

## Chapter Eight

# Democracy and Liberty

### 1. Main Ideas

The fundamental idea of democratic, political legitimacy is that the authorization to exercise state power must arise from the *collective decisions* of the equal members of a society who are governed by that power.<sup>1</sup> That is a very abstract statement of the concept of democracy – as abstract as it should be. Democracy comes in many forms, and more determinate conceptions of it depend on an account of membership in the people and, correspondingly, what it takes for a decision to be *collective* – authorized by *citizens as a body*.

Consider two conceptions of democracy, distinguished by their interpretations of the fundamental idea of collective decision: I will call them *aggregative* and *deliberative*. Both views apply in the first instance to institutions of binding collective decision making,<sup>2</sup> and

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each interprets the fundamental ideal that such institutions are to treat people bound by collective decisions as equals. According to an *aggregative* conception of democracy, then, decisions are collective just in case they arise from arrangements of binding collective choice that give *equal consideration to* – more generically, are *positively responsive to* – *the interests of each person* bound by the decisions.<sup>3</sup> According to a *deliberative* conception, a decision is collective just in case it emerges from arrangements of binding collective choice that establish conditions of *free public reasoning among equals who are governed by the decisions*. In the deliberative conception, then, citizens treat one another as equals not by giving equal consideration to interests – perhaps some interests ought to be discounted by arrangements of binding collective choice – but by offering them justifications for the exercise of collective power framed in terms of considerations that can, roughly speaking, be acknowledged by all as reasons.

Because the requirements for free public reasoning among equals are not narrowly political – not only a matter of the organization of the state – democracy, on the deliberative view, is not exclusively a form of politics; it is a framework of social and institutional arrangements that

1. facilitate free reasoning among equal citizens by providing, for example, favorable conditions for expression, association, and participation, while ensuring that citizens are treated as free and equal in that discussion; and
2. tie the authorization to exercise public power – and the exercise itself – to such public reasoning, by establishing a framework ensuring the responsiveness and accountability of political power to it through regular competitive elections, conditions of publicity, legislative oversight, and so on.

Deliberative democracy, then, is not simply about ensuring a public culture of reasoned discussion on political affairs, nor simply about fostering the bare conjunction of such a culture with conventional democratic institutions of voting, parties, elections. The idea instead is manifestly to tie the exercise of power to conditions of public reasoning: to establish “all those conditions of communication under which there can come into being a discursive formation of will and opinion on the part of a public composed of the citizens of a state”<sup>4</sup> and to generate “communicative power”<sup>5</sup> – an insti-

tutionalized impact of that will and opinion on the exercise of political power.

In the large project of which this essay forms one part, I explore the deliberative conception and its implications. Assuming as background a plurality of comprehensive philosophies of life – the fact of reasonable pluralism, which I will explain shortly – I aim to show that democracy, on the deliberative conception, is a substantive, not simply procedural, ideal and that the substance comprises egalitarian and liberal political values. More specifically, I show the central role within a deliberative conception of democracy of religious, expressive, and moral liberties, political equality, and an egalitarian account of the common good. Egalitarian and liberal political values emerge, then, as elements of democracy rather than as constraints upon it.

In this essay, I focus on the liberties. After sketching the fundamental notions of reasonable pluralism (Section 2) and deliberative democracy (Sections 3 and 4), I discuss religious, expressive, and moral liberty, emphasizing their essential role in a democracy as conditions of *deliberative inclusion*. The conclusion – on political community and political legitimacy – explains how the deliberative conception presents a compelling interpretation of the democratic ideal.

## 2. Reasonable Pluralism

I begin with the fact of reasonable pluralism:<sup>6</sup> the fact that there are distinct, incompatible philosophies of life to which reasonable people are drawn under favorable conditions for the exercise of practical reason. By a “philosophy of life” – what Rawls has called a “comprehensive doctrine” – I mean an all-embracing view – religious or secular, liberal or traditionalist – that includes an account of all ethical values and, crucially, provides a general guide to conduct, individual as well as collective. Let us say that people are reasonable, politically speaking, only if they are concerned to live with others on terms that those others, as free and equal, also find acceptable. The idea of reasonable pluralism, then, is that good-faith efforts at the exercise of practical reason, by reasonable people thus understood, do not converge on a particular philosophy of life. Such philosophies are matters on which reasonable people disagree.

The fact of reasonable pluralism is just one of the many forms of human difference, others being differences of preference and ability, life chances and biological endowment, ethnicity and rhetorical style. These differences set a generic task for an account of democracy: to explain how people, different along so many dimensions, are to be recognized and treated as free and equal members of a political society (however we interpret those protean ideas). Though the task is generic, the solution varies according to dimension, and here – as a matter of focus, and not prejudging questions of importance – I concentrate on the dimension captured by the fact of reasonable pluralism.

I said that philosophies of life are matters on which reasonable people disagree, and I mean that as a platitude. But seeing it as such requires that we distinguish the fact of reasonable pluralism itself from various philosophical responses to it. Reflective moral divergence is, for example, commonly taken to provide strong evidence for the conclusion that no moral outlook is true, at least not objectively true,<sup>7</sup> or that moral truth transcends our cognitive powers. But persistent divergence of outlook among reasonable people does not require a nihilist or relativist explanation. Reasonable people may disagree about a singular truth. Nor does the absence of convergence command skepticism. For the purposes of political argument, all we should say in response to the fact of reflective divergence is that in matters of comprehensive morality the truth, if there be such, transcends the exercise of practical reason appropriate to expect of others, as free and equal.

Five considerations speak in support of the fact of reasonable pluralism and the force of this response to it. To start with, we observe persistent disagreements among familiar traditions of ethical thought, each with its own elaborate structure and complex history of internal evolution – disagreements, for example, about the relative importance of values of choice and self-determination, happiness and welfare, and self-actualization, and about the religious and philosophical background of these evaluative views. Second, in addition to the sheer fact of disagreement, the exercise of practical reason generates no apparent *tendency* to convergence on a philosophy of life. Furthermore, third, no compelling *theory* of the operations of practical reason predicts convergence of comprehensive moralities after sufficient evidence or reflection or argument is brought to bear. For moral deliberation, we have nothing comparable to the economists' proof of the existence of a general

equilibrium of a competitive market economy with certain minimal optimality properties – much less an argument for convergence on such an equilibrium. Nor, fourth, are there any marginally attractive social or political mechanisms that might generate comprehensive agreement. Finally, we can identify natural explanations for the persistence of disagreement that do not require accusations of “unreason”: the exercise of practical reason often proceeds within distinct traditions of thought with complex internal structures; personal circumstance and sensibility predispose people to different traditions; and empirical constraints (including the constraints of considered evaluative judgments) are typically too weak to swamp such differences, in part because evaluative concepts themselves are imprecise and their explications are contested.<sup>8</sup>

These considerations may appear to prove too much: to create troubles for the deliberative view, too. For the deliberative view, it will emerge, requires some agreement on political ideas. Why, then, don't the observations that support the fact of reasonable pluralism exclude that agreement, too? By way of response, I need to say something more about the fourth point: the absence of convergence-generating mechanisms in the case of comprehensive philosophies of life. Consider the difference on this point between comprehensive moral consensus and a narrower political agreement.<sup>9</sup> While it is implausible to expect agreement on political values to result from a convergence of practical reasoning conducted within different, independent moral traditions, it is not so implausible to expect important elements of political consensus to emerge from the acquisition of ideas and principles embodied in shared institutions. The acquisition of political ideals and values proceeds in part through participation in common, public institutions of various kinds – families, associations, the state. And the formation of moral-political ideas and sensibilities proceeds less by reasoning or explicit instruction (which may be important in the case of comprehensive moral views) than by mastering ideas and principles that are expressed in and serve to interpret these institutions. Thus, people living within institutions and a political culture shaped by certain ideas and principles are likely to come to understand those ideas and principles and to develop some attachment to them.

Take the idea of citizens as equal moral persons. This idea is, in several ways, manifest in the norms and traditions of interpretation associated with citizenship in a democracy (though practice often fails to conform to those norms) – for example, equality before the

law, and equal civil and political rights. We can understand how citizens quite generally might acquire an understanding of one another as moral equals by holding the position of citizen and living in a political culture in which ideas of equality associated with that position play a central role in political discourse.<sup>10</sup> Different comprehensive views that accept this political understanding of equality will have different ways of fitting it into their broader conceptions. Some will accept political equality as following from a fundamental religious conviction about human equality, or a general moral conception of human beings as equally intrinsically valuable; others will accept political equality as an important, nonderivative value.<sup>11</sup> But what makes agreement possible in this case is that citizens who grow up within a reasonably stable democracy will find this (self-) conception familiar and attractive: the political ideas “expressed” in common, public institutions and appealed to in the culture to justify those institutions will shape the moral-political education of citizens.

Of course, the acquisition of moral ideas does not proceed exclusively through institutions. So citizens will need to be able to accommodate the political ideas and self-conceptions they acquire through institutions within their different philosophies of life: to find a way to combine, for example, a conception of human beings as servants of God bound by natural duties with a political conception of citizens as free, equal, and self-governing. And many views – religious, moral, philosophical – have sufficient internal flexibility or openness to make such accommodations possible.<sup>12</sup> But while this accommodation may take place when a comprehensive moral or religious view is elaborated in ways that make it compatible with a political conception, we have no reason to expect it to produce agreement extending beyond political values; for no institutional mechanism in a democratic society imposes pressure to reach agreement in ways that would erase fundamental differences between moral, religious, and philosophical traditions. The pressure of the shared institutions in explaining political agreement ends even as considerable disagreement remains.

In short, political values are institutionalized in a democratic society in ways that comprehensive moral (or religious, or philosophical) ideas are not. More precisely, comprehensive ideas are sustained through more particular social associations that are not shared: different churches, for example, advance different comprehensive views. So citizens acquire conflicting comprehensive views

through those associations. An account of how consensus might emerge on political values among citizens living in a political society, then, has resources unavailable to an account of a more comprehensive moral consensus.

Despite these considerations, one might still hold out hope for comprehensive moral agreement, and for a political community based on such agreement. In response to the observation that there is no tendency to reach agreement, we might, for example, take certain points of moral convergence – on the injustice of slavery or the value of religious toleration – as at least suggesting a broader tendency toward moral convergence.

Moreover, a political society with comprehensive moral agreement has at least four attractive qualities that might make it a society to be hoped for. In such a society, for example, members respect one another for their determinate, concrete commitments – for the values that animate their lives – and not simply for their abstract though perhaps unrealized human capacities, not merely for their inner but perhaps unexpressed dignity. Furthermore, all may believe the truth, whereas moral pluralism implies that some members are bound to endorse false moral ideas; even if we accept that false views have public rights,<sup>13</sup> still, endorsing the truth is an important human good; and endorsing it in common deepens mutual respect. In addition, agreement gives the members of a society a confidence in the bases of their conduct that is plausibly lacking under conditions of disagreement, thus mitigating pressures to reject the objectivity of ethical thought and embrace skepticism, nihilism, or simple alienation. Finally, as a practical matter, the absence of conflict on comprehensive views may ease communication and coordination.

In response to the proposed extrapolation from cases of convergence – slavery and religious toleration – it must be said that these are not cases in which people agree on comprehensive moral outlooks. Instead, people who belong to different moral and religious traditions come to agree on the injustice of certain especially injurious practices, despite persisting disagreement on other matters. Thus, the condemnation of slavery is common ground among Catholics, Muslims, Jews, and Protestants; and among Kantians and utilitarians. So the examples are not strong evidence for the thesis that practical reason generates a more general moral convergence among people working within different moral and religious traditions; rather, they are important cases of agreement on politi-



cal values among people who have fundamental moral disagreements.

Moreover, let us suppose that comprehensive agreement has important virtues. Still, if the exercise of practical reason does not generate convergence among people who begin with very different outlooks, associated with different traditions of moral, religious, and philosophical thought and practice, then how is comprehensive moral agreement to be achieved? Perhaps through some form of common moral education in a comprehensive view. But how is such education – as distinct from education about requirements of civic responsibility and decency – to proceed in the face of different and competing forms of moral thought, each with its own associational life? Perhaps through the state's coercive means. But it is not so clear that the state can produce genuine moral agreement, as opposed to public spectacles of conformity; and if it could, the price seems unacceptable, despite the values associated with agreement.

I assume the fact of reasonable pluralism, then. And this fact gives shape to the conception of citizens as free and equal that constitutes part of the deliberative conception of democracy I want to explore here. To say that citizens are *free* is to say, inter alia, that no comprehensive moral or religious view provides a defining condition of membership or the foundation of the authorization to exercise political power. Not that religious or moral views are, religiously, morally, or metaphysically speaking, matters of choice. To someone who has a religious view, for example, believing the view is a matter of believing what is true and acting on it a matter of fulfilling obligations that are not self-legislated and are perhaps more fundamental than political obligations.<sup>14</sup> But politically speaking, citizens are free in that it is open to them to accept or reject such views without loss of status. To say citizens are *equal* is to say that each is recognized as having the capacities required for participating in discussion aimed at authorizing the exercise of power.

What, more particularly then, can we say about a conception of democracy suited to conditions of reasonable pluralism? By excluding a comprehensive consensus on values, the fact of reasonable pluralism may suggest that a procedural conception of democracy, limited to such values as openness and impartiality associated with fair process, is the only remaining option. After all, that fact deprives us of a background of shared moral or religious premises – shared reasons – that would give more determinate con-



tent to the idea of popular authorization. Without that background, we are left, it may seem, with no basis for agreement on anything more than fair procedures – perhaps not even that. Faced with disagreement on comprehensive views, what legitimate complaint can a person raise about a framework of collective decision, beyond the complaint that the framework fails to take her interests into account?

I think this conclusion is incorrect, and will sketch a view that combines an assumption of reasonable pluralism with a more substantive conception of democracy. I will suggest as well that this combination is a natural result of adopting a *deliberative* understanding of the collective decisions that constitute democratic governance.

### 3. Public Reasoning

A deliberative conception of democracy puts public reasoning at the center of political justification. I say *public reasoning* rather than *public discussion* because a deliberative view cannot be distinguished simply by its emphasis on discussion rather than bargaining or voting as methods of collective decision making. On any view of democracy – indeed any view of intelligent political decision making – discussion is important, if only because of its essential role in pooling private information, against a background of asymmetries in its distribution.

According to the deliberative interpretation of democracy, then, democracy is a system of social and political arrangements that institutionally ties the exercise of power to free reasoning among equals. This conception of justification through public reasoning can be represented in an idealized procedure of political deliberation, constructed to capture the notions of free, equal, and reason that figure in the deliberative ideal. The point of the idealized procedure is to provide a model characterization of free reasoning among equals, which can in turn serve as a model for arrangements of collective decision making that are to establish a framework of free reasoning among equals. Using the model, we can work out the content of the deliberative democratic ideal and its conception of public reasoning by considering features of such reasoning in the idealized case and then aiming to build those features into institutions.

Thus, in an ideal deliberative procedure, participants are and

regard one another as *free*: recognizing the fact of reasonable pluralism, they acknowledge, as I noted earlier, that no comprehensive moral or religious view provides a defining condition of participation or a test of the acceptability of arguments in support of the exercise of political power. Moreover, participants regard one another as formally and substantively *equal*. They are formally equal in that the rules regulating the ideal procedure do not single out individuals for special advantage or disadvantage. Instead, everyone with the deliberative capacities – which is to say, more or less all human beings – has and is recognized as having equal standing at each stage of the deliberative process. Each, that is, can propose issues for the agenda, propose solutions to the issues on the agenda, offer reasons in support of or in criticism of proposed solutions. And each has an equal voice in the decision. The participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation, nor does that distribution play an authoritative role in their deliberation. In saying that it does not play an authoritative role in their deliberation, I mean that the participants in the deliberative procedure do not regard themselves as collectively morally bound by the existing system of rights except insofar as that system establishes the framework of free deliberation among equals. Instead, they regard that system as a potential object of their deliberative judgment.

In addition, they are *reasonable* in that they aim to defend and criticize institutions and programs in terms of considerations that others, as free and equal, have *reason to accept*, given the fact of reasonable pluralism and on the assumption that those others are themselves concerned to provide suitable justifications.

Which considerations count as reasons? Generically speaking, a reason is a consideration that counts in favor of something: in particular, a belief, or an action. Not an illuminating analysis: I doubt that illuminating analysis is available or that it would be helpful in answering our question.<sup>15</sup> What is needed is an account not of what a reason is, but of which considerations count as reasons. And the answer to this question depends on context. Whether considerations count in favor in the relevant way depends on the setting in which they are advanced. Applying this point to the issue at hand: a suitable account of which considerations count as reasons for the purposes of an account of democratic deliberation will take the form not of a generic account of what a reason is, but of a

statement of which considerations count in favor of proposals within a deliberative setting suited to the case of free association among equals, understood to include an acknowledgment of reasonable pluralism. This background is reflected in the kinds of reasons that will be acceptable – meaning, as always, acceptable to individuals as free and equal citizens.

I have already specified the relevant deliberative setting as one in which people are understood as free, equal, and reasonable and as having conflicting philosophies of life. Within the idealized deliberative setting that captures these conditions, it will not do simply to advance considerations that one takes to be true or compelling. Such considerations may well be rejected by others who are themselves reasonable – prepared to live with others on terms acceptable to those others, given their different comprehensive views – and endorse conflicting philosophies of life. One needs instead to find reasons that are compelling to others, where those others are regarded as (and regard themselves as) equals and have diverse reasonable commitments. How wide a range of commitments? Because we are addressing the institutional framework for making collective decisions and assume the participants to be free – not bound to their *de facto* commitments – the range of commitments is similarly wide: not exhausted by *de facto* commitments. Considerations that do not meet these tests will be rejected in the idealized setting and so do not count as acceptable political reasons. Let us say, then, that a consideration is an acceptable political reason just in case it has the support of the different comprehensive views that might be endorsed by reasonable citizens.

To illustrate these points about the role of the background – the conception of citizens as free, equal, and reasonable – in constraining the set of reasons, let us consider three implications; the first two will be particularly important in my discussion of the liberties.

First, people hold religious commitments on faith, and those commitments impose what they take to be overriding obligations. Such commitments are not, as such, unreasonable: though faith transcends reason, even as “reason” is understood within the tradition to which the commitments belong, citizens are not unreasonable for holding beliefs on faith. But beliefs held on faith – perhaps beliefs in what are understood to be revealed truths – can reasonably be rejected by others who rely only on the darkness of an unconverted heart, and so cannot serve to justify legislation.

Thus, it matters to our response to the case against abortion

stated in the recent encyclical, *Evangelium Vitae*, that Pope John Paul II claims that the gospel of life “*can . . . be known in its essential traits by human reason*” and that the “Law of God” that condemns abortion is “written in every human heart [and] knowable by reason itself” – in short, that the argument is presented as independent of a particular faith position.<sup>16</sup> Though I see no reason to agree with this claim about what lies within the compass of reason, our response to the argument must be different from what that response would be if the argument appealed openly to revealed truths or beliefs held on faith. We must show that the conception of reason it appeals to is itself sectarian and that the argument fails on a conception of reason that is not.

Second, the adequacy of a consideration as a political reason – its weight in political justification – will depend on the nature of the regulated conduct, in particular on the strength of the reasons that support that conduct. Thus, considerations of public order provide acceptable reasons for regulating conduct. Different views have different ways of explaining that value: utilitarians will find it on considerations of aggregate happiness, Kantians on the preconditions of autonomous conduct, others on the intrinsic value of human life and human sociability. Moreover, people are bound to disagree about the requirements of public order: that disagreement may extend to whether a state is necessary to secure the conditions of order. But it will not be acceptable to suppose that, as a general matter, the value of public order transcends all other political values. Except perhaps in the most extreme circumstances, for example, a state may not impose a blanket prohibition on alcohol consumption – including consumption in religious services – in the name of public order. The reasons that support such consumption include considerations of religious duty – more generally, considerations of fundamental duty, which are normally overriding. And those considerations will provide a suitable basis for rejecting a justification cast in terms of the value of public order, except in the most extreme conditions.

These first two points about reasons both generate pressure for liberty. The first point underscores that reasonable pluralism will lead to the rejection of some bases for restricting liberty as politically weightless; the second indicates that other bases of restriction will not be weightless, but insufficient to outweigh reasons that can be acknowledged, consistent with reasonable pluralism, as commanding or commanding a course of conduct.

Finally, third, the fact that a policy is most beneficial to me arguably provides me with a reason to support that policy.<sup>17</sup> But this reason carries no weight in public deliberation of the relevant kind, because others, concerned with their advantage and willing to find mutually acceptable reasons, will not accept it as a reason; moreover, it is reasonable for them not to accept it, in part because they can dismiss it while at the same time treating me as an equal and giving my good the same weight in their deliberations that they insist I give to theirs. Thus, I may *prefer* the arrangement that gives me the greatest advantage, and so have a personal reason for promoting it. But in the context of ideal deliberation, I must find considerations in favor of the arrangement that do not neglect the good of others. Similarly, I may wish to reject an arrangement that leaves me less well-off than some others. But I cannot offer as a reason against it that it leaves me less well-off, because every arrangement will leave some people less well-off than some others. So if I need to find reasons acceptable to others, I cannot reject a proposal simply because it does to me what each arrangement must do to someone – and, again, every arrangement leaves some less well-off than others. I can, however, reject it on grounds that an arrangement leaves me less well-off than anyone needs to be.

In presenting the deliberative view in terms of an ideal deliberative procedure in which parties are required to find reasons acceptable to others, I may appear to be tying the deliberative conception to an implausible requirement of political consensus – to the view that “deliberation leads to convergence.”<sup>18</sup>

I make no such assumption. Instead, I assume that different views will have different interpretations of the acceptable reasons and of how different reasons are to be weighted – for example, reasons of equality and of aggregate well-being. As a result, even an ideal deliberative procedure will not, in general, issue in consensus. But even if there is such disagreement, and a need to submit the decision to majority rule, still, participants in the ideal case will need to appeal to considerations that are quite generally recognized as having considerable weight and as a suitable basis for collective choice, even among people who disagree about the right result: agreement on political values is not agreement on the proper combination of them. But when people do appeal to considerations that are quite generally recognized as having considerable weight, then the fact that a proposal has majority support will itself commonly count as a reason for endorsing it. Even people who disagree

may, then, accept the results of a deliberative procedure as legitimate.

#### **4. Discussion, Deliberation, Motivation**

I said earlier that a deliberative conception of democracy cannot be characterized by its emphasis on discussion, that any view of democracy will have an important place for discussion because of its essential role in pooling dispersed, private information. Of course, discussion is not always so helpful. As Przeworski puts it, “If people behave strategically in pursuit of their interests, they also emit messages in this way”:<sup>19</sup> behavior does not lose its strategic character simply because it involves the use of language. And if people “emit messages” – that is, communicate – strategically, they may well have incentives to misrepresent private information, in which case discussion may play an essential role in deception and spreading misinformation. The mere fact that conduct is linguistically mediated does not, of course, imply that agents are prepared to constrain their conduct by reference to norms of honesty, sincerity, and full disclosure, rather than simply taking the most effective means to their ends. The use of language may, as a matter of conversational implicature, commit the speaker to such norms – to endorsing them as proper standards of guidance and criticism. But I don’t propose to rest anything on this hypothesis.

Though the strategic use of language to advance one’s aims always carries the potential of deviating from norms of honesty, the strength of incentives to engage in misrepresentation depends, *inter alia*, on the underlying diversity of citizen preferences. Intuitively, the more diverse the preferences of individuals – the more they disagree about the best outcome – the greater are the gains from strategically lying, misinforming, or distorting; the greater the gains, the greater are the temptations to undertake such manipulation.<sup>20</sup> The point is familiar in the setting of legislative decision making in legislatures with committee structures. The more extreme the preferences of committee members relative to median legislative preferences (the more they are outliers), the less informative the committees will be (more noise, less signal). For this reason, majoritarian legislatures will not – unless they have a collective preference for self-deception – want to leave important decisions in the hands of a committee composed of preference outliers: mem-

bers will not expect the committee to provide truthful and complete information.

But – and this is the crucial point – the extent of preference diversity is not fixed, not given in advance of political deliberation. Not that the *aim* of such deliberation is to change citizen preferences by reducing their diversity: the aim is to make collective decisions. Still, one thought behind a deliberative conception is that public *reasoning* itself can help to reduce the diversity of politically relevant preferences because such preferences are shaped and even formed in the process of public reasoning itself. And if it does help to reduce that diversity, then it mitigates tendencies toward distortion even in strategic communication.

Two points are essential here, one concerning reasons, the other concerning connections between reasons and motives. First, the reasoning that figures in collective decisions need not be exclusively instrumental – only a matter of determining the most effective means for achieving settled aims, given perhaps by desires. Indeed, practical reasoning – understood as reflection on and discussion about what reasons for action agents have – may proceed along deliberative paths with only the most attenuated connections to the agent's current aims.<sup>21</sup> Citizens are capable of recognizing *as reasons* considerations that conflict with their antecedent preferences and interests, ranking alternatives in accordance with such considerations and acting on those rankings. I might now recognize that I have good reason to refrain from harming others, but not think that I have reason ever to help them, nor have any desire at all to help. Suppose, however, that reflection on *why* I have reason not to harm leads me to see that the explanation for that reason also implies that I have reason to help. Though I have no desire to help, a new reason emerges from a search for reflective equilibrium that, as in this example, proceeds by considering the justification for settled reasons and the implications of the justification for other reasons that agents have. To the extent that I also have preferences that conflict with these reasons, I will continue to have incentives – perhaps strong ones – to strategically misrepresent information. But, coming now to the second point, seeing that certain of my antecedent preferences and interests cannot be expressed in the form of acceptable reasons may help to limit the force of such preferences as political motives.<sup>22</sup>

To illustrate: assume a commitment to deliberative justification



– assume, that is, the shared belief that political justification requires finding reasons acceptable to others, understood as free and equal, who endorse that commitment. And assume, alongside that, a desire that others serve my aims, regardless of their own.<sup>23</sup> Though this desire may prompt me to advance a proposal, it does not count as a reason in public argument. To defend the proposal consistent with my commitment to finding justifications of the appropriate kind, then, I need to advance reasons independent of the desire – which I will be prepared to do only if I believe that there are acceptable reasons. And presenting such reasons may lead to the formation of a new desire, say a desire to coordinate with others on mutually beneficial terms. Merely believing that I have such a reason may suffice to refashion preferences, but the motivational force of that recognition is likely to be greater if I must state the reasons thereby lending greater salience to them. That desire, unlike the desire that others serve my aims regardless of their own, is naturally expressed in a reason that is acceptable to others. Moreover, if I develop the desire to cooperate on mutually beneficial terms, my incentive to strategically misrepresent private information will decline. And that means that even if my communications are in part strategically motivated, I will be more likely to provide information that is commonly beneficial.

It should be clear, but it is nevertheless worth emphasizing, that the preference changes with beneficial effects on strategic communication are not simply changes of *induced* preference that result from the acquisition of new information through discussion.<sup>24</sup> Of course, new information may well induce new preferences: I now prefer eating bread to cheese because I believe that bread is more nutritious and prefer more nutritious to less nutritious food; if I learn that cheese is more nutritious, and I am rational, I will prefer cheese to bread. And sometimes disagreement among preferences is generated by simple differences of factual belief. Reducing differences owing to lack of common information will often be a good thing. But the kinds of preference changes I am contemplating reflect a sensitivity of motivations – understood as behavioral dispositions – to reasons, understood as standards of criticism and guidance, and not simply a sensitivity of some preferences to information about how most effectively to satisfy other preferences.

Though these are not cases of induced preference change, they are also not cases (like hypnotism or suggestion) of preferences changing without rational explanation. In the kinds of cases I am

considering, preferences change because a person comes to understand – through practical reasoning – that his current preferences lack an appropriate justification: not because new empirical knowledge is acquired that bears on the achievement of an aim (as in the bread to cheese example), but because the preference cannot be supported by reasons of a suitable kind, the agent recognizes that it cannot, and that recognition has sufficient salience to shape motivations. In the background is the view that the notion of a reason is essentially normative – a term of justification and criticism – and that a reason is not a kind of motivation. Practical reasoning, then, is a matter of reflecting on what one is to do, not what one is motivated to do, though the results of such reasoning can motivate.<sup>25</sup>

## 5. Religious Liberty

I have focused thus far on the structure of the deliberative view. I turn now to its substance, in particular to the thesis that democracy – on the deliberative interpretation of collective choice – must ensure religious, expressive, and moral liberties. This proposal departs from conventional understandings of the relationship between democracy and these liberties. To illustrate that understanding, I want to present a familiar dilemma associated with the idea of democratic legitimacy.

On the one hand, the value of democracy seems too procedural to provide a basis for an account of legitimacy; some democratic collective choices are too repulsive to be legitimate, however attractive the procedures that generate them. On the other hand, the idea of democracy appears to be the authoritative, sovereign requirement on collective decisions. That is because democracy appears to be the form of collective choice mandated by the fundamental political idea that citizens are to be treated as equals. Because the ideal of treating people as equals is so fundamental, and so intimately linked to democratic procedures of binding collective decision making, democracy is naturally identified not simply as one political value to be combined with others, but as the way we must settle the ordering of other political values – the way to ensure equal standing in settling the common environment. To put issues off the democratic agenda appears, by contrast, to establish objectionable spheres of privilege. Thus, Robert Dahl says:

It seems to me highly reasonable to argue that *no* interests should be inviolable beyond those integral or essential to the democratic process. . . . [O]utside this broad domain [which includes rights of political expression, participation, and association] a democratic people could freely choose the policies its members feel best; they could decide how best to balance freedom and control, how best to settle conflicts between the interests of some and the interests of others, how best to organize and control their economy and so on. In short, outside the inviolable interests of democratic people in the preservation of the democratic process [inviolable because of the roots of that process in an ideal of equal intrinsic worth] would lie the proper sphere for political decisions.<sup>26</sup>

Dahl immediately indicates some qualms about this view and explores ways to ensure that conventional democratic process might better protect fundamental interests that are not integral or essential to it.<sup>27</sup> But he has identified a genuine problem, whose most familiar expression arises in connection with what Benjamin Constant called the “liberties of the moderns” – religious liberty, liberty of conscience more generally, liberty of thought and expression, rights of person and personal property. These liberties lack any evident connection to conditions of democratic procedure: to borrow Dahl’s words, they are not integral or essential to it. So their protection is commonly understood as constraining democratic process – limiting its appropriate scope. In that respect they differ from political liberties, including rights of association, of speech on political questions, and of participation. If a constitution disables a majority from restricting political participation or regulating the content of political speech, that constitution can be interpreted as safeguarding the essentials of democratic process. Assurances of such political liberties help to ensure a connection between popular authorization and political outcome – to preserve the continuing authority of the people, and not simply the majority of them.<sup>28</sup> Those liberties – the liberties of the ancients – are constitutive elements of democratic process.

The liberties of the moderns appear, then, to be based on independent values, separate from the ideal of treating people as equals in arenas of collective choice that underlies the appeal of democracy. And that may suggest that, from the perspective of democratic thought, these liberties have roots no deeper than contingent popular consensus. Though abridgments of nonpolitical lib-

erties that emerge from a fair democratic process may be unjust, they face no problems of democratic legitimacy.<sup>29</sup>

On the deliberative conception of democracy, this conclusion is wrong: a deliberative view provides a basis for wider guarantees of basic liberties. The explanation of this feature is that the deliberative conception requires more than that the interests of all be given equal consideration in binding collective decisions; it requires, too, that we find politically acceptable reasons – reasons acceptable to others, given a background of reasonable differences of conscientious conviction. I call this requirement the *principle of deliberative inclusion*.<sup>30</sup>

To illustrate the roots and implications of this principle, I want to start with the case of religious liberty, one of the principal liberties of the moderns and the one that most sharply illustrates the analytical structure.

As I mentioned earlier, religious views set demands of an especially high order – perhaps transcendent obligations – on their adherents. Moreover, if we see these requirements from the believer's standpoint, we cannot see them as *self-imposed* – chosen by the agent. To put the point without benefit of ocular metaphor: if we believe about these requirements (say, as to day and manner of worship) what the adherent believes about them, then we do not believe that the adherent choose to place herself under these demands. The content and stringency of the demands are fixed instead by the content of the convictions, which the adherent believes true, not by the adherent's endorsement of those convictions. To be sure, if a believer did not endorse the convictions, then she would not believe herself to be bound by them: but given that she does endorse them, she thinks that she would then hold false beliefs and would be more likely to do what is wrong.

Liberal political conceptions are sometimes said to endorse, if only by way of implicit commitment, a conception of human beings as “bound only by ends and roles we choose,” and correspondingly to deny “that we can ever be claimed by ends we have not chosen – ends given by God, for example, or by our identities as members of families, peoples, cultures, or traditions.”<sup>31</sup> Liberalism, on this view, rests on moral voluntarism. And such voluntarism implies that religious moralities are false. It is difficult, I think, to find political conceptions that embrace uncompromising moral voluntarism – that conceive of human beings as, in Michael Sandel's

compelling phrase, “unencumbered selves.” In any case, that philosophy of life cannot possibly serve as common political ground. And once it is rejected as such, we see that reasonable adherents cannot accept, as sufficient reasons in support of a law or system of policy, considerations that would preclude their compliance with the fundamental religious demands or require that they treat those demands as matters of choice.

What, then, of citizens who do not share those views, who reject them as false – perhaps some elements as meaningless? (I will describe the issue from the point of view of a citizen who has fundamental moral convictions, but not religious convictions. Broadly parallel remarks could be made from the standpoint of different religious convictions.) They might respond in one of three ways.

First, they might regard all religious views that impose such stringent demands, whatever their content and foundation, as unreasonable. This response might issue from the conviction that all religious views are intolerant, and for that reason politically unreasonable, or that religious convictions cannot withstand reflective scrutiny. But neither of these views is acceptable. The first is simply false. Nothing in religious conviction itself – any more or less than in secular moral conviction – requires endorsement of the view that “error has no rights” or that truth suffices for justification. As to the second, there may be conceptions of “reflective scrutiny” on which religious views cannot withstand such scrutiny. But those conceptions themselves are almost certain to belong to comprehensive views (say, empiricist philosophies) that cannot be permitted to set the bounds on public reasoning, any more than can natural theology’s conception of natural reason. Moreover, any account of reflective scrutiny that condemns religious conviction will almost certainly condemn secular moral ideas as equally unreasonable.

A second possibility is to treat concerns to fulfill religious obligations as intense preferences, to be given equal consideration along with other preferences of equal intensity. This response urges us to put aside the content of the convictions and their special role – as first principles of practical justification – in practical reasoning. The roots of this response lie, I believe, in a misinterpretation of the value of neutrality. Neutrality requires that political justification in a democracy not depend on any particular reasonable view. But it does not require that we neglect the content of views, treat all as matters of mere preference, and let the strength of claims be fixed

by the intensity of those preferences.<sup>32</sup> Doing so indicates a failure to take into account the special weight of religious or fundamental moral convictions to the adherent, particularly the weight of requirements that the religious or moral outlook itself designates as fundamental demands: an unwillingness to see how the adherent's convictions, in virtue of their content, state or imply that the requirements provide especially compelling reasons, and not simply strong preferences.

But if we are not prepared to treat convictions as (without qualification) self-imposed, accept them as true, dismiss them as false, or – putting their truth or falsity to the side – let their weight be fixed by their intensity as preferences, what is left? The alternative is to take seriously that the demands impose what the adherent reasonably regards as fundamental obligations (paradigmatically compelling practical reasons), accept the requirement – associated with the deliberative view – of finding reasons that might override these obligations and acknowledge that such reasons cannot normally be found.<sup>33</sup> The result is religious liberty, understood to include freedom of conscience, which condemns disabilities imposed on grounds of religious belief, and free exercise of religion, which condemns in particular limits on public worship.<sup>34</sup> It emerges as the product of three elements. The first is the demanding character of religious requirements, which, from the point of view of those who are subject to them, are matters of fundamental obligation. It accepts the idea that free citizens, who accept that no comprehensive moral or religious view provides a defining condition of participation or a test of the acceptability of arguments in support of the exercise of political power, are, in a way, “encumbered”: it proposes a rendering of the idea that such citizens have obligations and commitments that are not properly understood, for purposes of political argument, as matters of choice. Second, it draws on the shared concern – fundamental to the deliberative conception – to find reasons that citizens who are subject to what they regard as basic obligations can reasonably be expected to acknowledge. And third, it draws on the fact that citizens who are not religious have fundamental convictions that they take to impose especially compelling obligations.

The first two points are by themselves sufficient, but the third underscores the unreasonableness of failing to acknowledge religious liberty; for those who might be prepared to deny freedom of conscience and liberty of worship to others will typically want to

claim freedom of conscience for themselves. And if they are unable to defend that freedom by appealing to the truth of their views, then they will need to defend it by reference to the stringency of the demands imposed by their fundamental and not unreasonable convictions. And then treating others as equals will require that they give similar weight to other demands belonging to that general category.

Suppose, then, that we prevent a person from fulfilling such demands for reasons the person is compelled to regard as insufficient: “compelled,” because denying the sufficiency of these reasons follows from a religious or moral philosophy that not unreasonably commands the person’s conviction. This is to deny the person standing as an equal citizen – to deny full and equal membership in the people whose collective actions authorize the exercise of power. And that, according to the deliberative conception, is a failure of democracy. We have denied full membership by failing to provide a justification for the exercise of collective power by reference to considerations that all who are members of the sovereign body that authorizes the exercise of power and who are subject to that power, and prepared to cooperate on reasonable terms, can accept. There are many ways to exclude individuals and groups from The People, but this surely is one.

To conclude, I want to make two observations about this account of religious liberty. First, my remarks are limited. I have not said anything directly about how to handle claims for religious exemption from general obligations with a strong secular justification (including obligations to educate children); or whether special provision is to be made for specifically religious convictions, as distinct from conscientious ethical convictions with no religious roots,<sup>35</sup> or about tolerating the intolerant. My aim here is not to resolve, or even to address, these issues: any view recognizing rights of free exercise will need to face those hard questions. I am interested only in making the more restricted point that a deliberative conception of democracy is not barred – by its emphasis on an ideal of democracy – from acknowledging a fundamental role for rights of religious liberty: indeed, that it must provide a place for such rights. The basis of such rights, on the deliberative view, lies deeper than contingent popular consensus. Like rights of political expression, they are founded on the idea of democracy itself.

Second, I emphasize that the rationale for the guarantees of religious liberty that fall under the requirement of deliberative inclu-



sion is neither narrowly political nor antipolitical. It is not narrowly political, because those guarantees are not simply about enabling people to participate in normal politics (or to participate without fear), nor simply about improving public discussion by adding more diverse voices to it. It is not antipolitical, because they are not simply about ensuring the strength of organized associations (churches among them) that help to protect individuals from the state's power.<sup>36</sup> The argument does not deny the links between religious liberty and associational liberty. The idea instead is that abridgments of such liberties would constitute denials to citizens of standing as equal members of the sovereign people, by imposing in ways that deny the force of reasons that are, by the lights of their own views, compelling. The reasons for abridgment are unacceptably exclusionary, because they are unsuited to the ideal of guiding the exercise of power by a process of reason-giving suited to a system of free and equal citizens.

The view I am presenting might, then, be contrasted with an approach suggested by Roberto Unger's conception of empowered democracy, as well as the approach I sketched in an earlier essay, "Deliberation and Democratic Legitimacy."<sup>37</sup> According to Unger, a system of immunities – negative liberties – is one component of a democratic order because "[f]reedom as participation *presupposes* freedom as immunity." The mistake of "critics of traditional democratic theory" is to believe that "participatory opportunities [are] a more than satisfactory *substitute* for immunity guarantees." According to Unger, participation is no substitute; instead, immunity rights are necessary if a citizen is to have the "*safety* that encourages him to participate actively and independently in collective decision-making." I do not disagree with the claim that immunity rights are necessary, nor with the criticism of other views. But I now think that the deliberative conception of democracy provides the basis for a less instrumental, less strategic rationale for certain liberties, even when those liberties are not needed to ensure appropriate inputs to democratic procedure.

## 6. Expressive Liberty

The principle of deliberative inclusion extends naturally from religious liberty to a *wide guarantee* of expressive liberty. By a "wide guarantee," I mean a guarantee not confined to political speech, even on very capacious understandings of political speech.

Cass Sunstein, for example, defines political speech as speech that is “intended and received as a contribution to public deliberation about some issue.”<sup>38</sup> I believe that a deliberative view supports stringent protections of expressive liberty, even when the expression falls outside the political, thus understood.

The deliberative view thus extends a more familiar democracy-based strand of free-speech theory, which defends stringent protections of *specifically political speech* as one prerequisite for a democratic framework of collective choice.<sup>39</sup> Alexander Meiklejohn’s version of this theory locates the roots of a strong free-speech guarantee in the U.S. constitutional design of popular self-government. Because popular sovereignty requires free and open discussion among citizens, the government undercuts the constitution’s defining principle – treats citizens as subjects of government rather than its sovereign masters – when it interferes with such discussion. Others who favor the democracy defense add three considerations that supplement Meiklejohn’s constitutional argument: (a) because citizens have diverse views, regulation of speech owing to its content establishes a regime of political inequality by silencing certain views or topics that may be important to some citizens; (b) content regulation effectively restricts the flow of information, perhaps reducing the quality of democratic discussion and decision; (c) content restrictions might limit the range of views in the discussion, and limits on range might confine the capacity of discussion itself to challenge received views and preferences by presenting unconventional outlooks.

Each of these considerations – fairness, quality, and reflectiveness – plays an important role in a full treatment of free expression as essential to deliberative democracy. Here, however, my aim is to indicate how the deliberative view supplements these considerations, and thus extends stringent protections beyond political speech – and thus also forestalls the need to stretch the category of “political speech” to cover, for example, *Bleak House*, *Ulysses*, and Mapplethorpe’s photographs (Sunstein’s examples) so that they are stringently protected. Restriction to political speech may seem natural, once one has decided to found rights of expression on potential contribution as *input* to a discussion about the proper use of public power. But a deliberative conception must be cautious about accepting such a limit. Though the idea of reasonable discussion aimed at agreement is fundamental to the deliberative view, it does not follow that the protection of expression is to be confined to

speech that *contributes to* such discussion. It may also need to extend to speech that cannot permissibly be regulated as an *outcome* of such discussion.

Consider, then, expression that is not part of any process of political discussion – not intended or not received as a contribution to public deliberation about some issue. But assume, too, that it reflects what a citizen reasonably takes to be compelling considerations in support of expression. Such expression advances what I will call an “expressive interest”: a direct interest in articulating thoughts and feelings on matters of personal or broader human concern, whether or not that articulation influences the thought and conduct of others.<sup>40</sup>

As examples, consider artistic expression driven by a concern to create something of beauty; or bearing religious witness with no intention to persuade others; or giving professional advice out of a sense of professional obligation, with no intention to shape broader processes of collective decision making. In the case of bearing witness, an agent endorses a view that places him under an *obligation* to articulate that view, and perhaps urge on others a different course of thought, feeling, or conduct. Restricting expression would prevent the agent’s fulfilling what she takes to be an obligation, thus imposing a burden that the agent reasonably takes to be unacceptable. To acknowledge the weight of those reasons, the deliberative view extends stringent protection to such expression. Given the background of reasonable pluralism, the failure to extend such protection represents a failure to give due weight to the reasons that support forms of expression that are not inputs to public discussion. As such, it constitutes a denial of equal standing, and decisions to deny protection are not suitably collective.

Or take expression on matters of political justice. Here, the importance of the issue – indicated by its being a matter of justice – provides a substantial reason for addressing it, regardless of how the message is received. The precise content and weight of the reason are matters of controversy. Aristotelian views identify public engagement as the highest human good; and Brandeis urged that “public discussion is a political duty.”<sup>41</sup> But even if political expression is neither the highest good nor a matter of duty, still, it is a requisite for being a good citizen, sometimes a matter of sheer decency. Typically, then, such expression has support from substantial reasons within different moral-political conceptions.

Bearing witness; speaking out on matters of justice; creating things of beauty; giving professional advice: such cases suffice to underscore the importance of the expressive interest. They work outward from fully conscientious expression – the paradigm of expression supported by substantial reasons from the agent's point of view, and therefore expression whose protection is supported by the principle of deliberative inclusion. To be sure, different evaluative conceptions have different implications for what is reasonable to say and do. But all conceptions assign to those who hold them substantial reasons for expression, quite apart from the value of the expression to the audience, and even if there is no audience at all. For this reason, the deliberative view endorses a strong presumption against content regulation, but does not confine that presumption to political speech.

Other reasons may also support that presumption, understood as part of a wide guarantee of expressive liberty: for example, considerations of reflectiveness (discussed earlier) which suggest that all manner of speech helps to form values and beliefs that also figure in public deliberation. But we need not confine ourselves to considerations of this kind. Content regulation is to be rejected because of the reasons for speech that are captured in the expressive interest, and not simply because such regulations prematurely foreclose public discussion.

To illustrate the point about the deliberative framework, the expressive interest, and a wide guarantee of expressive liberty, let us consider the case of regulations of sexual expression: in particular, regulations of pornography. Part of the trouble with such regulations – for example, the pornography regulations urged by Catharine MacKinnon – lies in this area.<sup>42</sup> An example of such regulation is an Indianapolis ordinance, adopted in 1986, which defines pornography as

the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- Women are presented as sexual objects who enjoy pain or humiliation;
- Women are presented as sexual objects who experience sexual pleasure in being raped;
- Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt;
- Women are presented being penetrated by objects or animals;

- Women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual;
- Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.<sup>43</sup>

In a nutshell, the regulation targets the graphic fusion of sexuality and subordination.

Turning, then, to the connections of sexual expression and the expressive interest, suppose that concerns about human welfare and the quality of human life prompt expression; the evident importance of those concerns provides substantial reasons for the expression. A paradigm is expression about sex and sexuality – say, artistic expression that displays an antipathy to existing sexual conventions, the limited sensibilities revealed in those conventions, and the harm they impose. In a culture that is, as Kathy Acker says, “horrendously moralistic,” it is understandable that such writers as Acker challenge understandings of sexuality “under the aegis of art, [where] you’re allowed to actually deal with matters of sexuality.”<sup>44</sup> Again, in an interview, Kathy Acker says:

I think you’d agree there are various things in us – not all of which are kind, gentle, and tender – readers of de Sade and Genet would probably agree on this point! But I think you can explore these things without becoming a mass murderer . . . without causing *real* damage, without turning to *real* crime. One way of exploring these things is through *art*; there are various ways of doing this. We have . . . to find out what it is to be human – and yet not wreak total havoc on the society.<sup>45</sup>

The human significance of sexuality lends special urgency to the explorations Acker describes. Moreover, and here I join the issue about pornography and the expressive interest, that urgency does not decline when, as in the case of pornography, sexuality mixes with power and subordination – when, as in materials covered by proposed regulations, it is not “kind, gentle, and tender.” On the contrary, a writer may reasonably think – as Acker apparently does – that coming to terms with such mixing is especially important, precisely because, in the world as it is, power is so deeply implicated in sexual identity and desire. To stay away from the eroticization of dominance and submission – as pornography regulations

require – is to avoid sexuality as it, to some indeterminate degree, is.

The connections between pornography (materials covered by the regulation) and the expressive interest may actually be strengthened because, in a world of unequal power, it engages our sexual desires, categories, identities, and fantasies as they are – even if our aim is to transform them. Regulations targeted particularly on the fusion of sexuality and subordination – on the apparent extremes of heterosexual and phallic conventions – will cover too much. For it may be in part by working with that fusion and acknowledging its force, rather than by simply depicting a world of erotic possibilities beyond power, that we establish the basis for transforming existing forms of sexuality.<sup>46</sup>

One difficulty with the regulations, then, is that they make no provision for the importance of the expressive interest – for the weight of the reasons that move at least some people to produce sexually explicit materials that conflict with the regulations. Underscoring that lack of provision, MacKinnon criticizes the exception in current obscenity law for materials with “literary, political, artistic, or scientific value”: “The ineffectualness of obscenity law is due in some part to exempting materials of literary, political, artistic, or scientific value. Value can be found in anything, depending, I have come to think, not only on one’s adherence to post-modernism, but on how much one is being paid. And never underestimate the power of an erection, these days termed ‘entertainment,’ to give a thing value.” Of course, the expressive interest may be overridden, but the conventional rationales for regulation fail to acknowledge it, and thus fall afoul of the requirement of deliberative inclusion. More particularly, though the connections with the expressive interest do not settle the issue, they do help to increase the burden of argument that must be carried in justifying such regulations: those connections mean that defenders of regulations must make a more compelling showing of the harms of pornography, and not simply advance the speculative arguments that are commonly proposed.

## 7. Moral Liberty

I want now to discuss the implications of the principle of deliberative inclusion in the area of moral liberty, what John Stuart Mill

called the “liberty of tastes and pursuits.”<sup>47</sup> I propose to concentrate in particular on the *enforcement of morality*.

My principal focus here will be on the permissibility of imposing criminal punishment on citizens for violating the ethical code shared by the majority in a society, even when that conduct is neither injurious nor offensive to others: Is it permissible for a political society to use its criminal law to force members to lead lives that are not, by the lights of the majority, immoral or perverse?<sup>48</sup> Criminalization is, of course, a special case, and problems of moral liberty extend well beyond it. Mill’s defense of moral liberty was as much a criticism of intrusive collective opinion as of state regulation. And, confining attention to state action, we need to address the codification of morality through regulations that are not backed by criminal sanction: for example, bans on same-sex marriage. But because the issues have important affinities, and can be seen more sharply in the area of criminalization, I will focus on it here.

In two important cases over the past decade – *Bowers v. Hardwick* and *Barnes v. Glen Theatre* – the U.S. Supreme Court affirmed the constitutional permissibility of criminalizing immoral conduct. In the first, “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was offered as a suitable rationale for a law imposing criminal sanctions on consensual homosexual sodomy.<sup>49</sup> To be more precise, the Georgia law itself imposed criminal sanctions on consensual sodomy quite generally, but was upheld by the Court only as applied to homosexual sodomy. In the second, the Court upheld an Indiana public indecency law requiring dancers to wear pasties and a G-string. As rationale for the law, Justice Rehnquist offers the public’s “moral disapproval of people appearing in the nude among strangers in public places.” Moreover, he notes traditional common law restrictions on public nudity and the view underlying those restrictions: that public nudity was an act *malum in se*. Writing in concurrence, Justice Scalia emphasizes that the conduct is prohibited because it is “immoral” – in conflict with “traditional moral belief” – not because it is offensive: “The purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there was not an offended innocent in the crowd.” Rejecting Mill’s harm principle – which requires a showing of harm to others as a necessary condition for criminal sanction – Scalia says, “Our society



prohibits, and all human societies have prohibited, certain activities not because they harm others, but because they are considered, in the traditional phrase, “*contra bonos mores*,” *i.e.* immoral” – and he goes on to mention “sodomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy” as areas in which legal regulation of conduct is constitutionally permitted, though the rationale for the regulations is rooted in “traditional moral belief.”

As Scalia’s examples indicate, the debate about the enforcement of morals is not confined to issues of sexual morality. Still, that has been a central historical focus – as in *Bowers* and *Barnes*, as well as in disagreements about generic anti-sodomy laws, and regulations of prostitution and pornography. I will maintain that focus here.

The debate about enforcing morality implicates in especially profound ways the value of democracy. Indeed, the debate about the permissibility of enforcing conventional ethics is commonly presented as a conflict between democracy, which is said to support the enforcement of morals, and some other value – say, personal liberty or autonomy – which is seen to be compromised by and to condemn that enforcement. Ronald Dworkin, for example, says that the argument from democracy is “politically the most powerful argument against liberal tolerance.”<sup>50</sup> And in his classical critique of Lord Devlin’s defense of the enforcement of morals, H. L. A. Hart says, “It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live.”<sup>51</sup>

To state the views of the moral populist in more generous terms: on moral issues, the values of the majority ought to be decisive because no other basis for determining our shared “moral environment” is compatible with the equality of citizens – no other basis is fair to citizens as equals. Moral disagreements in the community ought, then, to be resolved by a procedure of decision making that treats citizens as equals – say, majority rule. Lord Devlin himself suggests this case for enforcement in an essay titled “Democracy and Morality”: “Those who do not believe in God must ask themselves what they *mean* when they say that they believe in democracy. Not that all men are born with equal brains – we cannot believe that; but that they have at their command – and that in this they are all born in the same degree – the faculty of telling right from wrong. This is the whole meaning of democracy, for if in this

endowment men were not equal, it would be pernicious that in the government of any society they should have equal rights.”<sup>52</sup>

A first response to the moral populist argues that majority rule on moral questions – like majority rule decisions to establish racially segregated schools – does not treat citizens as equals, because it permits people to act on their view that some citizens are worth less than others. But we ought to resist acceding to this temptation too quickly. It is at least possible to condemn a way of life and the conduct it comprises without condemning those who lead it as worth less than others: that is, for example, the point of current Catholic doctrine on homosexuality. We may wish to argue, in the end, that this view is hostility barely concealed – that when it comes to matters sexual, moral traditionalism is homophobia and misogyny carried out by other means. Still, the means are different: a complex structure of religious and moral argument. We ought, then, to be cautious about simply *identifying* a willingness to punish conduct judged immoral with either racism or sexism – which are, on their face and without reinterpretation, about people, not ways of life. “Attempting to preclude the entire population from acting in ways that are perceived as immoral is not assimilable to comparatively disadvantaging a given group out of simple hostility to its members.”<sup>53</sup> To be sure, regulating ways of life as immoral may in the end be as objectionable as condemning people as of lesser worth, but we need to distinguish the troubles.

A second response to the argument from democracy is to defend a Millian harm principle on the basis of the value of autonomy or utilitarian principles. But this strategy may unintentionally lend added force to Devlin-style arguments. Let me explain, concentrating on appeals to the value of autonomy.

The argument from autonomy takes two principal forms. According to the first, the autonomy protected by restrictions on the enforcement of morality is principally the autonomy of the agent whose conduct would otherwise be regulated. According to the second, moral toleration benefits others, whose autonomy is enhanced by a greater range of alternatives.<sup>54</sup> The first version is more familiar and I will sketch a version of it presented by Ronald Dworkin, who offers it as a reply to one kind of communitarian argument for the enforcement of an ethical code.<sup>55</sup> What matters here are not the details, but the central thesis: that we cannot make people’s lives go better by requiring them to conform, through threats of criminal punishment, to an ethical code that they reject and would

otherwise violate. Dworkin rests this thesis on a theory of the best human life in which the value of autonomy or self-government plays a central role. According to this theory, a person's life is good only if the person chooses the values that guide it – or, if choice conveys the wrong picture, reflectively endorses those values.<sup>56</sup>

Dworkin endorses an especially strong form of the requirement of reflective endorsement, though he needs just such a strong form to defeat the argument for enforcement.<sup>57</sup> Reflective endorsement, he says, has *constitutive*, not merely *additive* value.<sup>58</sup> In particular, no part of a life contributes to the value of that life unless it is reflectively endorsed. So, for example, the development of intellectual powers makes a life better only if that development takes the form of *self-development* – development guided by the reflectively accepted values of the agent. Altruistic behavior – saving the lives of others, say – makes the saver's life better only if she endorses the value of altruistic behavior.

Dworkin's conclusions about the importance of reflective endorsement closely parallel Locke's defense of religious toleration; indeed, Dworkin's defense of moral toleration might be seen as generalizing Locke's argument. According to Locke, "Although the magistrate's opinion in religion be sound, and the way that he appoints be truly evangelical, yet, if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in against the dictates of my own conscience will ever bring me to the mansions of the blessed. . . . Faith only and inward sincerity are the things that procure acceptance with God."<sup>59</sup> Just as worship is of no value unless accompanied by inner conviction, by faith freely embraced, so, too, decent or socially beneficial conduct – a good impact on the world – adds nothing to the value of a life unless the behavior is accompanied by a freely embraced, inner conviction about the value of the conduct.

Reasoning from this premise about the dependence of salvation on inner faith, Locke argued that the state could not save souls through enforced religious rituals, and should not try. Similarly, premising the constitutive value of autonomy, Dworkin concludes that the state cannot make a person's life *better* by forcing that person to live according to an ethical code he rejects. The problem with moral paternalism, then, is not that it fails to be suitably skeptical about the good, or that it provokes civil conflict, but that it rests on an incorrect theory of the good life; it fails to appreciate the constitutive role of reflective endorsement in the value of a life.

If this is right, then we cannot defend the enforcement of morals by claiming to show equal concern for the true good of all citizens. Indeed, that argument is, in Dworkin's words, "self-defeating" because, according to the autonomy theory, a life of enforced moral conformity is not better than a life of chosen immorality.<sup>60</sup> On the contrary, the requirement of reflective endorsement supports freedom of personal choice under favorable conditions for considering how best to live (e.g., conditions in which people pursue different "experiments in living," to borrow Mill's phrase).

This argument has considerable force. The premise about autonomy serves as an axiom in a family of reasonable comprehensive moralities; and for the sake of discussion, I assume that the conclusions are well-supported by the premises. But as political argument, it has an important shortcoming: it depends on a comprehensive philosophy of life, and the deliberative view requires that, under conditions of reasonable pluralism, we free political argument from such dependence, particularly when such argument bears on the fundamentals of conduct.

Thus, the autonomy theory is a form of comprehensive moral liberalism, rejected by citizens who think, not unreasonably, that human lives are made good at least in part by their compliance with divine law, or their conformity to the order of the universe, or the quality of their impact on the world, or the extent to which they realize human powers. To be sure, citizens who endorse such views may themselves reject the enforcement of morality because they judge it worse or inappropriate to force lives to be as good as they can be. But just as the belief in religious toleration is not and should not be presented as contingent on a religious view about the sufficiency of inner faith to salvation, acceptance of moral toleration is not and should not be presented as contingent on the view that personal autonomy is the supreme moral value and comprehensive guide to conduct. I mentioned earlier that the autonomy argument for moral toleration generalizes a Lockean argument for religious toleration; whereas the latter rejects enforcement of a religious code because inner faith is required for salvation, the former, more abstractly, treats reflective endorsement as constitutive of the goodness of a life for the person who lives it. I think there is something right in this use of religious toleration as a model, but as I explain in some detail below, the deliberative view presents the parallel in a different way: it emphasizes in particular the weight of the reasons that lie behind the regulated conduct and the un-

acceptability for the purposes of political argument of the considerations that would justify the regulations.

The failure of this argument might suggest that majority rule ought, after all, to extend to moral issues. Precisely by underscoring moral disagreement – indeed, reasonable moral disagreement – the limits of the autonomy argument might suggest that treating citizens as equals requires that the majority be left free to fix the shared moral landscape. Lord Devlin makes just this point. Agreeing that moral differences often cannot be resolved through a good faith exercise of practical reason – that “after centuries of debate, men of undoubted reasoning power and honesty of purpose have shown themselves unable to agree on what the moral law should be”<sup>61</sup> – he concludes that the arbiter of social morality cannot be reason, but must instead be the people – “the ordinary man, the man in the jury box, who might also be called the reasonable man or the right-minded man.”<sup>62</sup>

But the deliberative account of democracy rejects that conclusion. To see why, notice first that controversies about the *enforcement* of morality characteristically track moral controversies: when enforcement is controversial, so, too, is the moral question itself. The issue, then, is not whether conduct, assumed not to be injurious to others, can permissibly be regulated for moral reasons *on which there is general agreement*. Instead, the issue is whether conduct can permissibly be regulated for moral reasons, despite deep and apparently unresolvable disagreement about the morality of the conduct and the grounds for regulating it.

This point seems easy to miss. In his criticisms of Devlin, for example, Hart asks “why we should not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence, and insist that before *general moral feeling* is turned into criminal law it is submitted to scrutiny of a different kind from Sir Patrick’s? Surely the legislator should ask whether the *general morality* is based on ignorance, superstition, or misunderstanding. . . .”<sup>63</sup> Such questions are certainly in order. But in controversial cases of enforcement, the assumption that regulations enforce “general morality” or “general moral feeling” is typically not, unless by “general” we mean “majority,” in which case a very large step needs to be filled in – the step that authorizes the majority to speak in the name of the community.

Take the case of homosexuality. It would be preposterous to say that the moral consensus of the community condemns homosexu-

ality, but some people want nevertheless to practice it despite its accepted immorality. Instead, some citizens, for religious or perhaps other reasons, condemn it and perhaps wish to regulate it (though not all who condemn also wish to regulate). Putting aside concededly insufficient appeals to Scripture, two principal arguments have been advanced for condemnation and regulation.<sup>64</sup> First, procreation is the natural end of sexuality (the natural end being the end for which God established sexual desire), natural ends ought to be practically authoritative, and conduct that by its nature is disconnected from or contravenes those ends is base, perverse, and worthless.<sup>65</sup> Second, homosexuality violates a principle of “complementarity,” warring against the differentiation – including sexual differentiation – that is essential to God’s ordering of the universe: “Human beings are . . . nothing less than the work of God himself; and in the complementarity of the sexes they are called to reflect the inner unity of the Creator.”<sup>66</sup>

These lines of argument are parts of philosophies of life that others reasonably reject (indeed, they are very much contested within the traditions of thought to which they belong).<sup>67</sup> Others believe that there is nothing sinful, immoral, or in any other way objectionable about being gay or lesbian. Some reject the view that procreation is *the* natural end of sexuality or, more generally, that human conduct has natural ends or that those ends, such as they are, ought to be authoritative in settling the best way to live. And some reject the particular metaphysics of creation that founds the principle of complementarity.

Parallel points can be made for the other disputes: about sodomy, pornography, or nude dancing. In each case, we ought not ask whether the state may enforce the *general morality of the community*: on these issues, though the majority may share a morality, the *community* does not – the democratic community, constituted by free and equal citizens. Disagreements are fundamental and deeply rooted in reasonable differences of outlook, associated with, among other things, different views about our bodies, about the role of our embodiment and the pleasures associated with it in the conduct of our lives, about how to respond to the independence from rational control characteristic of sexual pleasure. Some citizens find the law of sin in our members: they see in the body an obstacle to our highest purposes, or at least the source of temptation to do wrong. Others think, not unreasonably, that embodiment is essential to our nature, that bodily pleasures provide ways to break free



of conventional constraint, and that our capacity to transcend such constraints is fundamental to our nature as free agents. These are matters on which – I say this as platitude – people disagree, often profoundly, in thought, sensibility, and conduct: a public basis for justification is absent. The constraints of shared evidence and conceptual precision required for agreement are simply not in view. Law has no place here, not in a democracy committed to treating its members as equals. As Justice Blackmun said in dissent in *Bowers*: “That certain, but by no means all, religious groups condemn the behavior at issue gives the state no license to impose their judgments on the entire citizenry.”<sup>68</sup>

Fundamental, reasonable disagreement, then, puts strong pressure against the enforcement of conventional ethics: the principles in the name of which such enforcement might be justified cannot be accepted by all who are subject to them. And that pressure is particularly strong when, as in the case of sexual conduct, the regulations impinge deeply on the lives of those who are regulated. Given the underlying moral division, some members of the community suppose that the regulated conduct is not only permissible, but an essential part of their good: that sexual intimacy is a fundamental human good and that – particularly in view of the facts of human diversity – its value is contingent in part on its being guided by the judgments, feelings, and sensibilities of the parties to it.<sup>69</sup> Regulations impinge deeply, then, because the reasons that support such intimacy are substantial and can be acknowledged as such by people who reject those reasons. And because the reasons are so substantial, there is a correspondingly strong case against regulating it in the name of considerations drawn from philosophies of life that some citizens reasonably reject.

At the same time, should regulations not impinge very deeply – should the reasons supporting the conduct be less substantial – then the case against enforcement is less compelling, even if the reasons come from conventional ethics. Thus, regulating boxing because it is immoral – or betting because it is – may be less deeply objectionable than regulating sexuality. Though some may reject the reasons used to support the regulations, they may nevertheless accept majority support as itself sufficient reason. More generally, I think it is very difficult to argue for a blanket condemnation of the enforcement of community morality – in particular, a principled condemnation that does not depend on the complexities of legal categorization and associated slippery slopes – unless we premise



the autonomy version of moral liberalism. In any case, no such blanket condemnation is intended here.

I said earlier that the proponents of enforcement often appeal to the value of democracy, urging that the equality of citizens requires that majority values fix the moral environment. This point has considerable force when a collective choice is necessary, as, for example, in the area of security policy: there, we need to arrive at a common decision, so the majority may speak in the name of the community – the majority principle itself may be a matter of general agreement among people who disagree about the right policy.<sup>70</sup> But where regulation is unnecessary, as in the area of sexual morality, this rationale is unavailable.

The case for the majority as tribune of the community is not confined to issues on which collective choice is mandatory. It also has considerable force when regulations do not impinge deeply: when they do not cover conduct rooted in fundamental obligations or supported in other ways by substantial reasons. In such cases, even if a regulation is not required, it is permissible to adopt one with majority support. For example, taxing citizens to support research and development may be unnecessary, but it is unobjectionable: given differences of judgment and interest, it is to be settled by a procedure that treats people as equals. But fundamental interests and substantial reasons are at stake in the area of sexual morality (once more, the key issue of contest about the enforcement of morality). Given the reasonable rejection of the moralities in the name of which the regulations are imposed, the presence of such fundamental interests condemns the regulations.

In short, then, moral liberty – like religious and expressive liberty – is an ingredient in the democratic idea of collective choice by free and equal citizens. The decision to regulate cannot be collective, in a suitable sense: it cannot arise from free reasoning among equals. It is for that reason undemocratic.

## 8. Community, Legitimacy, Democracy

To conclude, I will sketch some remarks on a fundamental question that I have postponed for the end: What makes the deliberative conception of democracy compelling as an interpretation of the fundamental democratic idea – that the authorization to exercise state power is to arise from the collective decisions of those whose decisions are to be governed by that power?

The principal virtues of the deliberative conception are allied closely to its conception of binding collective choice. By emphasizing the importance of articulating shared reasons, the deliberative view expresses an especially compelling picture of the possible relations among people within a democratic order; moreover, it states a forceful ideal of political legitimacy for a democracy. I take up these two points in turn.

First, the deliberative conception offers a more forceful rendering than aggregative conceptions of the fundamental democratic idea – the idea that decisions about the exercise of state power are *collective*. It requires that we offer considerations acceptable to others, understood to be free, equal, and reasonable, and whose conduct will be governed by the decisions. It requires more than that we count their interests, while keeping our fingers crossed that those interests are outweighed.

This point about the attractions of the deliberative interpretation of collective decisions can be stated in terms of ideas of *political autonomy* and *political community*. If a political community is a group of people sharing a comprehensive moral or religious view, than reasonable pluralism ruins political community. But on an alternative conception of political community, deliberative democracy is a form of political community. To see how, notice first that by requiring justification on terms acceptable to others, deliberative democracy provides for political autonomy. Without denying the coercive aspects of common political life, it requires that all who are governed by collective decisions, who are expected to govern their own conduct by those decisions, must find the *bases* of those decisions – the political values that support them – acceptable, even when they disagree with the details of the decision.

Through this assurance of political autonomy, deliberative democracy achieves one important element of the ideal of community – not because collective decisions crystallize a shared ethical outlook that informs all social life generally, nor because the collective good takes precedence over liberties of members. Rather, deliberative democracy is connected to political community because the requirement of shared reasons for the exercise of political power – a requirement absent from the aggregative view – itself expresses the full and equal membership of all in the sovereign body responsible for authorizing the exercise of that power, and establishes the common reason and will of that body.

When I say that it expresses “full membership,” not simply

equal membership, I mean membership in the collective sovereign that authorizes the exercise of power, and not simply membership as a subject of that power. To be sure, an alternative conception of full membership is available: persons might be said to be full members of a political society just in case the values their philosophy of life comprises coincide with the values that guide the exercise of political power. Under conditions of reasonable pluralism, the deliberative view rejects such full coincidence, even as an ideal of practical reason. It acknowledges a separation between, as Michael Sandel puts it, “our identity as citizens [and] our identity as persons more broadly conceived.”<sup>71</sup>

But why this separation? Why, Sandel asks, “should political deliberation not reflect our best understanding of the highest human ends?” After all, when it does so reflect, we have an experience of political community unavailable from more truncated political argument, confined to common ground that can be occupied by alternative reasonable views.

The answer is contained in the idea of reasonable pluralism, and I will not repeat the details here. Suffice to say that if we take the fact of reasonable pluralism seriously, then we need to watch our third-person plurals as we move from “our identity as citizens” to “our identity as persons”: our identity as citizens is shared, or identity as persons is not. Acknowledging this, what are we to make of “*our* best understanding of the highest human ends?” As citizens, we do not have – nor can we expect to secure – a common view about the highest human ends. So the request that *we* make “*our* best understanding” the basis of political deliberation is empty – or, in practice, gets content from the conception endorsed by a particular group of citizens. In contrast, as persons, we each may have such understandings, but they are plural – they are “our best understandings.” Because those views are incompatible, we cannot fully incorporate them all into political justification, and to use any one in particular is unacceptable.

This suggestion about deliberative democracy and the value of community may seem strained in light of the role of religious, expressive, and moral liberties in the deliberative view. For such liberties are commonly represented as – for better or worse – the solvent of community. And that is especially true when we reject the enforcement of community morality.

But the deliberative view offers a reason for skepticism about that claim. Under conditions of reasonable pluralism, the protec-

tion of the liberties of the moderns is not a solvent of community. Reasonable pluralism itself may be such a solvent, at least if we define community in terms of a shared philosophy of life. But once we assume reasonable pluralism, the protection of the liberties of the moderns turns out to be a necessary though insufficient condition for the only plausible form of political community. For those liberties fall under the “principle of inclusion.” As that term indicates, they are conditions required to ensure the equal standing of citizens as members of the collective body whose authorization is required for the legitimate exercise of public power.

Finally, the deliberative conception of democracy presents an account of when decisions made in a democracy are politically legitimate and how to shape institutions and forms of argument so as to make legitimate decisions.

Generally speaking, we have a strong case for political legitimacy when the exercise of political power has sufficient justification. But, as a conceptual matter, a person can believe that the exercise of power is well justified – therefore legitimate – while also acknowledging that others over whom it is exercised reject the justification. As a conceptual matter, legitimacy does not require that the relevant justification be acknowledged as such by those who are subject to the legitimate power: there need be no justification *to* them. But the background of democracy – the idea of citizens as free and equal – and the fact of reasonable pluralism are important in characterizing a more limited conception of justification: because of these conditions, the relevant justification must be addressed to citizens, by which I mean that its terms must be acknowledged as suitable by those subject to political power. Given that citizens have equal standing and are understood as free, and given the fact of reasonable pluralism, we have an especially strong showing of legitimacy when the exercise of state power is supported by considerations acknowledged as reasons by the different views endorsed by reasonable citizens, who are understood as equals. No other account of reasons is suited for this case.

## Notes

1. “Governed by” rather than “affected by.” Democracy is about justifying authority, not about justifying influence. See Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); Christopher McMahon, *Au-*

- thority and Democracy (Princeton, N.J.: Princeton University Press, 1995).
2. I am grateful to T. M. Scanlon for emphasizing the importance of this parallel.
3. See Robert Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989). Dahl holds that the “principle of equal consideration” – which he attributes to Stanley Benn and which states that the good or interests of each must be given equal consideration – is the most compelling interpretation of the deeper “idea of intrinsic equality,” according to which individuals are, for the purposes of collective decisions, to be considered equal (85–6). Dahl justifies democracy, as a process for making collective decisions, by reference to the principle of equal consideration, given a “presumption of personal autonomy”: the presumption that individuals are the best judges and most vigilant defenders of their own interests. See *Democracy and Its Critics*, chs. 6–8.
4. Jürgen Habermas, “Further Reflections on the Public Sphere,” in Craig Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, Mass.: MIT Press, 1992), 446.
5. *Ibid.*, 452.
6. For discussion of this fact, see Joshua Cohen, “Moral Pluralism and Political Consensus,” in David Copp, Jean Hampton, and John Roemer (eds.), *The Idea of Democracy* (Cambridge University Press, 1993), 270–91; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); and Joshua Cohen, “A More Democratic Liberalism,” *Michigan Law Review* 92, 6 (May 1994): 1502–46.
7. On the importance of moral diversity as a source of pressures toward relativism and nihilism, see Gilbert Harman, “Moral Relativism,” in Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Oxford: Basil Blackwell, 1996), 8–14.
8. See Rawls’s discussion of the burdens of judgment in *Political Liberalism*, 54–8. Leif Wenar argues that these burdens are not widely acknowledged, that, for example, “a religious doctrine characteristically presents itself as universally accessible to clear minds and open hearts,” and he cites the Vatican II statement on Divine Revelation in support. See “*Political Liberalism: An Internal Critique*,” *Ethics* 106 (October 1995): 32–62. But to say that certain religious truths require revelation is to acknowledge that they, unlike truths of natural religion, are not simply available to clear minds and open hearts.
9. The remarks that follow draw on my “A More Democratic Liberalism.”
10. Consider in this connection the virtually unanimous popular endorsement of political equality and equality of opportunity indicated in Herbert McClosky and John Zaller, *The American Ethos: Public Attitudes*

*Toward Capitalism and Democracy* (Cambridge University Press, 1985), 74, 83.

11. Thus, Dahl formulates the “principle of equal consideration of interests,” as well as the “idea of intrinsic equality” on which it rests, to apply solely to processes for making binding collective decisions, and indicates that both might be adopted by adherents to religious moralities, as well as utilitarian and Kantian moral views. See *Democracy and Its Critics*, 85–7.
12. Consider, for example, the changes in the Catholic doctrine on toleration that emerge in Vatican II. The idea of human dignity, always a central element in Catholic moral and social thought, is developed along new lines as the basis for an account of political legitimacy with principled limits on the state’s authority in matters of religious faith and practice. See “Declaration on Religious Freedom,” 1.2. Dignity imposes an obligation to seek the truth and embrace it. But though the “one true religion subsists in the Catholic and apostolic Church,” the pursuit and embrace of truth must comport with our nature as free beings “endowed with reason” and the dignity owing to that nature. And this requires immunity from “external coercion,” as well as “psychological freedom.” The introduction to the Declaration ties the force of the sense of dignity and an understanding of its implications to modern experience (the “consciousness of contemporary man”). In an interesting essay on modern Confucian humanism and human rights, Tu Wei-ming suggests a way to reinterpret Confucian doctrine as incorporating a conception of dignity, tied to obligations in social relationships, that could serve in turn as a basis for a conception of human rights. Here, too, the conception of dignity is tied to central Confucian notions, but its formulation is prompted by modern political sensibilities, as articulated through international institutions. See Tu Wei-ming, “A Confucian Perspective on Human Rights,” unpublished, 1995.
13. For critical discussion of the idea of the “exclusive rights of truth,” see John Courtney Murray, “The Problem of Religious Freedom,” in J. Leon Hooper, S. J. (ed.), *Religious Liberty: Catholic Struggles with Pluralism* (Louisville, Ky.: Westminster/John Knox Press, 1993), ch. 2.
14. Michael McConnell says, “It would come as some surprise to a devout Jew to find that he has ‘selected the day of the week in which to refrain from labor’ since the Jewish people have been under the impression from some 3,000 years that this choice was made by God.” “Religious Freedom at a Crossroads,” *University of Chicago Law Review* 59 (1992): 115. The source of the quotation to which McConnell is responding is *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O’Connor, J., concurring).

15. Here I follow discussion in T. M. Scanlon's *What We Owe to Each Other*, ch. 1 ("Reasons"), unpublished manuscript, 1997.
16. Pope John Paul II, *Evangelium Vitae* (New York: Times Books, 1995), §§29, 62. For critical discussion of these claims and the argument based on them, see Judith Jarvis Thomson, "Abortion," *Boston Review* 20, 3 (Summer 1995): 11–15.
17. I say "arguably" because it might be said that reasons are essentially public and capable of being shared. If that is right, then the fact stated in the text would not constitute a reason.
18. See Adam Przeworski, *Democracy and the Market* (Cambridge University Press, 1991), 17.
19. *Ibid.*
20. See Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor: University of Michigan Press, 1991), 81–4, 95–6. Apart from this dependence on preference diversity, the effectiveness of speech depends on the ease of verifying information, and whether discussion proceeds sequentially and in public. See David Austen-Smith, "Strategic Models of Talk in Political Decision-Making," *International Political Science Review* 13, 1 (1992): 45–58; on economic institutions that promote verification and sequential, public conversation, see Charles Sabel, "Learning by Monitoring: The Institutions of Economic Development," in Neil Smelser and Richard Swedberg (eds.), *The Handbook of Economic Sociology* (Princeton, N.J.: Princeton University Press, 1995), 137–65.
21. For discussion, see Christine Korsgaard, "Skepticism about Practical Reason," *Journal of Philosophy* 83, 1 (January 1986): 5–25; Scanlon, *What We Owe to Each Other*, ch. 1. For illuminating criticism of instrumental rationality, see Robert Nozick, *The Nature of Rationality* (Princeton, N.J.: Princeton University Press, 1993), ch. 5. Particularly important for purposes here are the remarks on the symbolic utility of acting on principles.
22. Using Nozick's terminology (see note 21), when I see that a proposal cannot be defended with acceptable reasons, its symbolic utility declines. Assuming that symbolic utility is motivationally important, the motivation for advancing the proposal declines.
23. I am not worrying here about distinctions between "desire" and "prefer" – in particular that the latter is a polyadic relation.
24. On the distinction between primitive and induced preferences, and a case for the view that deliberation-induced preference change is a matter of changes in induced preferences as a result of new information, see John Ferejohn, "Must Preferences Be Respected in a Democracy?" in Copp et al. (eds.), *The Idea of Democracy*, 236–7; David Austen-Smith, "Modeling Deliberative Democracy," unpublished manuscript, April 1995.



25. For suggestive discussion of the role nonstrategic reasons can play in constraining discussion and improving its effectiveness, see James Johnson, "Is Talk Really Cheap? Prompting Conversation Between Critical Theory and Rational Choice," *American Political Science Review* 87, 1 (1993): 74–86.
26. Dahl, *Democracy and Its Critics*, 182.
27. Dahl has long been skeptical about the role of courts with powers of judicial review in providing such protection. See his remarkable essay, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (Fall 1957): 279–95, and *Democracy and Its Critics*, chs. 12, 13.
28. See John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980); Dahl, *Democracy and Its Critics*; and, more generally, on constitutional requirements as enabling democracy, Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge University Press, 1988), esp. 195–240; and Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," *Philosophy and Public Affairs* 21 (Winter 1992): 3–42.
29. This is, I believe, Dahl's view. Critics of Roberto Unger's conception of empowered democracy have (mistakenly, I believe) assumed that he endorses it. See his *False Necessity* (Cambridge University Press, 1987), 508–39. And it bears a strong family resemblance to the democracy-based interpretations of the U.S. Constitution advanced by Ely in *Democracy and Distrust*, and Bruce Ackerman in *We, the People* (Cambridge, Mass.: Harvard University Press, 1991), esp. ch. 1.
30. Of course, not all differences of conviction are reasonable. One implication is that the problem of toleration for the intolerant is a separate issue in an account of religious liberty. Religious liberty generally ought not to be treated as a response to a problem of unreasonableness.
31. Michael Sandel, *Democracy's Discontent* (Cambridge, Mass.: Harvard University Press, 1996), 322.
32. See Scanlon's suggestion that proponents of subjective criteria for interpersonal comparisons might defend those criteria by arguing that they "would be agreed on by people to the extent that they seek a principle recognizing them as equal, independent agents whose judgment must be accorded equal weight." T. M. Scanlon, "Preference and Urgency," *Journal of Philosophy* 72 (1975): 655–69.
33. On the encumbered self, see Sandel, *Democracy's Discontent*, 14.
34. On the distinction between these two aspects of religious liberty, and the connections between the arguments for them, see John Courtney

- Murray, "The Problem of Religious Freedom," in Hooper (ed.), *Religious Liberty*, 141–4, 148–51.
35. On this last point: the key to the case for religious liberty is that the content of a view assigns stringent obligations to a person who holds it. But specifically *religious* content is not essential.
  36. See the discussion of this rationale in Stephen Carter, *The Culture of Disbelief* (New York: Basic Books, 1993), 17–18, 35–9. As a general matter, Carter's defense of religious liberty seems too exclusively focused on the parallels between religious and associational liberty and, correspondingly, too dismissive of the continuities between freedom of conscience and freedom of public worship. On those continuities, see Murray, "The Problem of Religious Freedom," 148–51.
  37. Unger, *False Necessity*, 525, emphases added; Joshua Cohen, "Deliberation and Democratic Legitimacy," in Alan Hamlin and Phillip Petit (eds.), *The Good Polity*, (1989), 17–34.
  38. See Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993), 130.
  39. See Alexander Meiklejohn, *Political Freedom* (New York: Harper & Brothers, 1960); Sunstein, *Democracy and the Problem of Free Speech*; Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, 1 (Fall 1971): 1–35; Ely, *Democracy and Distrust*; Owen Fiss, *Liberalism Divided* (Boulder, Colo.: Westview Press, 1996).
  40. For discussion, see Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs* 22, 3 (Summer 1993): 207–63.
  41. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
  42. The discussion that follows is taken from Joshua Cohen, "Freedom, Equality, Pornography," in Austin Sarat and Thomas Kearns (eds.), *Justice and Injustice in Law and Legal Theory* (Ann Arbor: University of Michigan Press, 1996), 99–139.
  43. Indianapolis, Ind., City-Council General Ordinance No. 35 (June 11, 1984). The full text is cited in Catharine MacKinnon, *Feminism Unmodified*, (Cambridge, Mass.: Harvard University Press, 1987), 274 n 1. The regulation was overturned in *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *affirmed without opinion*, 475 U.S. 1001 (1986).
  44. See Kathy Acker, "Devoured by Myths: An Interview with Sylvere Lotringer," in *Hannibal Lecter, My Father* (New York: Semiotext(e), 1991).
  45. Interview with Andrea Juno in Andrea Juno and V. Vale (eds.), *Angry Women* (San Francisco: Re/Search Publications, 1991), 184–5.
  46. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); Susan Keller, "Viewing and Do-

- ing: Complicating Pornography's Meaning," *Georgetown Law Review* 81 (1993): 2195–228; Duncan Kennedy, *Sexy Dressing: Essays on the Power and Politics of Cultural Identity* (Cambridge, Mass.: Harvard University Press, 1993), 126–213.
47. See J. S. Mill, *On Liberty*, ch. 3.
48. Ronald Dworkin, "Liberal Community," *California Law Review* 77, no. 3 (1989): 479–504.
49. 476 US 186, 196 (1986).
50. Dworkin, "Liberal Community," 483.
51. H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, Calif.: Stanford University Press, 1963), 79.
52. Lord Devlin, "Democracy and Morality," in *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).
53. See Ely, *Democracy and Distrust*, p. 256. See also John Hart Ely, "Professor Dworkin's External/Personal Preference Distinction," *Duke Law Review* (1983): 985.
54. For an illustration of this strategy of argument, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), ch. 15. According to Raz, the duty of toleration is "an aspect of the duty of respect for autonomy." Autonomy requires a range of choices among different ways of life that include "distinct and incompatible moral virtues." People who endorse those ways of life tend, however, to be intolerant of one another. So ensuring the structure of alternatives required to foster autonomy requires guarantees against intolerance. But as this sketch indicates, the rationale for the guarantees lies not in the benefits conferred on individuals who receive protection, but in the preservation of a system of alternative possibilities for others.
55. Dworkin, "Liberal Community."
56. I take the term "reflective endorsement" from *ibid.*, 485–6.
57. The argument closely resembles the "maximalist" strategies for defending freedom of expression that I discuss in my "Freedom of Expression." The difficulties are correspondingly parallel.
58. The roots of this claim about the constitutive value of reflective endorsement lie in what Dworkin calls the "challenge" model of value: the view that a good human life is a life that responds suitably to life's challenges. Dworkin appears to think that an agent's conduct counts as meeting a challenge if and only if the agent engaging in the conduct reflectively endorses it. See his "Foundations of Liberal Equality," in *The Tanner Lectures on Human Values 1990* (Salt Lake City: University of Utah Press, 1991), vol. 11. I don't find Dworkin's case very plausible, but will not pursue the reasons here. I am indebted to John Tully for discussion of Dworkin's view.
59. John Locke, *Letter Concerning Toleration* (Indianapolis: Bobbs-Merrill, 1955), 34.

60. See Dworkin, "Liberal Community," 487.
61. Devlin, "Democracy and Morality," 93.
62. *Ibid.*, 90.
63. H. L. A. Hart, "Immorality and Treason," *The Listener*, July 30, 1959, 3, my emphases.
64. A third argument, advanced by Roger Scruton, claims that homosexuality exhibits an objectionable form of narcissism and obscene perception, that instead of "mov[ing] out from my body towards the other, whose flesh is unknown to me . . . I remain locked within my body, narcissistically contemplating in the other an excitement that is the mirror of my own." *Sexual Desire* (New York: Free Press, 1986), 310. Though Scruton presents the antinarcissism argument as an alternative to arguments from the natural end of sexuality and complementarity, it is not clear that it stands independently of the latter.
65. For a crisp statement, see C. H. Peschke, *Christian Ethics* (London: C. Goodliffe Neale, 1978), 2:379.
66. For discussion of the idea of complementarity, see Scruton, *Sexual Desire*, 309; Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (New York: Knopf, 1995); and especially Gareth Moore, *The Body in Context: Sex and Catholicism* (London: SCM Press, 1992), ch. 7. Moore rightly points out that, on natural interpretations, the idea of complementarity depends on the procreation-as-natural-end doctrine. The passage on complementarity comes from the *Letter on the Pastoral Care of Homosexual Persons* of the Catholic Church's Congregation for the Doctrine of the Faith.
67. See, e.g., Sullivan, *Virtually Normal*, and Moore, *The Body in Context*.
68. *Bowers v. Hardwick* 476 U.S. 186 (1986).
69. For suggestive remarks about the importance of sexual intimacy – connecting its value to the importance of individuality and imagination, while separating that value from concerns about procreation – see Stuart Hampshire, *Innocence and Experience* (Cambridge, Mass.: Harvard University Press, 1989), 124–31.
70. I borrow the example of security policy from the discussion of toleration in Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), 164–5. The general point – that the case for majority rule weakens when a collective policy is not necessary and that such policy is not required when it comes to moral issues – can be found in both Nagel and Joel Feinberg, *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990), 51.
71. Sandel, *Democracy's Discontent*, 322.