of justice”.³⁶ Further, Rawls talks approvingly of “deliberative democracy” as the conception that “limits the reasons citizens may give in supporting their political opinions to reasons consistent with their seeing other citizens as equals”.³⁷ Some rationales for legal regulations may be viewed as not universalizable by their very nature; not lending themselves for figuring in the justifications of legal coercive rules, regardless of the subjective convictions of espousers of those rationales.

In fact, Dworkin further concedes that moral positions based on religious convictions are such that not everybody has a reason to embrace them.³⁸ Now *this* would, in itself, be a significant use of public reason (and a significant demonstration that a public reason requirement *does* exclude many moral positions) but surely there is more to it - namely those positions that, under an impartial observer’s test, deny some groups and categories equal moral standing at the outset. And of course, Rawls would exclude the *non*-reasonable conceptions from the stock of comprehensive conceptions which are eligible for ascertainment of PR: there is not even a presumption that racists, religious fundamentalists, neo-Nazis and others who deny free and equal status of all citizens “would be amenable to public reason”³⁹, irrespective of their subjective views about how “reasonable” they are. So Dworkin’s claim that PR has no critical edge is unfounded.

The remarks above, about an “objectified” notion of reasonableness, point to a dilemma. If we define reasonableness too thickly, for the purpose of discerning the stock of doctrines which will yield PR, then the whole device of PR becomes redundant because all the work of justifying the law is done by reasonableness itself. A very thick definition of reasonableness basically substitutes the substantial conceptions of the reasoner for the conceptions of other people who also are the constituency of PR, so to speak. On the other hand, if we define reasonableness thinly, then there is a risk that some repugnant views will make it into the stock of doctrines considered for the purpose

³⁶ Samuel Freeman, “Political Liberalism and the Possibility of a Just Democratic Constitution”, *Chicago-Kent Law Review* 69 (1994):619-668 at 643.

³⁷ Rawls, “The Idea of Public Reason” at 139 n. 21.

³⁸ Dworkin, *Justice in Robes* at 253, emphasis added.

³⁹ Samuel Freeman, “Introduction: John Rawls – An Overview”, in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge University Press: New York 2003): 1-61 at 40.

of ascertaining PR, and could contaminate the law with racism, sexism, or some other illegitimate motives. I am only stating this dilemma without trying to solve it, because any solution must be context-dependent and rely on common sense. It is on a case-by-case basis that we must ascertain whether the requirement of PR that we articulate is thin enough to allow the views with which we disagree on merit but consider reasonable, and thick enough to disqualify conceptions which manifestly deny equality and freedom to other citizens. A particular application of the doctrine of PR should not be biased towards “our” views and at the same time should not be toothless. No abstract solution for finding such a middle road can be articulated but, for functional reasons, i.e. for the reasons of the *functions* that reasonableness plays in the construction, one should err on the side of thin rather than thick criteria of reasonableness, so that the PR device does not become superfluous. Reasonableness should aim at eliminating some clearly unreasonable doctrines but leaving in the space of overlapping consensus a number of comprehensive reasonable doctrines (in which case PR serves a useful function of an effective constraint on reasons in law-making), rather than becoming such a tough filtering device that only one (or very few) comprehensive doctrine will pass the muster, in which case PR is redundant, as all the scrutiny has been already done by applying the reasonableness test.

Let me now move on to the second horn of the dilemma articulated by Dworkin: to the claim that PR is much too rigorous a test because it would disqualify many more justifications than our intuitions or common sense would dictate. This second reading of PR is based on hostility towards admitting “comprehensive”, philosophical-religious arguments into the domain of public discourse, in order to be able to construct “overlapping consensus”. A critic of PR in this second sense may say that it is intuitively plausible that participants in public discourse about law should be able - indeed, even encouraged - to cite, and appeal to, their deep philosophical conceptions, including religious or religion-equivalent ones, based on certain views of the universe, society and individuals.

This suggests that the concept of “overlapping consensus”, if it is to inform a plausible model of PR, must undergo some modifications and refinements in order to make it compatible with widespread liberal-democratic intuitions. One (rather obvious) preliminary thing to note is this: PR (and the overlapping consensus) does not compel

us to admit only reasons which are not part of comprehensive conceptions: it requires us only to dismiss these political reasons which are part of some comprehensive conceptions *but not others*. The very fact of citing or appealing to (or being supported by) a deep philosophical rationale cannot disqualify a given argument from figuring in the PR - *that* would border on the absurd. What matters is that when we refer to our “comprehensive” doctrines, we must appeal only to those which are “reasonable” (in the sense discussed above), and therefore to those which lend themselves to producing “public political values” (the values that all citizens may accept, such as due respect for human life, the ordered reproduction of society over time, or equality of men and women)⁴⁰ which may properly figure in PR. Those values may belong to different “comprehensive” doctrines but it is not embarrassing to political liberalism because “[t]he only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values”.⁴¹ Of course the crux of the matter is *what* balance of political values will be deemed “reasonable” – but here we revert to the substantive (“objective”) criteria of free and equal citizenship etc. And these criteria may well allow for a relatively broad spectrum of “reasonable” political solutions of any given issue (thus mitigating the objection of excessive rigour of PR): “It is true that the balance of political values a citizen holds must be reasonable, and one that can be seen to be reasonable by other citizens; but *not all reasonable balances are the same*”.⁴²

It must be emphasized that what matters in the conception of PR is that we put forward only such proposals *for a coercive law* which may be accepted even by people who do not share our deep philosophical views – which in practice means that these proposals must be able of being defended *also* on some other grounds. In fact, this is what Rawls himself acknowledged in his reformulation of PR by explaining that we may “introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support”.⁴³ Rawls

⁴⁰ These three “public political values” are provided by Rawls as implicated by the question of abortion, Rawls, *Political Liberalism* at 243 n. 32.

⁴¹ Id at 243, footnote omitted.

⁴² Id at 243, emphasis added.

⁴³ Rawls, “The Idea of Public Reason” at 144.

acknowledges the role of *other* forms of discourse, which do not have the form of “public reasoning” (the title reserved for proposals leading to officially adopted laws and policies), such as “declaration” which occurs when “we each declare our own comprehensive doctrine, religious or nonreligious”,⁴⁴ with no requirement of public reason applicable here. This is important because occasionally the requirement of “public reason” is interpreted as if it applied to public debate in general – a requirement, which would of course lead to a radical erosion of public discourse. In fact, however, even such a “declaration” is for Rawls instrumental towards the purposes of public reason: “The aim of doing this is to declare to others who affirm different comprehensive doctrines that we also each endorse a reasonable political conception belonging to the family of reasonable such conceptions”.⁴⁵

But Rawls himself never explicated clearly enough the distinction between open general debate (what he sometimes calls “background culture”) and a discourse leading to authoritative decisions – a point noted by Charles Larmore who reminds us of the distinction between “*open discussion*, where people argue with one another in the light of the whole truth as they see it, and *decision-making* where they deliberate as participants in some organ of government about which option should be made legally binding”.⁴⁶ Larmore further emphasized, improving on Rawls’s self-interpretation of PR, that “the ideal of public reason ... really should govern only the reasoning by which citizens – as voters, legislators, officials, or judges – take part in political decisions (about fundamentals) that will be backed up by coercion and therefore have the force of law. Rightly conceived, it does not thwart the uninhibited political discussions that are the mark of a vigorous democracy”.⁴⁷ A sharp statement by Mark Tushnet: “It would be crazy to suggest that voters have to restrain from invoking religious reasons when they discuss politics”⁴⁸ may well apply to an “open discussion” but not to public discourse where citizen-voters act in their ‘official’ capacity and where the point is to argue for a particular coercive law or policy.

⁴⁴ Id at 155.

⁴⁵ Id at 155.

⁴⁶ Larmore, *Autonomy* at 210.

⁴⁷ Id at 212.

⁴⁸ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press: Princeton NJ 1999) at 91.

The distinction between different realms of public discourse, that of public and open deliberation and that of law-making, may serve as a point of departure in rebutting Jeremy Waldron's harsh criticism of the idea of PR as distorting the rationality and justness of justification. Summing up his discussion of the very idea of justification and reason-giving, Waldron says: "Official or civic deliberation is serious, momentous even, in its consequences, and surely we ought to pay attention to the most serious reasons, whatever their character, when the stakes are this high. ... We need to get it right. But how can we be sure we are getting it right if we restrict the range of reasons we are interested in?"⁴⁹ Now first thing to note about this Waldron's critique is that it is not addressed against PR only but against *any* constraints on the range of reasons which can be provided in justification of public policy (or any other decision, for that matter). Indeed, from the very concept of "justification" (as a practice of providing reasons for action) Waldron infers a principle that it must be "open and inclusive",⁵⁰ and that it "involves no restriction on the range of reasons that it is appropriate to mention".⁵¹ Of course, those reasons which are based on false statements of fact, or which are irrelevant to a given choice, or which do not have a certain normative significance which it is claimed they have, will have to be excluded from the process of justification, though people will frequently disagree about whether any of these conditions are present in a given case.⁵² But, as Waldron claims, these are *the only grounds* on which the very idea of justification "tends to exclude the invocation of statements of reasons".

While this last statement sounds analytical and descriptive, in the context of Waldron's argument it is openly normative. Exclusion of whatever reasons which may have bearing upon a particular decision inevitably detracts from rationality (and often, justness) of the decision. Having reviewed examples of such a detrimental effect of exclusion of reasons upon the decisions reached (a point to which I will return in a moment), Waldron states a more general directive: "to the extent that a given context *is* supposed to involve the unalloyed practice of justification, there should be no

⁴⁹ Jeremy Waldron, "Public Reason and 'Justification' in the Courtroom", *Journal of Law, Philosophy and Culture* 1 (2007): 107-134 at 123 [hereinafter Waldron, "Public Reason"].

⁵⁰ *Id* at 117.

⁵¹ *Id* at 116, footnote omitted.

⁵² *Id* at 116-17.

restrictions on the reasons it is appropriate to cite and no holding back in the search for reasons that might possibly pertain to the merits of the decision under scrutiny”.⁵³

This, remember, is made in the context of criticizing the very idea of PR as a particular device of exclusion of reasons in the process of public justification of coercive laws. Can the “no restrictions on reasons” imperative be applied to this realm? At first blush, it seems counterintuitive: in public matters, especially when leading to a coercive decision or act, we use (often impliedly and tacitly) all sort of rules about excluded reasons. Some of these exclusions are not of absolute strength but nevertheless are important and are psychologically plausible. For instance, Jon Elster seems to capture an important and uncontroversial truth about public discourse when he says that “[i]n a political debate it is pragmatically impossible to argue that a given solution should be chosen just because it is good for oneself. By the very act of engaging in a public debate – by arguing rather than bargaining – one has ruled out the possibility of invoking such reasons”.⁵⁴ It is not an analytical truth but it is nevertheless a strong contingent law of public debate that any appeals to self-interest are usually ineffective and frowned upon.

Consider various rules of evidence which provide for exclusion of evidence derived from unlawful searches and interrogations (the “poisoned fruit” doctrine), or inadmissibility of testimony if someone is subject to a privilege (spousal, or lawyer’s, or priest’s), etc.⁵⁵ No doubt, at least some of the evidence obtained in these ways could be seen as capable of providing the relevant and truthful reasons for a decision, and at the same time their exclusion is widely considered perfectly appropriate. This shows that, in practice, we do not accept a categorical ban on *any* exclusion of reasons in public justification, at least in some areas. And remember, Waldron’s objection to PR, discussed now, was an objection to *any* reasons-exclusion in public justification, and it is on the strength of this general hostility to exclusions per se that he argues against the idea of PR as a special case of reasons exclusion. Interestingly, Waldron himself briefly considers (contra Thompson) the example of exclusionary rules in trial proceedings, and here is how he articulates their rationale: “they bear witness to the fact that justification

⁵³ Id at 122, footnote omitted.

⁵⁴ Jon Elster, “The Market and the Forum: Three Varieties of Political Theory”, in Jon Elster & Aanund Hylland, *Foundations of Social Choice Theory* (Cambridge University Press: Cambridge 1986): 103-32 at 112-13, footnote omitted.

⁵⁵ This example had been used by Rawls in his first extended statement of PR, see Rawls, *Political Liberalism* at 218-19.

and the pursuit of truth are not the only aims of the criminal justice system: we also aim to sustain the dignity of the accused, the purely procedural aspects of the fairness of the process, and the public policy goals implicated in privilege and other exclusionary rules”.⁵⁶ This is a remarkable admission because precisely those same rationales could be provided for many other practices of rules exclusion in public discourse leading up to adoption or change of the coercive law. This seems to fit PR quite well: the dignity of the citizens (in particular those who philosophically may disagree with the adopted law), and the public policy goals having to do with, say, civility and compliance with law, may well be the legitimate aims justifying exclusion of non-public reasons.

The general and abstract point about *any* rule exclusion being anathema to the very idea of justification is further supported by Waldron in a series of examples scattered throughout his article which amount to what I would call an “intuitive-inductive” argument. The structure of the argument is to show that in a number of specific cases of arguing in favour or against a particular legal rule, an intuitively correct position would be only (or best) supported by arguments normally inadmissible under the principle of PR. The upshot is that, if we want to reach those conclusions about law (and we do), we need to disregard the constraints of PR. One example is about an absolute prohibition on torture: a position for which Waldron himself is deservedly famous. His negative example is that of Alan Dershowitz who uses the simple cost-benefit analysis to justify the use of nonlethal tortures under some circumstances.⁵⁷ Waldron’s conclusion about this confrontation: “Without the religious reasons, the case against torturing the terrorist – the case that must be opposed in our reasoning to the saving of hundreds or thousands of lives – consists in some limp rhetoric about personhood and the terrorist’s ‘dignity’”.⁵⁸

But is it really the case that, in a discussion about torture, if we disregard religious arguments and still want to make a sustained anti-torture argument, are we condemned only to some “limp rhetoric about personhood and the terrorist’s ‘dignity’”, as Waldron suggests?⁵⁹ What is inevitably “limp” about arguments based on a conception of personhood and equal dignity? Sure, in the philosophy libraries we can

⁵⁶ Waldron, “Public Reason” at 123-24.

⁵⁷ *Id* at 119-20.

⁵⁸ *Id* at 120.

⁵⁹ *Id* at 120.

find many shallow arguments on dignity – but we can also find many examples of limp and shallow theological arguments. This scepticism about the weight of secular (PR-compatible) arguments in favour of an absolute ban on torture, and about the allegedly “limp” nature of anti-torture arguments in terms of dignity and personhood, is surprising – and the exhibit no. 1 against Waldron’s scepticism is Waldron himself. In his own influential writings⁶⁰ Waldron has unfolded an impressive range of sustained and powerful arguments supporting an absolute ban on torture – and at least in some of his articles⁶¹ he resorted to *par excellence* secular arguments, most of which would be perfectly PR-compatible. In a deservedly famous article which appeared in the *Columbia Law Review*, there is an eloquent philippic against any toleration of torture by law, but in its seventy pages there is not a single religious or theological argument which I could identify. Waldron resorts, among other things, to a “pragmatic case”⁶² for an absolute prohibition (the power to use occasionally torture is very likely to be abused, intelligence officers are likely to lie about what is at stake, etc.),⁶³ and more importantly to an argument that torture is repugnant to the very spirit of “our law”⁶⁴ which consists of the ideas that law is not brutal in its operation, is not savage, and does not rule through abject fear and terror.⁶⁵ In making these irrefutable propositions, Waldron appeals to the values of the “dignity and agency”⁶⁶ of those who are subject to the law, and these appeals to human dignity are anything but “limp”. As a matter of fact, a section of his article devoted to an absolute character of prohibition on torture opens with a question: “[C]an we make sense – *without resorting to religious ideas* – of the idea of a noncontingent prohibition [of torture], a prohibition so deeply embedded that it cannot be modified or truncated...?”⁶⁷ – and an answer is resoundingly affirmative. This is a far cry from an implausible proposition that, shorn of theological justifications, our

⁶⁰ Waldron’s writings on torture have been collected in Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House* (OUP: New York 2010).

⁶¹ Elsewhere he has also developed a religious-based argument against torture, see Jeremy Waldron, “What Can Christian Teaching Add to the Debate about Torture?”, *Theology Today* 63 (2006) 330-43.

⁶² Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House”, *Columbia Law Review* 105 (2005): 1681-1750 at 1717.

⁶³ *Id* at 1716.

⁶⁴ *Id* at 1717.

⁶⁵ *Id* at 1726.

⁶⁶ *Id* at 1726, see also *id* at 1734.

⁶⁷ *Id* at 1711, emphasis added.

arguments for an absolute prohibition of torture are weak, unpersuasive, ineffectual or “limp”.

The idea of constraints-free public justification is therefore deeply implausible, and the quality of public justification of laws does not depend upon there being no constraints on reasons which can be provided for the proposed laws. Constitutional rights serve as constraints upon what can be effectively proposed for legal change (though of course they do not have the same effectiveness on constraining what can be proposed for constitutional amendment): “[I]f one has anything like a robust concept of rights then one also has a robust concept of excluded reasons”.⁶⁸ Similarly, constitutional separation of powers serves as a set of constraints upon what can be proposed for a procedural arrangement or assignment of powers between particular institutions. There may be also what William Galston called “purposive constraints”: purposes served by particular institutions inform the sets of reasons which can be provided in the context of those institutions because “the deployment of those reasons in that arena turns out to be incompatible with the purpose for which the arena was constituted in the first place”.⁶⁹ And of course there may be moral exclusions of reasons: the reasons for violating a person’s or a group’s dignity will be excluded from justification of a law on intrinsically moral grounds. Reasons excluded by such constitutional or purposive or moral grounds are not excluded in a different way than PR excludes non-public reasons under political liberalism: this is not exclusion from the general debate (much less, exclusion under the sanctions of law) but exclusion from constituting effective reasons for a proposed law.

4. Public Reason and Constitutional Law: On Motive-Oriented Scrutiny

Citizens’ and public officials’ arguments for making laws and policies must be sustainable through public reasons only, even if in the process of argument more comprehensive (hence, controversial) conceptions are cited. This brings us to the issue of a critical function of constitutional doctrines in scrutinizing the legitimacy of statutory rules, and especially those that *prima facie* restrict constitutional rights. I have

⁶⁸ William E. Galston, “Symposium Response”, *Journal of Law, Philosophy and Culture* 1 (2007): 191-97 at 194.

⁶⁹ *Id* at 194.

in mind a family of doctrines which refer to “unconstitutional motives” as tainting the legislation as unconstitutional. The main precept behind this approach is the idea that “[t]he limits the Constitution places on government may be understood not just in terms of minimizing certain sorts of harms, but in ruling certain goals out of bounds for government altogether. ... [S]ome prohibitions on government ... speak most naturally to intentions....”.⁷⁰ While appeals to religious justifications will be perhaps the most obvious case of a violation of the principle of PR (“The legitimacy of secular legislation depends ... on whether the State can advance some justification for its law beyond its conformity to religious doctrine”),⁷¹ the requirement of PR is broader than that and extends upon all motivations which are not reasonably universalizable in the way religious arguments are not.

According to some scholars of comparative constitutional law, the US constitutional model is typically “intent-based”, as opposed to the European (“continental”) model which is said to be more “impact-based”.⁷² The impact orientation (and I will be using “impact” and “effect” here interchangeably) is said to be concerned with effects of legislative action or inaction; it is found largely in the German-style “proportionality analysis”, and in particular in its last, most demanding prong (often called, proportionality *sensu stricto*), which consists of comparing the costs of interfering with a constitutional right with the benefit of achieving a constitutionally legitimate purpose (or maximizing another right): the law is constitutional if the benefits of interference prevail over the costs of restriction. Further, the impact orientation is said to reflect a low level of suspicion towards the government, where there is “less need to look for illicit or hidden intentions lying behind its actions”.⁷³

In contrast, the US model of constitutional review (and in particular, the review of constitutionality of restrictions on rights) is said to be mainly concerned with the intentions behind legislative actions, to be reflected in this aspect of “balancing” which consists in finding out whether the legislator used the least restrictive means to achieve a constitutionally important purpose (the “necessity” test), and reveals a high degree of

⁷⁰ Charles Fried, “Types”, *Constitutional Commentary* 14 (1997): 55-82 at 64 [hereinafter: Fried, “Types”].

⁷¹ *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

⁷² Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press: Cambridge 2013) at 64-81 [hereinafter: Cohen-Eliya & Porat, *Proportionality*].

⁷³ *Id.* at 65, footnote omitted.

distrust in legislative intentions or motives. American-style constitutional balancing is said to be an important “tool to smoke-out hidden illicit government motives”.⁷⁴ This proposition, with regard to the United States at least (I will put to one side now the characterization of continental systems as primarily impact-oriented), is well supported by the case law of courts (including the Supreme Court) which inquire into possibly impermissible motives, not only in such obvious areas as freedom of expression (to discern, for instance, whether a restriction has been motivated by intolerance towards a disfavoured opinion or protecting the authorities against criticism – a matter discussed at some length later in this Working Paper), freedom of religion (to see whether the regulation has been enacted out of favouritism or hostility to a religion), or anti-discrimination law (to discern racial or gender prejudice as a possible motive for the law), but also under the Dormant Commerce Clause (to strike down laws motivated by economic protectionism), the prohibition on bills of attainder (to see whether the laws, notwithstanding their formally non-penal character, have been triggered by punitive motives) or even the constitutional right to travel (to discern statutes enacted to serve the purpose of discouraging inter-state migration).⁷⁵

Before going any further I wish to make a terminological caveat. The concepts of “motives” and “purposes” are used in this context often interchangeably although the strict vocabulary meaning is not the same: a motive may be seen as a subjective reason for a particular action while purpose denotes *what* a person (or an institution) wants to achieve, not *why*. Every motive I have may be said, tautologically, to figure as my purpose, but not every purpose which I have actually motivates me to action in order to achieve this purpose. In a legal context, however, the distinction is pedantic, and “[w]hat is apparently assumed by all is that purpose and motives – if somehow motives could be determined – would either have to be used as independently determinative of the validity of an act or would be altogether irrelevant”.⁷⁶ One American scholar, J. Morris

⁷⁴ Id at 68, footnote omitted.

⁷⁵ See Caleb Nelson, “Judicial Review of Legislative Purpose”, *New York University Law Review* 83 (2008): 1784-1882 at 1855-56, and cases cited id at 1855-56 notes 291-293 [hereinafter: Nelson, “Judicial Review”]. For a non-exhaustive catalogue of constitutional clauses under which motive-based inquiries have been conducted, see also Louis S. Raveson, “Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?”, *North Carolina Law Review* 63 (1985): 879-992 at 883 notes 17-25.

⁷⁶ Note, “Legislative Purpose and Federal Constitutional Adjudication”, *Harvard Law Review* 83 (1970): 1887-1903 at 1887 n. 1 [hereinafter Note, “Legislative Purpose”].

Clark, noted that when the US Supreme Court refers to legislative goals which are adequately known, it refers to “purposes”, but when they have not been adequately known, and in particular when the Court refuses to rely on them, they will be labelled “motivation”.⁷⁷ But this usage (described but not endorsed by Clark) seems to put the cart before the horse because whether the Court *should* rely on legislative motives (or purposes) is precisely what is at stake in the discussion, and “motives” should be ascertained independently of what the Court decides to do about them.

Alexander Bickel had attached high importance to the distinction between motives and purposes, understanding the former as a subjective will or reason to act and the latter as a more objectified foreseeable effect of an action.⁷⁸ As Bickel had suggested, some of the difficulty about appealing to legislative motives “is due to confusion between, on the one hand, a finding of motive properly speaking ... and, on the other, a determination of the ‘purpose’ which ... is either the name given to the Court’s objective assessment of the effect of a statute or a conclusory term denoting the Court’s independent judgment of the constitutionally allowable end that the legislature could have had in mind”.⁷⁹ But even apart from the fact that (as will be mentioned in a moment) the courts themselves often are oblivious to this distinction and use the concepts interchangeably, this difference cannot be of constitutional consequence because it is more about the types of *evidence* that a court is allowed to use in order to determine the motive rather than about the legitimacy of the motive inquiry in the first place. It is perfectly intelligible to say that we care about legislative motives but look for their symptoms in the objectified purposes (in the eyes of an impartial observer, for instance), but it would not make any sense to claim that all we are interested in are objectified purposes and we do not care at all whether they were prefigured in any way in legislators’ motives. So the distinction just mentioned attaches to evidentiary matters rather than to the appropriateness of the motive/purpose inquiry.

There is a clear connection between *standards of review* of laws and the call for public justification in terms of appropriate reasons. In principle, though, the very idea that motives matter for a judgment of constitutionality does not necessarily imply any

⁷⁷ J. Morris Clark, “Legislative Motivation and Fundamental Rights in Constitutional Law”, *San Diego L Rev* 15 (1978): 953-1039 at 956.

⁷⁸ Alexander M. Bickel, *The Least Dangerous Branch* (Bobbs-Merrill: Indianapolis 1962) at 208-221.

⁷⁹ *Id* at 209.

particular judicial role in scrutinizing those motives; from an adoption of the general idea that motives/purposes are relevant to the validity of the law, no particular degree on the scale of activism-deference follows. We may well accept the wisdom of motive-based principle and at the same time be willing to adopt a strong presumption of constitutionality of legislative motives. When Laurence Tribe, in his leading textbook on constitutional law, observes that “the Court’s decisions do indicate a general tendency, when all other things are equal, to grant greater deference to Congress and to state legislature so far as the inquiry into purpose is concerned”⁸⁰ – then it does not follow that motives are irrelevant for the Court, but only that the Court will largely accept legislatures motives as proper, and will only question them in exceptional cases.

Whether or not Tribe’s description is an accurate synthesis of the Supreme Court’s current doctrine, it does not undermine the fact that motive-based interpretation is (and not only, should be, in accordance with the PR ideal) part of the American constitutional understanding. But in practice, a heightened scrutiny of laws may be seen as a vigorous enquiry into the reasons behind the law, stemming from an uncertainty, scepticism or suspicion as to the nature of the real reasons behind the law – or at least frustration that no such reasons have been provided by the legislature. The way in which balancing, US-style, is used to flush out unconstitutional (but hidden) motives is normally illustrated by the use of “strict scrutiny” of legislative intrusions of rights: both its tiers, regarding the means-ends relationship, and regarding the significance of the ends of legislation, may be properly seen as aimed at discerning (and, if found unconstitutional, disqualifying) the true legislative motives. Higher-than-usual scrutiny is normally justified by a suspicion that improper motives are at work, and requires a close connection between the asserted aim and the legislative means adopted. In a classic account provided by John Hart Ely, the flushing out of motives through the use of a stricter-than-usual scrutiny operates in the following way:

⁸⁰ Laurence H. Tribe, *American Constitutional Law* (1988 2nd ed.) at 817 [hereinafter Tribe, *American Constitutional Law*].

The 'special scrutiny' that is afforded suspect classifications ... insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fail. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation....⁸¹

In fact, the second aspect of strict scrutiny in the US version, namely a requirement of special importance of purposes asserted when a suspicion of illicit motives is justified, suggests immediately that the difference between American-style balancing and the European-style proportionality *sensu stricto* is wildly overdrawn. Proportionality *sensu stricto*, it may be reminded, requires weighing and balancing of costs and benefits resulting from a legislative action: costs in terms of infringement of a right and benefits in terms of maximizing a constitutionally valid purpose (including another right at stake). It may be thought that it is this third tier of the European proportionality which makes it significantly different from balancing US-style: while the first two tiers of proportionality can be well discerned in the balancing analysis (namely, suitability and necessity, the former being labelled a relationship of means to the ends, the latter, the least restrictive alternative), the third tier of European proportionality, namely comparing of costs and benefits may be thought to be absent from the balancing conducted through the US strict scrutiny. But it is not so: the exclusion of "trivial" (even if constitutionally permitted) purposes under the strict scrutiny presupposes calculus and trade-offs between the purpose and the intrusion on a right. Whether the purpose can be properly deemed "trivial" occurs as a *result* of comparing it with a legislative restriction; "triviality" is an outcome rather than an ingredient of the comparison. If, when suspicion of wrongful motives is justified, we determine that a purpose is too trivial (thus, serves as a pretext) to justify an interference with a right, it is because we have conducted a calculus of these two values: the values of the maximization of an aim asserted by the legislator, and the value of the cost of harm to a right. It is exactly the same comparison and calculus which is conducted in the balancing analysis *sensu*

⁸¹ John Hart Ely, *Democracy and Distrust* (Harvard University Press: Cambridge Mass. 1980) at 146, footnote omitted.

stricto. And it is only after, under a strict scrutiny test, we have established the relative “triviality” of the goal, that may we suspect that the goal as trivial as that must be a cover-up for something else, namely for an unconstitutional motive. “Because a rational actor would not ordinarily make an extremely poor tradeoff, it can be assumed that the government actor in such circumstances was motivated by goals other than what was alleged”.⁸² In this way, a motive analysis (the flushing out of illicit motives) under a strict scrutiny test is functionally dependent upon weighing and balancing substantially the same as in the proportionality *sensu stricto*.

The contrast between motive- and effects-oriented scrutinies should not be overstated. In those actual judicial pronouncements which affirm the importance of motive inquiry, it is usually accompanied by a finding of wrongful effects, for instance of a discriminatorily disparate impact upon different categories of citizens. But this is not embarrassing to a theory of Public Reason as an explanation of these cases or these arguments. There may be different ways of harmonizing these two strands of inquiry. One way may be that effects are seen as a threshold, or a prerequisite of a subsequent inquiry into motives, which completes the argument about unconstitutionality (as the case may be). Another way of harmonization may be by seeing effects as being indicators of most likely motives: in this case, effects stand as a measure of a motive, the latter being the true cornerstone of unconstitutionality. Such an inference from the effect to the motive is based on general empirical knowledge of the world: we know that some effects are usually triggered by some types of motives., and the probability that the effect *E* (for instance, a widely irregular border of a voting district) was *not* brought about by a motive *M* (an attempt to reduce voting power of a particular social group) is minimal. In addition, the substance of an act, combined with the anticipation of its likely effects, will usually constitute an important aid in discerning the motives when we are uncertain as to the most likely motive within a range of motives, of varying importance and validity, which may have affected the adoption of a statute. But occasionally, there may be a reverse connection: the awareness of the purpose behind a legislative measure may help judges ascertain its effects; “Purpose can be quite useful in helping courts to take account of the full range of effects which flow from a given piece of legislation. ...

⁸² Cohen-Eliya & Porat, *Proportionality* at 70.

Consideration of purpose will not answer whether the effects of an act are constitutional. But purpose may help a court to determine what those effects will be”.⁸³ In such cases, as Lawrence Alexander puts it, “the effects theory uses motive only as evidence of effects”.⁸⁴ In particular, this may be useful when the commonsensical, empirical knowledge indicates that an attempt to pursue certain purposes will lead to particular effects, and it is better to strike the law down before those effects, often with irreparable harms, occur.

In actual judicial arguments the line between these different patterns of harmonization may be blurred – but this does not upset an argument that, at least at times, judges implement (*sans le nom*) a Public Reason based theory whereby illicit motives (accompanied by troublesome effects) taint a regulation as unconstitutional. And I am making this proposition deliberately weak (“at times”) because I do not suggest that a judicial scrutiny into motives or purposes will be always appropriate; in fact, often the effect-based inquiry is all that matters because, judging from the effects, there is not even a *prima facie* suspicion that illicit motives may have been at work, (a point to which I will return below). But one must not protest too much. When a legal scholar claims: “Because it is the real world effects of government action that harm or help people, the default criterion for assessing constitutional validity should be the effects of the challenged government action”⁸⁵ – then for a proponent of the idea of PR a red light alert flashes: wrongful motives, when triggering legislation, also “harm people”. We *may* adopt a default rule, as suggested by Calvin Massey, in the sense that it is usually easier to proceed via the effects path, and if we reach a verdict of unconstitutionality, it is the end of the story. But it is not the end of the story if we encounter a suspicion of wrongful motives on the way, regardless of whether we like the effects or not.

So nothing in this paper should suggest that I consider illicit reasons to be a *necessary* condition of unconstitutionality: there may be all sorts of different categories of unconstitutionality, including fundamental legislative error when a legislator, for the

⁸³ Note, “Legislative Purpose” at 1893.

⁸⁴ Lawrence A. Alexander, “Introduction: Motivation and Constitutionality”, *San Diego Law Review* 15 (1978): 925-51 at 931, footnote omitted [hereinafter: Alexander, “Motivation”].

⁸⁵ Calvin Massey, “The Role of Governmental Purpose in Constitutional Judicial Review”, *South Carolina Law Review* 59 (2007): 1- 60 at 3.

best of reasons, enacts an irrational measure which cannot lead to the asserted purpose. For instance, Scott Bice was right to note that the justification process also serves to identify instances in which the negative *effects* of governmental action are a sufficient basis for invalidation under ‘racial’ equal protection, even though that action is not caused by racial prejudice.⁸⁶ This is obvious: the fact that illicit motivations contaminate a particular piece of legislation with a special type of defect does not mean that it cannot be defective for any other reasons. Removing prejudice (or, for that matter, sectarianism, irrationality and other motivations that do not pass the test of PR) is an important but not the only task of constitutional review. Moreover, in some cases an exclusive emphasis on motives may have perverse consequences: many commentators committed to the case of racial equality in the United States deplored *Washington v. Davis*⁸⁷ and its progeny, because making discriminatory motive a necessary factor in a successful claim for discrimination reduced the chances of overturning policies with clear disparate racial impact.⁸⁸ This is not a criticism of a motive-oriented scrutiny, but only of the *exclusivity* of such scrutiny, which is not a wise approach to take. And, to repeat, there will be cases when the impact is all that is needed to invalidate a law; in addition, it should be stressed that under some constitutional provisions the impact-based scrutiny will be more natural than a motive-based scrutiny: “some provisions are not understood to impose any purpose-based restrictions on legislative power”.⁸⁹ But also the reverse is true: if wrongful motives may be seen as a *sufficient* ground for unconstitutionality (in line with a general theory of Public Reason) then their connection with the effects inquiry is contingent rather than necessary. Going back to the “harmonization” of the two strands of inquiry, as we noted, very often (perhaps almost always) effects will figure prominently in the motive inquiry: either as a threshold, opening a prima-facie case for a suspicion that wrongful motives were at work, or as evidence for wrongful motives, or both. But because this connection is contingent rather than necessary, it need not *always* be the case, and we may have access to evidence about wrongful motives which does not rely (or which relies only in a

⁸⁶ Scott H. Bice, “Motivational Analysis as a Complete Explanation of the Justification Process”, *San Diego L. Rev.* 15 (1978): 1131- 1140 at 1133, emphasis added.

⁸⁷ 426 U.S. 229 (1976).

⁸⁸ The literature is voluminous; among the early critical comments on *Washington v. Davis* along these lines, see Kenneth L. Karst, “The Costs of Motive-Centered Inquiry”, *San Diego L. Rev.* 15 (1978): 1163-66.

⁸⁹ Nelson, “Judicial Review” at 1786.

very thin way) on effects of a regulation. In *Village of Arlington*,⁹⁰ Justice Powell, in affirming that impermissible motives behind official action are a necessary element of a finding of discrimination, listed a number of effects-related types of evidence for impermissible motives (such as a clear pattern arising of state action, which is unexplainable in any other way than as impermissibly based on race, in which case “[t]he evidentiary inquiry is ... relatively easy”),⁹¹ and then went on to say: “The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action...”⁹²

This shows that we *may* occasionally have direct insight into legislative motives, without the intermediary of effects which may or may not be a useful evidentiary tool. And the sources of this direct insight may range from the statements by members of the legislature themselves, including from legislators testifying themselves, in extraordinary situations, before the courts,⁹³ through testimonies by supporting administrative staff in legislatures⁹⁴ or by other decisionmakers whose views may illustrate motivations of those who enforce the law, to various minutes, reports and proceedings of legislatures. A legal scholar recently summarized the trend: “modern-day judges are perfectly willing to go beyond the objective indicia of legislative purpose when investigating whether facially neutral laws were actually motivated by illicit racial considerations”.⁹⁵

It does not follow that any American judge would ever decide the case of discrimination based on motives-inquiry *only*; in fact, it is rare that US courts would rest their judgment solely on the motive inquiry in any constitutional case. In a 1997 case of an alleged retroactivity in criminal law, the Supreme Court addressed an argument that a purpose of the change in legislation was to increase the quantum of punishment, and said: “Whether such a purpose alone would be a sufficient basis for concluding that a law violated the *Ex Post Facto* Clause when it actually had no such

⁹⁰ *Village of Arlington Heights v. Metro. Hous. Develop. Corp.* 429 U.S. 252 (1977).

⁹¹ 429 U.S. at 266, footnote omitted.

⁹² 429 U.S. at 268.

⁹³ 429 U.S. 268.

⁹⁴ *Miller v. Johnson*, 515 U.S. 900 (1995).

⁹⁵ Nelson, “Judicial Review” at 1851, footnote omitted.

effect is a question the Court has never addressed”.⁹⁶ The Court occasionally even said explicitly that it would not invalidate an otherwise legitimate action simply because an illicit motive was present,⁹⁷ though it is doubtful whether this assurance can be taken seriously because the requirement of motive for disparate impact cases does precisely that.

So in so far as the theory of Public Reason postulates that wrongful (because non-public) motives are sufficient to taint the law as illegitimate, this is not fully mirrored in the current US law, which is tentative about this point and where the wrongness of motives usually enters into the picture in conjunction with invidiousness of effects. (And this unwillingness to consider wrongful motives alone, as sufficient ground for unconstitutionality, was echoed in the past by some influential academic pronouncements, such as that “it is altogether possible for a law which is the expression of a forbidden motive to be a good law”⁹⁸ – something that, to a proponent of PR theory, is a contradiction of terms). In any event, the point of the argument here is to show that we *may* have motive inquiry in a “pure” form, which does not resort to effects as evidence for wrongful motives. As Charles Fried observed, “Just as we take an individual’s statement that he acted from a particular motive as indicative of his intent, so when we find such statements in, say, the legislative record we make the same attribution to the body as a whole”.⁹⁹

Of course, often it will be difficult to actually distinguish effect- and motive-based inquiry. One reason for this is that inquiry into effects can be addressed either to the actual effects, as they have already occurred at the time of constitutional *challenge*, (which may include unintended effects and side-effects of the law) or into predicted effects, at the time of *enactment* of a rule. The latter inquiry is the only possibility when there is facial challenge to a rule, but is also applicable to a rule as applied. This may be for various reasons. The actual effects of a rule at the time of a challenge may be different from their effects at the time of enactment or even at an early stage of the rule being in force; the effect may be influenced by changes circumstances in the world

⁹⁶ *Lynce v. Mathis*, 519 U.S. 433, 444 (1997).

⁹⁷ See e.g. *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000).

⁹⁸ Joseph Tussman & Jacobus tenBroek, “The Equal Protection of the Laws”, *California Law Review* 37 (1949): 341-381 at 360.

⁹⁹ Fried, “Types” at 61, footnote omitted.

impacting the rule. As Professor Alexander observed, “A rule’s present and predicted effects may be proper when enacted but improper at some later time, or vice versa”.¹⁰⁰ But it is generally thought that changing an initially proper rule which became constitutionally improper due to changed circumstances is typically a role for a legislator rather than the judiciary. It would seem to go too far in extending the judicial review into a function of monitoring the changing constitutionality of a rule over time if the rule had already been correctly found to be constitutional at an early stage of its operation. For instance, if at a time $T-1$ a judge finds an affirmative-action programme constitutional, because (for the sake of argument) it significantly contributes to a more “diverse student body” at a university,¹⁰¹ will it be proper (short of overriding the deep rationale for the former decision) for a judge at a time $T-2$ to assert that precisely the same type of programme has outlived its rationale (for instance, because a sufficiently “diverse student body” has been already achieved in a given university) with a consequence that the programme, in its actual effects, has become unconstitutional? Such a change of a constitutional qualification will come as a result of a complex empirical inquiry which is normally seen to be outside judicial competence and expertise. But if the effects are measured as predictions at the time of enactment, regardless of the actual effects at the time of constitutional challenge, then they are virtually indistinguishable from legislative intentions and purposes. It would be pedantic in the extreme to claim that the effects anticipated, expected and hoped for by the legislator are separate from the legislative motives, intentions, and purposes. In fact, they are one and the same.

An appeal to legislative motives or purposes in US constitutional law is often implicit only, but this does not make it any less powerful -- except that to discern it one has to engage in an interpretation of judicial decisions going behind a mere reading of their texts. An example of such an interpretation is provided by an important article of 1994 by Richard Pildes, in which he provides an account of constitutional adjudication in contrast to a balancing-of-rights account.¹⁰² Rather than the Court engaging in balancing of competing rights, Pildes claims, it can be better seen as engaging in a two-

¹⁰⁰ Alexander, “Motivation” at 936, footnote omitted.

¹⁰¹ See *Grutter v Bollinger*, 359 U.S. 306, 325 (2003).

¹⁰² Richard H. Pildes, “Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law”, *Hastings L.J.* 45 (1994): 711-51 [hereinafter Pildes, “Balancing”].

step inquiry: defining boundaries between different spheres of authority, and then articulating the appropriate principles that legitimate state action in a particular sphere under scrutiny. In the latter tier of reasoning, what is crucial for the Court is to see what principles – what purposes for state action – are appropriate to a given sphere, and which constitute excluded reasons: purposes which, considering the proper collective understanding of a given sphere, must not figure in justification of state action. The latter principles act very much as Raz’s exclusionary reasons: reasons not to act on certain reasons which are pre-empted by acceptable meanings of a given sphere of state authority, and this makes them analogous to Public Reason (as described earlier in this Working Paper as a Razian exclusionary rule).¹⁰³

This is a rough – but I hope, accurate – paraphrase of Pildes’ theory. Interestingly, the first dimension of the analysis reads very much as applying to constitutional law the celebrated idea of Michael Walzer about separate and tightly demarcated from each other “spheres of justice”, to be controlled by distinct principles applicable as they are to one sphere but not necessarily to another, and informed by collective understandings of a particular public good subject to social distribution in a given sphere.¹⁰⁴ Even strikingly similar language is used, about “carv[ing] up social and political place into distinct spheres”.¹⁰⁵ But from the point of view of our subject-matter here, it is the second dimension of Pildes’ theory that is more relevant, namely identifying the “excluded reasons” in particular spheres of authority scrutinized by the Court: “recognizing that certain reasons are simply excluded from being acceptable bases for action”,¹⁰⁶ and certifying certain reasons as appropriate to given state action. This is often only *implicit* in the Court’s reasoning but no less significant for that.

Consider one particular case-study provided by Pildes: that of voting rights. Pildes compared two of the central cases in this area which at first blush may seem inconsistent in method and in substance: *Lassiter v. Northampton County Board of Elections*¹⁰⁷ and *Harper v. Virginia Board of Elections*.¹⁰⁸ In *Lassiter*, the Court upheld a literacy test as a condition of the franchise; in *Harper*, seven years later, the Court

¹⁰³ See Part 1 of this Working Paper.

¹⁰⁴ Michael Walzer, *Spheres of Justice* (Basil Blackwell: Oxford 1983) at 6-10.

¹⁰⁵ Pildes, “Balancing” at 723

¹⁰⁶ *Id* at 714.

¹⁰⁷ 360 U.S. 45 (1959).

¹⁰⁸ 383 U.S. 663 (1966).

struck down a requirement to pay state poll taxes as conditioning an exercise of the right to vote. The confrontation is interesting because, in the minds of many (including myself), *both* outcomes are unacceptable, and yet Pildes explains the difference by reference to the proper understanding of a social practice in a given sphere, and the resulting implications for excluded (or approved) reasons: “Literacy tests and poll taxes differ, in Court’s view, precisely because they rest on different justifications and reflect different theories about the nature of voting”.¹⁰⁹ In *Lassiter*, Pildes claims, “[t]he justification for literacy tests is that they help define a political community with the relevant competence for political participation”;¹¹⁰ in *Harper*, however, “the very justification for poll taxes is in itself the obstacle to their constitutionality”.¹¹¹ The same conception of the nature of voting, and of the political community, may support both decisions because in one case, the justification is found as continuous with the broader theory of voting, and in the second case, it is contrary to it.

One may of course object to the outcome in *Lassiter*: there may be all sort of grave problems with the literacy test, also from the point of view of what idea of political community it sustains when viewed as a legitimate reason for restricting a right to vote. Significantly, and today somewhat distressingly, some judges – including very prominent ones – believed that literacy tests and poll tests are actually based on the *same* or very similar justifications, and are believed to be equally related to the task of “promot[ion of] civic responsibility”.¹¹² In his dissent to *Harper v. Virginia State Board of Education*, Justice Black (whom Justice Stewart joined) connected the poll tax requirement with a broader political philosophy of voting, suggesting that “it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means....”.¹¹³ And soon after he referred to *Lassiter* claiming that literacy tests “find justification on very similar grounds”.¹¹⁴ This may suggest that, under some philosophical understandings of the voting in a

¹⁰⁹ Pildes, “Balancing” at 743.

¹¹⁰ *Id* at 743

¹¹¹ *Id* at 744.

¹¹² *Harper v. Virginia State Board of Education*, 383 U.S. 663 , 685 (1966) (Black, J., dissenting).

¹¹³ 383 U.S. at 685 (1966) (Black, J., dissenting).

¹¹⁴ 383 U.S. at 685 (1966) (Black, J., dissenting).

democratic state, literacy and property tests stand or fall together – differently than under Pildes’ interpretation. (While they stand together in Justice Black’s dissent in *Harper*, they fell together under the Voting Rights Act of 1965, the successive amendments of which gradually led to a permanent ban on literacy tests throughout the nation by 1975).¹¹⁵ But this is largely beside the point; we will always disagree about the substance of a particular reason and its relevance to the broader nature of a particular constitutional practice, while agreeing that *some* connection between such a motivating reason and the outcome is crucial to the finding of (un)constitutionality – which is the main point being pressed in this paper.

5. Case Study: Freedom of Speech

The salience of motive-oriented scrutiny is clearly visible in the field of freedom of speech with respect to which, some time ago, it was observed that “for free speech problems regarding the exchange of ideas, the challenging party establishes a first amendment violation by showing that the decisionmaker’s action was motivated solely by ideological considerations likely to compromise the rights to acquire information or ideas, or subtly to influence the party’s beliefs....”.¹¹⁶ More generally, and more recently, Elena Kagan argued in her wide-ranging article that “First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with it”.¹¹⁷

Speech may harm people – and regulation of speech oriented towards eliminating or reducing harms is compatible with the principle of PR. But regulation of speech may also be based on hostility towards ideas expressed or willingness to screen out some information or opinion from the public domain – and these motives for suppression are illegitimate; they are incompatible with PR because they would not be endorsable by the

¹¹⁵ For a brief history of this legislation, see Samuel Isacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press: New York 2012, 4th ed.) at 56-57.

¹¹⁶ John Donovan, “Unconstitutional Motivation Analysis and the First Amendment: The Further Demise of a ‘Wise and Ancient Doctrine’”, *Case Western Reserve Law Review* 33 (1983): 271-293 at 291-92.

¹¹⁷ Elena Kagan, “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine”, *University of Chicago Law Review* 63 (1996): 413-517 at 414.

holders of those opinions or information. Much of the debate about a proper role of government in regulating speech centers around a distinction between harm-based and hostility-based restrictions of speech. The line between both types of motivation can be “exceedingly fine”,¹¹⁸ but in principle this distinction (corresponding, as it does, to PR-compatible and PR-incompatible motives) explains much about the First Amendment speech jurisprudence. This line marks a difference between “government censorship” and “legitimate, reasonable, neutral justifications” (based on prohibiting “special harms”)¹¹⁹ of speech regulation.

This is where the motive for restrictions acquires crucial importance. The general principle governing the US First Amendment jurisprudence may be formulated as follows: restrictions that express a viewpoint that is preferred (or, conversely, disliked) by the government should be subjected to very strong scrutiny. By implication, restrictions that are viewpoint-neutral, and which do not discriminate among different viewpoints, may be subject to more lenient scrutiny because there is little reason for suspicion that they result from improper governmental motives. The latter restrictions are sometimes presented as content-based rather than viewpoint-based, which is imprecise: I will return to this point a little later.

But first I wish to consider the relationship between harm-based restrictions of speech (which, presumptively, are perfectly unimpeachable from the point of view of PR) and content-based restrictions based upon hostility to the point of view, which do not pass the muster of PR. Is it a distinction with a difference? Take an example of a restriction which would command a quasi-universal endorsement even by the most radical libertarians: that of child pornography. A proponent of a viewpoint-based theory (a theory which presumptively prohibits viewpoint restrictions) may say: this restriction is perfectly compatible with my theory because it is targeted at a very special kind of harm rather than a viewpoint: it is not a “viewpoint” (which might be articulated as the opinion that exploiting children for sexual purposes is proper) which is the target of the restriction but the real harm for children. A proponent of viewpoint-based theory may cite Geoffrey Stone’s formula that “the government may not restrict expression simply

¹¹⁸ Id at 422 n. 27.

¹¹⁹ For this distinction, framed in these words, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 434 (1992) (Stevens, J., concurring).

because it disagrees with the speaker's views",¹²⁰ and maintain that, in the case of child pornography the restriction is imposed not simply because of the disagreement with a pornographer's perspective: it just so happens that pursuing the aim of prevention of a special harm coincides with the effect of restricting the viewpoints which are conducive to the harm. The primary aim, the argument may go, is to avoid harm, and "[t]hat aim might dwarf, or even be unaccompanied by, any bias toward the point of view expressed".¹²¹

The italicized words in the quote from Steven Shiffrin indicate a theoretical problem: can we really imagine a harm-oriented regulation of speech completely "unaccompanied by" any dislike to the point of view expressed? At a minimum, there will be always a "point of view" that the harm claimed by the lawmaker is insignificant, or is not harm at all. But this harm-viewpoint connection is trivial: we can always concoct a "point of view" parallel to the task of harm-reduction. When, for instance, a regulator wants to minimize an obvious harm arising from false or misleading advertisements by lawyers without necessarily at the same time targeting all other advertisements (an obvious content based regulation),¹²² we can always attribute it to a "viewpoint" that the harms of false advertisement by this professional group are of special character – but this attribution is not interesting, because this "viewpoint" description does not add anything to the harm language. What is more interesting and important for our purposes is an opposite situation: can we imagine viewpoint-oriented restrictions unaccompanied by targeting of a harm? Because if we cannot, and if (as some believe)¹²³ any putative viewpoint-based restriction in fact collapses into harm reduction, the idea that viewpoint-based restrictions reveal illicit motivations is in trouble.

¹²⁰ Geoffrey R. Stone, "Content Regulation and the First Amendment", *William & Mary Law Review* 15 (1983): 189-252 at 227, emphasis added, footnote omitted.

¹²¹ Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Princeton University Press: Princeton 1990) at 18, footnote omitted, emphasis added.

¹²² See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In this decision, the Supreme Court invalidated a law which would ban even truthful advertisements by lawyers, but at the same time Justice Blackmun, who delivered the opinion of the Court, suggested that a law targeting false advertisements by lawyers (even without reaching false advertisements by other branches of industry or professions) may be constitutional, id at 383.

¹²³ This is the view by Tribe, *American Constitutional Law*, at 925.

Or is it? The very fact that we can identify content-based speech regulations which are fundamentally harm-oriented, with an insignificant viewpoint-dislike ingredient, is significant for the application of the idea of PR in constitutional law: such laws will not, normally, lend themselves to the search for illicit motives. Whether we encounter an opposite scenario: a viewpoint-based restriction which seems harm-insensitive, may therefore be of a lower importance for the PR theory: even if we answer the question in the negative, there will still be room for PR, at least in certifying PR-compatibility of harm-oriented speech regulations. Perhaps we can say this: viewpoint-based restrictions which look harm-insensitive occur when there is a significant disagreement as to whether a given speech is indeed harmful, and even if so, what is the severity of harm and whether it prevails over the harms of restrictions. When, however, there is a high degree of consensus about the harmfulness of speech, and about its gravity which is likely to easily prevail over whatever costs of restrictions (as in the case of prohibition of child pornography), we do not need to reach the viewpoint-sensitive argument. It is redundant; it does not add anything to the argument that the gravity of harm prevails over the harm of regulation. (This is particularly visible in the case of so-called “fighting words”: the articulation of a “viewpoint” targeted by a legislator does not add anything to our firm and widely shared views about the harm arising from verbal assaults captured by this concept).¹²⁴ When, however, there is a degree of disagreement and uncertainty about the harm of speech and about its weighing and balancing with the harm of regulation (as in regulating defamation of public officials, hate speech or milder forms of pornography), the viewpoint-oriented analysis acquires a real bite. A viewpoint-characterization of a regulation may be therefore parasitic on the fact that the assessment of harm in question is controversial.

But this may be too quick. So far the argument proceeded as if the concept of “harm” applied to freedom of speech as to any other legally protected individual freedom, namely, that an identification of net harm (harm of speech prevailing over the harm of regulation) was all that is required to justify restriction. But this perspective disregards the fact that the principle of freedom of speech is special compared to

¹²⁴ In a canonical formulations, they are described as “those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace”, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

freedom protected under the harm to others principle, and that this special character means that the government has to produce weightier justifications for restricting freedom of speech than for restricting many other freedoms. As a result, a certain degree of harm which would justify restriction of non-communicative action must be tolerated under the principle of freedom of speech which is not simply reducible to freedom simpliciter. There are many arguments which can be provided for such an understanding of freedom of speech, and many justifications for such a special immunity of this freedom to a simple harm-benefit calculus, but there is not room for this discussion here, so I can only refer a reader to my more extensive discussion of this understanding elsewhere.¹²⁵ What matters for our discussion here is that one of the arguments for immunizing freedom of speech from normal restrictions on freedom simpliciter, that is, from an ordinary harm calculus, is that harm following from speech may be often mitigated by counter-speech (“more speech” as a remedy to bad speech), or by the fact that people by-and-large are unlikely to become persuaded by much of the despicable speech, or that the government may have special incentives to underestimate the benefits and overestimate the harms of putatively bad speech, etc. These are the factors which, under many convincing theories of freedom of speech, occur in the case of speech but not necessarily of many other exercises of human liberty, and they argue for a much greater prudence in regulating speech compared to regulating various other individual freedoms.

But note that some exercises of speech lend themselves better to this analysis better than others. Generally, various mitigating circumstances as mentioned a moment ago consist in the fact that for speech to become harmful, it must be heard, understood and endorsed by other people; in other words, that it must be mediated by other people’s minds. The harm occurs when other people (normally, many people) become convinced by the speaker’s message: for instance are convinced by his racist hatefulness, or misleading advertising, or degrading opinions about someone. These cases coincide with content regulation, because the harm arises out of the content which is imparted upon the public space. And so when we talk about content regulation, we have in mind

¹²⁵ Wojciech Sadurski, *Freedom of Speech and Its Limits* (Kluwer: Dordrecht 1999), chapter 1. For a classical discussion of the principle of freedom of speech as a special, independent principle, not reducible to the general principle of freedom and to a simple harm calculus, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press: Cambridge 1982) at 5-10.

regulation of speech the harmfulness of which occurs only, or primarily, through the intermediation of the hearers' (or readers', or viewers', etc.) minds, and when we may hope that a number of mitigating factors, just mentioned, may occur. That is when content regulation discourse is relevant.

But there are situations which do not fit this scenario: when the harm is produced without, or with very insignificant, mental intermediation of the audience, and when we can scarcely count on the audience offering such mitigating factors as "counter-speech". "Fighting words" is a paradigmatic category of speech where mental intermediation of the audience plays almost no role in producing the harm. The harm occurs, as it were, in the moment and by the very fact of uttering certain words in a certain fashion, and the fact that no persuasion of hearers is instrumental to producing harm implies the inappropriateness of describing the situation in terms of "viewpoint" or "content" of the speech. Another paradigmatic example of such cases will be child pornography, in so far as the harm consists fundamentally in a crime committed to children used for the production of such films or pictures. The same harm occurs when national secrets are passed, through communicative action, to an enemy, or in insider trading, also through passing of information. The fact that such actions usually do not even register in our minds as "speech", for the purposes of protection of freedom of speech, may be largely due to the fact that the usual effects connected with speech, which renders it deserving of presumptive protection and having to do with the effects of persuasion, do not occur here. There is no act of persuading anyone of anything in order to produce harm instantly; there is no "perlocutionary"¹²⁶ effect of the speech which is required for production of the harm. In such cases we do not need any content- or viewpoint-based description because it does not add anything to an account in terms of harm.

Of course, there will be cases in which it may be difficult to assign a given expression to one or another of the categories just described, and there will also be expressions which have mixed consequences: both harm in terms of persuading others and in terms of an instant cost to the target (defamation may be seen to be such a mixed case, where the wrong consists both in infringing immediately the dignity of the defamed person, and in lowering her reputation in the eyes of others). There will be also

¹²⁶ On "perlocutions" see John Searle, *Speech Acts* (Cambridge University Press: Cambridge 1969) at 45-47.

cases where, although the wrong requires mental intermediation there is nevertheless a small likelihood that the usual “mitigating factors” countering the effect of bad speech will be effective (this may be in the case of misleading advertisements, where we normally have a little capacity to verify the truthfulness of ads before we have harmed ourselves by relying on them). But for our purposes here, only a highly stylized distinction between two categories of harm-producing speech is sufficient. In the first category, when the harm is produced by “mental intermediation” of the audience, the language of viewpoint or content is perfectly apposite, because the causation of harm is necessarily dependent upon the content or viewpoint being absorbed mentally by the audience. In the second category, this factor of harm-producing intermediate processes of understanding, interpreting and absorbing the message is insignificant, so we may talk about harm directly, in isolation from the content or viewpoint because the latter concepts do not add anything to what we already know: that certain kinds of speech produce harm.

So far I have been treating content-based regulations in an undifferentiated manner, but now is the time to move on to the point foreshadowed above: a distinction between content-based (as a broader notion) and viewpoint-based (as a narrower notion) restrictions. These two notions are sometimes used interchangeably, and the very idea of a viewpoint-based approach is sometimes captured by the concept of “content-based” restrictions. As Justice Stevens observed in his concurrence in a famous “cross-burning case”: “As we have long recognized, subject-matter regulations generally do not raise the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations. Thus, in upholding subject-matter regulations we have carefully noted that viewpoint-based discrimination was not implicated”.¹²⁷ The question is how to explain this difference?

In fact, the difference makes good sense if we adopt a template of motive-oriented approach to freedom of speech jurisprudence. It is not necessarily the case that subject-matter regulations do not implicate a motive scrutiny, or even that they implicate motive scrutiny to a lesser degree than viewpoint regulations. To be sure, viewpoint regulations seem to evoke improper motivations more urgently and obviously than subject-matter

¹²⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 434 (1992) (Stevens, J., concurring).

motivations: Geoffrey Stone captured this intuition well saying that “the probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint... than when it is content-neutral”.¹²⁸ But the main point I wish make is that, within a subset of content regulations, viewpoint regulations implicate different motivations than subject-matter regulations do, and that it is the more invidious character of the motivations likely to trigger viewpoint regulations which explains our (and the judges’) higher degree of hostility towards viewpoint- than towards subject-matter regulations.

A hint about the nature of the difference may be suggested by an already quoted phrase in Justice Stevens’ concurrence in *R.A.V.*: “subject-matter regulations generally do not raise the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations”.¹²⁹ These two defects of viewpoint regulations are missing from subject-matter regulations – but if so, then what is the concern about subject-matter regulation that triggers its higher scrutiny than content-neutral regulations (i.e., regulations of time, place and manner – which, after all, may greatly reduce the circulation of ideas and information, but if they are not indirect forms of content regulation, do not raise suspicion of illicit governmental motives), though admittedly lower than in the case of viewpoint regulations? There must be something about subject-matter regulations that makes them revealing of some wrongful governmental motives, but not that wrongful as in the case of restrictions based on viewpoint.

We do not need to work particularly hard to reconstruct a possible defect in governmental motivation for the first type of restriction: it is an official dislike (or its opposite, official preference) for a particular viewpoint, ideology, opinion. But what is a likely and at the same time reprehensible motivation for a government’s selection of issues worth discussing and debating, and by implication, issues not worth discussing in public? Let me anticipate my conclusions: the likely motive behind such a preference or reprobation for an entire subject-matter is the one of paternalism, and paternalism

¹²⁸ Geoffrey R. Stone, “Content Regulation and the First Amendment”, *William & Mary Law Review* 15 (1983): 189-252 at 230.

¹²⁹ 505 U.S. at 434 (Stevens, concurring).

implicated in subject-matter restriction is likely to be less objectionable than the sort of intolerance for point of view discernible through a viewpoint regulation.

In terms of effects, the distinction between two types of intervention is clear but normatively non-conclusive: subject-matter intervention impoverishes public debate by removing a particular issue from the agenda while viewpoint regulation skews the debate in a particular direction, favored by the government. Now both these effects may be deplored as the case of governmental “censorship” but they work differently, and it is possible that the effects of agenda-narrowing are more tolerable than the effects of privileging a particular viewpoint. Or not. Suppose a public university refuses to fund any student activities (a student newspaper, for instance) having as its object a discussion of religious issues, from whatever perspective, and then under a different scenario, the same university refuses funding only to pro-religious (or, if you like, only atheistic) groups.¹³⁰ The latter effect may be seen to be more reprehensible because the debate has been biased in a direction expected by the government. But the impoverishment of the debate in terms of subject-removal may also have devastating effects on public discourse. And there may be something instantly paradoxical about the legitimate power of the public body to entirely remove a particular subject from the forum, but not to prohibit only some viewpoints while maintaining others intact: doesn't the greater power include the lesser? So we really need to reconstruct the most likely motives of official action in both cases to appreciate the different status of both types of restrictions. (And to facilitate the argument, I will sharpen the distinction by assuming that we may easily distinguish between viewpoint- and subject matter regulations – something that, in real life, is far from obvious).¹³¹

So going back to our example of a public university refusing any funding to a student group which intends to discuss religious issues: a condition of the grant will be that religion will not be on the agenda. What reasons for such a regulation hitting the whole subject matter might the university have? To make our thinking sharper, we must exclude, for the sake of argument, indirect viewpoint-discrimination as an actual though unstated motivation: we must assume that we have checked for a situation where the

¹³⁰ This example roughly corresponds to the facts of *Rosenberger v. The University of Virginia*, 515 U.S. 819 (1995).

¹³¹ This distinction is crucial for the argument in Justice Souter's dissent in *Rosenberger*, 515 U.S. 819 at 892-98 (Souter, J., dissenting).

subject is a proxy for a viewpoint. And we must disregard purely legal arguments, which will be most obvious: the university will most likely argue in terms of constitutional separation of state and religion, non-establishment of religion etc. We need to find the likely moral or political arguments because what we search for is not a purely formal characterization of the official action but the best, or the most likely, justification of such action.

In my view, the most likely justification will be a view that discussing religion is, at least under some circumstances and in some settings (those which are relevant to the university funding) not good for the discussants themselves, for instance because it is divisive, brings or amplifies antagonisms within the student body, diverts their attention from more pressing issues or from their studies, etc. Now each of these rationales may sound silly (and probably they are silly, to some extent), but they are not outright absurd, and they are not inconceivable as rationales for such a refusal. In fact, they seem to me to be the most likely explanation for such an action (again, if we have discounted indirect discrimination, *arguendo*, and also formalistic-legal arguments). And this is, of course, a paternalistic argument *par excellence*: intervention in an action for the benefit of wilful, adult participants, against their avowed preferences.

As we know, no regulation is based on a single rationale, and we can think of some other, non-paternalistic motivations for our example: the university may fear disorder at the campus arising out of religious antagonisms, for instance. What matters for the characterization of a regulation as paternalistic (and for the normative implications of such characterization) is which of the rationales seem to be dominant, and the public order rationales seem to me to be clearly secondary, pretextual, and largely disingenuous, because they are relatively easy to control and cabin, without interfering with speech. But paternalistic concerns are not so easy to be addressed without minimizing the likelihood of discussions about religion at the campus, and a refusal of funding seems like a reasonable means to that end. But under different scenarios, subject-matter restrictions are more congruent with non-paternalistic, and PR-compatible rationales. In its decisions belonging to the public forum doctrine, the Supreme Court had long established that in a so-called “non-public forum” access may be “based on subject matter and speaker identity so long as the distinctions drawn are

reasonable in light of the purpose served by the forum and are viewpoint neutral”.¹³² Earlier, the Court had determined, similarly, that in a public property which is not technically a traditional public forum, in addition to content-neutral restrictions “the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”.¹³³ So here we have a clear distinction between dreaded viewpoint regulations and subject-matter regulations which may be perfectly reasonable because they are consistent with the purposes of the forum (in the case of *Perry*, it was about access to the interschool mail system). In such cases, the rationale for a different normative status of viewpoint- and subject-matter regulations is clear: the latter may have a good PR-compatible rationale. After all, topic suppression may be aimed at having an orderly discussion at all (think about agenda-less public meetings).¹³⁴ But what if the most likely rationale is paternalistic, as in the example of removal of religion from the public agenda?

The best explanation is that paternalism, at least of the sort likely to underlie subject-matter regulations, is a less objectionable moral position than an official intolerance to a particular opinion, as discernible in viewpoint-based regulations. Paternalism is not intolerance: it would be a misnomer to characterize an action of removing a particular subject-matter from public debate as “intolerance” towards a particular topic. In fact, it is hard to understand how a rational person may “dislike” an issue (as opposed to disliking a particular “take” on an issue). One may of course dislike the very fact that a particular issue is debated but this is just an effect of a motive which still needs to be established: it is merely an announcement rather than a rationale for one’s desire of subject removal. One may, for instance, dislike the fact of discussing electoral politics in the workplace or in army barracks, but it must be an attitude based on some further reasons which are not captured by the concept of intolerance or dislike. I am of course not claiming that paternalism is a non-objectionable, much less that it is a benign, moral position. But in the context of freedom of speech restrictions on a

¹³² *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-93 (1993), emphases added.

¹³³ *Perry Education Association v. Perry Local Educators’ Association*, 46 U.S. 37, 46 (1983).

¹³⁴ See Stephen Holmes, “Precommitment and the Paradox of Democracy”, in Jon Elster & Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press: Cambridge 1988): 195-240 at 232-35.

subject matter, such an attitude seems to me to be less objectionable than intolerance implicated in viewpoint restrictions. This is for reasons which were famously pressed in H.L.A. Hart's restatement of Mill's Harm Principle: the anti-paternalistic zeal of Mill was based on his belief in the individual rationality and knowledge which is unpersuasive today.¹³⁵ There is no denying that often paternalism in the area of freedom of speech may be deeply offensive: for instance, to argue about limiting some information because it will upset the hearers is incompatible with the fundamental dignity of the hearers. But paternalism supported as a solution to the collective action problems, or to dilemmas resulting from imperfect knowledge or defective preference formation, need not be always offensive to the dignity of individuals. This is, more generally, the case when removal of subject matter is considered good for the audience members for reasons other than their alleged incapacity to evaluate information.

Consider again the already exploited example of religious debates in the university. Whatever the reasons may be for the university's refusal to fund a religious discussion, distrust of the audience based on suspicion that they will not be able to properly evaluate the information is unlikely to figure among them. Rather, the more likely argument would be that it will create extra divisiveness which is not good for participants. (In fact the fear of divisiveness had been occasionally cited by the Supreme Court as a major rationale for the Establishment Clause of the First Amendment).¹³⁶ It is still a paternalistic intervention, but it is not as objectionable as if it was based on distrust in their good judgment. It is paternalistic in the broad sense of the word (because it is an unsolicited intervention based on the perceived good of the person), but it is not paternalistic in the offensive meaning of the word, where individuals' actual preferences are displaced by the regulator: in the religion-on-campus example, the good of avoiding divisiveness may be recognized by the association's members themselves, even if they do not have sufficient motivations to pursue it, not knowing how others will behave.

It is time to take stock. I have tried to establish that viewpoint-restrictions and subject-matter restrictions (two subcategories of a broader genus of content-based restrictions of freedom of speech) correspond to two perceived wrongful motivations in

¹³⁵ H.L.A. Hart, *Law, Liberty, and Morality* (Stanford University Press: Stanford 1963) at 30-34.

¹³⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

regulating speech: respectively, to intolerance and paternalism. The fact that these two types of regulation are (plausibly) viewed as triggering unequal levels of scrutiny can be best explained by the fact that these two moral defects of motivations are of unequal moral weight: paternalism (at least in the forms likely to inform subject-matter regulation) is less objectionable than intolerance. This provides a normative explanation for the broader idea that often the law of freedom of speech is aimed at ferreting out improper motivations for regulation. But at times, we focus entirely on the effect of harm rather than improper motives: when the harm is produced instantly by the very fact of uttering certain words, and mental intermediation of the audience is insignificant in harm production, the language of wrongful motives is redundant: harm prevention is a sufficient justification for restriction of speech. But it is not embarrassing to a motive-based theory because these are “easy cases” in which the distinctiveness of speech compared to non-speech disappears, and they often do not even register in our thinking as restrictions of freedom of speech: speech acts are harmful per se, not through their content, as understood and interpreted by the audience.

Conclusions

The general idea that only such exercises of public power are legitimate which are based on properly “public” reasons, and that reasons which are inadmissible taint an authoritative directive with illegitimacy, can be translated into a constitutional doctrine under which improper legislative motives contaminate a law with unconstitutionality, even if we may approve of the effects of such laws. This was the fundamental idea of this working paper, but in itself, it relies on prior, more fundamental rationales for adopting the idea of PR in the first place. I have not undertaken such a defence of the conception here, but elsewhere I had argued that, while at the most general level the ideal of public reason expresses the fundamental value of respect for persons, respect itself is too vague and too thin a value to sustain a political ideal as weighty as that of public reason.¹³⁷ Respect has to be seen as part of a constellation of values, of which freedom and equal citizenship are of particular importance. Each of these values enhances our political life which can be explained in terms of another value; they are in a mutually supportive,

¹³⁷ See Wojciech Sadurski, “Common Good and Respect for Persons”, Sydney Law Research Paper No. 13/91, <http://ssrn.com/abstract=2362546>.

interlocking, integrated scheme of political values, where each is understood and appreciated in the light of the other.¹³⁸

This idea, properly reinterpreted and recalibrated, resonates with a constitutional doctrine which calls for invalidation of laws tainted by wrong (i.e. unconstitutional) motives: public reason may be a useful tool in identifying which motives should be found unconstitutional. Any scrutiny which relies upon the second-guessing of actual legislative motives is patently unworkable; hence, what is needed is an “objectified” approach to the motives, which can be detected through reasonableness analysis, based on arguing from the effects back to (the most likely) motives. This is especially necessary when we do not have reliable evidence of the legislator’s actual motives. But there are limits to the arbitrary “manufacturing” of reasons, and the test of public reason is of value not only in the scrutiny (*à la* constitutional court) of laws already enacted but also as an appeal to lawmakers (including citizens acting as “popular legislators”) that only some *types* of arguments should be used in public discourse: namely arguments that can be endorsed by those who do not necessarily agree with the specific merits of the proposal. While at first blush it may be seen as a prescription for hypocrisy and “political correctness” (“Use only such arguments which pass the muster of generally acknowledged public reason”), in fact the test of public reason may play an important therapeutic and reflexive role: it may teach us to use only such arguments in public discourse which are respectful of other fellow-citizens who may disagree along the dimensions of differing ideologies, religions and philosophical outlooks.

In this working paper, I have used the US constitutional law as a useful resource for considering the theory that some illicit motives render a legislative action unconstitutional, and in particular considered the First Amendment law of freedom of speech as a case study (going beyond the American law, and beyond this particular case study is a task to be undertaken in the subsequent iterations of this project). But of course a different story can be plausibly told about the same case: a story which would appeal to reprehensible effects, or impact, of certain categories of laws, as conclusive for

¹³⁸ For an account of an integrated scheme of values, in contrast to a “detached” perspective, see Ronald Dworkin, “Hart’s Postscript and the Character of Political Philosophy” *OJLS* 34 (2004): 1-37 at 14-18 (reprinted subsequently in *Justice in Robes*). As Dworkin puts it, “we suppose not only that an integrated value’s existence depends on some contribution it makes to some other, independently specifiable, kind of value, ... but that the more precise characterization of a [sic] integrated value ... depends upon identifying that contribution”, *id* at 16.

their unconstitutionality. Freedom of speech can be described, perhaps, as oriented towards minimizing the overall restrictions on the amount and quality of speech in the public realm. Perhaps...But it is not part of my approach to proclaim the exclusivity, or even the superiority (though, if pressed, I would claim *that*) of the motive-oriented theory of constitutionality over the effect-oriented one. My aspiration was to show that the former makes good moral and political sense, and that it supports the theory of public reason. But just as public reason may be one of a number of coeval theories of legitimacy of political authority, so can unconstitutional motivations theory be just one of a number of criteria of unconstitutionality. Wrongful motives are sufficient but not the only plausible basis for unconstitutionality – just as detection of non-public reasons in an authoritative directive may be a sufficient but not the only plausible ground for deeming it illegitimate.