Public Reason, Rawlsian Restraint, and the Judiciary: The Influence of Political Philosophy on Legal Scholars and Judges in Relation to Religious Liberty

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Introduction

This paper concerns the political theory of public reason in its application to religious freedom issues. Public reason, or its related idea, public justification, is in my estimation, just the latest extension of the problem of religious toleration in its particular relationship to the right of religious liberty. This latest expression of the toleration debate began, by most estimates, with John Rawls' A Theory of Justice.[1] I will argue that in its Rawlsian form, public reason contains some serious flaws, which can be corrected by the work of political philosophers such as Gerald Gaus, Kevin Vallier and Michael Perry, among others, to include the voices of religious people and groups.

Political philosophers have posited that in a liberal democracy coercion by the state that affects individuals in some way, should be justified by good reasons and those reasons ought to be capable of being stated publicly.[2] The foundation for this idea derives from Immanuel Kant and other thinkers who saw moral autonomy as the highest value in a society.[3] How can the state presume to coerce a morally autonomous person without some overriding higher moral interest? A law or policy can be legitimately imposed only if it can be reasonably justified to its recipients so that they can agree to it. The principle appeals to reasonableness, but as we will see, it defines what is reasonable for individuals in a narrow way. The public reason question is: What reasons are valid in order for their agreement to "count"? So far, the theory is simple and intuitively acceptable. However, while liberals (Kant, Mill and others) "endorse the liberal idea that individuals are to be free to decide their own conceptions of a good life, they both subscribe to a kind of perfectionism of the self to guide individuals' decisions about which values and endeavors they ought to pursue…. For the implication of these philosophical liberalisms is that transcendent religious doctrines [as opposed to autonomy or individuality] are false in crucial respects, regarding both the nature of morality and value, and also (given liberalism's alliance with the natural sciences) the origins of the universe, humankind and many natural facts."[4] We can see then that John Rawls' very conception of liberalism predisposes him to denigrate religion in the social realm, if not also privately.[5]

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[1] Harvard University, 1971.

[2] Defining a liberal democracy is not as easy as one might think. First there is the problem of which "Liberalism" we are discussing, classical or modern. Second, the term has different connotations in the United States than in Europe. Third, even within a given variety of Liberalism, one can discern differences. I am using the term "liberal" in a broad sense here. See below for a brief discussion of liberalism as an ideology.

[3] See Kant, *What is Enlightenment?* (1784).

[4] Samuel Freeman, "Democracy, Religion and Public Reason," in *Daedalus*, Volume 149, Number 3 (2020), pp. 37-58, 40.

[5] Though Rawls attempts to make his idea of public reason more palatable in some of his later writings.

Though the seed of the public reason theory is not new, its modern conception was articulated by John Rawls in several of his works.[6] Rawls stated the idea as part of his larger project to theoretically conceive of a stable and just liberal regime that was not founded on utilitarian principles. Rawls writes:

> "a basic feature of democracy is the fact of reasonable pluralism-the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions."[7]

Rawls introduces a liberal democratic regime as a collectivity of individuals who possess differing "comprehensive doctrines," by which he apparently means values that animate their lives. But he continues:

"Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens."[8]

The heart of Rawls' notion of public reason consists of "good reasons" for laws or coercive state action, and he immediately suggests that all comprehensive doctrines, including religious views, be replaced by "politically reasonable" ideas that can appeal, he believes, to all.[9] Exactly what those reasons are Rawls does not specify, but it is agreed that they are secular. In Rawls' earlier works, he was much more dismissive of comprehensive doctrines such as religious ideas. He appears to have wished that everyone accept his two basic principles of justice[10], and then, that these would become the societal basis for future policy and law. In doing so, Rawls tends to reject both a constitutional definition of principles and any metaphysical principles as foundational,

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[6] See John Rawls, *A Theory of Justice*. Belknap Press of Harvard University Press, 1971; *Political Liberalism*. Columbia University, 1993; and "The Idea of Public Reason Revisited," in *University of Chicago Law Review*, Volume 64, No. 3 (1997), pp. 765-807. For a discussion or the historical predecessors to Rawls' public reason doctrine, see Ibid., pp. 41-43.

[7] "The Idea of Public Reason Revisited," Ibid., pp. 765-766, hereafter cited as IPRR.

[8] Ibid., p. 766.

[9] Kevin Vallier has detailed several versions of public reason in "Chapter 5: Conceptions of Public Reasons," at https://www.kevinvallier.com/wp-content/uploads/2010/10/Chapter-5-Conceptions-of-Public-Reasons.pdf (2010), retrieved January 11, 2021.

[10] Rawls' two principles of justice: (1) "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." (2) "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." See Rawls, *A Theory of Justice*, op. cit., p. 302.

unless they could be re-defined to be consistent with his own principles.[11] To disagree with the principles is considered to be unreasonable.

This leaves the religious person (whose ideas have been defined as comprehensive and non-mainstream) with several choices when involved in deliberative democracy, which are summarized by Andrew Murphy:

> (1) one may change the comprehensive doctrine to fit the conditions of publicity; (2) one may dissemble, manufacturing a "public" justification for political stances, thus disguising one's true motives; (3) through civil disobedience or other direct action, one may seek to change the parameters of public debate (to the end that a marginal position will eventually become widely accepted); or (4) a citizen may temporarily violate the strictures of public reason by advancing comprehensively derived views, so long as he or she follows such a violation with sufficient public reasons in due course.[12]

None of these alternatives is particularly palatable to an individual, as Murphy details, and they even violate some basic principles of equality and freedom, not to mention dignity as a person. But the theory itself is one thing. How could it be applied in real decision-making settings? Further, has it been applied, either consciously or unintentionally as a result of the secular presuppositions of public officials? In a liberal democracy, several different institutional arrangements can be found for making decisions that have coercive results, including some that we can call "one person rule."[13] One official decides to impose a law or policy on others. This of course occurs after the initial participants to the social contract have agreed on the type of constitutional arrangements to establish. One common type of one-man rule is a court of law, presided over by a single judge or a panel of jurists. This is the point at which the theory of public reason intersects with the Federal court system and the United States Supreme Court.

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[11] On Rawls' first principles of justice, which are "supra-constitutional," see his *A Theory of Justice*, op. cit., pp. 60ff. Rawls did modify his view of religion in "The Idea of Public Reason Revisited," but mostly to clarify his earlier views.

[12] Andrew R. Murphy, "Rawls and the Shrinking Liberty of Conscience," in *The Review of Politics*, Vol. 60, No. 2 (Spring, 1998), pp. 247-276, 249-250. I should note that John Rawls does believe the tenets of a liberal democracy include toleration and liberty of conscience, but he also wishes to keep those values in their proper sphere by bracketing them when a polity is faced with collective action issues. Moreover, Rawls is perfectly at home with private belief. Having said that, Rawls does betray his secular leanings in not making a place for transcendental values in his scheme.

[13] I am not using the term literally here. It may be expanded slightly to include two, three or a few more decision makers acting collegially and voting to make a ruling or impose a law.

Court decisions in many cases partake of that peculiarly political characteristic of being coercive.[14] To a liberal like Rawls this would mean they should be justified, at least theoretically, and public reasons should accompany judicial decisions. But what if an argument is made that only reasons that are "accessible" to other liberals like Rawls should be accepted by the courts. Moreover, I will assert here that the courts have been urged to do that very thing by supporters of public reason/public justification theory.[15] Besides that, we can see evidence that courts have adopted some variation of the so-called "consensus" theory of public reason, as opposed to the "convergence" theory, which allows for religious and other "comprehensive doctrines" to be accounted for. One might think that the existence of the First Amendment Free Exercise Clause would prevent that kind of decision from occurring, certainly at the level of the Supreme Court. The Free Exercise Clause embodies the value of religion and religious reasons into the fundamental law of the nation. However, this fact has not prevented both legal scholars and judges, and now a generation of law students, from minimizing religious reasons or eliminating them from law. The subject of the remainder of this paper addresses this problem and then introduces a better theory that recognizes religious reasons as valid while also affirming secular reasons: the "convergence" theory.[16]

Consensus theory (Rawls' theory in essence) attempts to find "secular" reasons that all participants affected by a law or policy can agree to. Only publicly accessible reasons are allowed, and publicly accessible reasons are both "reasonable" and non-comprehensive by definition.[17] As Rawls writes, a law has been adequately justified "when all the reasonable members of political society carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive views."[18] One can hold comprehensive doctrines but these should not be part of the public reasons that all reasonable people could publicly agree on. This means that for Rawls "public justification thus depends on the fact that all reasonable persons can endorse a political conception of justice from within their non-public or comprehensive doctrines, but public reason itself makes no reference to the content of those nonpublic doctrines—it depends only

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[14] I am defining coercion to include decisions to allow something to occur, if they come from a state act and affect the well-being of citizens. What one group has a right to can become a coercive duty to another.

[15] See for example, the work, discussed below, of scholars like the philosopher Robert Audi and the legal scholar Brian Leiter.

[16] Two of the most articulate defenders of this theory are Gerald Gaus and Kevin Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry, and Political Institutions," *Philosophy & Social Criticism*, 35(1): 51–76.

[17] Jonathan Quong, "Public Reason," in *Stanford Encyclopedia of Philosophy*, at https://plato.stanford.edu/entries/public-reason/ (2017), retrieved January 11, 2021.

[18] John Rawls, *Political Liberalism*, op. cit., p. 387.

on the shared political ideas found within the political conception of justice."[19] The conception of justice of the proposed law or policy must be publicly political. If it were religious, for example, it would be deemed inaccessible and private, and therefore unacceptable.

Convergence theory on the other hand, arising as a critique of consensus theory, asserts that the accessibility criterion is too restrictive, that religious reasons are reasonable as well, and that therefore a great many more reasons ought to "converge" on a single option, as it were, from different angles or perspectives.[20] Jonathan Quong writes, "By contrast, *convergence* accounts of public reason's structure allow for the possibility that a principle or rule may meet the test of public reason even in the absence of any shared or public reasons."[21] Moreover, religious liberty justifications can be allowed in the deliberation, as they are considered equally valid (at least presumptively) as political or "secular" reasons.

Rawlsian Public Reason in the Academic Legal and Philosophical Sphere

John Witte and Joel Nichols have articulated the actual use of the Rawlsian version of public reason in the academic legal sphere. Their perspective on public reason in the law will be helpful to my own points to be made here. The authors begin by suggesting that until from about 1993 until about 2015, religious liberty rights were well-protected.[22] Reasons varied, but for the authors, the "bigger challenges" to religious freedom grew out of the culture wars, especially between religious freedom and sexual freedom.[23] They then add that legal scholars have begun to challenge the idea that religion is at all special. Even if it was thought to be a high value in the eighteenth century, it has "become obsolete in our post-establishment, postmodern, and post-religious age. Religion…is too dangerous, divisive and diverse in its demands…."[24] Leading critics of religious liberty include Brian Leiter and Micah Schwartzman, both of whom argue that "there is no apparent moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action."[25] Schwartzman

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[19] Jonathan Quong, "Public Reason," in *Stanford Encyclopedia of Philosophy*, at https://plato.stanford.edu/entries/public-reason/, 2017, retrieved January 6, 2021.

[20] Kevin Vallier, "Convergence and Consensus in Public Reason," in *Public Affairs Quarterly*, Vol. 25, No. 4 (October 2011), pp. 261-279.

[21] Quong, "Public Reason," op. cit.

[22] John Witte, Jr. and Joel A. Nichols, "'Come Let Us Reason Together': Restoring Religious Freedom in America and Abroad," in *Notre Dame Law Review*, Volume 92, Issue 1 (2017), pp. 427-450, 427-429.

[23] Ibid., p. 430.

[24] Ibid., p. 432.

[25] Brian Leiter, *Why Tolerate Religion?* Princeton University, 2014, p. 63. See also Schwartzman, "Religion as a Legal Proxy, " in *San Diego Law Review*, Volume 51 (2014) and "What If Religion is Not Special?, in *University of Chicago Law Review*, Volume 79 (2012).

added, in typically Rawlsian language, that religious claims of conscience have no more right to accommodations than any other "comprehensive secular doctrine."[26] In fact, John Rawls has been an inspiration, if not a direct influence, in the writings of anti-religious accommodation scholars. These academic writers, in addition, will constitute a major influence on law school students, some of whom in turn will become legal academics and judges. Rawls goes so far as to urge scholars to educate judges to persuade them to interpret the Constitution consistent with his own principles of justice. Judges, he writes, are to be "exemplars of public reason."[27]

Besides legal scholars, a bevy of philosophers concentrating in political philosophy have also supported and extended Rawls' arguments about public reason. The philosopher Robert Audi for example has argued that "one has a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support (say, one's vote)."[28] Steven Macedo appears to write in the same vein when he states, "If some people…feel 'silenced' or 'marginalized' by the fact that some of us believe that it is wrong to seek to shape basic liberties on the basis of religious or metaphysical claims, I can only say 'grow up!'" Taking a "shared reasons" view of public reason, he adds that a commitment to that idea includes a "duty of civility according to which citizens owe each other reasons that they can share…."[29] These examples represent the mainstream philosophical position on public reason and religious freedom, though there are critics of the consensus view and also scholars who have attempted to find a compromise.[30] The legal scholars and the philosophers show evidence of much cross-fertilization in their writings on this subject, as one would expect.

Rawls' conception of the good and just would not deny the validity of the aspirations of the United States Constitution in the abstract. It is in the particulars that problems would arise, especially with regard to religious freedom. It follows then that he would advocate a lessening of exemptions

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[26] Schwartzman, "What if Religion is Not Special," Ibid., p. 1377.

[27] *Political Liberalism*, op. cit., pp. 231-240.

[28] Robert Audi, *Religious Commitment and Secular Reason*. Cambridge University Press, 2000, p. 86. See also 4. Robert Audi, "The Separation of Church and State and the Obligations of Citizens," *Philosophy and Public Affairs*, Volume 18 (1989), pp. 259-96; "Religion and the Ethics of Political Participation," *Ethics*, Volume 100 (1990), pp. 386-97; "Religious Commitment and Secular Reason: A Reply to Professor Weithman," *Philosophy and Public Affairs*, Volume 21 (1991), pp. 66-76

[29] Steven Macedo, "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?" in *Natural Law and Public Reason*, edited by Robert P. George and Christopher Wolfe. Georgetown University Press, 2000, pp. 11-49, p. 35.

[30] On the former, see for example the works of Nicholas Wolterstorff, Christopher Eberle, Andrew Murphy, and Michael J. Perry. For the latter, see James P. Sterba, "Reconciling Public Reason and Religious Value," in *Social Theory and Practice*, Vol. 25, No. 1 (Spring 1999), pp. 1-28.

and accommodations by the courts. Below I will assert and defend a broader understanding of public reason/public justification.

Putting Religion in its Proper Place

In this section I will draw on the critics of Rawlsian public reason, who have not only showed the deficiencies of the "Rawlsians" but also offered positive solutions to the problem. To restate the issue: In a liberal democracy that values autonomy and justice, state action requires that it be capable of justification to those affected, and that public or shared reasons are the only ones that count in most instances. Since religious reasons are non-public and cannot, in the estimation of Rawls and others, be reasonably articulated, they should not play a role in the consensus sought by liberals. If, as Rawls urged, academics influence students, law students, legal academics and philosophers, as well as judges, and can be convinced that his version of public justification is correct, the parts of the United States Constitution that address religious establishment and religious freedom would be overridden by his two principles of justice and interpreted as of, at best, secondary value, even if a majority of citizens held to religious reasons in assessing laws and policies. This is the general outcome that I see in legal circles presently, with the exception of religious legal scholars and philosophers.

Does religion deserve a place at the public table? Historically, of course, the Christian religion has played a central role in public debate and discourse, from the 300s AD to relatively recently. The Enlightenment (c. 1680-1800) undercut the influence of Christianity, and, later, its influence undermined even religion in general in the form of secularization.[31] Almost no one, however, on the American scene, even during the Enlightenment, which was more moderate in its expression here, urged restricting the role of religion in political debates.[32] Even Jefferson and Madison, though bold in their time in the eyes of some, did not attempt to extricate religion in their writings on separation of church and state or from its general influence in political debates about law and policy. Historically, then, religion has had a substantial influence in public justification theory (long before it adopted that name for the concept). Individuals were not urged to keep their religious ideas to themselves in finding consensus.

More recently, as Witte and Nichols have shown,

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[31] Secularization is a contested phrase and concept. Some scholars argue, plausibly, that secularization in our current culture is really more of a kind of replacement of one kind of religious thought and practice with new forms. Others speak of a basic disenchantment of the culture over several centuries. See Peter Harrison, editor, *Narratives of Secularization*. Routledge, 2018 and Charles Taylor, *A Secular Age*. Belknap Press of Harvard University, 2018.

[32] In the nineteenth century, some did call for a restriction of religious involvement in politics, for various reasons, some anti-Catholic sentiment and some on separationist grounds. See Philip Hamburger, *Separation of Church and State*. Harvard University, 2004.

"Too many of these critical arguments trade in outmoded philosophical assumptions that serious public and political arguments about the fundamentals of life and the law can take place under the 'factitious or fictitious scrim of value neutrality.' The reality, the last generation of philosophy has taught us, is that every serious position on the fundamental values governing public and private life—on warfare, marriage reform, bioethics, environmental protection, and much more—rests on a set of founding metaphors and starting beliefs that have comparable faith-like qualities. Liberalism and secularism are just two belief systems among many, and their public policies and prescriptions are enlightened, improved, and strengthened by full public engagement with other serious forms of faith, belief, and values."[33]

Religion has, it is argued, been caricatured by its public reason critics. Once again, Witte and Nichols have forcefully made this point.[34] I have seen it at work in the academic community on more than one occasion. A minimal toleration of alleged antiquarian religious ideas does not help matters, as this also creates the environment for Rawlsian public reason to bracket religion in public debate.

The benefits of religion in public life have also been advanced and, more recently, shown in empirical work.[35] Without doubt, religion plays a demonstrable role in the stability of a society, in several aspects: personal morality, public behavior, the amelioration of what might otherwise be barbaric laws and actions by government, restraint of political self-interest, as embodied in laws derived from religious ideas and in the individual ethics of leaders in a society influenced by religion, humanitarianism, well-functioning civil society, and even in constraining economic self-

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[33] John Witte and Joel Nichols, "Come Let Us Reason Together," op. cit., p. 438. The authors continue, stating that a growing number of "serious" political thinkers now recognize that deeply held religious views ought not to be banished from public discourse. Ibid.

[34] See Ibid., p. 39: "Few people of faith, and even fewer scholars of religion, would recognize this caricature of religion. For many adherents, religion consists of complex and comprehensive "life-worlds" (as anthropologists call them). Religion involves daily rites and practices, patterns of social life and culture, and institutional structures and activities that collectively involve almost every dimension of an individual's public and private life. Professor Leiter and many other critics of religious freedom posit a flat and anachronistic concept of "religion" as mere irrational belief and self-interested truth claims. And even then, they pay little attention to the immense literature on philosophy of religion and religious epistemology, hermeneutics, theological ethics, and more, which has placed religious ideas and beliefs, metaphors and norms, and canons and commandments into complex and edifying conversations with nonreligious premises and worldviews. It is this diverse and often sophisticated world of religious ideas and institutions, norms and practices, and cultures and communities whose freedom is at stake, not the imagined religious abstractions that haunt the law review world."

[35] For theoretical works asserting the value of religion, see works on Edmund Burke, Jean-Jacques Rousseau, Immanuel Kant, and many American Founding Fathers. Citing several recent studies on the social benefits of religion, see Witte and Nichols, Ibid., pp. 442ff.

interest in a free society, among others. These benefits have not gone unnoticed in history, but have recently been quantified to a greater extent.

In addition, to address the Rawlsian public reason theorists, especially the more anti-religious among them, it is important to correct what they have misinterpreted or ignored from the past. Many public reason theorists have looked back to the sixteenth century and seen it as the model *par excellence* to define the essence of the problem of religion. They focus especially on the wars of religion and their aftermath as a reason to distrust religion as a major (or minor) factor in law and policy-making. They fail historically to understand that these conflicts actually catalyzed discussion and then action on religious toleration, religious liberty and finally religious freedom as a right rooted in nature or revelation.[36] I would argue as well that in at least a good many instances of past religious conflict, the motives were not religious in reality. Religion then cannot share the blame alone for past problems, and in fact has contributed to their resolution.

Besides the historical issue, Rawlsians also are troubled by what they see as the restrictions on personal autonomy and justice created by religious ideas making their way into public law. These issues include abortion and contraception, homosexual marriage, transsexualism, demands for goods and services made on people of sincere faith, euthanasia, in vitro fertilization, private religious schools as competitors to a liberal democratic ideal of education, the invocation of conscience rights by religious individuals in cases of coercion to participate in activities they disagree with on religious grounds and objection to closing worship services under certain conditions. As I have said, the trouble Rawlsian public reason theorists have is that their modern idea of what constitutes the content of a reasonable view in a liberal democratic society has shifted since the Enlightenment, from basic negative rights, grounded ultimately in natural law or revelation, to positive rights which are defined more and more expansively and to a much more expansive view of the role and scope of the state. To go deeper, the ideas of equality and justice, on which Rawls based his theory, have themselves undergone both an expansion and a shift, the latter, involving a progressive diminishment of transcendental ideas.[37] We can blame Immanuel Kant for some of this, as he clearly called on enlightened individuals to break free of the traditional political and religious restraints, and to think for themselves, properly using reason.[38] However, Kant cannot be accused of all the later changes in thought. Scientism, the "cult of science," is responsible for a large part of the issues we face today. If science itself, after separating itself from philosophy and theology, is separated from ethics, and further, from Christian ethics, as it was in the nineteenth century, then it was free to advocate the conclusions reached in the twentieth century

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[36] See Robert Louis Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom*. Yale University, 2019.

[37] See Rawls, *A Theory of Justice*, op. cit.

[38] Immanuel Kant, *What is Enlightenment?* (1784). This work is seen by many as the manifesto of Enlightenment, though Kant did not believe it had yet come to pass.

without serious challenge.[39] These supposedly scientific conclusions about man, human nature, truth, the good, justice, etc., largely evolutionary, fit well with Enlightenment criticism of special revelation, religion in general, and authority.

Public Reason Revised

Breaking free from this secularized worldview is a cultural task, as Rawlsians themselves have understood. But recent critics of Rawls' public reason theory have shown themselves up to the task. The first response to Rawslian public reason concerns its requirement that all citizens adopt their rationale to support (or oppose) a proposed rule only for *identical* and non-comprehensive reasons—an overlapping public consensus.[40] The agreement must be an overlapping consensus consisting of publicly accessible and reasonable reasons, basically bracketing out religious reasons. But why must religious reasons be excised? This question is the heart of the criticism of Rawlsian public reason. To answer the question, first, the necessity of the basic elimination of religious reasons appears to be a presupposition, which itself is not grounded on reason but on a foundational belief.[41] Why is that presupposition more valid than a religious presupposition that religious ideas are of great value? Rawls seems to have understood the person "as an entity whose identity or 'self' is prior to, rather than constituted by (even in part), moral convictions and commitments."[42] But again, why is that view controlling, except as evidence of Rawls' and others' already formed worldview? In fact, Rawls as much as admits this as the reason for his view.[43] But there is no single cultural conception of the person, and in fact, it could be argued that there is a basic agreement that moral values do "create" the human nature in a significant way. Moral values of course are (in most cases[44]) closely connected to religious views. The only reason then that courts would minimize religious values in interpreting law would seem to be individual judges' embracing the presuppositions that religion is of less value than other alleged values (or of no value). But that is an arbitrary position.[45] As Christopher Eberle puts it, "due respect for human

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[39] See Roger G. Olson, *Science and Scientism in Nineteenth-Century Europe*. Illinois University, 2008 and J. P. Moreland, *Scientism and Secularism*. Crossway, 2018. See also James Davison Hunter and Paul Nedelisky, *Science and the Good: The Tragic Quest for the Foundations of Morality*. Yale University, 2018.

[40] See Kevin Vallier, "Convergence and Consensus in Public Reason," in *Public Affairs Quarterly*, Vol. 25, No. 4 (October 2011), pp. 261-279.

[41] See Paul Billingham, "Convergence Justifications Within Political Liberalism: A Defence," in *Res Publica*, Volume 22 (2016), pp. 135-153.

[42] Michael J. Perry, "A Critique of the 'Liberal' Political-Philosophical Project," in *William and Mary Law Review*, Volume 28, Issue 2 (1986-1987), pp. 205-233, 213.

[43] See John Rawls, "Kantian Constructivism in Moral Theory," in *Journal of Philosophy*, Volume 77 (1980), p. 505, 517.

[44] Though of course one can conceive of non-religious ethical theory, as have many philosophers—emotivism, rationality, etc.

[45] I do not have time to delve into possible psychological reasons as to why judges and legal scholars might insist on strongly Rawlsian public reason.

worth provides no reason to regard state coercion that is justified by some 'ecumenical' reason as morally preferable to state coercion justified by a diverse spread of 'sectarian' reasons."[46] Not only is that position arbitrary, but the American Constitution itself, in the First Amendment Religious Freedom clause explicitly grants importance to religion, and a priority implied (and actually historically shown) by its placement as the "first liberty," ratified as a right in the initial and fundamental social contract. No court or legal academic is able rationally to contradict this point, except to argue that "times have changed."[47]

Second, a convergence theory of public reason both satisfies the desire for reasons to justify state action and the legitimacy of religious reasons. My reasoning lies in the inadequacy of the standard view that religious reasons are not shareable or accessible in the public justification process. Christopher Eberle argues that Rawlsians have adopted an asymmetry in their theory. As Eberle asks, "…what is it about secular [reasons] such that [that those reasons] can play a justificatory role that is disallowed to any and every religious consideration?"[48] His answer, with which I agree, is that the secular reason "differs in no relevant epistemic, sociological, or moral respects from at least some religious claims, and so the differential treatment of religious and secular reasons pre-supposed by the standard view lacks a principled basis."[49] A convergence theory requires that each citizen "has conclusive reason to endorse the coercive measures…, not that each citizen endorses those coercive policies for the same reason….it does not matter whether those reasons are shared, unshared, or some combination thereof."[50] We may dispense with the requirement of shared reasons, and therefore with the elimination of religious reasons, especially, in my estimation, where a social contract (a constitution for example) has clearly attributed value to some idea and practice such as religious liberty. There is simply no good reason to discriminate against religious reasons as opposed to secular reasons.

I should add here that scholars like Gerald Gaus, Kevin Vallier and others do not, in their advocacy of a convergence theory, believe that religious reasons are unlimited in their validity. However, neither would religious persons. For example, to propose either allowing or commanding human sacrifice for alleged religious reasons would still not likely command very much agreement and

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[46] Christopher Eberle, "Consensus, Convergence, and Religiously Justified Coercion," in *Public Affairs Quarterly*, Volume 25, Number 4 (October 2011), pp. 281-303, 287.

[47] The latter view would be consistent with a "Living Constitution" approach, which, I would contend, lies behind the denigration of religious liberty and likely drove Rawls' ideas about how judges ought to decide cases applying his principles.

[48] Eberle, "Consensus, Convergence, and Religiously Justified Coercion," p. 288.

[49] Ibid.

[50] Ibid., p. 289. Eberle and Gerald Gaus (see p. 289) do not apply public justification and public reason theory to non-coercive state action, but I do and believe it is fully as useful in any possible state action, including courts "allowing" some actions otherwise not agreed on by citizens living in a regime, or not consonant with fundamental law, the Constitution.

so, likely, no public reason, no matter which version one adopted.[51] The American courts have generally been able to draw reasonable lines defining actions that violate norms of external behavior, even if they are alleged to have religious reasons.[52] Nevertheless, religious reasons can play a decisive role, and especially in cases involving the invocation of fundamental law such as the American First Amendment.

A third response to Rawlsian public reason theory I have already mentioned above. I believe that there are good reasons to extend the scope of convergence theory to any and all state action, including non-coercive action. For Gaus and others, a presumption exists against *coercive* state action, a principle to which I subscribe, unless the act can be justified. This covers a wide variety of coercive actions with religious implications—conscience issues of health care workers, limitations on or forbidding of church attendance during a pandemic, the requirement to pay for contraceptives, etc. But any action by the state affects the welfare of some group of individuals. It is not inaction not to coerce.[53] The allowance of abortion does not require that any woman actually procure one, but the argument remains that the abortion harms the unborn person and has other adverse effects in society. These are usually religiously-based arguments, whether from natural law or revelation. The result of the allowance of actions like the example above is arguably just the same in its impact as a positive command to require abortions, though less widespread in scope. But whether a woman can or cannot obtain an abortion after all is said and done through the legislative and judicial process does not lessen the validity of religious reasons offered in the public debate. In the end, a liberal democracy will usually adopt some policy of action or non-action, but this ought not to preclude the place of religion in arriving at the final decision. This goes as well for the courts, which should give due allowance for religiously-rooted legal theories.[54]

Moreover, Rawls' very theory of liberalism is problematic, and it is on this theory that Rawls has built his consensus theory of public reason. The term "liberalism" has a long history and has undergone shifts in connotation over time and in various regions of the world. I argue that Rawls has adopted a more or less modern theory of liberalism and liberal democracy, by which he neglects certain elements that would have been acceptable among earlier, even Enlightenment, liberals. The major neglected element is religion as an important value. An examination of the development of modern liberalism in the nineteenth century (Progressivism in America) will show that, with few exceptions, and fewer in the twentieth century, liberals increasingly tended to

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[51] See Ibid., p. 291.

[52] Examples include murder, theft, polygamy, and other acts that violate most local, state and Federal statutes.

[53] See Ibid., p. 289.

[54] The question of what is and is not defined as action is a theological and philosophical one, as is the question of what is coercive or non-coercive. See Scott Anderson, "Coercion," in *Stanford Encyclopedia of Philosophy*, at https://plato.stanford.edu/entries/coercion/ (2011).

discount religion. They did espouse toleration, but at the same time they restricted religious liberty, especially in the latter part of the twentieth century.[55]

As a modern liberal, Rawls attempted to identify basic liberal principles, "principles whose justification is 'impartial,' or 'neutral' among certain opposing religious, philosophical and moral views."[56] Given moderate scarcity in a society and differing conceptions of the good, and given that conceptions of the good grounded in religion and other values cannot be settled, a conception of justice must be put forth that all would agree to. This conception then omits religious differences as relevant. However, as Perry states, "There is no such [neutral or impartial and] transcendent justification."[57] Indeed, Rawls only adopts principles that he also believes are non-neutral but are secular, in his "original position" and the subsequent movement to a liberal regime. He and other modern liberals have exhibited this tendency to dismiss religion as an arcane vestige of a past age that was illiberal, especially as they look back to the Reformation and post-Reformation wars of religion for their historical guidance. As I mentioned earlier, the nineteenth century can be considered an extension of Enlightenment liberalism, and it is during this period that science and scientism had its greatest secularizing impact, along with the continuing undermining of revelation by theological liberalism and higher criticism. The double impact of scientism and theological liberalism culminated in the twentieth century.[58] Rawls did conclude that toleration was more or less a settled response after the seventeenth century, but, even if he was correct (arguable), that is not the same as giving religion its proper place in public discussion about laws and rules. I have no easy solution to this major cultural and intellectual shift, except to hope that evangelical theologians and philosophers will be able to reverse this long-standing trend. Some have already attempted this admirably. In addition, other trends have somewhat weakened theological liberalism and scientism. However, both are still in the ascendancy.

Finally, as Andrew Murphy has shown, and as I mentioned above, Rawls appears to have had a somewhat skewed view of history. Murphy argues that Rawls "locates his 'political liberalism' as the culmination of 300 years of theorizing about the good society, with its roots in the seventeenth-century struggle for religious toleration…[and]… makes the ambitious claim that 'were justice as fairness to make an overlapping consensus possible it would *complete and extend* the movement of thought that began three centuries ago with the gradual acceptance of toleration that led to the

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55 On the historical development of liberalism as a political ideology, see

56 Michael J. Perry, "A Critique od the 'Liberal' Political-Philosophical Project," op. cit., p. 209.

57 Ibid., p. 212.

58 On the impact in the legal realm see Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value*. University of Kentucky Press, 1973. On the rise of theological liberalism, see Claude Welch, *Protestant Thought in the Nineteenth Century*, 2 volumes. Yale University, 1985.

nonconfessional state and equal liberty of conscience.'"[59] Rawls believes his own liberalism is in a continuous line of development from the seventeenth century to his day, but Murphy claims Rawls' liberalism represents a retreat from that development. He asserts that Rawls worked against liberty of conscience, unwittingly or not, and at worst, created "a scheme of repression and self-censorship which renders comprehensive doctrines meaningless."[60] Rawls argued that the victory of toleration (this itself is subject to historical correction) "resulted in the acceptance not only of pluralism, but of *reasonable* pluralism."[61] It appears that Rawls read his own version of liberalism back onto the seventeenth century. For him then, all liberalism after that is interpreted through his own overlapping consensus theory, which bracketed religion more or less from then to this day and severely restricted religious liberty, even in the face of historical evidence in the ratification of American Constitution itself.

Conclusion

My aim in this paper has been to show the link between Rawlsian public reason theory and current trends in academic writing and decision-making, especially among legal scholars and judges. I have succeeded more I would say with academics. Court decisions are a bit more difficult to evaluate in order to show a direct influence of Rawls or Rawls' disciples and legal decisions regarding religious liberty. However there is little doubt that the legal academy has been substantially influenced by Rawls' ideas or those similar to his. The law school is the incubator for future legal academics and for judges. It therefore stands to reason that the possible, if not probable, influence of Rawlsian public reason on judicial decisions should be taken seriously. Religious liberty has fared better from around 2010 to the last part of 2020, the latter, with an addition to the United States Supreme Court. However, the long-term trend has been mixed at best in the last thirty years. Law schools, public and private, show few signs of reversing their relative indifference and sometimes hostility to religious freedom. Lower courts too often weigh religious liberty very lightly compared to other state interests. Even some justices have seemed to show little respect for religion. My hope is for a better future. Hopefully this paper has awakened all of us to the task at hand.

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[59] Andrew R. Murphy, "Rawls and the Shrinking Liberty of Conscience," op. cit., pp. 248-249, *quoting Rawls, Political Liberalism, op. cit., p.154.*

[60] Ibid., p. 250.

[61] Ibid., p. 252. See Rawls, *Political Liberalism*, op. cit., pp. xxiv-xxv.