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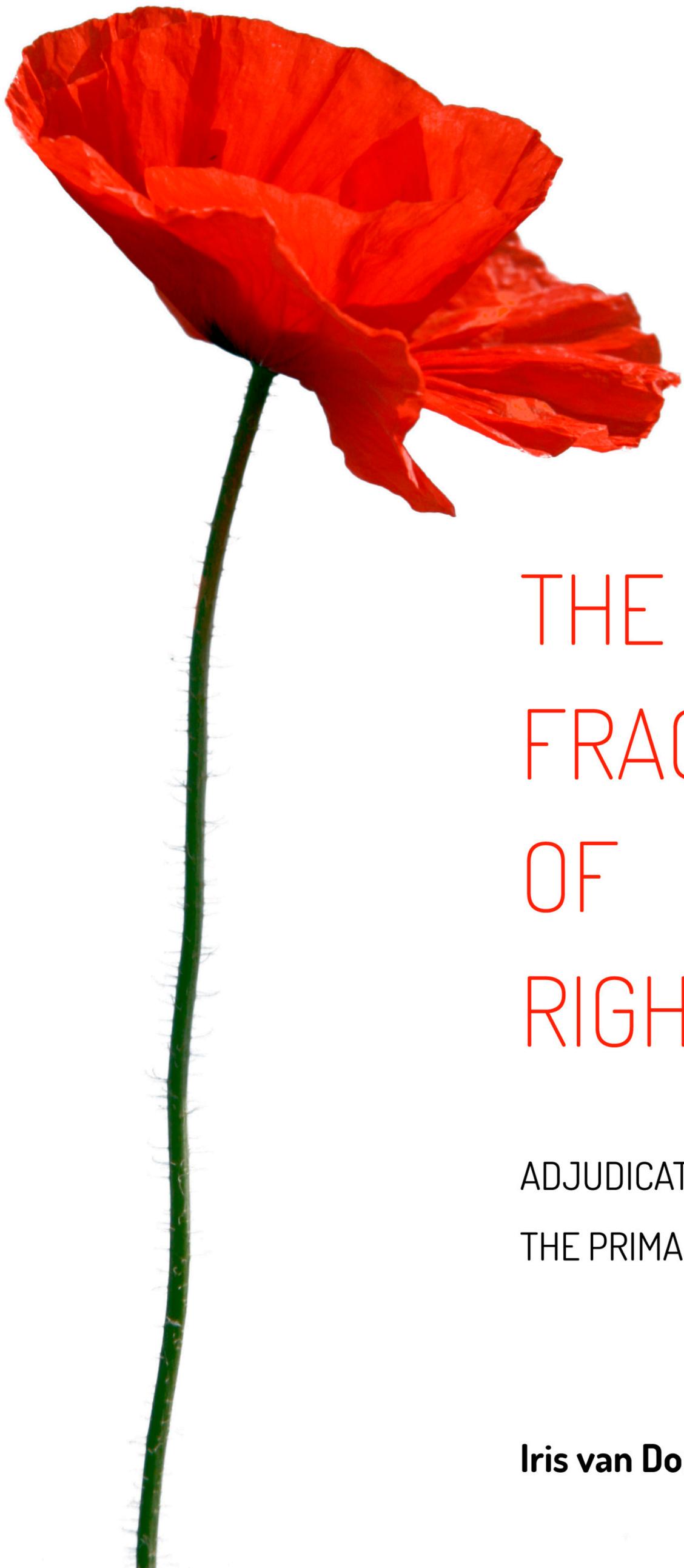
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THE
FRAGILITY
OF
RIGHTNESS

ADJUDICATION AND
THE PRIMACY OF PRACTICE

Iris van Domselaar

The Fragility of Rightness
Adjudication and the primacy of practice

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The Fragility of Rightness
Adjudication and the primacy of practice

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*"The need to let suffering speak is the condition of all truth."*¹

¹ Cornell, Drucilla, *The Philosophy of the Limit* (New York: Routledge, 1992), 13.

“It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court.”²

“[..T]he rule of law anoints winners and creates losers, and therefore causes someone to suffer -no matter what it does or who it favours.”³

1 Introduction

1 Adjudication and its troublesome phenomenology

The judge reads his sentence: "I give the local authorities leave to place the minors with long term foster parents with a view to adopt". He now and then looks at Maggie, a mother of four children. To him Maggie has proven to be incapable to provide a stable environment for her children. He has no confidence that Maggie will ever change. Hearing the sentence, we see Maggie suffer and utter her agony-fed anger in heartrending cries. "You bastard, you bastard!" she shouts. The judge continues his sentence in an undisturbed, tranquil manner. Finally, a furious Maggie in desperate anguish is led out of the courtroom. She will never again be a mother in the full sense of the word.

This is a scene from the film *Lady Bird* *Lady Bird*, directed by Ken Loach. The scene conveys the troublesome character of adjudication in a rather direct way, not in the least because of Maggie's cry.⁴ It shows us adjudication as a practice that leads to pain and suffering because of decisions that possibly could have been otherwise.⁵ The

² Dworkin, Ronald, *Law's Empire* (Cambridge, US: Harvard University Press, 1986), 1.

³ Wolcher, Louis, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, Applied Legal Philosophy (Hampshire: Ashgate, 2008), 13.

⁴ Throughout the history of mankind the cry has been the primordial expression of unmistakable pain. Already in Sophocles' tragedy 'Philoctetes' we read: "I cannot mistake that grievous cry of human anguish from afar -its accents are too clear." Cf. Sophocles, *The Complete Plays of Sophocles*, ed. Jebb, Richard Claverhouse (Cambridge: Cambridge University Press, 1924), 198.

⁵ Precisely because of its dramatic aspect, adjudication is one of the legal practices that are relatively often displayed in movies, documentaries and novels. Obviously, not only citizens that are directly and formally involved in legal proceedings are affected by legal decisions,

scene naturally leads to all kinds of questions because suffering is a phenomenon that by and in itself is generally experienced as disturbing and that cries out "for its own abolition or cancellation" and hence evokes a critical perspective.⁶ Questions also arise because as spectators we have a sympathetic understanding of Maggie's situation. We have become convinced that Maggie really loves her children and that her failure to properly care for them is not for a lack of trying. We have also come to see that as a person the judge is of a certain, not all too emphatic character, that he evidently stems from a particular social class and that he seems to be quite rigid and cold.

So as spectators we naturally ask ourselves: is Maggie right in feeling wronged by this particular judge or can we ignore Maggie's cry and anger as an outburst of mere subjectivity? Has the judge violated some kind of norm or value that applies to his relation with Maggie? Would reinstating Maggie in her parental rights indeed flagrantly harm the interests of the children? What does it mean when the judge says that he is 'bound' to decide in this way? Would another judge perhaps have decided differently? Does the judge's reaction in court show us something about his way of using the law? Is there a 'right' outcome at all in such a case?

It goes without saying that Maggie's case is not a rarity. One need not be a radically critical citizen or legal scholar to agree that adjudication is a large-scale practice due to which concrete citizens lose or do not get something that they value because of a decision that a judge happens to make. We are all familiar in one way or another with adjudication's troublesome phenomenology, its (potential) painfulness, intransparency, unpredictability and messiness. As Ronald Dworkin wrote: "People often stand to gain or lose more by one nod of a judge than they could by any general Act of Congress or Parliament."⁷

but also others who will experience their consequences. We often get to see these side-effects of legal decisions in literary or cinematographic representations of adjudication.

⁶ Mayerfeld, Jamie, *Suffering and Moral Responsibility* (Oxford: Oxford University Press, 1999), 111. For my understanding of suffering I draw on the colloquial meaning of the word: "[t]he bearing of pain, inconvenience, or loss; pain endured; distress, loss, or injury incurred." Cf. <http://www.webster-dictionary.net/definition/Suffering>.

⁷ Dworkin, *Law's Empire*, 1. In a similar vein he states: "Day in day out we send people to jail, or take money away from them, or make them do things they do not want to do, under

Of course adjudication is not the only institution that comes with roles which demand of concrete people to make choices that substantially affect fundamental interests of concrete others, choices that perhaps could also turn out otherwise. Families, churches, schools, corporate companies, fraternities, public services and other institutions also know such roles, either formally or informally.⁸ However, adjudication is in a league of its own in that the decisions it produces are effectuated with the help of state-power and may entail extreme forms of coercion. Also the scope of adjudication is practically comprehensive; judicial decisions can encompass virtually all aspects of citizens' lives and the workings of nearly all other social institutions.⁹

So in the light of all this the question arises how to account for the *moral* quality of adjudication. Again in the words of Dworkin: "there is inevitably a moral dimension to an action at law [..]"¹⁰ Hence, it is not surprising that contemporary legal philosophy and legal theory have extensively occupied themselves with this question.

coercion of force, and we justify all of this by speaking of such persons as having broken the law or having failed to meet their legal obligation, or having interfered with other people's rights. Even in clear cases (a bank robber or a wilful breach of contract), when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce him." Dworkin, Ronald, *Taking Rights Seriously* (London: Duckworth, 2005 (1977)), 15.

⁸ Judges are of course not the only 'law-doers'. In the words of Louis Wolcher: "the list of law-doers can be made just as long as the extension of the concept 'juridical person!'"

For some examples I again quote Wolcher: "property-owners seeking to exclude others from their land; citizens exercising various legal privileges (such as the privilege of self defence); teachers and parents implementing their legal right to discipline unruly children; reporters lodging embarrassing demands for information under the Freedom of Information Act; mutually hostile litigants fighting out their aggressions in lawsuits; lawyers subpoenaing witnesses and executing judgements; [...] bureaucrats granting or denying government benefits; police officers cruising the neighbourhood in patrol cars." Cf. Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 41.

⁹ For instance, in the Netherlands each year around 1,8 million legal cases are adjudicated. Cf. <http://www.rechtspraak.nl/Actualiteiten/Nieuws/Documents/Basisverhaal-Rechtspraak.pdf> (visited on 15 December 2013).

¹⁰ Dworkin, *Law's Empire*, 1.

A considerable part of the literature these disciplines have generated, deals with the question how a judge can indeed be *justified* in taking a particular judicial decision and with the related question what reason a citizen has to accept the resulting burden.¹¹

Offhand it may seem surprising that in this body of literature the troublesome phenomenology of adjudication that gave rise to the moral question in the first place, is almost absent. Except in the form of a brief reference so as to introduce the moral question, mainstream approaches to adjudication typically leave this phenomenology unaddressed.¹² Once such an approach presents a normative theory to account for moral quality in adjudication, adjudication's painfulness, intransparency, unpredictability, messiness, and relative unintelligibility disappear from the discursive stage, so to say. From then on this phenomenology is either understood as the result of a legal mistake or an injustice which theory can correct, or of an un-reflective or irrational understanding of practice itself.¹³ In any case moral quality and this

¹¹ Cf. Lyons, David, 'Justification and Judicial Responsibility', *California Law Review* 72, 2 (1984); Greenawalt, Kent, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', *Columbia Law Review* 75, 2 (1975); Dworkin, *Taking Rights Seriously*; Solum, Lawrence B., 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', *Metaphilosophy* 34, 1/2 (2003); Soper, Philip, 'Legal Theory and the Obligation of A Judge. The Hart/Dworkin Dispute', *Michigan Law Review* 75, 3 (1977); Richards, David, 'The Theory of Adjudication and the Task of the Great Judge', *Cardozo Law Review* 171 (1979).

¹² We see that the troublesome phenomenology of adjudication is used as nothing but a starting point for normative legal theory to get itself off the ground for instance in Ronald Dworkin's classical work 'Law's Empire' where he states: "It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court." Cf. Dworkin, *Law's Empire*, 1. In a similar vein legal theorist David Lyons where he gives an account of the justification of judicial decisions. He briefly refers to this phenomenology when stating that a "judicial decision is not a game played by judges, nor is justification part of such a game. Judicial decisions have a significant impact on important interests of those who come before the courts, as well as on other persons and justification must take this into account." Cf. Lyons, 'Justification and Judicial Responsibility', 192.

¹³ Robert Cover goes so far as to state that mainstream legal philosophy and theory "blithely ignore" this phenomenology. In critical reaction to this neglect he famously opened his article *Violence and the Word* as follows: "[l]egal interpretation takes place in the field of death and

troublesome phenomenology are presented as counterparts and if the former is accounted for, the latter may be ignored.

Surely this tendency is not idiosyncratic for legal theory or legal philosophy. The propensity to control and dismantle the apparently dark, messy, painful, unpredictable and incomprehensive aspects of life by means of (normative) theory seems deeply entrenched in Western (intellectual and religious) history.¹⁴ Since the dawn of intellectual history theorizing is embraced as a life saving art, so to speak, as an adequate way of increasing control over the life-threatening practical world. Already in Plato's work we recognize the idea that theory can save human beings from "being buffeted by the 'appearances' of the moment."¹⁵

This book is a philosophical inquiry into the moral quality of adjudication and its underlying motive is indeed a concern for and an interest in the phenomenology of adjudication. However, the book is also meant to be reflective regarding the role assigned to philosophy and normative theory as one of philosophy's typical products in attempts to account for moral quality in adjudication.

The first part of our inquiry identifies and criticizes the limitations of normative moral theory in accounting for the moral quality of adjudication. The second part of this inquiry will be more constructive: it proposes a particular account of moral quality that takes said limitations of normative theory seriously. This philosophical approach, which I call the *fragility of rightness*, gives primacy to adjudication's practice. It accommodates for adjudication's phenomenology to a large(r) degree than do mainstream approaches. While trying to offer a moral interpretation of adjudication's

pain, [...w]hen interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence." Cover, Robert, 'Violence and the Word', *Yale Law Journal* 95 (1985), 1601.

¹⁴ Cynthia Halpern has put it thus: "There are a multitude of different cultural and historical responses to suffering, but by far the vast majority invoke moral and religious forces to explain the meaning of suffering [...]." In these traditions the problem of suffering is addressed for instance by referring to it in terms of the provenance of multiple gods, in terms of God's plan or in terms of a Grand Moral Theory. See: Halpern, Cynthia, *Suffering, Politics, Power. A Genealogy in Modern Political Theory* (New York: State University of New York Press, 2002), 5.

¹⁵ Nussbaum, Martha C., *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, Rev. ed. (New York: Cambridge University Press, 2001 (1986)), 93.

practice, this approach does not overcome, prevent or dismantle its troublesome phenomenology as an irrational appearance, negligible side-effect or anomaly. It rather understands this phenomenology as inherent to the moral nature of adjudication.

The *fragility of rightness* is constituted by three elements: *a virtue-ethical conception of adjudication*, the concept of *civic friendship* and the concept of a *tragic legal choice*. By virtue of these elements it presents adjudication as a potentially moral practice, but also as inescapably fragile and disturbing, and therefore as destabilizing for the legal order as a whole, for the judiciary, for concrete individual judges, as well as for citizens.

It goes without saying that my proposal is tentative. The goal of this book is to advance our understanding of the moral character of adjudication and to further, not to close discussions.

2 Methodology

I use two methods to elaborate the argument for the *fragility of rightness*. The method used in the first part of the book fits within what has been coined as the ‘analytical tradition’ in practical philosophy, which aims to achieve “clarity, systematic rigor, narrowness of focus” through discursive argumentation.¹⁶ I use this analytical method primarily as a way of developing an internal critique on approaches to adjudication and theories of justice that are part of the analytical tradition. Hence, one strand of the argument that leads to the *fragility of rightness* is presented by means of relatively abstract and analytical discourse.

The other strand of argument is based on unwrought narrative that seeks to express the phenomenology of adjudication. Thereto I discuss quite some concrete legal cases, although not in the same way in each and every chapter. For instance, in chapter two and three approaches to adjudication and justice are discussed that typically abstract from concrete narrative. I choose to make this ‘felt’ by hardly discussing concrete cases. By contrast, narrative abounds in the critical discussion of these theories in the first part of this book and in the second part that gives primacy to practice. In this way

¹⁶ McDermott, Daniel, 'Analytical Political Philosophy', in *Political Theory. Methods and Approaches*, ed. Leopold, David and Stears, Marc (Oxford: Oxford University Press, 2008), 11.

I try to reconcile form with content. The concrete cases that are discussed are not meant as mere illustrations of abstract philosophical analysis, but rather as part and parcel of the overall argument. As such the method as a whole resembles what Martha Nussbaum has called ‘perceptive equilibrium’.¹⁷ I set out to find an equilibrium between impressions, emotions and embedded views that surround the practice of adjudication on the one hand and clarity, generality, intelligibility and philosophical rigor on the other. My aim is to stay relatively close to the life and blood of concrete individual legal cases. By giving ample attention to the particulars of cases I hope to engage not only the intellectual faculties of the reader, but also his or her moral perception, empathy and imagination. As we shall see, within the *fragility of rightness* these faculties are considered indispensable for appreciating the moral nature of adjudication.

3 Road map

The overall plan of the book is as follows: in part one, ‘The stability of rightness’, I elaborate a critique on what I call a ‘stabilizing approach’ to adjudication. This qualification covers approaches that in their account of moral quality in adjudication give primacy to normative moral theory. This part of the book consists of seven chapters.

By means of the notion of ‘legal commensurability’ chapter two lays out a formal typology of a stabilizing approach and the predicate ‘stabilizing’ will be explained. In chapter three I will sketch the central features of the kind of normative theories of political morality that a stabilizing approach to adjudication relies upon. The next four chapters offer a discussion of two strong candidate normative theories of justice and an assessment of their capacity to support a ‘stabilizing approach’. These are John Rawls’ Theory of Justice and Martha Nussbaum’s Capabilities Approach. Having concluded that these theories cannot support a stabilizing approach to adjudication, chapter eight supports the preceding *internal* critique by a more fundamental, one could say *external* critique on any attempt to secure the moral quality of practice

¹⁷ See: Nussbaum, Martha C., *Love’s Knowledge. Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 168-194. In chapter eight I will show that the *fragility of rightness* assigns a more modest function to philosophy than does Nussbaum in her account of a ‘perceptive equilibrium’.

(adjudication included) through normative theory. This chapter also offers some indications of an approach to justice that does without normative moral theory. The sketch of such a quasi-phenomenological approach to justice includes some of the elements that will be specified for the context of adjudication as a special ‘sphere of justice’ in the second part of the book.

This first part of the book prepares the floor for the second and more constructive part, ‘The instability of rightness’. Here I expound the *fragility of rightness*, my version of what I dub a ‘destabilizing approach’ to adjudication. As a preparation chapter nine first offers a critical discussion of a postmodern approach to adjudication as one version of such a destabilizing approach. I criticize and reject this approach, but nevertheless take some of its insights on board. In the next three chapters I present the constitutive elements of the *fragility of rightness*. Chapter ten proposes a *virtue-ethical conception of adjudication* as the first element. Chapter eleven presents the concept of *civic friendship* as the second element and in chapter twelve I introduce the concept of *tragic legal choice* as the third and final element. Chapter thirteen offers concluding remarks and discusses some practical implications of the *fragility of rightness*.

4 Delimitations and caveats

As said, this book offers a critical study of theories of adjudication and theories of justice and their failing relation to practice, and it defends a new approach to adjudication, named the *fragility of rightness*. A few preliminary remarks are in order. Both in the critical and in the constructive part the argument is delimited to Western legal orders that can be qualified as constitutional democracies under the reign of the rule of law. Thereby the argument is assumed to equally apply to common law and civil law systems, although I do not exclude the possibility that the implications of the *fragility of rightness* may slightly differ for both systems.¹⁸ As this is not the case for the kernel of my argument, for reasons of scope I will ignore these differences.

¹⁸ See for a clear overview of the central differences between common law and civil law systems and the historical and geographical background of this divergence: 'The Common Law and Civil Law Traditions', *The Robbins Collection* (2010), <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>. (visited on December 2013)

Next, because I use ‘typologies’ as a means to characterize ways of thinking about adjudication, law and justice, one could easily charge me with using ‘straw men’. A critical reader who is unsympathetic to the argument could object that it is parasitic on unwarranted simplifications, that it insufficiently takes into account all kinds of nuances within the theories that are criticized and also that it ignores relevant ‘later work’ of certain philosophers and legal theorists.

To some extent my argument is indeed vulnerable to such charges. But I hold that this does not make the rendering of the relevant positions inadequate or my criticism inefficacious against theories that do express the ‘spirit’ that this typology aims to convey. More specifically, an important rationale for using typologies such as those of ‘stabilizing’ or ‘destabilizing’ approaches to adjudication, is that they allow me to shed light on the interconnectedness of the features assigned to adjudication by theories that fall under said typology.

In addition, judges, lawyers or other readers acquainted with the practice of adjudication will immediately discern that I construe adjudication as if it were a practice in which a single judge determines the outcome of a legal case. Thereby I seem to turn a blind eye to the fact that a considerable part of legal cases are dealt with by more than one judge, i.e. in a division bench and also that these days legal decisions are increasingly the work of judicial assistants.¹⁹ Although these issues deserve further attention where the concrete implications of the arguments are concerned, these facts do not influence their validity. Boldly put: what will be the case for a single judge, will also be the case for a group of judges, for a full court, or for other administrators of justice who are involved in legal decision-making.

Also, it may be clear that the focus of this inquiry lies exclusively on the practice of adjudication where concrete citizens are the participating parties in the proceedings. However, given the number of legal entities other than natural persons that are regularly involved in proceedings, this focus may be considered the wrong way to set the stage. The same goes for the fact that we focus on the moral quality of

¹⁹ At the same time, due to savings on the budget of the judiciary, at least in the Netherlands cases are increasingly decided by a single judge section. See for a critical discussion of the increasing role of legal clerks in legal decision-making also: Kronman, Anthony T., *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, US: Harvard University Press, 1995), 325-331.

adjudication in relation to the effects on citizens who are formally involved in legal proceedings and not in relation to the effects of these decisions on other citizens. My answer to this potential criticism: because natural persons who are formally involved in legal proceedings often most directly and deeply experience the consequences of judicial decisions, it is this highly substantial area of adjudication that puts the moral question most urgently on the table. Of course this is not to deny that further inquiry may be needed in other areas of adjudication so as to adequately deal with its moral quality. However, this is in line with the fact that the *fragility of rightness* does not pretend to be finally conclusive regarding the moral quality of adjudication.

Next, throughout the book I use a range of *fictitious* legal cases that are based on a study of a range of cases and judgments that are real.²⁰ Hence, these cases do not *directly* correspond to real judicial cases and judgments. The claim is that these cases *could* happen, not that they actually did happen.

Finally and related to the previous point: this book has an interdisciplinary character. It connects the insights of political philosophy with those of legal theory, theories of adjudication and case law. However, an inherent drawback of interdisciplinarity is that one cannot delve as deeply into the relevant debates as one would do when sticking to one discipline. As I am not a practicing lawyer and do not have specific expertise in a particular *legal* field, legal experts may here and there object to what they take to be a misunderstanding of legal technicalities on my part. As always the devil is in the details, but what matters is the force of the overall argument of the book.

²⁰ Because I am acquainted with the Dutch legal system and as a way of avoiding some of the problems that pertain to the domain of legal pluralism, I have chosen to almost exclusively draw on Dutch (case) law. Of course, the legal context and concrete legal setting may be different in other countries, but nonetheless the argument is meant to apply to all Western constitutional democracies.

Part I The stability of rightness. Giving primacy to theory

“To the extent that law imposes burdens, it requires justification.”²¹

“Conventional theories of law take it for granted that once a given instance of human suffering is objectively justified by something called ‘the law’ there is no further need to be concerned with it.”²²

2 A stabilizing approach to adjudication

1 Introduction

Now that we have established that from a moral point of view it matters what decisions judges take, we can start to address the question how to account for moral quality in adjudication. To this end and as a first step in our inquiry this chapter offers a critical analysis of mainstream normative approaches to adjudication. One such approach is a ‘common sense’ approach. It largely reflects the shared understandings of legal practitioners and citizens. Another approach is a philosophical approach. It articulates a way of understanding adjudication that is rather dominant in legal theory and practice.

In this chapter both approaches will be expounded. First I will discuss the ‘common sense’ approach. I will argue that this approach does not suffice as an account of moral quality in adjudication (2). Such an account needs a perspective that is more detached and critical. It needs philosophy. In the remainder of the chapter I discuss the central features of a ‘stabilizing’ approach as a philosophical approach to adjudication (3). Subsequently, I explain why such an approach can be qualified as ‘stabilizing’ (4), and I will address the potential charge that I have overstated the stabilizing character of this approach (5). The chapter ends with concluding remarks and some thoughts on how we can best assess the merits of a stabilizing approach and hence proceed with our inquiry (6).

2 The morality of adjudication and why philosophy needs to come in

Lawyers and non-lawyers may question whether we need philosophy in trying to account for the moral quality of adjudication. For it seems that our ‘common sense’ already provides us with a rather straightforward answer on this justificatory

²¹ Lyons, 'Justification and Judicial Responsibility', 196.

²² Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 25.

‘problem’. Common sense suggests that moral quality of adjudication is secured if judges do "what is required, expected, or otherwise appropriate of persons occupying that role."²³ If judges adequately fulfil their judicial role, then we need not be bothered by the painfulness of legal decisions - at least not from a moral point of view, because in Western constitutional democracies the judicial role itself is morally defensible.

Brian Tamanaha paraphrases this common sense view on adjudication when stating that: “[a]n institutionalized, independent judiciary is crucial to both functions of the rule of law: it is an important means to hold government officials to the law (vertical), and to resolve disputes between citizens according to the law (horizontal).”²⁴

So, the common sense view of adjudication boils down to the idea that the moral quality of adjudication is secured through judges fulfilling their professional role within an in itself defensible legal order.

At the surface this idea has plausibility. But at the same time it goes without saying that if reference to the judicial role is to have any justificatory force for legal decisions and their consequences, we have to assess whether and to what extent this role actually constrains a judge. As David Lyons rightly states: “[n]ot just anything a court might think up as a way of deciding a case will do. For not just anything is capable of *justifying* a decision.”²⁵ Hence, any account of moral quality in adjudication must as a minimum offer a set of constraints connected to the judicial role, such that judicial decisions are not tantamount to the legal effectuation of personal values, feelings, whims or caprices. Such an account must minimally rebut the sceptical view of law and adjudication which seriously and forcefully challenges the idea that judges are in any meaningful way constrained by the law. In the eyes of a sceptic, the judicial role does not bridle the judge at all. Consequently, referring to the judicial role cannot do any justificatory work, as it inherently implies strong discretion for the judge.

²³ Wasserstrom, Richard, 'Roles and Morality', in *The Good Lawyer*, ed. Luban, David (New Jersey: Rowman and Allanheld, 1983), 25.

²⁴ Tamanaha, B.Z., 'A Concise Guide to the Rule of Law', in *Florence Workshop on The Rule of Law* ed. Walker, Neil and Palombella, Gianluigi (Florence: Hart Publishing, 2007), 14.

²⁵ Lyons, 'Justification and Judicial Responsibility', 184.

Although the age-old discussion on the sceptics' arguments is extensive, I will nonetheless briefly expound some of their main arguments in order to gain clarity about the challenges that any account of the moral quality of adjudication must face. Notwithstanding the wide variety of their views, the sceptics belonging to the Legal Realists and the Critical Legal Studies Movement²⁶ agree that the law is radically indeterminate. They hold that because of this radical indeterminacy the judge has strong discretion in each and every case: "in any set of facts about actions and events that could be processed as a legal case, any possible outcome -consisting of a decision, order, and opinion- will be legally correct."²⁷ As Holmes so pointedly put it, the law is nothing but the sum of the "prophecies of what the courts will do in fact, and nothing more pretentious".²⁸

In support of their indeterminacy thesis the sceptics put afore several arguments. First, they assert that the law is indeterminate because it never offers just one single and clear rule that is solely relevant to a case -there is always a group of (vague and contradictory, at least competing) rules applicable²⁹ with "multiple potential points of indeterminacy", so that in each and every case the judge is free to choose which rule to apply.³⁰ Also, where legal precedents are involved, judges can more or less randomly decide what rule a certain precedent stands for, because every precedent can be interpreted in several ways. Thus, the judge has unrestricted leeway to choose the

²⁶ Because the Legal Realists and members of the Critical Legal Studies Movement produced a vast literature and because their mutual relations and differences are deeply complex, for this context the sceptical approach will be presented by primarily drawing on secondary literature, in particular on: Altman, Andrew, 'Legal Realism, Critical Legal Studies, and Dworkin', *Philosophy and Public Affairs* 15, 3 (1986); Kramer, Matthew H., *Objectivity and the Rule of Law*, Cambridge Introductions to Philosophy and Law (Cambridge: Cambridge University Press, 2007); Barak, Aharon, *Judicial Discretion* (New Haven: Yale University Press, 1987).

²⁷ Solum, Lawrence B., 'Legal Theory Lexicon', http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html. (Visited December 2013)

²⁸ Holmes, Oliver Wendell, 'The Path of the Law', *Harvard Law Review* 10 (1897), 459-461.

²⁹ Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', 187.

³⁰ *Ibid.*, 186.

outcome of any case and make his interpretation fit that outcome.³¹

Second, the sceptics assert that the judge has considerable freedom to select and establish the relevant facts of the case. The law itself does not prescribe how judges should select the relevant facts and neither do these facts present themselves with labels that mention the applicable rule. Consequently, the judge has the freedom to select and establish the facts such that his legal arguments lead to the decision that he intuitively favoured from the start (his “hunch”) and for whatever reason that pleases him. Jerome Frank has eloquently stressed this point where he states that “[t]he judge, in arriving at this hunch, does not nicely separate his belief as to the “facts” from his conclusion as to the “law”; his general hunch is more integral and composite, and affects his report -both to himself and to the public- concerning the facts.”³²

Third, from a sceptical point of view moral background principles cannot solve this problem of indeterminacy. These principles are themselves too indeterminate and legal systems are generally characterized by a group of both encompassing and contradictory moral principles.³³ In the words of Altman: “the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place.”³⁴

By these arguments the sceptics do not mean to deny that judicial decisions can (sometimes) be foreseen, that is, predicted. Their indeterminacy thesis does not imply an unpredictability thesis. However and in the same vein: according to the sceptic, predictability is not an indication of determinacy either, as it is based on nothing but

³¹ Ibid.

³² Frank, Jerome, *Law and the Modern Mind* (New York: Brentano's Publisher, 1931), 116. See for discussions about the (intimate) relation between facts and rules in the process of legal reasoning and the resulting ‘discretion’ of the judge by Dutch legal theorists: Scholten, P., ed., *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* (Zwolle: W.E.J. Tjeenk Willink, 1974), §26; Vranken, J.B.M., ed., *Asser-Vranken (Algemeen Deel)* (Zwolle: W.E.J. Tjeenk Willink, 1995); Wiarda, G.J., *Drie Typen van Rechtsvinding* (Deventer: W.E.J. Tjeenk Willink, 1999); Smith, Carel E., *Regels van Rechtsvinding* (Den Haag: Boom Juridische uitgevers, 2005), 82-86; ———, *Feit en Rechtsnorm. Een Methodologische Studie naar de Betekenis van de Feiten voor de Rechtsvinding en de Legitimatie van het Rechtsoordeel* (Maastricht: Shaker, 1998).

³³ Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', 189.

³⁴ Ibid.

empirical regularities in the behaviour of a particular judge or a certain group of judges, rather than on the normative force of arguments and reasons drawn from the legal system. The regularities in legal decision-making that might make them predictable are due to “extra legal factors such as shared psychological inclinations, rather than to the terms of legal requirements and entitlements”.³⁵

Obviously, if we would embrace the sceptics’ view on law and adjudication it would have far-reaching implications for our inquiry. If the sceptics are right, the notion of moral quality in adjudication simply does not make sense. For, as far as the sceptic is concerned, “every answer to the particular legal question is as good (or as bad) as any other answer.”³⁶

If we would assent, there is no morally sensible answer to the questions of losing citizens such as Maggie whose plight we discussed in the introduction: ‘Why me?’, ‘Why in this way?’, ‘What have I done to deserve this?’. What is more, if we agree with the sceptics, the judicial role cannot free the judge from full and personal responsibility for the particular consequences of his decisions, nor can it help him to make sense of the consequences of these decisions.³⁷ How the judge assesses the bearing of his judicial decisions will exclusively depend on his personal ethics.

This way of portraying the practice of adjudication boldly contradicts the common sense idea of adjudication that I mentioned earlier. In the words of Jeffrey Brand Ballard: “[t]he conviction that judges are “bound by the law” is very common among lawyers, judges, legal scholars, and members of the general public.”³⁸ But, it goes without saying that the commonness of this appealing conviction by itself does not suffice to rebut the sceptic view. To more thoroughly analyse the plausibility of this ‘common sense’ view of adjudication and whether it can rebut the sceptic view, I turn to Hart’s analysis of law and adjudication. This because Hart claims to offer a description of the ‘internal point of view’ of legal practitioners, especially judges. Through his articulation of this ‘internal viewpoint’ he claims to offer an account of an essential aspect of the true understanding of the judicial role that refutes the

³⁵ Kramer, *Objectivity and the Rule of Law*, 26.

³⁶ *Ibid.*, 14.

³⁷ See Barak, *Judicial Discretion*, 131.

³⁸ Brand-Ballard, Jeffrey, *The Ethics of Lawless Judging* (Oxford: Oxford University Press, 2010), 4.

sceptical view. The articulation of this 'internal point of view' might show us what judges and legal practitioners actually mean when they say or think that they are legally bound to make decision X or Y.

Drawing on said 'internal point of view', Hart asserts that the law is not as undetermined and adjudication not as arbitrary as the sceptics suggest. Hart concedes to the sceptic that because of the mere fact of it having language as its vehicle, the law does have an 'open texture' that sometimes leaves strong discretion to a judge in a concrete case. "The discretion thus left to him by language may be very wide; so that if he applied the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice", Hart says.³⁹

However, Hart holds that strong discretion is exceptional and limited to hard cases. From the internal point of view that legal practitioners share, most legal rules have perfectly clear core-meanings that "smoothly work over the great mass of ordinary cases".⁴⁰ And even where the law allows for strong discretion, legal decisions are not necessarily arbitrary or irrational. According to Hart in these cases the law still excludes a wide range of considerations and reasons as non-legal and hence also excludes various outcomes as incorrect.⁴¹ Where judges have to use strong discretion and "it cannot be *demonstrated* that a decision is uniquely correct", these decisions can nonetheless be "acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests", he says.⁴²

Hart further asserts that if we want to understand the way in which judges are 'bound' by law, we should also take the range of secondary rules, rules of recognition and rules of adjudication that characterize modern legal orders into account.⁴³ By accepting his role the judge not only commits to applying settled legal rules, but also subscribes to the rules that belong to the "common public standards of official

³⁹ Hart, H.L.A., *The Concept of Law*, 3th ed., Clarendon Law Series (Oxford: Oxford University Press, 2012 (1961)), 127.

⁴⁰ *Ibid.*, 128.

⁴¹ Cf. Kramer, *Objectivity and the Rule of Law*, 15.

⁴² Hart, *The Concept of Law*, 205.

⁴³ *Ibid.*, 94.

behaviour.”⁴⁴ Ultimately the edifice of law as a whole of primary and secondary rules is based on a rule of recognition that is not so much a rule, but rather a complex of historical, social and institutional facts. This rule indicates -albeit implicitly and as a matter of social fact- that the system of valid law exists and is accepted and thus ‘binds’ the judge.⁴⁵ By accepting his role, the judge explicitly subscribes to the system and declares himself bound by it, thus taking a qualified internal point of view. As suggested, Hart’s analysis of the ‘internal point of view’ is not only an account for the relative determinacy of law, but also a meagre account for the moral quality of adjudication. He for instance points out that judges will not see injustice and the violation of generally accepted moral principles as part of the goals of settled law. David Lyons summarized Hart on this point: “courts may have to reach beyond the law, but they are expected to do so responsibly, to a mode of moral adjudication.”⁴⁶ In addition, in his discussion of the relation between law and morality Hart also refers to the judicial virtues, more specifically to the virtues of impartiality and neutrality, as qualities that judges must have and use when assessing the alternatives at stake.⁴⁷ In this way he also aims to rebut the idea that strong judicial discretion is tantamount to arbitrariness or irrationality. On the basis of Hart's articulation of the ‘internal point of view’ one might think that common sense is right in holding that adjudication will have moral merit because judges are bound by the law -at least, if broadly conceived-. However, such a conclusion is premature and also wrong. For one thing, the constraints that judges experience as a matter of social fact do not yet suffice as a defence of the determinacy of *law*. For such a claim more independent arguments are needed with regard to the qualities of this ‘internal point of view’, i.e. of these constraints. This also, because -as Hart himself acknowledges and emphasizes- the considerations constituting the ‘internal point of view’ may themselves be under-determinate, open to a range of different interpretations and hence subject to judicial choice.⁴⁸

⁴⁴ Ibid., 116.

⁴⁵ Ibid., 101-103.

⁴⁶ Lyons, 'Justification and Judicial Responsibility', 187.

⁴⁷ Hart, *The Concept of Law*, 205.

⁴⁸ Cf. Kramer, *Objectivity and the Rule of Law*, 19.

Also, Hart's rather superficial reference to the judicial virtues is too weak an argument. Briefly mentioning these virtues can hardly do the argumentative work that is needed to corroborate the claim that a "fresh choice between open alternatives" is *not* necessarily arbitrary or irrational.⁴⁹

Next, even if the 'internal point of view' does constrain the judicial role, this still is not an argument for the *moral* determinacy of the law and hence for the moral quality of judicial decisions. If reference to the 'internal point of view' is to account for *moral* quality we need reasons to believe that it generates outcomes that are *morally* defensible.

As a legal positivist, Hart would not be bothered by this point. In his 'separation thesis' he posited the claim that law and morality are to be clearly distinguished conceptually. Positivism according to Hart is nothing more than "the sin, real, or alleged, of insisting on the separation of law as it is and law as it ought to be."⁵⁰

So Hart is far from believing that law has intrinsic moral merit. Rather to the contrary, he notes that history shows it can be (ab)used for all kinds of purposes and still be law.⁵¹ Settled law is not always wise or just and hence the 'internal point of view' may also come with a morally troublesome content.⁵²

At this point Hart's articulation of the 'internal point of view' stops to be of any help to common sense when aiming to refute the sceptics. Hart himself stresses that to honestly explore the moral character of adjudication we cannot be content with the dominant self-understanding of this practice. This is why Hart defends a wide concept of law.⁵³ He emphasizes that we should not assume too easily that the exercise of judicial power is justified. This would conceal the "delicate and complex moral issues" that are so intimately connected to the law.⁵⁴ As Hart puts it: "however great the aura of majesty or authority which the official system may have, its demands must

⁴⁹ Hart, *The Concept of Law*, 128.

⁵⁰ Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 51.

⁵¹ Hart, *The Concept of Law*, 210.

⁵² Lyons, 'Justification and Judicial Responsibility', 191.

⁵³ Hart, *The Concept of Law*, 207-212. See also: Lyons, 'Justification and Judicial Responsibility', 210 and next.

⁵⁴ Hart, *The Concept of Law*, 211.

in the end be submitted to a moral scrutiny”, which scrutiny must be referring to “something outside the official system.”⁵⁵

Hence, for our inquiry into the moral quality of adjudication we need a more critical and distanced perspective, one outside or beyond what judicial officials as a matter of social fact acknowledge as valid law and as justified decisions.⁵⁶ In this inquiry we do not want to simply accept what legal practitioners consider familiar, normal or legally right, simply because they experience it that way. For one thing, this ‘internal point of view’ as the viewpoint of participating lawyers is likely to be self-congratulatory or a rationalisation of the status quo.

Therefore an essential role is reserved for (legal) philosophy as a discipline with the critical potential and analytical rigor that make it well-suited for offering an account of moral quality in adjudication.⁵⁷ Through philosophical analysis we can leave the (legal) cave and possibly get a brighter and truer vision of the moral character of adjudication.

“Innocence is indeed a glorious thing; but the real world, being guilty, needs philosophy,” Nussbaum rightly says.⁵⁸ In the remainder of this book I will therefore indeed address the issue of moral quality in adjudication from a philosophical point of view. Below I start off by presenting the central features of a *stabilizing approach to adjudication* as a philosophical approach that indeed does not content itself with the interpretations that are dominant within a legal system.

⁵⁵ Ibid., 210.

⁵⁶ Cf. Lyons, 'Justification and Judicial Responsibility', 210 and next.

⁵⁷ Of course, the nature of philosophy is itself a matter of philosophical debate as will also become clear in the argument that is pursued in this book. But notwithstanding this continual debate, it is rather uncontroversial that philosophy is a discipline that can be distinguished by its explicit, discursive, rational and critical way of proceeding. Cf. Quinton, Anthony, 'The Ethics of Philosophical Practice', in *The Oxford Companion to Philosophy*, ed. Honderich, T. (Oxford: 1995).

⁵⁸ Nussbaum, Martha C., 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', in *The Path of the Law and its Influence. The Legacy of Oliver Wendell Holmes, Jr.*, ed. Burton, Steven J. (Cambridge: Cambridge University Press, 2000), 50.

3 A stabilizing approach to adjudication. Legal commensurability and adjudication as applied moral theory

This section expounds the central features of a ‘stabilizing approach to adjudication’, a particular philosophical way of accounting for moral quality in adjudication.⁵⁹ It is an approach that relies on legal commensurability and conceives of adjudication as applied moral theory.⁶⁰ In this approach the ideal of adjudication is understood as the practical implication of a normative moral theory.

Throughout the history of western legal thought the idea of commensurability (or comeasurability) has been connected with law.⁶¹ John Finnis observes that “[a]

⁵⁹ Elements of this section I have discussed in an article addressing two dominant conceptions of adjudication that can be recognized in the current Dutch jurisprudential debate. See: Domselaar, Iris van, 'Zelfbevestigende' versus 'Ontregelde' Rechtspraak', *Nederlands Juristenblad* 86, 16 (2011).

⁶⁰ As will become clear, the typology that is offered largely draws on the work of Ronald Dworkin who is a legal commensurabilist par excellence, but also on the work of others who have discussed the issue of commensurability in relation to practical reasoning more generally. For this discussion I am highly indebted to the illuminating way Henry Richardson has analysed commensurability in practical reasoning. See: Richardson, Henry S., *Practical Reasoning about Final Ends* (Cambridge: Cambridge University Press, 1997).

⁶¹ An important impetus to the contemporary debate about commensurability in law has been given by the Pennsylvania Law Review Symposium on ‘Law and Incommensurability’ held at the University of Pennsylvania Law School. The papers presented at this conference are published in: Symposium, 'Law and Incommensurability', *University of Pennsylvania Law Review* 146 (1998). For a discussion about (in)commensurability in relation to or relevant for law see also: Chang, Ruth, 'Introduction', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997). Finnis, John, 'Commensurability and Public Reason', in *Incommensurability, Incomparability, and Practical Reason* (Cambridge, US: Harvard University Press, 1997). Luban, David, 'Incommensurable Values, Rational Choice, and Moral Absolutes', *Cleveland State Law Review* 38 (1990). Schauer, Frederick, 'Commensurability and its Constitutional Consequences', *Hastings Law Journal* 45 (1993). Warner, Richard, 'Incommensurability as a Jurisprudential Puzzle', *Chicago-Kent Law Review* 147 (1992). Wright, R. George, 'Does Free Speech Jurisprudence Rests on a Mistake? Implications of the Commensurability Debate', *Loyola of Los Angeles Law Review* 23 (1989). George, Robert, 'Does the 'Incommensurability Thesis' Imperil Common Sense Moral Judgements?', *American Journal of Jurisprudence* 37

classical explanation of law calls it a measure: *quedam regula et mensura actuum*, a kind of rule and measure of action.”⁶²

Moreover, dominant contemporary legal thought -either explicitly or implicitly- holds that legal commensurability is a necessary condition for the justification of legal decisions.⁶³ If the legal propositions in a concrete case are not commensurable, no rational legal decision can be made, or so is the generally shared idea.⁶⁴

Not surprisingly, *incommensurability* in law is often presented as an equivalent to the ‘non-decidability thesis’, constituting a threat to “our ability to reason decisively” and to rationally in law.⁶⁵ Related to incommensurability questions are often raised about the legitimacy of adjudication as the institution fit to rationally solve social conflicts. Where incommensurability applies, it is suggested that we would do “better to ponder whether these cases would be better left to judges, or whether they should start a social conversation, that can lead to a better shaping of social preferences.”⁶⁶

Surely this presumed relation between justification, rationality and commensurability is not exclusive for legal thought. Already in Plato’s Republic we can read that “the arts of measuring and numbering and weighing come to the rescue of the human understanding.”⁶⁷ One could indeed state that in dominant conceptions of practical

(1992); Schroeder, Jeanne, 'Apples and Oranges', in *Research Paper Series* (New York: Cardozo Law School, 2001). Mather, Henry, 'Law-making and Incommensurability', *McGill Law Journal* 47 (2002). Scharffs, Brett G., 'Adjudication and the Problems of Incommensurability', *William and Mary Law Review* 42 (2000). Schmidt, David J., 'Can Law Survive: On Incommensurability and the Idea of Law', *University of Toledo Law Review* 26 (1994). See for a general and illuminating overview of the philosophical discussion about incommensurability of values: Hsieh, Nien-hê, 'Incommensurable Values', Metaphysics Research Lab, Stanford University, URL = <http://plato.stanford.edu/archives/fall2008/entries/value-incommensurable/>.

⁶² Finnis, 'Commensurability and Public Reason', 215.

⁶³ See for a defence against this critique: Alexy, Robert, 'Constitutional Rights, Balancing and Rationality', *Ratio Juris* 16, 2 (2003).

⁶⁴ Bix, Brian, *Law, Language and Legal Determinacy* (Oxford: Clarendon Press, 1995), 97.

⁶⁵ Scharffs, 'Adjudication and the Problems of Incommensurability', 1372.

⁶⁶ Brems, Eva, ed., *Conflicts between Fundamental Rights* (Oxford: Intersentia, 2008), 30.

⁶⁷ Plato, 'The Republic', ed. Jowett, Benjamin (The Internet Classics Archive), Book X.

reasoning “the commensurability issue lurks as a reef upon which hopes for rational deliberation [...] seem likely to be wrecked.”⁶⁸

Nonetheless, in spite of its presumed importance for rational decision-making, both in philosophy and in jurisprudence the concept of commensurability is still contested and considered deeply complex.⁶⁹ Hence I will offer only a tentative sketch of legal commensurability and will leave certain important controversies in abeyance. This sketch is only meant as the articulation of a particular way of thinking about the morality of adjudication.⁷⁰

Roughly put: legal commensurability indicates that for almost all legal decisions there will be a legally valid measure, i.e. a commensurans, on the basis of which a judge can come to a correct legal decision.⁷¹ This need not be the same commensurans for every legal decision. To suppose otherwise would amount to a rather implausible monism as regards the standards that are used in legal reasoning. Legal

⁶⁸ Richardson, *Practical Reasoning about Final Ends*, 89.

⁶⁹ Cf. Bix, *Law, Language and Legal Determinacy*, 96, 104. Brett Scharffs commented on the recent debate on commensurability in law: “although there is considerable overlap in usage, and although some common ground does appear to be emerging, reading the literature might give one the feeling that this is a debate about to collapse from its own weight.” Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1373.

⁷⁰ Again, this ‘narrative’ largely draws on Ronald Dworkin’s theory of adjudication.

According to Brian Bix commensurability is central to Dworkin’s attempt to justify legal decisions: “If the evaluative criteria of Dworkin’s theory are incommensurable, then the claim that there must be unique right answers to most legal problems must fail.” See: Bix, *Law, Language and Legal Determinacy*, 104. Dworkin himself seldom explicitly refers to commensurability. At one point he argues that his theory of adjudication “presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate.” Cf. Dworkin, Ronald, 'A Reply by Ronald Dworkin', in *Ronald Dworkin & Contemporary Jurisprudence*, ed. Cohen, Marshall (London: Duckworth, 1983), 272. Other theories of adjudication to a certain degree also 'fit' within the framework of legal commensurability, such as those of Robert Alexy and Neil MacCormick. See for instance: Alexy, 'Constitutional Rights, Balancing and Rationality'. MacCormick, Neil, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978).

⁷¹ Henry Richardson describes a commensurans as “the commensurating value or good”. See: Richardson, *Practical Reasoning about Final Ends*, 15.

commensurability requires that a range of commensuranses is available -be it principles, rules or other legally valid standards- that can be hierarchically ordered and that together form a coherent and consistent system that can in the end be reduced to one final higher order commensurans. As we shall see below, this final commensurans that has both justificatory and explanatory force for the legal order as a whole is a normative theory of political morality.

In contemporary philosophical studies about commensurability one finds a variety of predicates that are used as equivalents for 'commensurans', such as 'metric'⁷², 'scale'⁷³, 'higher level synthesizing category'⁷⁴, 'common unit of measurement'⁷⁵, or 'common measure'.⁷⁶ In spite of the sometimes substantial differences in meaning, these denominators have in common that they all refer to a shared measure that is used as decisive ground for a ranking between pairs of items in terms of 'more than' or 'equal to'.⁷⁷ For any of these equivalents the idea is that there is a measure in terms of which certain things can exhaustively be compared. Such a measure is, as Finnis has put it, to provide for a "(non-optional) standard for comparing options and ranking them as obligatory, permissible, or impermissible, or as legally valid and enforceable or unenforceable, voidable or void, and so forth".⁷⁸

A significant question is whether such a commensurans is confined to a ratio scale, a measure that is characterized by a fixed zero point and units of equal distance and that consequently facilitate a cardinal ranking.⁷⁹ Both for the moral and the legal domain this has been a serious point of debate. For instance, Ruth Chang reserves the term

⁷² Cf. Sunstein, Cass, 'Incommensurability and Kinds of Valuation', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997), 238.

⁷³ Cf. Grimm, Stephen, 'Easy Cases and Value Incommensurability', *Ratio* 1 (2007), 28.

⁷⁴ Cf. Stocker, Michael, *Plural and Conflicting Values* (Oxford: Oxford University Press, 1990), 172.

⁷⁵ Cf. Hsieh, 'Incommensurable Values'.

⁷⁶ Cf. Raz, Joseph, 'Incommensurability and Agency', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US: Harvard University Press, 1997), 110. Cf. Richardson, *Practical Reasoning about Final Ends*, 91.

⁷⁷ Cf. Raz, 'Incommensurability and Agency', 110.

⁷⁸ Finnis, 'Commensurability and Public Reason', 215.

⁷⁹ Grimm, 'Easy Cases and Value Incommensurability', 28.

‘incommensurable’ for “items that cannot be precisely measured by some common scale of units of value” and thereby suggests -other things equal- that commensurability entails the prevalence of a ratio scale.⁸⁰ Others have pointed out that legal commensurability also obtains when an ‘ordinal scale’ is available.⁸¹ An ‘ordinal scale’ obtains, in the words of Stephen Grimm, when “some candidate for measurement X is better than another candidate for measurement Y, but not that it is better by some fixed quantitative amount.”⁸²

For the context of *legal* commensurability the broader interpretation of the concept of a commensurans seems more plausible. Confining its definition to a ratio scale can hardly account for the intelligibility of theories of adjudication that claim or suggest to rely on legal commensurability. It simply does not make sense to hold that a judge can arrive at a rational decision because the right to freedom of expression weighs 3.2 times more than the right not to be discriminated. It therefore seems more plausible to hold that commensurability obtains when a ranking between legal claims is possible on the basis of an ‘ordinary scale’. Typical examples of a commensurans will then be rules, precedents, legal or moral principles and legal ‘viewpoints’ such as the ‘common point of view’.

If one relies on legal commensurability it is crucial that the commensurans is sufficiently determinate to guide the reasoning of the judge so as to lead to a particular right outcome or a well-confined range of such outcomes. This measure thus allows the judge, in the words of Dworkin, only ‘weak discretion’ in the sense that it will require judgment on the part of the judge to connect the term(s) of the commensurans with the concrete case at hand.⁸³

In order for a commensurans to have in any sensible way actual action-guiding force it should also be available independently of the judge and antecedent to the decisions

⁸⁰ Chang, 'Introduction', 2. For the legal context Cass Sunstein also seems to confine the commensurans to a ratio scale presenting the dollar as exemplary metric. He holds that “[u]nder this general definition of metric, many possible standards -excellence, well-being, affective allegiance- count as criteria, but not as metrics.” Cf. Sunstein, 'Incommensurability and kinds of Valuation', 238.

⁸¹ Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes', 67.

⁸² Grimm, 'Easy Cases and Value Incommensurability', 28.

⁸³ Dworkin, *Taking Rights Seriously*, 31-39.

to be made. Legal commensurability indicates that the measure that channels the decision-making is already ‘in place’ before the legal agent confronts a legal case and independently from him.⁸⁴ It thus suggests an ‘outside in’ approach to legal decision-making: the measure for the right legal decision is to be found ‘outside’ the legal agent.⁸⁵

It is this ‘priority’ and ‘independency’ of the commensurans that can explain the difference between ‘commensurability’ and ‘comparability’.⁸⁶ Where comparability merely suggests that an agent can rank two or more different items on the basis of some shared feature, commensurability means that such a ranking is grounded on a “significant rationale”.⁸⁷ Commensurability does not amount to the possibility of ad hoc ranking by an agent who deliberates what to do. Rather, it indicates that a ranking is “induced by some significant or even essential property of the items.”⁸⁸ Legal commensurability thus indicates the availability of a measure that has normative force in relation to the judicial decision to be made. For this normative force of the commensurans another feature must be introduced, i.e. its alleged ‘representative adequacy’.⁸⁹ This assumed representative adequacy of the commensurans explains why judges are held to be justified in applying the commensurans to the particular legal case at hand.

For this context the meaning of representative adequacy is twofold. First, it points to what may be called ‘rationality as intelligibility’, pointing to what at a certain time and place can reasonably be said to be intelligible.⁹⁰ One could say that this test is

⁸⁴ Richardson, *Practical Reasoning about Final Ends*, 251. cf. ———, *Practical Reasoning about Final Ends*, 104.

⁸⁵ See also: McDowell, John, *Mind, Value & Reality* (Cambridge, US: Harvard University Press, 1998), 50.

⁸⁶ Authors who stress the difference between comparability and commensurability in practical reasoning in general: Stocker, *Plural and Conflicting Values*, 175, 178, 214; Scharffs, ‘Adjudication and the Problems of Incommensurability’, 1393.

⁸⁷ Luban, David, ‘Value Pluralism and Rational Choice’, in *Georgetown Law School Research Paper* (Georgetown: Georgetown Law School, 2001), 7.

⁸⁸ Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’, 67. Cf. Soper, ‘Legal Theory and the Obligation of A Judge. The Hart/Dworkin Dispute’, 504.

⁸⁹ See Richardson, *Practical Reasoning about Final Ends*, 104-111.

⁹⁰ MacCormick, *Legal Reasoning and Legal Theory*, 103.

“concerned with what makes sense in the world, and with what makes sense in the context of the system.”⁹¹ Obviously, whether a commensurans satisfies such a test need not be undisputed. Debates about whether legal concepts make sense for a particular case cover a considerable part of what ‘the stuff of adjudication’ is all about. Questions of intelligibility arise particularly in relation to the ‘qualification’ of the facts.

Second, the representational adequacy of the commensurans also suggests that it is a measure in terms of which all that matters for a concrete legal case is exhaustively taken into account.⁹² The lens offered by a commensurans is assumed to be also morally adequate for the identification of the relevant interests and facts. So, if one relies on legal commensurability the reasons provided by settled law cannot by themselves explain why a judge is justified in effectuating these selfsame reasons against citizens, i.e. why they would count as a genuine justification for a particular judicial decision. The notion of ‘representative adequacy’ functions as the intermediate concept that bridges the gap between adjudication and morality as being inextricably linked.⁹³ As such this representative adequacy of the commensurans can also make sense of the fact that theories of adjudication that rely on legal commensurability typically hold that adjudication “has value, that it serves some interest or purpose or enforces some principle -in short that it has some point.”⁹⁴ Robert Alexy for instance expresses this idea where he argues that if the law raises a claim to rightness, this by itself provides an argument for the idea that “morality is

⁹¹ Ibid. Henry Richardson qualifies the kind of ‘rationality’ between the measure and what is measured as one of ‘inherence’; a commensurans must be a concept that can reasonably be said to be instantiated, honoured or realized by a particular decision. Richardson, *Practical Reasoning about Final Ends*, 110.

⁹² Cf. Wiggins, David, 'Incommensurability. Four proposals', in *Incommensurability, Incomparability and Practical Reason*, ed. Chang, Ruth (Cambridge, US. : Harvard University Press, 1997), 53.

⁹³ In this way legal commensurability is supposed to overcome the justificatory deficit of Hart’s descriptive positivism.

⁹⁴ Dworkin, *Law's Empire*, 47.

necessarily included in the law”⁹⁵ because “moral reasons can and must participate in the justification of legal decisions when authoritative reasons run out.”⁹⁶

It is at this point that the role of normative moral theory of naturally kicks in, as the final or supreme commensurans, as the decisive and exhaustive normative source in adjudication. If one relies on legal commensurability, adjudication is construed as an institutional expression of normative moral theory.⁹⁷ Of course, commensurabilists do not hold that in each and every legal case judges invoke arguments drawn from a normative moral background theory of law and adjudication.⁹⁸ Legal commensurability simply implies that for judges the “ladder of theoretical ascent is always there” if needed.⁹⁹

There are several candidate normative moral theories for the function of a final commensurans. To qualify, such a theory must according to Dworkin fit most of settled law and at the same time it must be superior to any other theory as a matter of political morality.¹⁰⁰ In the end the judge must choose the best theory, that is, the theory that offers the soundest political and moral principles that are consistent or even coherent with the existing body of valid rules.¹⁰¹ So to rely on legal

⁹⁵ Alexy, Robert, 'The Nature of Legal Philosophy', *Ratio Juris* 17, 2 (2004), 164.

⁹⁶ Ibid., 165. MacCormick attributes representative adequacy to rules where he states that rules “may be conceived of as tending to secure, or being aimed at securing, some end conceived as valuable, or some general mode of conduct conceived to be desirable.” MacCormick, *Legal Reasoning and Legal Theory*, 156.

⁹⁷ It is in relation to this function assigned to moral theory as the final justificatory commensurans that Dworkin refers to the value of integrity of law. Integrity of a legal order indicates that judges insofar as possible treat a particular system of legal standards “as expressing and respecting a coherent set of principles, and to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.” See: Dworkin, *Law's Empire*, 217; Dworkin, Ronald, 'In Praise of Theory', *Arizona State Law Journal*, 29 (1997).

⁹⁸ Cf. Dworkin, 'In Praise of Theory', 360.

⁹⁹ Ibid.

¹⁰⁰ Dworkin, Ronald, *A Matter of Principle* (Cambridge, US: Harvard University Press, 1985), 143.

¹⁰¹ Cf. Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', 387.

commensurability means that the practice of adjudication or judicial decision-making has a two-sided nature: it accommodates a wide range of institutionally embedded considerations, but at the same time it also includes a more independent moral point of view. This moral point of view is offered by a normative theory of political morality. This two-sidedness is succinctly expressed by Robert Alexy where he states that the law “necessarily comprises both a real and factual dimension and an ideal and critical one. In the definition of law the factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness.”¹⁰²

So far the exposition of some features of a commensurans. Now the question remains how a judge can be justified in making a *particular* decision. The claim that the commensurans by itself is the supreme determining factor in the legal decision does not suffice as an answer. We still lack a particular arithmetic that connects said commensurans with the decision.

Those relying on legal commensurability take ‘maximisation’ as such a guiding arithmetic, i.e. the rational method for closing the gap between the commensurans and a concrete judicial decision.¹⁰³ In the words of David Luban: “The connection between commensurability and rational choice is straightforward. If goods are commensurable, they possess a common measure, and we may choose among them by a simple algorithm: More is better, less is worse.”¹⁰⁴

Importantly, in this context ‘maximisation’ is not confined to reasoning that aims to ‘maximize’ a quantifiable good or ‘utility’. It has the more general meaning of attempting to make the decision that best instantiates, contributes to, or promotes the

¹⁰² Alexy, Robert, 'The Dual Nature of Law', *Ratio Juris* 23, 2 (2010), 167.

¹⁰³ Henry Richardson makes this idea of maximizing explicit in his characterisation of practical commensurability, which entails that a “commensurans is to serve as the measure in terms of which the agent makes a choice, by maximizing along its dimensions, and not merely as a summary of the choices an agent has made.” Richardson, *Practical Reasoning about Final Ends*, 104.

¹⁰⁴ Luban, 'Value Pluralism and Rational Choice', 6.

commensurans.¹⁰⁵ It surely covers what is usually meant by ‘deduction’ and ‘balancing’ as common methods of legal reasoning.

Note that a reliance on an arithmetic like ‘maximisation’ is not tantamount to being committed to a mechanistic or formalistic view of adjudication. Neither is such a reliance premised on the idea that for each and every decision there is one single right answer. As said, legal commensurability allows for the possibility that the commensurans delineates a well-confined range of possibly correct legal answers. Legal commensurability is thus fully consistent with envisaging adjudication as a highly complex interpretative activity in which serious disagreements can arise. In fact, this is precisely what legal commensurability suggests and why Dworkin assigns superhuman intellectual and philosophical skills to his model of the ideal judge, Hercules.¹⁰⁶ To come to the right decision(s), Hercules interprets settled law in the best light, that is, in the light of the most convincing background theory of political morality, truly an intellectually demanding task.

As the example of Hercules already reveals: the important role that adherents of legal commensurability assign to theory has consequences for the professional responsibilities of the judge. If one relies on legal commensurability, a good judge must satisfy the demands of a normative moral theory. The pivotal judicial virtue of the judge will be a theoretical ability, the ability to interpret the law on the basis of the background moral theory.¹⁰⁷ Within the framework of legal commensurability the judicial role is in essence philosophical and an excellent judge will be identified by his “his or her ability to articulate the implications of such background theories [...]”¹⁰⁸ Competent judges may of course make mistakes, but this will then be either

¹⁰⁵ Cf. Grimm, 'Easy Cases and Value Incommensurability', 28. Robert Alexy for instance conceptualizes constitutional rights by using this notion of maximisation where he states that these rights are norms “requiring that something be realized to the greatest extent possible, given the legal and factual possibilities”. See: Alexy, 'Constitutional Rights, Balancing and Rationality', 135.

¹⁰⁶ Cf. Dworkin, *Taking Rights Seriously*, 105.

¹⁰⁷ Richards, 'The Theory of Adjudication and the Task of the Great Judge', 218.

¹⁰⁸ *Ibid.*, 205. See also: Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges', 367.

because they use the wrong kind of theory or because they make “more pedestrian errors of analysis.”¹⁰⁹

Finally, an important feature of legal commensurability is the way it understands the bearing of the losing claim. In this regard Dworkin makes a telling distinction between 'bare harm' and 'moral harm'.¹¹⁰ For Dworkin bare harm is the idea of a loss as an affected citizen subjectively experiences it. Whether such bare harm indeed occurs will thus by implication depend on an empirical state of affairs, for instance the suffering or frustration that is actually experienced by the losing party.¹¹¹ From a moral point of view -other things equal- we do not need to be concerned with this kind harm.

Moral harm, by contrast, is according to Dworkin an objective loss and hence we should be troubled by it from a moral point of view. Moral harm “assumes that someone suffers a special injury when treated unjustly” and which stems from the injustice factor.¹¹² Now, legal commensurability suggests that the negative consequences that may be experienced by citizens who participate in legal proceedings -negligible incidents aside- are to be understood as bare harm, referring to a merely subjective state of the citizen that is legally irrelevant. Consequently the losing claim “does not simply lose out, it vacates the field. It is not on the scene any more at all”, so to say.¹¹³

Of course, this feature has everything to do with the assumed representative adequacy of the commensurans. If one relies on legal commensurability the idea is that all that matters legally is exhaustively accounted for by a commensurans. And as the commensurans determines the ranking there is simply no viewpoint available in terms of which the judge is allowed to assign legal or moral weight to the losing claim. Or to put it differently: a commensurans functions as what Dworkin has qualified a ‘dispositive concept’, i.e. a dimension that in the end functions as a two-edged sword:

¹⁰⁹ Dworkin, *Taking Rights Seriously*, 313.

¹¹⁰ ———, *A Matter of Principle*, 80.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Nussbaum, Martha C., 'Aeschylus and Practical Conflict', *Ethics* 95, 2 (1985), 243.

a test for *conclusive* claims as to the concrete legal rights that citizens have and thus as to the related duty of judges to establish and enforce these rights.¹¹⁴

This categorical denial of all moral and legal relevance of the losing claim entails that no *genuine* conflicts of legal (including moral) rights will occur, at least not as a phenomenon that is part of the moral nature of adjudication.¹¹⁵ The framework of legal commensurability only allows for prima facie conflicts -think for instance of Dworkin's 'hard cases'- which are waiting to be dismantled by rigorous legal reasoning.¹¹⁶ Legal commensurabilists like Dworkin will thus typically raise the following questions, just rhetorically: "How can both A and B be true when B is a straightforward contradiction of A, stating, for example, that a company is not liable for a damage? How can both p and non-p be regarded as true answers?"¹¹⁷

4 Stability explained

In this section I will further explain why I call theories of adjudication and actual practices of adjudication that rely on legal commensurability and on normative moral theory 'stabilizing'.

The connection between 'commensurability' and 'stability' is nothing new. From the early days of Western philosophy -and even before that- commensurability was considered not only an important condition for rationality as we saw in the previous section, but connected to this, also for the stability of agents facing a practical question. For instance in Sophocles' 'Antigone' the protagonist Creon achieves -in the words of Martha Nussbaum- "singleness, straightness, and an apparent stability" because he relies on commensurability.¹¹⁸ In the same fashion Plato notably stressed

¹¹⁴ Dworkin, *A Matter of Principle*, 125.

¹¹⁵ Cf. Waldron, Jeremy, 'Rights in Conflict', *Ethics* 3 (1989). This feature of the moral irrelevance of the losing claim can also and more straightforwardly be explained by the fact that legal commensurability in the end sees judicial decision-making as a form of applied moral theory and thus as being under the guise of theoretical reason and bound by the principle of non-contradiction.

¹¹⁶ Cf. Dworkin, Ronald, 'Hard Cases', *Harvard Law Review* 88, 6 (1975).

¹¹⁷ Statman, Daniel, 'Hard Cases and Moral Dilemmas', *Law and Philosophy* 15, 2 (1996), 133-134.

¹¹⁸ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 58.

that commensurability would save people from indecisiveness and neurotic conflict.¹¹⁹ Commensurability could protect people from “intolerable pains and confusions.”¹²⁰ In contemporary legal thought we can discern a similar connection between commensurability and stability. Theories of adjudication that rely on legal commensurability are considered stabilizing for the judge, the legal order as a whole and also for the citizen(s) concerned. By contrast, radical *incommensurability* in law has been linked to a state of indecisiveness, ambiguity, arbitrariness, and “a sense of hopelessness and helplessness”.¹²¹

As to the stability for the judge: within the framework of legal commensurability a judge always has a prior and external measure to his avail that contains -albeit by implication- the right answer (or a well-defined range of right answers) for the legal case at hand. Although finding this right answer may be an intellectually demanding task, the judge need not experience any kind of fundamental epistemic insecurity or radical doubt, let alone a sense of ‘madness’ when he is at the point of making a decision. Far from that, legal commensurability gives a judge firm legal ground to stand on.

Legal commensurability is also stabilizing for the judge because the judicial role is rather impersonal. Judging is understood as a constative activity rather than as a performative activity. It is about establishing what the case is in fact already. So strictly speaking the person of the judge, his will or character, is not involved. What is involved are his cognitive skills that are necessary to determine and recognize the implications of the commensurans. If one relies on legal commensurability, adjudication is predominantly a matter of application. He does not have to understand a legal decision as his deed in the sense of: ‘due to me, John, Mister X has to bear this

¹¹⁹ Cf. Barbour, John D., 'Tragedy and Ethical Reflection', *The Journal of Religion* 63, 1 (1983), 1; Schmidt, 'Can Law Survive: On Incommensurability and the Idea of Law'; Pildes, Richard H., 'Review: Conceptions of Value in Legal Thought', *Michigan Law Review* 90, 6 (1992); Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, chapter 4 and 6.

¹²⁰ Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 106.

¹²¹ Scharffs, 'Adjudication and the Problems of Incommensurability', 1435. See also: Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes', 68.

burden A as a result of my choice.’ He can -of course within certain boundaries- simply refer to his professional responsibility to apply the law.

The morally reassuring effect of legal commensurability for the judge is also due to the following. Within the framework of legal commensurability the judge is obliged to exclusively use the lens of the commensurans in determining what to decide.

Consequently his attention is turned away from the reality that the judge experiences as concrete situated being, i.e. from the confrontation with the affected citizen, from the considerations that he otherwise would take seriously, that is, when not fulfilling his professional task. Using the lens of a commensurans, the judge does not ‘see’ the affected citizen, nor does he experience the relational aspect of the situation. Hence, the shield of the commensurans protects the judge against being ‘naked’, so to say, when confronted with the concrete reality that characterizes a legal case.

Another reason why legal commensurability is morally reassuring for the judge is the assumption that every legal case can be *exhaustively* resolved, that is, without a moral loss. As such, legal commensurability offers the judge the prospect of moral innocence. It allows him to avoid ‘dirty hands’.¹²² The pain, harm and suffering stemming from right legal decisions can be categorically accounted for in terms of what Ronald Dworkin has called ‘bare harm’, being a legally irrelevant subjective experience of the losing citizens.¹²³ As a consequence the judge will be perfectly justified to experience the consequences of his decisions “as dispassionately as we view the April showers that bring the flowers of May.”¹²⁴

It is important to note, however, that the idea of judicial moral innocence dovetails neatly with the possibility that judges will sometimes feel a sense of insecurity, loss, regret, guilt or personal responsibility. Within the framework of legal commensurability these experiences are not understood as part and parcel of the judicial role. Rather, they are treated as indications that the subjective inner-life of the judge is not (yet) fully determined by his professional point of view. Once the judge has fully internalized the framework of legal commensurability, the way he personally

¹²² See for an illuminating discussion of ‘dirty hands’: Gowans, Christopher W., *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (Oxford: Oxford University Press, 1994), 228-237.

¹²³ Cf. Dworkin, *A Matter of Principle*, 80.

¹²⁴ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 62.

experiences his decisions is likely to change. The idea is that a “belief in commensurability cuts very deep: taken seriously, it will transform our passions as well as our decision-making, giving emotions such as love, fear, grief, and hence the ethical problems that are concerned with them, an altogether different character.”¹²⁵ As said, legal commensurability is also ‘stabilizing’ for the legal order as a whole. If adjudication fulfils the requirements that stem from legal commensurability, a legal order need not be troubled by the exercise of force that it generates. Legal decisions will be morally justified and fully transparent, rather than expressions of arbitrary and opaque exercises of force.¹²⁶ Within the framework of legal commensurability, the principle of political legitimacy can be exhaustively satisfied where adjudication is concerned. Citizens who participate in a legal proceeding will have an explicate reason to accept the burden of a legal decision. Ideally this decision is the implication of living in a principled society, i.e. a society that understands the relations between citizens as a matter of political morality. If a citizen nonetheless complains about the painful consequences of a particular decision, the legal order can ask him to wise up and revise his views on the matter, i.e. to make a distinction between what he subjectively experiences and what is legally the case.

In this way, and to conclude this section, a reliance on legal commensurability is also stabilizing for the ‘losing’ party of a legal proceeding. This citizen does not have a reason to be confused or troubled because of being wronged. He will not be troubled by the confusing and painful experience of being the victim of a decision that could have been otherwise, or that lacks moral ground. A losing citizen can be provided an explicit and exhaustive reason as to why he should accept the particular decision and the resulting burdens. In this way he can also fully understand and concretely experience what living in principled society amounts to. Within a framework of legal commensurability principled judicial decisions are not seen as just “a matter of

¹²⁵ Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 106. Cf. Pildes, 'Review: Conceptions of Value in Legal Thought', 1546. Again, this purported transformative influence is not specific for legal commensurability, but is attributed to practical commensurability in general.

¹²⁶ Cf. Dworkin, *Law's Empire*, 71.

theoretical elegance, but also as a matter of how a community committed to equal citizenship should govern itself.”¹²⁷

5 Do I overstate the stabilizing character of legal commensurability?

On the basis of the preceding section one could of course question whether I have not overstated the stabilizing effect of legal commensurability. To rebut this potential charge I will examine a slightly looser, less stringent interpretation of legal commensurability. This interpretation should have the same justificatory potential, but without the stabilizing consequences that I discussed in the previous section. Such an interpretation is in fact offered by Matthew Kramer in his elucidating and thought provoking article ‘When is there not one right answer?’¹²⁸

Kramer presents an approach to adjudication that is characterized by a reliance on legal commensurability combined with the acknowledgment that judges will sometimes have strong discretion and cause or authorize a genuine moral loss. His approach suggests that to rely on legal commensurability is not that stabilizing at all. Legal commensurability will indeed produce a troublesome judicial phenomenology, or so seems the idea. I will argue that Kramer’s account is incoherent and that reliance on legal commensurability implies commitment to a stabilizing view to adjudication. Kramer’s contention that a correct legal decision can nonetheless cause a genuine moral loss is intimately connected with his critique on Dworkin's theory of adjudication, stating that the latter insufficiently acknowledges the inherent plurality of moral values. Kramer’s approach seeks to be more responsive than Dworkin’s to the fact that judges may have to decide about plural values. He does so by identifying two classes of situations in which he thinks that genuine moral loss should be acknowledged due to this plurality of values.

The first category of legal cases that Kramer identifies is the one for which “the uniquely correct response to a moral problem lies in opting for the lesser of the two wrongs.”¹²⁹ In these cases the judge makes the right decision by choosing the lesser evil. Because “if the judge does not choose the lesser evil in order to avoid the

¹²⁷ Dworkin, Ronald, *Justice in Robes* (Cambridge, US: Harvard University Press, 2008), 53.

¹²⁸ Kramer, Matthew, 'When Is There Not One Right Answer', *The American Journal of Jurisprudence* 53 (2009).

¹²⁹ *Ibid.*, 63.

greater, he or she will have failed to adopt the uniquely correct course of conduct”, Kramer argues.¹³⁰ Contrary to Dworkin’s view, in these cases the moral value of the losing claim “remains fully operative”.¹³¹ Thus, for Kramer determinate correctness is fully consistent with the idea of a genuine moral loss that will have to be rectified or compensated for. As he puts it: “[b]eing overtopped does not amount to being negated.”¹³² Although a judge may decide in accord with the ranking by choosing the ‘lesser of the two wrongs’, according to Kramer this does not make the moral bearing of the losing claim evaporate.

The second category is that of legal cases in which the values at issue are incommensurable. In these cases judges will have strong discretion to decide one way or the other, as there is no common measure available in terms of which competing legal propositions can be ranked: “there is no coherent moral basis for an overall comparison between them.”¹³³ For cases in this category Kramer also holds that legal decisions may cause a genuine moral loss. He states: “when moral obligations coexist incommensurably [...], each of them continues to obtain as a moral obligation. A person’s non-compliance with any such obligation is a wrong that will have to be rectified.”¹³⁴

So according to Kramer both categories of cases show that a reliance on legal commensurability may well be “[f]ully consistent with the spectre of inescapable wrongness” and with attributing strong discretion to the judge. They suggest a rather radical sort of judicial responsibility and also unintelligibility regarding the grounds of the decision.¹³⁵ Again, these aspects are in contrast with the predicate ‘stabilizing’ that I assigned earlier to approaches to adjudication that rely on legal commensurability.

However, I think that Kramer fails in his attempt to give a looser and less stabilizing interpretation of legal commensurability. He fails because the two categories of legal

¹³⁰ Ibid.

¹³¹ Ibid., 66.

¹³² Ibid.

¹³³ Ibid., 64.

¹³⁴ Ibid., 66.

¹³⁵ Ibid., 63.

cases he delineates cannot coherently be accounted for.¹³⁶ As said, the first category refers to situations in which determinate correctness holds according to Kramer -and hence there is a commensurans- and at the same time the judge is deemed to have violated a professional obligation because he did not decide in accord with the losing claim. The problem with this category is that Kramer's description of the cases largely draws on the rhetorical force of the concepts of 'duty' and 'obligation'. He begs the question as to why the judge has a duty to compensate for the losing claim in these cases. This is problematic because the contrary seems to be the case: in view of what is meant by commensurability, in these cases a judge has no duty at all with regard to the losing claim. The 'ranking' -as suggested by Kramer's notion of 'lesser evil'- indicates that a commensurans is in fact used and thus that the judge is exclusively duty bound to give effect to the ranking that this commensurans dictates. There is no separate normative source in terms of which a duty of the judge to decide otherwise can be grounded. It is this reductive power of the commensurans together with the requirement of maximization that Kramer underestimates. These features of commensurability are not reconcilable with the acknowledgment of a genuine moral loss. Consequently, in the effectuation of this ranking the judge does not violate the value at stake in the losing claim. Kramer must either relegate the claim on rightness as determinate correctness, or he must acknowledge the reductive power of the commensurans as the decisive source for determining the duty of the judge. More or less the same holds for the second category of legal cases. Kramer argues that genuine incommensurability occurs in situations where there is simply no value available in terms of which the options can be ranked. Due to this incommensurability judges will have strong discretion. Kramer at the same time asserts that the judge then has "remedial obligations" under which he has to rectify his "non-compliance with the unfulfilled duties."¹³⁷ But, if in a legal case the available options are genuinely incommensurable, Kramer must be clear about why the judge would have a duty at all to decide for the one or for the other, and why he must rectify his non-compliance

¹³⁶ It must be noted that Kramer does not explicitly put forth these arguments for legal reasoning, but rather for practical reasoning in general. However, as these arguments are a way of criticizing Dworkin's theory of adjudication it seems that indeed the arguments are meant to also hold for the legal domain.

¹³⁷ Kramer, 'When Is There Not One Right Answer', 66.

with an unfulfilled duty. Richard Warner has put this problem of incommensurability concisely: “The jurisprudential problem is to explain how such decision-making is consistent with the institutional demand that courts’ decisions are based on the *superiority* of one set of reasons over the others. What does the court appeal to as a way of showing that one set of reasons is superior to another, competing set? My point is not that this problem is unsolvable. My point is that there is a problem to be solved.”¹³⁸

Kramer in any case does not solve this problem by simply premising that in case of incommensurability the judge has a duty to decide in accord with both claims. Moreover, it remains to be seen whether the attempt to accommodate for the second category of cases does not jeopardize Kramer’s overall reliance on legal commensurability. This reliance hinges on the idea that the second category of cases is a rare phenomenon in law. However, to stick to an overall reliance on commensurability by simply asserting that incommensurability in law will not be commonplace because that would be “devastating”, as Kramer indeed does, is not a convincing strategy. It is a highly problematic assumption and surely begging the question. By accommodating this category of cases, rather than loosening the implications of legal commensurability, Kramer opens the door to full-fledged scepticism that is both at odds with the identification of a genuine moral loss and of course with legal commensurability.

Hence, the two categories of legal cases identified by Kramer cannot function as an argument against the claim that a reliance on legal commensurability is stabilizing for judges and a legal order as a whole. Kramer fails to elucidate how his theory of adjudication can genuinely accommodate the possibility that legal decisions may lead to ‘inescapable wrongness’, while at the same time maintaining a claim on determinate correctness for the majority of cases. If determinate correctness is not assumed, he fails to make clear how it is that a legal decision can be justified or determined as right at all. Also, in that case the notion of ‘inescapable wrongness’ is simply incoherent, at least without further justification for qualifying a particular decision as ‘wrong’. As it stands, Kramer’s amendment to Dworkin does not so much put the stabilizing effect of a reliance on legal commensurability in perspective, but rather ends up either making the sceptical approach to adjudication plausible, or

¹³⁸ Warner, 'Incommensurability as a Jurisprudential Puzzle', 170.

reaffirming the idea that a claim of determinate correctness entails the denial of relevant moral loss.

6 Conclusion and how to proceed

This chapter started with a discussion of a ‘common sense’ approach to adjudication, an approach that characterizes the shared views of legal practitioners and arguably of citizens with regard to the moral quality of adjudication. Thereto I used Hart’s ‘internal point of view’ as an adequate reconstruction of this common sense interpretation. I rejected this approach because it lacks critical, justificatory force. It offers a rather appealing and self-gratulatory interpretation of adjudication without good reason.

For an account of moral quality in adjudication a more critical and detached viewpoint is needed and I introduced philosophy as a proper discipline to offer such an account. Subsequently, I discussed a stabilizing approach to adjudication, as a philosophical approach that relies on legal commensurability and related to this also on the normative force of moral theory. Moreover, I have pointed out why I qualify this approach as ‘stabilizing’, i.e. why it is that such reliance is stabilizing for the judge, for the legal order as a whole and also for the 'losing' citizen.

So now the question we face is whether we shall accept a stabilizing approach to adjudication and how we should proceed when answering this question. As to the latter: assessing the merits of a stabilizing approach on the basis of its ‘fit’ with the actual practice of adjudication will not help us. A stabilizing approach offers a moral ideal of adjudication that has both critical and aspirational potential and therefore by definition it does not need to fit the actual practice, because actual practices of adjudication can be full of ‘mistakes’. What is more, no ‘neutral’ description of adjudication can be offered. Any description will be contested and hence such a description in and by itself can never function as a knockdown argument for or against an account of moral quality in adjudication.

For our assessment of a stabilizing approach to adjudication I thus propose a different route. Its starting point is the role of normative moral theory on which this stabilizing approach hinges for its validity. A stabilizing approach assumes that a normative background theory of political morality can function as a final commensurans for law

and adjudication, thereby warranting a reliance on legal commensurability.¹³⁹ Such normative theories are thus assumed to function as an exhaustive explanation and justification for the practice of adjudication.

Yet, this reliance is neither self-evident nor unproblematic. In fact, it is a rather vulnerable feature of a stabilizing approach. Ronald Dworkin, the ‘legal commensurabilist’ par excellence, even stated that his theory of adjudication could possibly be wrong “in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.”¹⁴⁰

The validity of potential normative background theories of political morality is therefore a highly pertinent object for further scrutiny.

We must see whether indeed these theories can support a stabilizing approach to adjudication, i.e. to what extent a normative theory of political morality can in fact support a reliance on legal commensurability and its stabilizing -its morally and epistemically reassuring- picture of adjudication. In the remainder of the first part of this book I will focus on this very question.

¹³⁹ Finnis, John, 'On Reason and Authority in Law's Empire', *Law and Philosophy* 6 (1987), 375.

¹⁴⁰ Dworkin, *A Matter of Principle*, 144.

*"The project of finding a short cut to heaven is as old as the human race."*¹⁴¹

*"We claim to walk straight in the path of justice."*¹⁴²

3 On reason's hope. Normative theories of political morality and their potential stabilizing function for adjudication

1 Introduction

In the previous chapter we discussed a stabilizing approach to adjudication that relies on legal commensurability and by implication also on a normative theory of political morality. A stabilizing approach holds that if the law and judges comply with the demands of the best normative theory available, adjudication can be a practice - negligible incidents aside- that is fully intelligible, discursively explicable and morally harmonious. This approach assigns to a normative theory of political morality the power to dissolve the (potentially) troublesome phenomenology of adjudication in an epistemically and morally reassuring way.

In this chapter I will discuss the features of normative theories of political morality more thoroughly. It offers a typology of such theories (2) and, in addition, briefly discusses the role these theories themselves assign to adjudication (3). The chapter ends with a brief conclusion (4).

The argumentative aim of the chapter is twofold. I seek to illuminate why a normative theory of political morality is a key element of a stabilizing approach, or more succinctly put: what normative theory has to do with stability. In addition, the chapter sets the stage for the subsequent chapters in which two specific versions of a normative theory of political morality will be scrutinized to assess their potential to validate a stabilizing approach to adjudication.

¹⁴¹ Oakeshott, Michael, 'The Tower of Babel', in *Anti-Theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 185.

¹⁴² Aeschylus, *The Eumenides*, ed. Lloyd-Jones, Hugh, trans. Lloyd-Jones, Hugh (New Jersey: Prentice-Hall, 1970), 30.

2 On (the stabilizing effect of) normative theories of political morality

Obviously, offering a typology of normative theories of political morality is a far from neutral exercise. As moral theory itself is a contested concept, any interpretation will be an expression of a particular stance on the matter. In the words of Robert Louden: “there exists no detailed, univocal definition of the term which is employed faithfully by all who profess to be ethical theorists.”¹⁴³ So, I cannot but play with loaded dice when offering a typology of normative theories of political morality. As a way to compensate for this inescapable bias, I seek to present a typology that the most miscellaneous moral philosophers can at least to some extent accept. Also, the reader should bear in mind the purpose of this typology: to better appreciate the spirit of a stabilizing approach to adjudication. So far the preliminaries.

In order to understand the spirit of normative theories of political morality it should be reminded that the word *theory* comes from the Greek word *theôria*, which in turn is based on the verb *theôrein*, “to look at, view, behold.”¹⁴⁴ In ancient Greece this verb was applied to sight-seeing travellers, to attendants at festivals in distant cities, and to people who came to witness public games. At a certain point philosophers were compared to such *theôroi*, people who only observe what is happening, and the connection between theory and philosophy was made.¹⁴⁵ Later on *theôria* gradually lost its focus on *visual* perception and the word gradually evolved towards a “mental gazing at, completing, or studying”, a meaning which we can already clearly find in Plato’s *Republic*.¹⁴⁶

Therefore it is not surprising that the origin of the tradition of normative moral theory has indeed been located in Plato’s philosophy, particularly in Socrates’ method of practical inquiry. In answering practical questions Socrates notably abstracted from all kinds of particularities and from the specific local considerations that characterize the perspective of a concrete situated person.¹⁴⁷ “[...U]nder Socratic reflection we

¹⁴³ Louden, Robert B., 'Virtue Ethics and Anti-theory', *Philosophia* 20, 1 (1990), 95.

¹⁴⁴ ———, *Morality and Moral Theory. A Reappraisal and Reaffirmation* (New York: Oxford University Press 1992), 85.

¹⁴⁵ *Ibid.*, 86.

¹⁴⁶ *Ibid.*

¹⁴⁷ Williams, Bernard, *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985), 190.

seem to be driven to generalize the I and even to adopt, from the force of reflection alone, an ethical perspective.”¹⁴⁸

In this Socratic vein normative theories of political morality in their account of a just society typically abstract from the contingencies that characterize a political order and its concrete institutions and also from the embedded judgements that occur in such an order. Normative theories of political morality typically “represent the priority of the moral over the political”.¹⁴⁹ In the words of Raymond Geuss they offer an “ethics first view”: through the use of theoretical reason they single out the ends that a society should strive for, as well as the constraints these ends suggest for institutional arrangements.¹⁵⁰

More particularly normative theories of political morality typically introduce a set of normative principles that can justify, evaluate, guide and explain the political order to which they apply. A political philosopher who offers a normative theory of political morality will try to “reduce that apparently endless diversity of particular moral judgments” by means of abstraction.¹⁵¹ He will offer “some basic concepts”, or as Bernard Williams has coined them, ‘thin concepts’.¹⁵² These concepts articulate on the most general and abstract level “a schema, a very bare outline” of what the central concerns should be in respect to citizens’ basic rights and duties.¹⁵³ Society is construed as potentially the materialization of (theoretical) reason itself and thus as fully intelligible and transparent, and as such also publicly accessible.¹⁵⁴ In the end normative theories of political morality boil down to a project of systematization. This

¹⁴⁸ Ibid., 21.

¹⁴⁹ Hawthorn, Geoffrey, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 2-3.

¹⁵⁰ Geuss, Raymond, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 8.

¹⁵¹ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 50.

¹⁵² Ibid., 47.

¹⁵³ Williams, Bernard, 'Liberalism and Loss', in *The Legacy of Isaiah Berlin*, ed. Lilla, Mark, Dworkin, Ronald, et al. (New York: The New York Review of Books, 2001), 92.

¹⁵⁴ Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 46; Rawls, John, *A Theory of Justice* (Cambridge: Harvard University Press, 1999 (1971)), 434.

is clearly expressed by Martha Nussbaum where she states that “one of the major purposes of having an ethical theory is to bring the material of ethical experience into pernicious ordering, rendering the incoherent coherent (by suitable revision and discarding), and showing how one thing is related to another. This also makes it possible to extend the application of principles to previously unconsidered material, or to see how one concrete judgment can be extended to similar cases.”¹⁵⁵

For the realization of their substantive goals normative theories of political morality depend on the competences of the relevant agents, i.e. of politicians, officials and citizens to understand and apply the abstract concepts they provide. So, as a rule these theories hold that public officials and citizens “should think, not only in moral terms, but in the moral terms that belong to the political theory itself”.¹⁵⁶ All relevant agents should at least to a certain degree have the virtues that are necessary for applying a theory: “clarity and consistency of thought, speech, and action, the ability to reflect, to detach oneself from prevailing opinion, to ask questions, to give reasons.”¹⁵⁷ At the risk of being infeasible, normative theories of political morality have it that citizens and officials ideally are something of a philosopher, or must in any case be able to detach themselves from their normal embedded views and unreflective ways of understanding the world.¹⁵⁸

This demand of detachment is why normative theories of political morality are often also considered the typical products of the Enlightenment and modernity, as “[t]he goal of Enlightenment was to advance as close as possible to a kind of intellectual utopia in which ignorance and superstition [...] are replaced by a seamless web of beliefs verified by rational methods.”¹⁵⁹ Indeed, normative theories of political morality are keen to present themselves as forceful antidote to or weapon against

¹⁵⁵ Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', 57.

¹⁵⁶ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 3.

¹⁵⁷ Geuss, Raymond, *Outside Ethics* (Princeton: Princeton University Press, 2005), 6.

¹⁵⁸ Cf. Oakeshott, 'The Tower of Babel', 193.

¹⁵⁹ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 45.

biases, prejudices, traditions and other ‘irrationalities’ that may figure in a political order.¹⁶⁰

It is important to note that this claim to objectivity and detachment is not to say that normative theories claim to present final and infallible viewpoints of justice. Political philosophers who present a theory of political morality do not hesitate to stress that their conception of justice is inherently open-ended, open for improvements, just as theories in the natural sciences may be revised after new observations.¹⁶¹ But at the same time normative theories of political morality generally do assign absolute standing to their conceptions of justice where their practical status is concerned.¹⁶² As theory is given primacy over practice, the viewpoint of justice that these theories propose is presented as the “final court of appeal in practical reasoning”.¹⁶³ It means that once a particular theory is considered the best available at a certain time and place, its principles must be applied as if they have a ‘once and for all’ status. For practical matters these principles ‘guillotine’ all other viewpoints, they must be taken as absolutes.

In addition and related to the previous point, normative theories of political morality see it as an important practical task to resolve social conflicts. In a society that is reigned by a normative theory of political morality the rules of theoretical reason and hence also the principle of non-contradiction apply: contradictory statements regarding the basic claims of citizens cannot both be true and hence at least one must be false.¹⁶⁴

Normative theories of political morality tend to “assimilate conflicts in moral belief to theoretical contradictions and apply to moral understanding a model of theoretical

¹⁶⁰ Williams, *Ethics and the Limits of Philosophy*, 85; Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 33.

¹⁶¹ Cf. Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour', 57.

¹⁶² Cf. Geuss, *Philosophy and Real Politics*, 17.

¹⁶³ Rawls, *A Theory of Justice*, 116.

¹⁶⁴ Cf. Horn, Laurence R, 'Contradiction', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2012).

rationality and adequacy”.¹⁶⁵ They often hold that “for any apparent conflict, either one of the conflicting statements is not true or the two statements do not really enjoin incompatible actions.”¹⁶⁶ Consequently, when a social conflict occurs a vital point of political morality is to ‘show’ that one of the parties involved in the conflict was irrational, i.e. mistaken about the (moral) weight of the interests involved.¹⁶⁷

More generally, normative theories of political morality hold that once a society complies with its demands, citizens cannot have any legitimate complaints against workings of the central institutions in this order. They account for the requirement of political legitimacy in a rather straightforward way: the moral viewpoint they offer is considered an exhaustive and final reason before each and every citizen regarding their particular positions and their concrete plights. This notwithstanding the fact that justice can in practice be counter-intuitive, can be at odds with our everyday and raw experience on a pre-reflective level and can be inconvenient or even extremely painful. But these experiences do not render a complaint legitimate as “the claims of personal prudence are already given appropriate weight within the full system of principles”.¹⁶⁸ Reasonable citizens must be able to distance themselves from these more embedded views and ‘subjective’ experiences so as to accept the practical implications stemming from these principles.

Theories of political morality thus embrace what can be qualified as the doctrine of moral harmony.¹⁶⁹ They aim to completely and exhaustively reconcile citizens with

¹⁶⁵ Williams, Bernard, *Moral Luck. Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981), 81. Cf. Williams, 'Liberalism and Loss', 162.

¹⁶⁶ Gowans, Christoffer W., 'Introduction. The Debate on Moral Dilemmas', in *Moral Dilemmas*, ed. Gowans, Christoffer (Oxford: Oxford University Press, 1987), 4. Gowans sees this characteristic not only as a strand of modern conceptions of moral theory, but as a rather dominant one in moral philosophy. He writes: “[...] with few exceptions philosophers from Plato on have viewed moral dilemmas as mere appearances”. See also: Louden, 'Virtue Ethics and Anti-theory', 97.

¹⁶⁷ Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 13; Williams, 'Liberalism and Loss', 100-102.

¹⁶⁸ Rawls, *A Theory of Justice*, 117.

¹⁶⁹ For the use of the term ‘moral harmony’ see: Williams, Bernard, 'Replies', in *World, Mind, and Ethics*, ed. Altham, J.E.J. and Harrison, Ross (Cambridge: Cambridge University Press, 1995), 139.

the political order they live in by trying to overcome any kind of ambivalence and *aporias* where citizens' positions in society are concerned.¹⁷⁰ Through (the use of) theoretical reflection citizens are made at home in the political order by making this order completely intelligible and by securing that citizens will not suffer from genuine moral loss.

On the basis of the discussion so far we can establish that if normative theories of political morality live up to their aspirations, they will have a stabilizing effect on (the central institutions of) a political order. In any case, the troublesome phenomenology of such an order can be explained and justified as either a mistake or as a negligible side-effect of living in society that is committed to a moral ideal that citizens have reason to endorse.

Normative theories of political morality are also morally and epistemically reassuring for the central institutions in society: for each and every question with regard to citizens' claims in society they offer a final and morally exhaustive, loss-free answer. In a sense these theories bring good news about the moral potential of a political order.¹⁷¹ They bring hope because they hold that a political order is in essence friendly to their aspirations and they rely on the idea that "[a] society free from irremovable contradictions, a society pointing the way as logic does, to correct solutions only, can be built eventually, given enough time and good will."¹⁷²

So far the typology. On the basis of this typology we can now see why a normative theory of political morality plays such a crucial role in a stabilizing approach to adjudication. These theories typically offer a viewpoint of justice that dovetails well with the features of a final commensurans. That is, as it befits the description of the final commensurans the viewpoint of justice that these theories propose is assumed to have sufficient normative force in order for the relevant values to be honoured by the relevant agents and institutions. It is presented as a viewpoint that is external and independent and as such offers guidance to the agents and institutions concerned.

¹⁷⁰ Cf. Bauman, Zygmunt, *Postmodern Ethics* (Oxford: Blackwell, 1993), 9.

¹⁷¹ Cf. Williams, Bernard, 'The Women of Trachis. Fiction, Pessimism, Ethics', in *The Greeks and Us. Essays in Honor of W.H. Adkins*, ed. Loudon, Robert B. and Schollmeier, Paul (Chicago: The University of Chicago Press, 1996).

¹⁷² Bauman, *Postmodern Ethics*, 9.

Also, similar to a final commensurans these principles of political morality purportedly encompass all concerns that are deemed pertinent for answering the particular practical problem at hand. They are assumed to have absolute standing precisely because of the assumed exhaustiveness and adequacy of their viewpoint. In addition, and again as it befits a final commensurans, such a conception is held to rationally resolve actual social conflicts; it allegedly offers solutions that do not come with genuine moral loss.

So, if theories of political morality can indeed live up to their claims -other things equal- this would warrant a reliance on legal commensurability, and by implication it would warrant a stabilizing approach to adjudication. At least in so far they comply with the principles of political morality, judicial decisions can be assumed to be determined or at least sufficiently constrained by principles of political morality, they can be assumed to be the rational resolution to the conflict at hand and they can also be assumed to exhaustively satisfy the legitimate claims of the citizens involved. The liberal principle of reciprocity will then be fully satisfied. Based on such a conception the losing citizen can be provided an exhaustive and explicit reason for why he should bear the burdens of a particular judicial decision. Such a citizen is not 'sacrificed', but rather given his moral due. If the claims of a theory of political morality can be upheld, such a theory indeed supports an epistemically and morally reassuring account of adjudication. The troublesome phenomenology of adjudication can then be dealt with as a negligible side-effect of living in a society that is committed to principles of political morality, i.e. to justice. This phenomenology may be ignored as the result of a pre-reflective, primitive or subjective point of view.

3 The role of adjudication. Returning the compliment

As said, the validity of a stabilizing approach to adjudication depends on the availability of an adequate normative theory of political morality. In this section we shall see that such theories of political morality return the compliment: they consider adjudication a crucial institution for the realisation of the values of political morality they propose. But this is not an analytical claim. Theories of political morality on the one hand and law and adjudication on the other are not intrinsically linked. There is no a priori reason to assign a practical role to law and adjudication for the realisation of justice. In a society of saints who agree on a common ideal, disputes about citizens'

basic claims will not occur and law and adjudication would presumably be redundant institutions.

But where the conditions in our world are concerned, normative theories of political morality do assign an important practical task to both the institutions of law and adjudication for the realisation of their goals.¹⁷³ They consider adjudication as the forum par excellence through which the principles of political morality, i.e. of justice, are effectuated. Due to the intellectual skills of judges, their impartiality and their institutionally anchored independency, the judiciary is seen as a particularly appropriate institution for the realisation of values of political morality vis-à-vis concrete citizens. In this regard normative theories of political morality often take it to be salient that despite the sometimes extreme inequality between the parties, citizens who go to court can equally rely on a full and fair hearing of the merits of their case and that the case will be settled on the basis of this hearing, of the law and of moral principles. Moreover, through adjudication the values of political morality will ideally also be realised beyond the scope of the actual parties concerned.

All this is not to say that normative theories of political morality claim to ‘directly’ determine the reasoning of judges. By contrast, they are sensitive to and respect the difference between the institutional rights of citizens -legal rights included-, and the rights and duties that they would have if the background values of political morality would be the exclusive normative source. Theories of political morality typically assign a certain autonomy to the institutions that bear responsibility for the realisation of values of political morality. They rely on a division of labour, so to say.

At the same time, these theories also stress that law and adjudication are only ‘partially autonomous’. Bound by the specific rules of their institution, they are not insulated from the requirements of political morality.¹⁷⁴ Other than for instance the institution of chess, law and adjudication are subject to the principles of political

¹⁷³ John Rawls’ and Martha Nussbaum’s theories of justice are cases in point as we shall see in the next chapters. Cf. Rawls, *A Theory of Justice*, 175; Nussbaum, Martha C., ‘The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: ‘Perception’ against Lofty Formalism’, *Harvard Law Review* 121, 1 (2007).

¹⁷⁴ Cf. Dworkin, ‘Hard Cases’, 1079.

morality precisely because they intensely influence citizens' lives.¹⁷⁵ Consequently, normative theories of political morality typically hold that in applying the law judges have the political duty to honour the values of political morality by means of settled law.

So, as said, normative theories of political morality return the compliment they receive from a stabilizing approach to adjudication as to the importance of their role. They assign an important task to adjudication in guaranteeing the protection of citizens' moral rights. Adjudication is not considered as merely one mode of dispute resolution among others, but rather as an institution in which the values of political morality can be effectuated in a most clear and elegant way in confrontation with concrete citizens.

4 Conclusion

This chapter offered a typology of normative theories of political morality. It also paid attention to the role such theories assign to adjudication.

The typology explained that if theories of political morality can indeed live up to their claims, than -other things equal- they indeed can play an epistemically and morally reassuring role in (the main institutions of) a political order. More specifically, for the institutions of law and adjudication it would warrant a reliance on legal commensurability and hence also justify a stabilizing approach to adjudication. This because the viewpoint of justice that such theories offer fits the features of a final commensurans. We also saw that theories of political morality typically return the compliment to a stabilizing approach to adjudication. In the same way this approach holds that a normative moral theory of political morality plays a key role in adjudication, normative theories hold that adjudication is a crucial institution for the realization of their goals.

As the next steps in our examination of the validity of a stabilizing approach, in the following four chapters I will answer the question whether the strongest candidate background theories of political morality for law and adjudication indeed live up to their own claims. We shall see that these theories are more fragile and less reassuring

¹⁷⁵ This partial autonomy explains why political philosophers such as Rawls and Nussbaum do consider themselves a relevant 'voice' when critically evaluating actual case law.

than they themselves suggest and that this bears on the moral character of adjudication.

"We can say [...] that men have equal dignity, meaning by this simply that they all satisfy the conditions of moral personality [...]. And being alike in this respect, they are to be treated as the principles of justice require."¹⁷⁶

4 The Fragility of Justice I. Rawls' Theory of Justice as moral background theory of law and adjudication

1 Introduction

This chapter offers a discussion of Rawls' *A Theory of Justice* because this theory may support a stabilizing approach to adjudication or, as we saw, a morally and epistemically reassuring way of accounting for the moral quality of adjudication.¹⁷⁷ At first sight Rawls' theory is a strong candidate because it is a *normative theory* of political morality and as such it has, at least at the outset, the formal features of a final commensurans, the kind of viewpoint on which a stabilizing approach hinges. Content-wise Rawls' theory is also a plausible candidate as it shows considerable fit with Western constitutional democratic legal orders and their adjudication. This theory can explain and conceptually anchor a range of values that these legal orders are committed to, such as liberty rights and a range of social-economical rights.¹⁷⁸ So, as a normative background theory of law and adjudication Rawls' theory potentially has strong justificatory and explanatory force.

¹⁷⁶ Rawls, *A Theory of Justice*, 291.

¹⁷⁷ Rawls' conception of justice as laid out in *A Theory of Justice* is preferred here as candidate for a background theory of law in a constitutional democracy above the account of justice as introduced in *Political Liberalism*. This because the former has a comparatively better chance to justify a reliance on legal commensurability where adjudication in a constitutional democracy is concerned. This is not to say that elements of *Political Liberalism* will not be used in the discussion in this chapter. However, these will only be brought up if and in so far they are consistent with the claims made in a *Theory of Justice*. Rawls' *Political Liberalism* and in particular the principle of political legitimacy it holds will be discussed in more detail in the next chapter, which deals with Nussbaum's theory of justice that bases her account of political legitimacy on Rawls' political liberalism. Cf. Ibid; Rawls, John, *Political Liberalism* (New York: Columbia University Press, 2005).

¹⁷⁸ Cf. Rawls, *A Theory of Justice*, 171.

This chapter is an introductory chapter to Rawls' theory of justice. First we shall see that Rawls introduces justice as the first virtue of society that has as its rationale to protect the dignity of each and every citizen. Because of Rawls' interpretation of dignity his theory will be presented as predominantly Kantian (2.1). Subsequently, I will point out that it also has an Aristotelian twist to it (2.2). The chapter then briefly discusses Rawls' conception of adjudication (3). We shall see that this conception indeed squares well with a stabilizing approach to adjudication. The chapter ends with some concluding remarks (4).

It will not be until the next chapter that I will go into the question whether Rawls' theory of justice can validate a stabilizing approach to adjudication.

2 Rawlsian justice. Kantian with an Aristotelian twist

2.1 Protecting 'noumenal selves'

In *A Theory of Justice* Rawls makes it clear -albeit often implicitly- that the central value of a just society is the equal dignity of citizens.¹⁷⁹ Equal dignity is not simply one among other values that society should strive for, it is the value that according to Rawls gives all other values their final point and is the basis for all legitimate claims of citizens. Equal dignity is the all-encompassing rationale behind a just society and Rawls' conception of justice is an attempt to give substance to this value for the context of Western constitutional democracies.¹⁸⁰

Rawls is well aware that by itself the value of equal dignity is far too indeterminate to function as a premise in a process of deductive reasoning leading to a determinate viewpoint of justice. Nonetheless he presents justice as the explication of the ideal of equal dignity in terms of what rights and duties citizens should have. This ideal "is manifest in the content of the principles to which we appeal", Rawls says.¹⁸¹

¹⁷⁹ For a direct reference to the notion of dignity see: *Ibid.*, 513. There Rawls states that his theory offers a rendering of the notion of equal dignity, albeit that the principles of justice are not deduced from it. This because according to Rawls it is precisely the notion of equal dignity that needs interpretation: "[...] once the conception of justice is on hand, [...] the ideas of respect and human dignity can be given a more definite meaning."

¹⁸⁰ *Ibid.*, 527.

¹⁸¹ *Ibid.*, 513.

The account that Rawls gives of human dignity is predominantly Kantian.¹⁸²

According to Kant the dignity of humanity (*Menschenwürde*) is based on the idea that human beings have a special nature as free and independent beings and are able to live in accord with a conception of the good. As Kant puts it: “[t]he will is thought of as a faculty of determining itself to action in accordance with the representation of certain laws. And such a faculty is to be found only in rational beings.”¹⁸³ This notion of a rational being that has a free will is the notion of a *causa noumenon* (*homo noumenon*), independent of any sensible conditions. This as opposed to the idea of a human being as a *phenomenon* (*homo phenomenon*), a sensible creature that is subject to and determined by empirical laws.¹⁸⁴ It is this first aspect that according to Kant is the source of dignity and the reason why human beings deserve respect. This rational faculty gives human beings their absolute worth, makes them ends in themselves.

¹⁸² In several places in his work Rawls claims that his theory is Kantian in nature and origin. See for instance: Ibid., xviii, 101. Essays in which Rawls defends his conception of justice explicitly in Kantian terms are for instance: Rawls, John, 'Kantian Constructivism in Moral Theory', *The Journal of Philosophy* 77, 9 (1980); ———, 'The Basic Liberties and Their Priority', in *The Tanner Lectures on Human Values* (Michigan: University of Michigan, 1981).

Whether Rawls is right in presenting his conception of justice as a neo-Kantian approach is a recurring topic in both moral and political philosophy. For instance, Oliver Johnson argues that Rawls in presenting Justice as Fairness as Kantian “must radically misinterpret Kant. For the conception that he has of man’s nature as a moral being is basically opposed to, rather than consonant with, that held by Kant”, cf. Johnson, Oliver A., 'The Kantian Interpretation', *Ethics* 85, 1 (1974). For a similar critique see: Budde, Kerstin, 'Rawls on Kant', *European Journal of Political Theory* 6, 3 (2007). Budde argues that Rawls "forces onto Kant's theory a Rawlsian interpretation which crucially alters Kant's theory". See for the claim that Rawls' Justice as Fairness should be interpreted in Kantian terms: Hampton, Jean, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?', *The Journal of Philosophy* 77, 6 (1980); Darwall, Stephen L., 'A Defense of the Kantian Interpretation', *Ethics* 86 (1976).

¹⁸³ Kant, Immanuel, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, trans. Ellington, James W. (Indianapolis: Hackett Publishing Company, 1993), 35.

¹⁸⁴ ———, *Critique of Practical Reason*, trans. Abbott, T.K. (New York: Prometheus Books, 1996), 74.

“Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will.”¹⁸⁵

In this Kantian vein Rawls argues that citizens should be treated as equals because in essence they are equally rational and free, i.e. they have the capacity for an effective sense of justice and the capacity to form, revise and rationally pursue a conception of the good.¹⁸⁶ For Rawls these capacities bring the “claims of justice into play”.¹⁸⁷

In order to know what equal dignity exactly implies for these claims of justice, Rawls notably introduces the idea of the ‘the original position’ as the justificatory connection between the value of equal dignity and the substance of justice.¹⁸⁸ The original position represents the viewpoint of the Kantian ‘noumenal’ selves, the viewpoint of the moral personality of an essentially free and rational creature.¹⁸⁹ It epitomizes what citizens as moral creatures can be thought to agree upon when it comes to the distribution of the burdens and advantages of living in society.¹⁹⁰

Not surprisingly, the original position is predominantly arranged in such a way that it excludes all kinds of considerations that may stem from more situated, embodied perspectives. It is meant to constrain (the influence of) the motives that may result from the perspective of citizens when conceived of as *homo phenomenon*, a being subject to empirical laws. The metaphor that expresses these constraints is that the parties in the original position are situated behind a ‘veil of ignorance’: they do not know their place in society, their social class or status, their fortune in the distribution of natural assets and abilities, their intelligence and strength, their conception of the good, the particular features of their personal psychology and the particular circumstances of their own society.¹⁹¹ For similar reasons internal contingencies such

¹⁸⁵ Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, 35.

¹⁸⁶ Rawls, *A Theory of Justice*, 513; ———, ‘Kantian Constructivism in Moral Theory’, 525.

¹⁸⁷ Rawls, *A Theory of Justice*, 44, 448, 505-506. The fact that Rawls sees these moral capacities as giving rise to claims of justice explains why he holds that animals are not protected by the principles of justice.

¹⁸⁸ *Ibid.*, 102-168.

¹⁸⁹ *Ibid.*, 255.

¹⁹⁰ *Ibid.*, 118-119; Freeman, Samuel, *Rawls* (New York: Routledge, 2007), 143.

¹⁹¹ *Ibid.*

as needs, strivings and desires are also excluded from the reasoning in the original position. Moral creatures should not be construed as being 'stuck' to their empirical or situated nature.

So, by these constraints on the reasoning leading to justice Rawls aims to secure that in the end justice will be the viewpoint of 'moral personality' as such. Being equal in their moral nature, the participants in the 'original position' all have the same interests, or so is the idea: "we can view the choice in the original position from the standpoint of one person selected at random", Rawls says.¹⁹²

In addition Rawls asserts that the things that citizens as 'noumenal selves' need are the 'primary social goods'. According to Rawls each citizen needs these goods, regardless of his empirical characteristics such as his religion, his sexual preference and his talents. The primary social goods that Rawls designates are basic liberties, freedom of movement and free choice, powers and prerogatives, income and wealth, and the social basis of self-respect.¹⁹³ Again, these goods do not describe the basic needs of actual 'flesh and blood' creatures. The list is not to be understood as the "outcome of a purely psychological, statistical, or historical inquiry."¹⁹⁴

As to the distribution of these goods Rawls proposes the following principles of justice as the distributive principles that the parties in the 'original position' will agree upon:

"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 advantage, consistent with the just savings principle, and b) attached to offices and positions open to all under conditions of fair equality of opportunity."¹⁹⁵

¹⁹² Rawls quoted in: Hampton, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?', 317.

¹⁹³ Cf. Rawls, *A Theory of Justice*, 92; ———, 'Kantian Constructivism in Moral Theory', 526.

¹⁹⁴ Freeman, Samuel, ed., *Collected Papers. John Rawls* (Cambridge, US: Harvard University Press, 1999), 314.

¹⁹⁵ Rawls, *A Theory of Justice*, 266.

Rawls moreover presents these principles as lexically ordered, giving priority to the protection of the basic liberties over the other social goods.¹⁹⁶ These liberties may only be restricted for the sake of liberty itself, not for serving the common good, economic and social advantages, any given religious or metaphysical values or ‘truths’.¹⁹⁷

Rawls compares these principles of justice with Kantian categorical imperatives. By this he means to emphasize their uncompromising normative force.¹⁹⁸ Moral personality or dignity is “beyond all price” and hence the viewpoint of justice that aims to protect this dignity holds unconditionally.¹⁹⁹ “These principles are [...] given absolute precedence so that they regulate social institutions without question and each frames his plans in conformity with them. Plans that happen to be out of line should be revised”, Rawls states.²⁰⁰ Indeed, it is this absolute status of justice that we also find in Rawls’ famous phrase on the first page of his *Theory of Justice*: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override”.²⁰¹

Of course, the fact that justice is considered a final and exhaustive viewpoint for assessing the claims of citizens implies that if society complies with the demands of these two principles, citizens can be held responsible for dealing with their plight. Rawls is clear: if justice has been done “[...] the question is settled. The claims of existing social arrangements and of self-interest have been duly allowed for. We cannot at the end count them a second time because we do not like the result.”²⁰²

¹⁹⁶ Ibid., 132.

¹⁹⁷ Ibid., 54.

¹⁹⁸ ———, ‘Kantian Constructivism in Moral Theory’, 522.

¹⁹⁹ ———, *A Theory of Justice*, x,11, 513, 213, 223.

²⁰⁰ Ibid., 495.

²⁰¹ Ibid., 3.

²⁰² Ibid., 117. This uncompromising character of justice is also indicated by the ‘priority of rightness’ that Rawls defends, which -inter alia- entails the idea that citizens’ conceptions of the good should always be adapted to what justice allows for. Cf. ———, *A Theory of Justice*, 27-30, 437-439. It is also expressed by the fact that Rawls sees his theory as a theory of pure procedural justice. Once the principles of justice are agreed upon, there is no independent viewpoint available in terms of which citizens’ position can be morally assessed. Cf. ———, *A Theory of Justice*, 89.

Of course, all this is not to deny that Rawls does -albeit rarely- take notice of the fact that the protection of equal dignity, and hence the implications of justice for everyday life can indeed be experienced as painful and troublesome. Justice may lead to loss, frustration and a sense of sacrifice on the part of citizens. “Not everyone always benefits by what the two principles require if we think of ourselves in terms of our more specific positions”, he states.²⁰³ Certain forms of life may even die out -“no society can include within itself all forms of life”- and this may be reason for regret. But, if these consequences are allowed for by justice and hence are not due to “arbitrary bias or injustice”, then from a moral point of view society needs not be bothered by them.²⁰⁴

What is more, if society is just and citizens are reasonable they can escape from their situated or phenomenal perspective, ‘step back’ and establish that from a moral point of view they do have reason to accept their positions. For Rawls justice means “to discard as irrelevant as a matter of social justice much of the information and many of the complications of everyday life.”²⁰⁵ By taking responsibility for the contingencies that characterize their position, citizens can even realize their higher order desire to express their moral nature: as citizens they are not determined by these contingencies and always have a choice in how to deal with them.²⁰⁶

2.2 Concrete needs also count: an Aristotelian twist

Admittedly the aforementioned Kantian account of dignity and the ensuing Kantian interpretation of Rawlsian justice is not the whole story. In substantiating what dignity entails for the viewpoint of justice, Rawls does also assign considerable weight to the needs of citizens as embodied, empirically situated beings. Other than a ‘purely Kantian’ theory of justice would suggest, Rawls holds that justice is also to protect the interests of citizens that stem from the more embodied dimension of being human. Citizens should as a matter of justice also be provided the necessary means so as to be able to develop and exercise their moral powers.

²⁰³ Rawls, *A Theory of Justice*, 85.

²⁰⁴ ———, *Political Liberalism*, 197.

²⁰⁵ ———, *A Theory of Justice*, 76.

²⁰⁶ *Ibid.*, 503.

One could say that this gives an Aristotelian twist to Rawls' theory of justice.²⁰⁷ In both his ethical and political philosophy Aristotle underscored citizens' inescapable dependency and vulnerability regarding the realisation of their good. This dimension of dependency and neediness comes forward for instance where Aristotle discusses the importance of the quality of social practices for the moral development of citizens. "[...]it does not make a small difference whether people are habituated to behave in one way or in another way from childhood on, but a very great one; or rather, it makes all the difference of the world", Aristotle says.²⁰⁸ In a similar vein Aristotle discusses the importance of (civic) friendship and all kinds of goods as necessary constituents of leading a flourishing life.²⁰⁹ Finally the dependency of citizens on society is of course most prominently expressed in Aristotle's notorious and elusive proposition that human beings by their nature are "political animals". Citizens need society in order to flourish.²¹⁰

In Rawls' *A Theory of Justice* the attention for citizens' dependency and neediness as concrete embodied beings surfaces especially in the third part of the book.²¹¹ There he expresses sensitivity for "human desires and needs, their relative urgency and cycle of recurrence, and their phases of development as affected by physiological and other

²⁰⁷ From a neo-Kantian point of view one could also dub this the 'impure side' of Rawls' conception of justice. For a thought provoking discussion of the 'impureness' of Kant's ethical theory see: Loudon, Robert B., *Kant's Impure Ethics. From Rational Beings to Human Beings* (Oxford: Oxford University Press, 2000), 167.

²⁰⁸ Aristotle, 'Nicomachean Ethics', in *Nicomachean Ethics: Translation, Introduction, and Commentary*, ed. Broadie, Sarah and Rowe, Christoffer (Oxford: Oxford University Press, 2002), 1103b23-26.

²⁰⁹ Ibid., 1099a31-1099b8.

²¹⁰ Cf. Ibid., 1097b10. See for an illuminating interpretation of this phrase Cooper's essay 'Politics and Civic Friendship': Cooper, John M., *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory* (Princeton: Princeton University Press, 1999), 357-377.

²¹¹ In this third part Rawls states that the primary social goods can also be accounted for "by the conception of goodness as rationality, in conjunction with the general facts about human wants and abilities, their characteristic phases and requirements of nurture, the Aristotelian Principle, and the necessities of social interdependence." Rawls, *A Theory of Justice*, 381.

circumstances”, and also for the general facts of social interdependency.²¹² There he also discusses a range of goods that any citizen as concrete embodied creature has reason to value, like “familiar values of personal affection and friendship, meaningful work and social cooperation, the pursuit of knowledge and the fashioning and contemplation of beautiful objects [..].”²¹³

What is more, in this third part Rawls also discusses psychological laws or tendencies in human behaviour as crucial elements in his thinking about what citizens need in order to lead a good life. Rawls for instance discusses the law of reciprocity that boils down to the idea that it is “a deep psychological fact” that from the moment of birth human beings have a tendency to ‘mirror’ others, a tendency to reciprocity.²¹⁴ As a consequence, citizens can only develop their moral nature if they have been raised in a social environment of a certain quality.²¹⁵

The other empirical law that Rawls discusses is the ‘Aristotelian principle’.²¹⁶ This law says that citizens naturally enjoy the exercise of their realized capacities (their innate or trained abilities). They will always strive for more complicated and complex activities and hence they need practices in which such activities are exercised.²¹⁷

Friendship, art and the pursuit of knowledge are therefore instances of intrinsically good social practices: “in the design of social institutions a large place has to be made

²¹² Ibid., 372-373.

²¹³ Ibid., 373.

²¹⁴ Ibid.

²¹⁵ Ibid., 433. For instance, as to the capacity to form, pursue and revise a conception of the good, Rawls establishes that citizens can only develop this moral capacity if significant others have to a sufficient degree treated them in accord with their worth. “One can only develop a sense of self-worth if others have valued one’s plans, aspirations, thoughts and ideas”, Rawls states. Cf. ———, *A Theory of Justice*, 413. With regard to the other moral capacity, that of acting in accord with a sense of justice, Rawls follows the moral psychologist Lawrence Kohlberg where he argues that citizens will develop this moral power only if both in their upbringing and in later life they have experienced that the manifest intentions of other persons and social arrangements contribute to their good. Cf. ———, *A Theory of Justice*, 433.

²¹⁶ Rawls, *A Theory of Justice*, 372-380.

²¹⁷ Ibid., 374. As Rawls puts it: “[W]e need one another as partners in ways of life that we are engaged in for their own sake, and the successes and enjoyments of others are necessary for and complementary to our own good”.

for them, otherwise human beings will find their culture and form of life dull and empty.²¹⁸

In the end Rawls holds that a just society is not only a desirable ideal because it can satisfy the claims of the ‘noumenal selves’, the claims that stem from their rational, free and independent nature. He also holds that a just society is desirable because it offers the preconditions for citizens to lead a humanly valuable life, it offers the conditions on which all citizens as a *homo phaenomenon* actually depend.

Surely one could argue that Rawls’ sensitivity for citizens’ actual needs as empirical creatures is not a *moral* concern that his theory aims to address, but a prudential concern. That is, by these considerations Rawls simply tries to meet the feasibility requirement, i.e. the requirement that justice can indeed be realized in practice and gain stable support of citizens.²¹⁹ By discussing all kinds of features that citizens share as empirical, situated beings he can show that justice is congruent with citizens’ good, i.e. that citizens have a motive to be just.

However, this understanding comes at the cost of playing down the normative bearing that Rawls does attribute to knowledge about these needs. For one thing, Rawls clearly asserts that general empirical knowledge about the needs of human beings is part of the reasoning in the original position.²²⁰ As the outcome of the reasoning in the ‘original position’ represents the ‘moral point of view’, by implication it cannot have but *moral* bearing. Hence, being part of the considerations in the original position, citizens’ dependency and vulnerability are constitutive for what justice requires.

Next, the moral bearing of this needy and dependent aspect of citizenship is also implied by the egalitarian aspirations that Rawls holds. That is, according to Rawls justice must “mitigate the influence of social contingences and natural fortune” on the kinds of lives that citizens can lead.²²¹ The moral quality of social institutions depends on their “tendency to counteract the natural inequalities deriving from birth, talent, and circumstance, pulling those resources in the service of the common good”.²²²

These egalitarian aspirations have led for instance to the principle of equal

²¹⁸ Ibid., 377.

²¹⁹ Ibid., 6, 19, 191, 347, 395, 580.

²²⁰ Ibid., 16.

²²¹ Ibid., 63.

²²² Nagel, Thomas, 'Rawls on Justice', in *Reading Rawls* (New York: Basic Books), 3.

opportunity, the difference principle and the principle of the fair value of political rights. These principles are meant to prevent, address or compensate certain empirical inequalities in order to secure that citizens will genuinely be able to develop and exercise their moral powers, at least to a sufficient level.²²³ It goes without saying that said egalitarian aspirations, and hence these principles, cannot be understood without Rawls attributing moral import to the empirical situations of citizens, i.e. without him being convinced that it matters from a moral point of view to what extent citizens' needs are met, needs that stem from their situated, enmattered nature.

To summarize, Rawls' theory of justice is predominantly Kantian in the sense that the determination of citizens' basic claims in society hinges on a rather abstract conception of citizenship. On the other hand his theory comes with an Aristotelian or empirical twist in that justice is also to address the basic needs of citizens when conceived of as empirically situated beings. Justice as the central virtue of society thus has to address different dimensions of citizenship, the dimension of moral personality and the dimension of dependency and neediness regarding citizens' potential to exercise their moral powers.

3 Rawls' conception of adjudication. A version of a stabilizing approach

As it befits a normative theory of political morality, in Rawls' theory of justice adjudication plays a crucial role in the realisation of the principles of justice.

Adjudication is one of the institutions through which these principles are implemented. Conversely, if adjudication complies with these principles, it can be understood as a morally justified practice.

In order to understand Rawls' conception of adjudication, his notion of the 'four stage sequence' is crucial.²²⁴ Through this device Rawls gives insight in how justice is to be applied in the context of a constitutional democracy. By this device Rawls aims to "simplify the application of the two principles of justice."²²⁵ It describes four

²²³ Rawls' 'loose' remarks on education throughout his *Theory of Justice* can also be understood in this egalitarian light. Education is a social good that can secure that citizens have to some extent equal chances to develop their moral powers. For that reason "resources might better be spent on the education of the less rather than the more intelligent, at least over a certain time of life." Rawls, *A Theory of Justice*, 101.

²²⁴ Ibid., 101-160, 171-176.

²²⁵ Ibid., 171.

institutional levels through which the principles of justice are to be realized: that of the philosophical principles, that of the constitution, that of legislation and policy and finally the level of the application of rules to concrete cases “by judges, administrators, and the following of rules by citizens generally.”²²⁶ Hence adjudication is one of the institutional ways in which the principles of justice are effectuated vis-à-vis concrete embodied citizens. This is also implied by Rawls’ discussion of the implications of his account of justice for concrete legal cases and his assertion that courts can be understood as instances of ‘public reason’, informed as they are by a public conception of justice.²²⁷

What is more, Rawls holds that adjudication -as part of the general requirements of the rule of law- is crucial for realizing the first principle of justice, the one that protects equal liberty. According to Rawls adjudication is indispensable for the realisation of *formal* justice, a constitutive element of the first principle. Law and adjudication publicly and regularly establish the “grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties”, Rawls says.²²⁸ Against this background it is not surprising that for Rawls the ideal judge aims “to give justice, to decide cases fairly in according with what the law requires.”²²⁹ In a just society the law more or less complies with the principles of justice and hence a judge should follow the law in order to render justice. More than anything a Rawlsian judge should possess certain cognitive competences, an ability for analytical thought and the “[j]udicial virtues such as impartiality and considerateness [that] are the excellences of intellect and sensibility [..].”²³⁰

Indeed, as will be clear by now, Rawls’ conception of adjudication fits the description of a stabilizing approach to adjudication. For him adjudication can in the end be conceived of as the expression of a prior moral measure that can exhaustively cover all that is relevant from a moral point of view. If the law more or less complies with the background principles of justice, and if the judge has applied this law fairly to the

²²⁶ Ibid., 175.

²²⁷ ———, *Political Liberalism*, 236.

²²⁸ ———, *A Theory of Justice*, 207.

²²⁹ Ibid., 355.

²³⁰ Ibid., 453.

particular case, the consequences of these decisions can be defended exhaustively to the losing citizen. The burdens of such a decision can be construed as an expression of a genuine equilibrium between 'self and others', between the good of society and that of individual citizens. These burdens are conceived as fair rather than as an unjust exploitation of contingencies of nature or social circumstances, not as burdens that we do not want citizens to bear.

Rawls is not concerned with legal uncertainty and the discretion that judges may have because of the indeterminacy of law and justice. To phrase it in the words of David Carlson, for Rawls “[t]he legal universe is complete and filled. Right answers are available, even if sometimes difficult to discern.”²³¹ Hence, as the judge always has a guiding measure to this avail, in fulfilling his professional responsibility he does not need to feel responsible for causing burdens. The principles of justice and the law precede adjudication, so that in its moral essence adjudication is a purely constative activity, not performative.²³² Through his cognitive powers the judge in fact establishes what is already the case. Strictly speaking his personality or his will is not the cause of a legal decision and its consequences. Consequently, citizens only have a legitimate complaint if the judge fails “to apply the appropriate rule or to interpret it correctly”.²³³ However, these situations need not worry us because they are corrigible, they can be overcome. Once law and the practice of adjudication comply with the demands of justice, complete moral harmony can be realized, or so is the idea. In so far as the phenomenology of adjudication is nonetheless experienced as troublesome, it is an irrational understanding of a phenomenon that we need not be concerned with. If adjudication complies with the demands of justice, at least from a moral point of view all is well. Thus, in this sense Rawls relies on justice to function as a final commensurans and hence to warrant a reliance on legal commensurability in the practice of adjudication.

²³¹ Carlson, David Gray, 'Jurisprudence and Personality in the Work of John Rawls', *Columbia Law Review* 94 (1994), 1833.

²³² Ibid.

²³³ Rawls, *A Theory of Justice*, 207.

4 Conclusion

This chapter discussed Rawls' *A Theory of Justice* as it presents a normative theory of political morality that is a strong candidate to be the normative moral background theory of law and adjudication in Western constitutional democracies. As such it can possibly validate a stabilizing approach to adjudication.

I presented Rawls' theory as Kantian with an Aristotelian twist. The Kantian nature of Rawls' theory was located in the fact that the value of equal dignity that justice is to serve is grounded on a Kantian conception of the person. Equal dignity implies that a just society must respect citizens in their rational, free and independent nature, a nature that they all equally share. Accordingly, the legitimate claims of citizens are to be deduced from a perspective that largely abstracts from citizens' actual needs, desires, states of affairs and particular embedded positions.

At the same time Rawls' theory comes with an Aristotelian twist in that it also seeks to secure the needs that citizens as vulnerable and needy creatures have, in order for them to lead a good life. As such Rawls' conception of justice also aims to put under the control of reason all kinds of contingencies that may influence citizens' chances to genuinely develop and exercise their moral powers.

Finally, this chapter briefly discussed Rawls' conception of adjudication. It was established that -as it befits a normative theory of political morality- this conception is a version of a stabilizing approach to adjudication. In the next chapter, we shall see whether Rawls' normative theory of political morality can in fact validate such a stabilizing approach, that is, whether justice can fulfil the function of final commensurans.

“One cannot agree to a principle if there is a real possibility that it has any outcome that one will not be able to accept.”²³⁴

“A focus on real cases and on empirical facts can help us to identify the salient features that a political theory should not efface or ignore.”²³⁵

5 The Fragility of Justice II. Rawls’ residues of justice and their bearing on adjudication

1 Introduction

In the previous chapter we discussed the central features of Rawls’ theory of justice as a normative theory of political morality that may support a stabilizing approach.

The upshot of the present chapter will be that in spite of its aspirations Rawls’ theory will lead to *residues of justice* and as a consequence a stabilizing approach to adjudication cannot be maintained. That Rawls’ theory does lead to residues will be argued for under the headings of the ‘conflicts of justice argument’ (2), the ‘conceptual poverty argument’ and (3) the ‘under-determinacy argument’ (4). As part of these arguments I will also show how these residues bear upon the moral character of adjudication by discussing concrete legal cases. It must be borne in mind that in the discussion of these legal cases the implications of Rawls’ theory for adjudication are at stake, not the moral quality of the *actual* practice of adjudication itself. The chapter ends with some concluding remarks (5).

2 Rawls’ residues and their bearing on adjudication

2.1 Justice as internally conflicted

As a proponent of normative moral theory befits, Rawls holds that in a just society genuine conflicts of justice will not occur. He highly relies on the conflict-solving potential of justice. Justice as he understands it can rationally resolve all kinds of

²³⁴ Ibid., 151.

²³⁵ Nussbaum, Martha C., *Women and Human Development. The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 11.

conflicts in a way that is compatible with the "freedom and equality of citizens as moral persons."²³⁶

Contrary to this far-reaching claim, this section argues that conflicts of justice are part and parcel of a Rawlsian society, i.e. a society that complies with the demands of justice. These conflicts are not so much due to an inconsistency in Rawls' theory, but rather to contingencies in the practical world. These contingencies may be such that the values that justice aims to protect prove impossible, meaning that the realisation of one value will imply infringement of another.²³⁷

One category of conflicts that may arise is that between citizens' rights to the protection of the basic liberties as guaranteed by the first principles of justice.²³⁸ In the previous chapter we saw that these basic liberties include freedom of thought, freedom of conscience, the political liberties, freedom of association, the freedoms specified by the liberty and integrity of the person and the rights and liberties covered by the rule of law. Rawls understands these liberties as "a framework of legally protected paths and opportunities."²³⁹ We also saw that these are not absolute, but can be restricted, albeit only for the sake of liberty itself.²⁴⁰ Such restrictions should be

²³⁶ Rawls, 'The Basic Liberties and Their Priority', 54.

²³⁷ Brett Scharffs offers an instructive description of impossibility: "The term 'impossibility' usually refers to states of affairs, either choices or acts. For example, your being in both New York and Paris right now is an impossibility; they are jointly impossible states of affairs. But values might also be impossible if the realization of one necessarily makes it impossible to realize the other. For example, honesty and tact may be impossible, at least in certain situations. Ways of living one's life may also be impossible. It is jointly impossible to live the life of a Tibetan monk and live the life of a movie star." Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

²³⁸ See for discussion on (the possibility of) conflicts of rights also: Shapiro, Daniel, 'Conflicts and Rights', *Philosophical Studies* 55, 3 (1989); Wellman, Christopher Heath, 'On Conflicts between Rights', *Law and Philosophy* 14, 3/4 (1995); Eddy, Katharine, 'Welfare Rights and Conflicts of Rights', *Res Publica* 12 (2006).

²³⁹ Rawls, *Political Liberalism*, 325.

²⁴⁰ Here I draw on Hart's succinct summary of the restrictions that Rawls allows for. Cf. Hart, H.L.A., 'Rawls on Liberty and Its Priority', *University of Chicago Law Review* 40, 3 (1973), 542.

governed by the principle of the common interest: they are only permitted if they are "in an appropriate sense equally to everyone's advantage."²⁴¹

Indeed, as to this principle Rawls himself optimistically holds that it can be secured for all citizens. As he puts it: "under reasonably favourable conditions, there is a practical scheme of liberties that can be instituted in which the central range of each liberty is protected."²⁴²

Rawls offers two arguments in support of this claim. First, he stresses that institutions that bear responsibility for the realisation of justice have sufficient leeway to adapt the *scope* of the basic liberties so as to make them fit into a coherent scheme that can be equally guaranteed to all. In reaction to Hart's critique on the wide ranging scope of (Rawls' first formulation of) this first principle, Rawls asserted that the principle merely protects an equal right to a "fully adequate scheme" of basic liberties rather than an equal right to "the most extensive total system of these liberties".²⁴³

As a benchmark to determine whether such a scheme is indeed "fully adequate" Rawls states that this will depend on whether it will provide citizens the institutional means for an "adequate development and the full and informed exercise of both moral powers."²⁴⁴

By clever institutional arrangements this benchmark can be met, or so Rawls holds. The second argument that Rawls offers has an empirical flavour: he suggests that history supports his optimism. According to Rawls history has shown that the 'central range of applications' of the basic liberties can indeed be secured to all citizens, that is, under favourable conditions.²⁴⁵ "The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found", Rawls says.²⁴⁶

The value of endeavours to secure the first principle in practice notwithstanding, we may question whether these arguments suffice to support Rawls' rather far reaching

²⁴¹ Rawls, *A Theory of Justice*, 217.

²⁴² ———, 'The Basic Liberties and Their Priority', 11.

²⁴³ Cf. Ibid; ———, *Political Liberalism*, 333.

²⁴⁴ Rawls, *Political Liberalism*, 333.

²⁴⁵ Ibid., 298.

²⁴⁶ ———, 'The Basic Liberties and Their Priority', 11, 12; Scanlon, Thomas, 'Adjusting Rights and Balancing Values', in *Fordham Law Review* (2004), 1482.

claim where the occurrence of conflicts of justice is concerned. As to the first argument: sure, by deploying an abstract and general criterion such as an 'adequate scheme' Rawls indeed gives leeway to institutions to reduce the scope of the basic liberties. By so doing he indeed makes it more likely that genuine conflicts between these liberties can be avoided. However, reference to this leeway can hardly serve as an argument for the claim that the application of the first principle will not lead to conflicts. At least not if theory comes before practice and this principle is to have substantive meaning, something which Rawls himself emphatically underscores. That is, Rawls underscores the moral import of the first principle and its priority over other values by referring to his 'deep' understanding of what it means for citizens to have a conception of the good, and to be genuinely committed to a religious, philosophical or moral conviction. With this principle Rawls claims to be sensitive to the fact that "an individual recognizing religious and moral obligations regards them as binding absolutely."²⁴⁷ The first principle protects "forms of belief and conduct the protection of which we cannot properly abandon or be persuaded to jeopardize [...]", Rawls says.²⁴⁸ This principle protects citizens' most deeply held ideas, ideas that are "non-negotiable."²⁴⁹

However, the substantive meaning of the first principle cannot be upheld if Rawls at the same time allows the scope of protection of these liberties to be adapted so that conflicts will not, or are not likely to arise. Practice will then determine the substance of justice, rather than vice versa. Anyway there is no guarantee that the first principle can still do the 'protective work' that Rawls' wants it to do.

Neither is reference 'history' a strong argument for corroborating the claim that the application of the first principle does not lead to genuine conflicts. Against the background of the rather frequent occurrence of social conflicts between citizens' liberties, at least on the 'phenomenological level', mere reference to 'history' does not yet explain why the interests of the 'losing' citizens did not fall within the 'central range of application' of the basic liberties. That social conflicts (supposedly) have been solved as a matter of social fact does not imply that these conflicts have been *genuinely* solved, that is, without a genuine moral loss in the sense of a violation of a

²⁴⁷ Rawls, *A Theory of Justice*, 182.

²⁴⁸ ———, *Political Liberalism*, 312.

²⁴⁹ *Ibid.*, 311.

legitimate claim of justice of the losing citizen. So far the remarks on the arguments that Rawls' gives to support the claim that the first principle of justice does not lead to genuine conflicts.

Besides these critical remarks on the weakness of Rawls' argumentation to support a rather strong claim, let us now descend to the level of the 'example' as a further support for the contrary claim that in a society that lives up to Rawlsian justice genuine conflicts between citizens' legitimate claims do occur. Staying with the first principle of justice, such conflicts may for instance arise between the right to freedom of conscience on the one hand and the rights to equality and to the protection of integrity on the other hand. The scope of protection that is needed for one liberty does not necessarily fit with the scope of protection that is needed for the other liberty, while both 'scopes' may be indispensable for realizing the benchmark that Rawls himself has set: to provide for the institutional means for an "adequate development and the full and informed exercise of both moral powers."²⁵⁰

More concretely, such conflicts may arise when for instance Christian Orthodox schools refuse to employ Christian Orthodox homosexual teachers because of their homosexuality. In such a situation the schools may claim the liberty to refuse homosexual teachers and the teachers may as a matter of equality claim the right to work at such a school.²⁵¹

In such a case a genuine conflict of justice may occur. As to the right of homosexual teachers: discriminatory policies of Christian Orthodox schools detrimentally affect the social conditions for self-respect for Christian Orthodox gay teachers. Not being

²⁵⁰ Ibid., 333.

²⁵¹ See for a socio-legal discussion of these conflicts as they occur in the Netherlands: Oomen, Barbara, Guijt, Joost et al., 'CEDAW, The Bible and the State of the Netherlands: The Struggle over Orthodox Women's Political Participation and their Responses', *Utrecht Law Review* 6 (2010); Oomen, Barbara, 'Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands', *Human Rights Quarterly* 33 (2011). Oomen et al. observe that in the Netherlands Christian Orthodox communities feel threatened by the state. They perceive state-intervention through special legislation regarding the political participation of women, marriage issues, homosexuality and the inoculation of children as acts of 'equality-totalitarianism', endangering their communities.

permitted to work at a particular place purely because one is a homosexual and therefore considered to be sinful or an inferior person is likely to genuinely damage one's sense of self-worth. It in any case compromises the value of equal moral worth, the freedom of the person, the freedom from psychological oppression, physical assault and dismemberment, things that Rawls aims to protect through the first principle. To be safeguarded from this kind of discriminatory treatment is the core of the first principle, i.e. an *equal* right to an adequate scheme of these liberties.

As to the claim of the Christian Orthodox schools: Rawls' own views on the substantial import of the basic liberties implies that if Christian Orthodox schools are not allowed to refuse, suspend or dismiss teachers who are (practicing) homosexuals, it is a restriction of the core -and not merely the periphery- of the freedom of conscience, the freedom of assembly, the freedom of education included.

Take the liberty of conscience. Let us assume that Christian Orthodox communities sincerely hold that homosexuality seriously conflicts with God's law and with the purpose of life as it is laid down in the Bible.²⁵² Let us also assume that the role and place of (their interpretation of) the Bible in daily and spiritual life of these communities is pervasive and all encompassing.²⁵³ If the state forces members of such Christian Orthodox communities to revise a crucial element of their conception of the good, we cannot but conclude that from the viewpoint of Rawls' theory the integrity of their religious beliefs is endangered. Such enforcement may boil down to requiring an existential split from those Christians. On the one (public) hand they must give up the Bible as their absolute source of authority, making them 'bad Christians', while on the other (private) hand they are free to choose, practice and live by their religion. In addition, from Rawls' viewpoint the liberty of association is also put in peril if Christian Orthodox schools are not allowed to refuse homosexuals as teachers. This liberty aims to secure the protection of practices in which citizens can realize "the ends and excellences to which they are drawn."²⁵⁴ It is through this liberty that

²⁵² See for instance: Oomen, 'Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands', 192.

²⁵³ Ibid., 183.

²⁵⁴ Rawls, *A Theory of Justice*, 476. Rawls deems this liberty also to be crucial for the freedom of conscience: "unless we are at liberty to associate with other like-minded citizens, the exercise of conscience is denied." Cf. ———, *Political Liberalism*, 313.

religious groups can guarantee the stability of their forms of life, which is only possible if they have sufficient control over “the laws and rules that govern their association, either directly by taking part in its affairs themselves or indirectly through representatives [...]”.²⁵⁵

To deny that both liberties will in fact be violated in their core seems at odds with the reason why Rawls’ is so serious about the first principle of justice in the first place: because it holds the indispensable institutional means for citizens to develop and live in accord with their most deeply held beliefs.²⁵⁶ In addition, Rawls does seem convinced that one cannot freely ‘cherry pick’ the elements of one’s religion that are convenient at a particular time and place. Rawls does not see religion, as Stephen Carter has put it, as “a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes.”²⁵⁷

Surely one can object that Rawls’ theory simply is not meant for the protection of interests such as those of Christian Orthodox schools, because they violate the legitimate interests of fellow citizens or because they are immoral themselves.²⁵⁸

However, such objections overshoot their mark -at least if only supported by the empirical fact of a conflict, i.e. the fact that a particular exercise of liberty is not compatible with the legitimate exercise of liberties by another citizen. The fact of conflict by itself cannot lead to the conclusion that the interests of one of the parties involved do not *deserve* theory's protection. If we take seriously Rawls’ own commitment to provide to all citizens a set of liberties through which they can genuinely develop and exercise their moral powers, then the situation as described above may well be qualified as a conflict of justice. The interests at stake on both sides cannot but be seen as part of “the central range of application” that these liberties aim to protect.

Of course conflicts between citizens’ right to freedom of conscience and their right to equality represent only one of the (categories of) conflicts that may occur in a

²⁵⁵ Rawls, *A Theory of Justice*, 476.

²⁵⁶ *Ibid.*, 182.

²⁵⁷ Carter, Stephen L., 'Evolutionism, Creationism and Treating Religion as a Hobby', *Duke Law Journal* 1987, 6 (1987), 978.

²⁵⁸ Rawls, *A Theory of Justice*, 230.

Rawlsian society.²⁵⁹ Whether such conflicts arise will depend on clever reflection, but most of all on the extent to which the practical world proves to be ‘friendly’ towards Rawls’ aspirations. It will depend on the extent to which the values that Rawls’ theory aims to protect as matters of justice and hence of equal dignity, will also prove compatible in practice. In his aspiration for a morally harmonious political order Rawls in any case underestimates the inescapable fact that genuine conflicts may regularly occur. He “evade[s] the conflicts of substantive goods that competition among (and within) particular basic liberties commonly reveals.”²⁶⁰ It is more realistic to acknowledge that genuine conflicts of justice will be part of a just society and that as a consequence residues of justice will occur, other than as negligible incidents. These residues result from the resolution of said conflicts, entailing a genuine moral loss, a violation of one of the values that Rawlsian justice is committed to protect.

2.1.1 Conflicts of justice in adjudication

The fact that when applied to society Rawls’ principles of justice may lead to genuine conflicts between citizens’ legitimate claims and hence to residues of justice bears on the moral character of adjudication. Because justice can lead to genuine conflicts, when applying this viewpoint judges may be confronted with a legal case in which they have to resolve such a conflict. Justice itself will then not provide any guidance to the judge -except in some cases where justice may provide reasons stemming from the rule of law-. Even if citizens’ most basic interests are at stake, interests that Rawls’ theory aims to protect, the outcome of such decisions will then depend on other factors than the ‘moral point of view’. From the viewpoint of Rawls’ theory these judicial decisions in such cases will thus lack any justificatory (moral) ground. Theory itself cannot provide any answer as to why a ‘losing’ citizen must bear the burden of the decision. What is more, again, in case these conflicts occur the resolution by the judge will lead to a genuine moral loss, an infringement of the interests that Rawls’ theory seeks to protect. I will illustrate this by a legal case that concerns the conflicts of justice that we discussed above.

²⁵⁹ We can for instance also think of conflicts between the right to privacy and the right to freedom of expression as they nowadays occur because of the possibilities that internet offers.

²⁶⁰ Gray, John, 'Where Pluralists and Liberals Part Company', *International Journal of Philosophical Studies* 6, 1 (2001), 29.

The case of *Arwin Mitchel*²⁶¹

Arwin Mitchel worked as a biology teacher at a Christian Orthodox school. He loved his job and he was generally admired for his teaching qualities. Arwin knew that the board of the school was most negative about homosexuality, so he kept his sexual orientation secret. However, after some years Arwin got depressed for having to hide such an important aspect of his identity. On advice of his psychiatrist Arwin decided to be more open about his homosexuality. To this end and as a first step Arwin's partner would now and then pick him up after classes. But already after a few times, Arwin was dismissed. The school argued that Arwin's homosexual relationship and particularly him being so open about it violated the fundamentals of the denomination of the school.

Thereupon Arwin went to court and requested that his dismissal would be declared void as it was based on discriminatory grounds. He also asserted that the discrimination caused him severe psychological pain, because one way or the other he was in fact asked to give up on who he was: a Christian Orthodox homosexual teacher.

The board of the school argued to the contrary that Arwin's homosexual behaviour was an objective reason for dismissal as the denomination of the school was founded on a particular interpretation of the Bible, which qualifies homosexuality sinful as it does lying, adultery, fornication, and drunkenness. According to the board it would be completely inconsistent with the foundations of the school to employ homosexual teachers, not in the least because teachers are supposed to be role-models. Not allowing the school to refuse or dismiss homosexual

²⁶¹ For this case I predominantly draw on the case law of the Netherlands Institute for Human Rights -previously The Equal Treatment Commission-. One of the tasks of this Institute is to assess complaints about discrimination. It thereby applies a variety of national and international anti-discrimination rules and provisions. An important relevant national law is the Equal Treatment Act. For the case above article 5 paragraph 1 under c of this Act is particularly relevant. This rule prohibits discrimination of teachers by special schools merely because of their homosexuality. The decisions of this Institute are, however, not legally binding and cannot be enforced. Cf. Netherlands Institute for Human Rights, June 15 2007, Judgment nr: 2007-100; Netherlands Institute for Human Rights, April 29 1999, Judgment nr: 1999-38; Rechtbank 's-Gravenhage, November 2 2011, ECLI: NL: RBSGR:2011:BU3104. See for cases in which Islamic teachers are refused by Christian Orthodox schools: Netherlands Institute for Human Rights, May 9 2011, Judgment nr: 2011-74; Netherlands Institute for Human Rights, May 12 2006, Judgment nr: 2006-93.

teachers would also violate the liberty of conscience and the privacy of the parents who want their children to be educated in a Christian Orthodox way.

In a case like this a judge may due to contingent facts find himself stuck between two impossible claims, which from the viewpoint of justice can both be seen as legitimate. In trying to serve the principles of justice through his interpretation of settled law the judge may on the one hand feel duty-bound to protect the homosexual teacher against discrimination, while on the other hand he may feel he must protect the freedom of conscience, of education and of assembly of the school and the parents of the students. As in this case justice is internally conflicted, it does not offer the judge a viewpoint in terms of which he can rank the interests at stake. The decision can therefore not be justified by the viewpoint of justice itself. Moreover, in case such conflicts occur, Rawls' viewpoint can neither exhaustively solve the conflict, nor 'dismantle' this conflict as only an 'apparent conflict' that is merely the result of the irrationality of (one of) the parties involved. That is, whatever the judge will decide, his decision will come with a genuine moral loss, a serious infringement of the basic rights of one of the parties involved. In this case justice is far from functioning as a commensurans: it cannot guide the reasoning of the judge, nor will it lead to morally reassuring outcomes. Even if the judge lives up to his professional responsibility, the decision he takes does not fit the demands of a stabilizing approach to adjudication. Justice cannot prevent that such a decision lacks a final *justificatory* ground and will harm the legitimate interests involved.

2.2 Justice as conceptually poor

Another reason why Rawlsian justice leads to residues of justice concerns the relative 'poverty' of its conceptual framework. For this conceptual poverty argument I draw on the work of Amartya Sen and Martha Nussbaum.²⁶² Both have convincingly argued

²⁶² Cf. Sen, Amartya, 'Equality of What? ', in *The Tanner Lectures on Human Values*, ed. McMurrin, S. (Salt Lake City: University of Utah Press, 1980), 31-53; ———, 'Justice: Means versus Freedoms', *Philosophy and Public Affairs* 19 (1990); Nussbaum, *Women and Human Development. The Capabilities Approach*, 88-89; Nussbaum, Martha C., 'Rawls and Feminism', in *The Cambridge Companion to Rawls*, ed. Freeman, Samuel (New York: Routledge, 2003); ———, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, US: Harvard University Press, 2006), 22-25, 81-92; ———, *Creating Capabilities: The Human Development Approach* (Cambridge, US: Harvard University Press, 2011); Alexander, John M., *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Hampshire: Ashgate, 2008); Robeyns, Ingrid and Brighouse, Harry, 'Introduction: Social Primary Goods and Capabilities as Metrics of Justice',

that Rawls' primary goods do not suffice as a metric of justice because they are insensitive to crucial differences between citizens, differences that affect their opportunity to lead a humanly dignified life. Such differences are for instance those between citizens' physical or mental characteristics and differences between their social positions. As Sen has famously put it: "the primary goods approach seems to take too little note of the diversity of human beings. If people were basically very similar, then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament and even body size. So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences."²⁶³

The critique of both Sen and Nussbaum boils down to it that a viewpoint of justice that reduces citizens' needs to a set of primary goods, does not really treat them as equals. If we want to protect the value of equal dignity, justice should be cognizant of a range of differences between citizens conceived as empirically situated creatures.²⁶⁴

In his *Political Liberalism* and in direct response to Sen Rawls asserts that in a just society in spite of all their differences citizens will not "fall below the line", they will have more than the "minimum essential capacities required to be a normal cooperating member of society."²⁶⁵ Rawls thinks that his principles of justice in fact sufficiently deal with these differences, as the very point of two of these principles was to compensate for and mitigate them.²⁶⁶

in *Measuring Justice*, ed. Robeyns, Ingrid and Brighouse, Harry (Cambridge: Cambridge University Press, 2010).

²⁶³ Sen, 'Equality of What? ', 215-216.

²⁶⁴ Nussbaum, *Women and Human Development. The Capabilities Approach*, 69.

²⁶⁵ Rawls, *Political Liberalism*, 183. All this is not to say that Rawls commits himself to the view that citizens can indeed genuinely exercise their moral powers, even if their most rudimentary needs are not met. However, Rawls explicitly states that justice will not (yet) be in play in these situations. If justice is to be a relevant virtue at all, at least some minimal requirements must be met. Conditions may in any case not be "so harsh that fruitful ventures must inevitably break down." Cf. ———, *A Theory of Justice*, 110.

²⁶⁶ Rawls, *Political Liberalism*, 326. See for a critical discussion of this claim: Daniels, Norman, 'Democratic Equality: Rawls's Complex Egalitarianism', in *The Cambridge Companion to Rawls*, ed. Freeman, Samuel (Cambridge: Cambridge University Press, 2003).

More generally, throughout his work Rawls is keen to stress that justice is not tantamount to securing equal happiness. Happiness “always presumes a degree of good fortune” and therefore can never be secured as a matter of justice.²⁶⁷ Where some of the differences between citizens may indeed influence their happiness, they do not affect their dignity, for all can still lead a life in which they develop and use their moral powers. Citizens can be asked to “revis[e] and adjust [...] their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.”²⁶⁸

Also, Rawls relies on the fact that for each citizen there will be social unions available that can provide for the support that citizens as embedded creatures need to lead a life in accord with dignity. In these social unions that fit their particular position citizens can acquire a sense of self-esteem and they can train and further their abilities and talents.²⁶⁹ And for the genuinely unlucky ones, Rawls stresses that their plight can be addressed at the legislative stage.²⁷⁰

These (potential) replies do not go to the heart of the critique of Sen and Nussbaum, i.e. that other dimensions than the primary social goods are relevant as a matter of equality when determining citizens’ legitimate claims. That is, Rawls does not offer an argument as to why for instance the distribution of income and wealth should be decisive in determining ‘the least advantaged’ group. In this regard Benjamin Barber rhetorically asked why the “unemployable, self-deprecating wealthy suburban housewife or the self-respecting, overburdened welfare mother or an overtaxed undervalued assembly line worker or the alienated, anomic college dropout” do not qualify as the least-advantaged also.²⁷¹

²⁶⁷ Rawls, *Political Liberalism*, 184; ———, *A Theory of Justice*, 360.

²⁶⁸ Rawls, *Political Liberalism*, 189.

²⁶⁹ ———, *A Theory of Justice*, 388.

²⁷⁰ ———, *Political Liberalism*, 184.

²⁷¹ Barber, Benjamin, 'Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls', *The American Political Science Review* 69 (1975), 667. See for this point also: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 115.

Particularly if we take Rawls' Aristotelianism and egalitarianism seriously -a dimension of Rawls' theory that we discussed in the previous chapter²⁷²-, it seems more fitting to hold that for Rawls substantial differences between citizens' capacities to converse the social primary goods into valuable functioning are in fact relevant. As to his Aristotelianism: Rawls himself holds that in order to be good, a life must be constituted by a range of intrinsic goods and excellences. If these goods and excellences are lacking, human life is dull and superficial and self-esteem is in jeopardy also.²⁷³ He finds such situations genuinely troublesome.

As to Rawls' egalitarianism: the rationale of the principle of equal opportunity and the difference principle is to prevent that citizens' opportunities and chances in life are largely determined by *undeserved* inequalities.²⁷⁴ The influence of these inequalities should be mitigated, meaning that the advantages that befall those who are favoured by nature and society also work for the good of the least-advantaged. However, if justice simply ignores citizens' *actual* ability to make valuable use of the primary goods, these Aristotelian and egalitarian concerns cannot be fully honoured.

Because of their conceptual poorness Rawls' principles of justice are thus insufficient to realize the aspirations of his theory.

Rawls merely assumes that in a just society citizens will have the necessary intellectual, physical and moral capacities, he assumes that there will be social unions available to support them, and he assumes that his principles will sufficiently mitigate the effects of undeserved differences between citizens. However, these assumptions are no arguments for not making justice more sensitive to differences between citizens' concrete positions.²⁷⁵ Not in the least because actual reality points to the contrary: it shows us that a 'fair' distribution of the primary social goods can lead to outcomes in which citizens do fall 'below the line', situations in which they -beyond their own clear fault- are not able to convert the primary goods into valuable functioning.

²⁷² There we saw that Rawls' theory aims to address the interests of the 'noumenal selves' but also to satisfy the fundamental needs of concrete empirical human beings.

²⁷³ Rawls, *A Theory of Justice*, 386.

²⁷⁴ *Ibid.*, 86.

²⁷⁵ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 108-109.

Take the position of divorced mothers in Western constitutional democracies. It is widely known that these women face serious obstacles to and have specific needs for the realisation of their ends.²⁷⁶ Often they have little opportunities to pursue a (well-paid) professional career and are likely to either live on social welfare or work for relatively low wages. They also tend to have problems with their emotional and physical health and with social integration due to the burdens that their position brings. This precarious position is due to a complex and interrelated amalgam of factors such as limited 'human capital' (professional education, training and job experience), parental responsibilities, a lack of adequate child-care provisions²⁷⁷ and gender norms and role models that are dominant in society.

However, Rawls' viewpoint of justice does not recognize the position of these mothers as salient, let alone unjust and hence as a problem that society should be concerned with or try to overcome. This because their position is not due to a

²⁷⁶ See for instance: Peterson, Richard R., *Woman, Work and Divorce* (New York: State University of New York Press, 1989); Kamerman, Sheila B. and Kahn, Alfred J., 'Single-parent, Female-Headed Families in Western Europe: Social Change and Response', *International Social Security Review* 42, 1 (1989); Franz, M., Lensche, H. et al., 'Psychological Distress and Socio-Economic Status in Single Mothers and their Children in a German City', *Social Psychiatry and Psychiatric Epidemiology* 38, 2 (2003); Casey, Timothy and Maldonado, Laurie, "Worst Off. Single-Parent Families in the United States. A Cross-National Comparison of Single Parenthood in the U.S. and Sixteen Other High Income Countries', (New York: Legal Momentum, 2012). In the Netherlands divorced mothers have a five times higher chance to structurally end up below the poverty-line with little prospect of change for the better, compared to married women with children. Cf. Brakel, Marion van den and Lok, Reinder, 'De Inkomenssituatie van Alleenstaande Moeders: Trends and Dynamiek', (Den Haag: Statistics Netherlands, 2010). A task force of a Dutch trade union also observed that divorced women have low self-esteem and a high stress-level due to poverty and the difficulty they experience trying to combine duties of care and being the sole breadwinner of the family. See: Vrouwenbond, FNV, 'Manifest Meer Kansen voor Alleenstaande Ouders in Lokaal Beleid', (FNV, 2010).

²⁷⁷ Nussbaum stated in this regard: "a poor single mother may frequently be forced to choose between high quality care for her children and decent living standards, since some welfare rules require her to accept full-time work even when no care of high quality is available to her." Nussbaum, *Creating Capabilities: The Human Development Approach*, 37.

violation of justice.²⁷⁸ It does not stem from an unequal distribution of basic liberties and neither is it the result of a violation of the principle of equal opportunity: it is not primarily due to discrimination on the labour market or a lack of chances for primary or secondary education.^{279 280}

This position does not qualify as a violation of the difference principle either, as it is unlikely that divorced mothers will be identified as the 'least-advantaged group'. Their low income is -partly- due to the fact that they work part-time, their poor work-experience and their lack of professional training. Even if they would be part of the 'least advantaged' group, it would result in a claim for higher wages or a higher level of welfare and thus leave the other obstacles and needs that characterize their position as they are: unnoticed.²⁸¹

In brief, not being due to a violation of justice the plight of divorced mothers is one that in Rawlsian society will be understood as entered into voluntarily and one for which these mothers can be held responsible.²⁸² Although their position may give these women reasons for regret, shame and anger, it is not unjust.

²⁷⁸ Of course, the critique that Rawls does not adequately address gender-injustices is nothing new. In her renowned book *Justice, Gender, and the Family* Suzan Moller Okin notoriously criticized Rawls for not addressing gender-injustices, in particular as they exist in the family. In the chapter 'Vulnerability by Marriage' Okin points to the socio-economical downfall that divorced mothers experience after divorce; where men's income status improves after a divorce, the position of women and their children "deteriorates seriously", and comes with "serious social and economic dislocation". Cf. Okin, Susan Moller, *Justice, Gender and the Family* (New York: Basic Books 1989), 161. See for Rawls' reply to this critique: Rawls, John, 'The Idea of Public Reason Revisited', *The University of Chicago Law Review* 64, 3 (1997). For a discussion of gender-injustices in relation to Rawls' primary goods see also: Nussbaum, 'Rawls and Feminism'; Robeyns, Ingrid, 'Gender and the Metric of Justice', in *Measuring Justice*, ed. Brighouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010).

²⁷⁹ Cf. Rawls, *A Theory of Justice*, 63; Freeman, *Rawls*, 90.

²⁸⁰ Cf. Rawls, *A Theory of Justice*, 176.

²⁸¹ Think for instance of the difficulties these women face in combining their professional tasks with responsibilities of care. Accommodating for these obstacles would thus be to move to another framework. Cf. Robeyns, 'Gender and the Metric of Justice', 226.

²⁸² Rawls, *A Theory of Justice*, 82.

However, if we take Rawls' Aristotelian and egalitarian concerns seriously, we have reason to qualify the position of divorced mothers as residues of justice. Their position is not only undeservedly worse compared to that of divorced men, but it is also such that they have little opportunities to pursue a conception of the good that includes the ingredients for a flourishing life. It lacks a range of human goods that Rawls himself sees as prominent in any valuable life, such as meaningful work, friendships and all kinds of social cooperation for which he acknowledges that citizens depend on others.²⁸³ From that perspective the position of these divorced mothers comes with burdens that we do not want them to bear.²⁸⁴

Another example that supports the conceptual poorness argument is the way Rawls' principles of justice work out for cognitively challenged and socio-economically weak consumers on the financial service market.²⁸⁵ This group of consumers will be

²⁸³ Ibid., 363.

²⁸⁴ Nussbaum, Martha C., 'Justice for Women!', *The New York Review of Books*, October 8 1992.

²⁸⁵ The topic of consumer protection is not often linked to the notion of social justice. It is generally held that social justice does not apply to contract law and hence neither to consumer law. However, the pervasive effects that (the legal validation and enforcement of) contracts can have on citizens' lives is a good reason to understand contract law including consumer law as a legal institution to which the requirements of social justice do apply. See for a discussion of Rawlsian justice in relation to contract law: Kordana, Kevin A. and Tabachnick, David H., 'Rawls and Contract Law', *The George Washington Law Review* 73, 3 (2005). See for a discussion about the justifiability of consumer protection: Posner, Richard, 'The Question of Consumer Competence', <http://www.becker-posner-blog.com/>. See for an interesting article on consumer protection on the financial service market: Benston, George J., 'Consumer Protection as Justification for Regulating Financial Service Firms and Products', *Journal of Financial Service Research* 17, 3 (2000). See for a general discussion of consumer protection: Deakin, Simon, "Capacitas: Contract Law and the Institutional Preconditions of a Market Economy", in *CBR Research Programme on Corporate Governance* (Cambridge: Centre for Business Research University of Cambridge, 2006); Morgan, Fred W., Schuler, Drue K. et al., 'A Framework for Examining the Legal Status of Vulnerable Consumers', *Journal of Public Policy and Marketing* 14, 2 (1995); Duivenvoorde, Bram, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practice Directive', *Journal of European Consumer and Market Law* 2 (2013).

more likely than their fellow citizens to enter into adverse or even detrimental contracts, for instance agreeing to high interest rates. Due to their vulnerable socio-economical position they will also be hit harder by the consequences of such contracts than others would.²⁸⁶

If we take Rawls' principles of justice as decisive, their position and the potential outcomes for them can be left to themselves. In a society that complies with these principles a state is not allowed to interfere with the contracts between citizens, except for the protection of liberty itself.²⁸⁷ As citizens are assumed to have the moral powers necessary to make valuable use of the primary goods, the contracts concerned are taken as expressions of free choice.²⁸⁸ From the viewpoint of Rawls' principles -of course, other things equal- the 'will' theory of contracts²⁸⁹ can be embraced, which implies that the protection of party autonomy is the main rationale behind contract law. "[P]romises are inviolable and consumer assent to contract terms should be strictly interpreted and enforced", will then be the maxim.²⁹⁰ The contractual obligations and duties of consumers, banks and other commercial parties operating on the financial service market will be established independently of the actual cognitive powers of consumers and of the consequences of these contracts. Concepts such as

²⁸⁶ Cf. Duivenvoorde, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practice Directive', 72.

²⁸⁷ Rawls' difference principle can also offer an argument for a rather *laissez-fair* approach to contract law. Cf. Kordana and Tabachnick, 'Rawls and Contract Law', 614-616.

²⁸⁸ Again, Rawls assumes that in a well-ordered society "the moral powers are realized to the requisite minimum degree". He holds that "[o]nly scattered individuals are without this capacity or its realisation to the minimum degree". Cf. Rawls, *A Theory of Justice*, 442-443; ———, *Political Liberalism*, 302. See for a critical discussion of assuming the rationality of consumers: Jacoby, Jacob, 'Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory', in *Working Paper* (New York: New York University, 1999).

²⁸⁹ See for a defence of such a theory: Fried, Charles, *Contract as a Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

²⁹⁰ Cf. Silber, Norman I., 'Observing Reasonable Consumers: Cognitive Psychology, Consumer Behaviour and Consumer Law', *Loyola Consumer Law Reporter* 2, 3 (1990), 69.

‘average consumer’²⁹¹, ‘reasonable’, ‘duty of care’, or ‘abuse of circumstances’ will not be based on actual empirical realities with regard to the rationality of consumers or the consequences of their purchases and obligations. They are based on a benchmark that assumes that consumers have sufficient moral and intellectual powers to make meaningful and responsible use of their freedom of contract. As Rawls has put it, we should “not look behind the use which persons make of the rights and opportunities available to them in order to measure the satisfaction these give.”²⁹²

Sure, from the viewpoint of Rawls’ principles of justice it is not ‘anything goes’ where the freedom of contract is concerned. Under strict conditions regulative rules are justified. Such rules may for instance focus on the protection of well-defined and exceptional groups of seriously incapacitated citizens for whom the conditions of justice do not (yet) apply and whose legal personality can therefore (temporarily) be denied. Also, in case of clear abuse or deceit contracts may be annulled. In these situations the will of the consumer and hence the contract cannot be said to be an expression of a citizens’ moral powers.²⁹³ For all other situations it is either a form of unwarranted paternalism or a matter of policy that is indifferent from the perspective of justice, if consumers nonetheless receive protection because of their specific position.²⁹⁴

²⁹¹ See for a brief discussion of this standard in the Dutch context: Duivenvoorde, Bram, ‘De ‘Gemiddelde Consument’ als Rationele Actor’, *WPNR* (2010). See for a discussion of the notion of ‘reasonable consumers’ against the background of empirical findings as to the limits and errors in the consumer decision-making process: Silber, ‘Observing Reasonable Consumers: Cognitive Psychology, Consumer Behaviour and Consumer Law’. Silber argues (p. 69) contrary to the wariness of neo-formalist legal theorists that in the US “courts and legislatures appropriately take into consideration consumers’ cognitive limitations in developing regulations and “reasonable consumer standards”. See: Kordana and Tabachnick, ‘Rawls and Contract Law’, 627.

²⁹² Rawls, *A Theory of Justice*, 80.

²⁹³ Kordana and Tabachnick, ‘Rawls and Contract Law’, 628.

²⁹⁴ For instance, whether a concrete consumer has a claim to damages because of an extreme and idiosyncratic reaction to a product he has purchased will then be a matter of strong discretion rather than of ‘rights’. Cf. Morgan, Schuler et al., ‘A Framework for Examining the Legal Status of Vulnerable Consumers’. Similarly, to improve the quality of consumer decisions can be a legitimate social goal, but it is not a requirement of justice. In this regard it

As was the case for the position of divorced mothers: against the background of Rawls' Aristotelian concerns, ignoring the special position of cognitively challenged and socio-economically vulnerable consumers on the financial service market can lead to residues of justice. Ignoring the specific obstacles that this group of consumers experiences in fact reinforces the impact that natural and social accidents have on their chances to lead a humanly dignified life.

Sure, if a cognitively and socio-economically weak consumer makes an 'irrational' choice and buys a suit he cannot afford, the consequences of such a purchase are relatively minor. Such a purchase will not have an overall incapacitating effect.

However and as said, things may be different with contracts on the financial service market.²⁹⁵ Due to poor solvability, the complexity of the products and the often high interest rates on loans, financial products are likely to lead to problematic debts for this group, that is, debts that deeply influence their lives.²⁹⁶ High debts more often than not have negative consequences for the physical, emotional and psychological health of the debtors and often lead to social isolations and domestic problems.²⁹⁷ If we take

remains to be seen how from the perspective of Rawls' principles we must evaluate the policies of the Directorate General for Health and Consumers of the European Union that aim to promote the financial education of consumers and to raise the level of awareness of consumers "so that they are better equipped to make informed, considered and rational choices in financial services." Cf. http://ec.europa.eu/consumers/rights/fin_serv_en.htm (visited on September 2012).

²⁹⁵ See for a general discussion of cognitive limitations of consumers: Eisenberg, Melvin Aron, 'The Limits of Cognition and the Limits of Contract', *Stanford Law Review* 47, 2 (1995). In this article Eisenberg canvasses empirical research regarding cognitive abilities that are relevant for contracting. The main cognitive limitations he designated are: "bounded rationality, optimistic disposition, systematic underestimation of risks, and undue weight on the present as compared with the future."

²⁹⁶ Cf. Ommeren, C.M. van, Ruig, L.S. de et al., 'Huishoudens in de Rode Cijfers. Omvang en Achtergronden van Huishoudens met een Risico op Problematische Schulden', (Zoetermeer: Panteia, 2009), 61. This report describes the scope and the background of households which have problematic debts or run the risk of getting into debts. One of the factors mentioned is risky behaviour on the financial service market.

²⁹⁷ Cf. Hulshoff, Caro, *Psychische Klachten en Schulden: Preventie en Hulpverlening bij zowel Immateriële als Materiële Problemen. Een Onderzoek bij Allochtone en Autochtone*

Rawls' theory to indeed protect not only the needs of 'noumenal' selves, but in an Aristotelian vein also the needs of citizens as concrete empirical creatures, these situations can be qualified as residues of justice. This because other than due to their own clear fault citizens will not be able to genuinely develop and exercise their moral powers.

To summarize: in this section I have argued that when applied to society, because of its conceptual poorness justice will lead to residues of justice, situations that are at odds with the substantive goals to which Rawls' theory is (also) committed.

2.2.1 Conceptual poverty of justice in adjudication

In this section we shall see how the conceptual poverty of Rawls' principles of justice and the residues it produces or allows for bear upon the moral character of adjudication. When used as a background theory of law and adjudication justice cannot prevent that judges will as a matter of their professional responsibility in their interpretation of settled law turn a blind eye to information related to the ability of a citizen to convert the primary goods into valuable functioning. This may lead to genuine loss, at least from the viewpoint of the concerns that Rawls' theory aims to address. Rawls' conception of justice can therefore be said to be too narrow a viewpoint to genuinely warrant a reliance on legal commensurability and hence to validate a stabilizing approach to adjudication. To put it in more technical terms: because of its conceptual poverty Rawls' conception of justice lacks the kind of 'representative adequacy' that a measure needs if it is to function as a commensurans.²⁹⁸ In this section I will discuss several legal cases in support of this claim: two of these cases concern the position of divorced mothers; in the other two the position of cognitively challenged and socio-economically vulnerable consumers is at stake.

The case of *Jamie Muller*²⁹⁹

Cliënten (Amsterdam Riagg-Zuid Oost, 1997); Gathergood, John, 'Debt and Depression: Causal Links and Social Norm Effects', *The Economic Journal* 122, 563 (2012).

²⁹⁸ I discussed this feature of a commensurans in chapter 2.

²⁹⁹ This case and the next case to be discussed draw on the following cases: Centrale Raad van Beroep, January 30 2008, ECLI:NL:CRVB:2008:BC5172; Rechtbank Rotterdam, June 12 2007, ECLI:NL:RBROT:2007:BA7335; Centrale Raad van Beroep, March 24 2009,

Jamie Muller married her first boyfriend when she was nineteen years old. The couple got three children. Jamie worked close to her home as a dental-assistant and her husband ran a small business of his own. Because of the mental illness of their youngest son, Jamie worked only one morning a week. Conform the advice of her son's medical specialist, she tried to offer him a stable, secure and regular domestic situation and did not to bring him to a care-centre. Leaving her son for too long too often would bring him anxiety-attacks.

At a certain point the couple got into a serious relational crisis and tried counselling, but to no avail. Eventually Jamie's husband wanted a divorce. After the divorce Muller had to work three full days to make a living for herself and her children. Her ex-husband could not afford to pay any substantive alimony.

The dentist however, Jamie's employer, wanted her to work still more hours and also on a variable basis because of his increasing clientele. Jamie refused because of her parental responsibilities. When Jamie was dismissed because of her 'inflexibility', she went to court and disputed her dismissal.

The judge now has to decide whether Jamie Muller's employer had the right to dismiss her. According to settled law -including the civil law code and the collective labour agreement- an employee is not obliged to simply agree to a change in working hours. The employer and employee must come to a 'reasonable' equilibrium regarding working-conditions.³⁰⁰

If the judge, committed as he is to honouring the viewpoint of justice, uses Rawls' principles to give substance to the open norm of 'reasonableness', he will indeed have no reason of justice to assign special weight to Jamie's interests regarding her role as a single mother. From the viewpoint of Rawlsian justice these interests do not have more weight than for instance Jamie's interest to watch television rather than work the requested hours. That Jamie cannot freely delegate her exacting parental responsibilities and that she has a vital interest to keep her job as she is the breadwinner of the family, are factors that at least from the viewpoint of justice do not deserve special weight.

However, if the judge ignores these factors or at least does not assign them special weight, Jamie may beyond her own fault end up in a situation in which she is unable to exercise her moral powers in a meaningful way. If Jamie will indeed be fired, she will not be able to work in her profession -there is no other dentist in her residential area- and as a consequence she will lack the opportunity to gain self-esteem through the use of her professional capacities. She and her children are likely to structurally end up in serious poverty with dire

ECLI:NL:CRVB:2009:BI1015. In the latter case a mother with five children, the youngest two and a half years old, claimed that instead of being punished by a reduction of her welfare of 200 Euro a month for not complying with her obligation to accept work, she should be exempted from this obligation until her youngest daughter went to school.

³⁰⁰ See: Bouwens, W.H.A.C.M, Houwerzijl et al., *H.L. Bakels, Schets van het Nederlandse Arbeidsrecht* (Deventer: Kluwer, 2013), 79-82.

consequences such as social isolation, health problems and emotional distress. If we take seriously Rawls' idea that besides its Kantian interpretation equal dignity also entails honouring the needs of citizens as empirical, situated creatures to a sufficient degree, Jamie's dismissal can be qualified as a genuine moral loss. Holding Jamie responsible for the situation in which she may end up after her dismissal reinforces rather than reduces the detrimental influence of contingent facts on her chances to lead a humanly dignified life. This is at odds with the Aristotelian and egalitarian concerns that Rawls' theory seeks to honour. Here we see that if a judge uses Rawls' viewpoint of justice as a decisive measure when interpreting settled law and determining citizens' concrete legal rights, due to its conceptual poverty this measure will lack the 'representative adequacy' that characterizes a commensurans. The concepts of justice that the judge has to his avail are insensitive to factors that from the viewpoint of equal dignity are in fact relevant when determining citizens' rights. The case of Jamie shows that due to this conceptual poverty of justice, judicial decisions will not be as morally reassuring as a stabilizing approach to adjudication and its reliance on legal commensurability suggest.

Of course the case of Jamie is only one example of how the conceptual poverty of justice bears upon the moral character of adjudication, more specifically on the determination of the concrete legal rights and duties of single mothers. Next I discuss two cases in which the position of cognitively vulnerable and socio-economically weak consumers on the financial service market is at stake.

The case of *Bill Van Dyck*³⁰¹

Van Dyck is 84 years old and lives a very isolated life. Twice a week he goes to the grocery store and once a month to the bank to collect money because he does not trust ATM machines. Van Dyck receives a small pension. One day Van Dyck had a nice conversation with a bank employee. It turned out that the employee also enjoyed fishing. Already the next day Van Dyck returned to the bank because he had enjoyed talking with the employee and he thought him sufficiently reliable to ask him for financial advice.

Van Dyck candidly told the employee that he worried about the financial situation of his seriously handicapped son and that he strongly wished to help him financially. Already for

³⁰¹ The construction of the cases of Bill van Dyck and Lisa Burroughs draws on the following cases: Rechtbank Leeuwarden, August 13 2009, ECLI:NL:RBLEE:2009:BJ5283; Rechtbank Zwolle, March 4 2009, ECLI:NL:RBZLY:2009:BI2318; Rechtbank Utrecht, February 17 2010, ECLI:NL:RBLEE:2009:BJ5283; Rechtbank Amsterdam, November 11 2008, ECLI:NL:RBAMS:2008:BG4885; Rechtbank Utrecht, January 28 2008, ECLI:NL:RBUTR:2008:BC2458.

quite some years he was saving some money for him. The bank employee suggested that Van Dyck could purchase a financial product that came down to the bank lending him money and investing it in stock on behalf of Van Dyck.

One week later Van Dyck, who trusted the employee, signed a special stock-lease contract. But unfortunately for him soon the exchange rates fell. After three years the term of the contract ended and the bank held Van Dyck liable for € 20.000, that is, for the remaining debt including contractual interest as the leased stock was worth far less than the amount of the original loan. Van Dyck was in shock; he had never expected such an outcome to be possible. He was also anxious to forfeit his apartment and he was deeply disturbed by the fact that he had lost all he had saved for his son.

Van Dyck's daughter in law advised him to file a lawsuit and he did. In court Van Dyck (or more precisely his lawyer) argued that he had been in error about the conditions of the contract and that it therefore should be nullified. He thought that the monthly payments were investments in stock and not the payment of interest on the loan.

He moreover argued that the bank had abused his vulnerable position and had violated its duty of care. The bank employee knew that Van Dyck was socially very isolated because he had told him so and he also knew that he had therefore appreciated their talks and came to trust him.³⁰² According to Van Dyck the bank employee could also have known that the contract did not reflect his will, because he had so much stressed his keenness to leave his son some money after his demise. The employee should have known that he did not want to risk all his savings. As part of its duty of care the bank should have warned Van Dyck clearly about the risks of the contract, also because Van Dyck was cognitively vulnerable due to his old age. From the viewpoint of Rawls' principles of justice the judge must interpret the applicable law -other things equal- in a way that ignores Van Dyck's actual cognitive limitations, his socially isolated position and also the consequences of the contract. That is, of course, if the case is not one of clear fraud or deceit, or one in which the minimal cognitive capacities are obviously absent. Once above these benchmarks, the judge may simply assume that the outcome of the contract can be "left to take care of itself".³⁰³

At the same time, if the judge legally effectuates the contract as indeed an expression of Van Dyck's free will, this seems not to dovetail well with Rawls' egalitarian concerns. From the

³⁰² See for a discussion of both kinds of vulnerabilities of older consumers: Yoona, Carolyn, Coleb, Catherine A. et al., 'Consumer Decision Making and Aging: Current Knowledge and Future Directions', *Journal of Consumer Psychology* 19 (2009); Moschis, George P., Mosteller, Jill et al., 'Research Frontiers on Older Consumers' Vulnerability', *Journal of Consumer Affairs* 45, 3 (2011); Yong-Soon, Kang and Ridgway, Nancy M., 'The Importance of Consumer Market Interactions as a Form of Social Support for Elderly Consumers', *Journal of Public Policy & Marketing* 15, 1 (1996).

³⁰³ Rawls, *A Theory of Justice*, 76.

viewpoint of these concerns that take citizens' vulnerabilities as empirical creatures seriously, Van Dyck may rightly feel wronged. That is, in this case Van Dyck's vulnerabilities have been exploited in a way that seriously and structurally reduces his potential to exercise his moral powers. Holding him legally responsible would not only legally authorize such exploitation, it would also thwart Van Dyck in realizing his most wanted goal: to provide for an income for his handicapped son. On the basis of Rawls' own concerns we can say that a legal decision to hold Van Dyck fully liable leads to a moral loss, even though it may be in accord with justice.

The case of *Lisa Burroughs*

Eighteen years old, Lisa fell in love with John who was thirteen years older. Lisa worked part-time with MacDonald's and John had a lowly paid job as construction worker. They were both poorly educated. At a certain point in their relationship John decided that he wanted to live together with Lisa. He also wanted to rent a new apartment and furnish it. He came to the conclusion that in order to finance this they had to arrange a revolving credit loan for a grand total of € 60.000, which was rather excessive relative to their budget.

Soon after they got the loan the couple failed to pay the rent. Due to their financial stress -Lisa blamed her boyfriend for having forced the loan on her- the couple broke up. In accord with the terms of the contract the credit company held Lisa severally liable for € 85.000, the grand total of the original loan and the contractual interest. Thereupon Lisa went to court arguing that the credit company violated its duty of care. The company should have known that at the time of the signing of the contract she did not fully understand its consequences. Because of her young age and her lack of experience on the financial service markets the credit company should have informed her about the risks.³⁰⁴ All the more so because during the session with an employee of the company her boyfriend had done all the talking and because her financial position was obviously very weak.

As in the case above, in interpreting the applicable laws and standards from the viewpoint of Rawls' principles of justice, the judge -other things equal- must be indifferent to Lisa's actual moral powers and the decisive role of her boyfriend -that is, if he does not want to risk being all too paternalistic. For the same reason the judge must ignore the detrimental consequences that the contract has for Lisa.³⁰⁵ This outcome can be accounted for in terms of procedural justice. It may not be morally 'reassessed' and is rather to be understood as one of the many complications of everyday life for which a citizen can be held responsible. If there is no clear case of intentional abuse of circumstances or of fraud or deceit, the judge can as a matter of justice decide that the credit company should not have to pay for Lisa's stupidity and that it is reasonable to expect Lisa to have comprehended the terms of the contracts.

³⁰⁴ See also: Steinberg, Laurence, 'Risk Taking in Adolescence: What Changes, and Why?', *Annals of the New York Academy of Sciences* 1021, 1 (2004).

³⁰⁵ Kordana and Tabachnick, 'Rawls and Contract Law', 629.

However, if we take Rawls' egalitarian concerns seriously, to ignore the range of information about Lisa's person and position as an embodied and situated being when determining the legal implications of the contract, is hardly to respect her dignity. Because of her actual cognitive and emotional vulnerability and her precarious socio-economical position, Lisa may rightly feel that she is not respected, but rather is asked to bear the burdens for the good of others and especially for the profits of the credit company.³⁰⁶ Given Lisa's concrete position the contract is lopsided and exploitative and its effectuation may put Lisa in a socio-economically precarious position with long-term consequences for her chances to realize her life-plan. Although this effectuation is in line with Rawls' principles of justice, from the viewpoint of his Aristotelian and egalitarian concerns it also results in a genuine moral loss. Again, here we see how the conceptual poverty of justice bears upon the character of judicial decisions. It impedes a judge who is committed to justice to have a keen eye for the extent to which a concrete citizen is actually experiencing obstacles in using the primary goods in a valuable way. Even though judges may indeed aim to be just, these conceptual limitations lead to genuine moral losses, to morally unsatisfying outcomes. The conceptual poverty makes justice into a standard that is hardly as morally reassuring as Rawls and a stabilizing approach to adjudication suggest.

So far the discussion of cases that show how the conceptual poverty of Rawls' viewpoint of justice affects the moral quality of adjudication.

2.3 Justice as under-determinate

A final reason why Rawls' theory of justice leads to residues of justice is the under-determinacy of justice and connected to this the *strong* discretion this implies for the responsibility bearing institutions and officials concerned.

Rawls is well aware that abstract and general principles of justice produced by philosophy do not by and in themselves suffice for citizens and public officials to know what justice concretely requires. To this end he introduces the 'four stage sequence' -which we already saw in the previous chapter- so as to "to simplify the application of the two principles of justice" for constitutional democracies.³⁰⁷

³⁰⁶ Ibid.

³⁰⁷ Rawls, *A Theory of Justice*, 171. To that end Rawls distinguishes the level of the philosophical principles, the level of the constitution, the level of legislation and policy and that of the application of rules to concrete cases "by judges, administrators, and the following of rules by citizens generally."———, *A Theory of Justice*, 175.

This device is meant to secure that his account of justice will indeed be a “workable political conception” and not merely a theoretical exercise.³⁰⁸ It is this device that according to Rawls can account for the determinacy of justice. With the help of the ‘four stage sequence’ justice will be infused with all kinds of empirically loaded considerations that are to make its application a matter of judgment rather than of choice. Rawls says: “the flow of information is determined at each stage by what is required in order to apply these principles intelligently to the kind of questions at hand, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against one another is ruled out. Hence, the principle of the rational and impartial application of principles defines the kind of knowledge that is admissible.”³⁰⁹

So, because there will be a considerable body of relevant information available for each institutional level, Rawls relies that there will be little leeway for public institutions, officials or citizens to determine what justice requires.³¹⁰ At the same time he is keen to stress that ‘right answers’ may sometimes be hard to find. For instance, where violations of the first principle of justice can be “clearly seen to be unjust”, Rawls thinks that this is not the case for the application of the second principle of justice that concerns economical and social policies.³¹¹ For this principle “[o]ften the best we can say of a law or policy is that it is at least not clearly unjust.”³¹² In case the four-stage sequence does not give any determinate answers, “justice is to that extent likewise indeterminate”.³¹³ For these situations he holds that society can legitimately “fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lay within the allowed range, and the legislature in ways authorized by a just constitution has in fact enacted them.”³¹⁴

To summarize: with the help of the ‘four stage sequence’ justice will overall offer sufficient normative guidance to determine what justice requires in concrete terms and

³⁰⁸ Rawls, *A Theory of Justice*, 171-176.

³⁰⁹ *Ibid.*, 176.

³¹⁰ ———, *Political Liberalism*, 340.

³¹¹ ———, *A Theory of Justice*, 174.

³¹² *Ibid.*

³¹³ *Ibid.*, 176.

³¹⁴ *Ibid.*

if in certain situations it does not, then its outcomes will fall within the “permitted range”.³¹⁵ In any case, according to Rawls these outcomes will not occasion genuine moral wrongs. This means by implication that if justice allows public authorities and officials strong discretion, Rawls relies on it that this by no means amounts to troublesome arbitrariness or moral loss.

In light of the rather elaborate defence of the determinacy of justice that Rawls offers, one may consider it splitting hairs to nonetheless argue that justice is too under-determinate to realize its substantive goals. However, I think that Rawls’ arguments for the determinacy of justice are more like a reassurance than genuine arguments. That is, Rawls does not explain *how* justice will actually guide the decisions that are to be made on the levels that the ‘four stage sequence’ describes, for instance decisions about what weight to assign to the body of information that is available. This body of information that Rawls declares pertinent and even crucial for the specification of justice is vast, indeterminate and encompasses conflicting views. Thence genuine choices have to be made about selection and attributing weight. However, justice does not offer any guidance for this task as it is precisely this very body of information that is meant to give substance to justice on the practical level. Hence, the ‘specification’ of justice may well be simply the result of contingent or arbitrary facts, in any case of empirical factors that affect the way responsibility bearing institutions and public officials exercise their strong discretion. We have not been offered a reason to a priori assume that the range of specifications is such that citizens’ dignity will be secured, at least if dignity is to have any substantive meaning. So conceived, the ‘four-stage sequence’ may function as a grab bag: the outcomes it produces are, at least from the viewpoint justice, unpredictable and random. They can in no way sensibly be reduced to a shared ‘justice-inhering’ feature, not even their being conducive to or in accord with the value of equal dignity.³¹⁶ As said, these outcomes may even amount to residues of justice, i.e. morally troublesome situations, for instance in the form of (arbitrary) restrictions of citizens’ opportunities to lead a dignified life.³¹⁷

³¹⁵ Ibid.

³¹⁶ Cf. Weithman, Paul, 'John Rawls and the Task of Political Philosophy', *The Review of Politics* 71, 1 (2009), 313.

³¹⁷ Rawls, *A Theory of Justice*, 176.

To illustrate that the under-determinacy of justice and the strong discretion it entails can in practice lead to residues of justice, I will discuss the practical bearing of Rawls' principles of justice on the institution of criminal law and punishment. For in other societal domains where only trivialities are at stake we need not be all that worried about the under-determinacy of justice and we may be more willing to just accept a specification as one that justice allows for.³¹⁸ Residues of justice are perhaps not likely to occur. Things are different for criminal law and punishment as institutions that so intensely influence citizens' lives. For these institutions we do not want to assume too easily that they accord with the demands of Rawls' viewpoint of justice, precisely because the interests that his principles aim to protect are so prominently at stake: the basic liberties.

From this perspective it is quite remarkable that Rawls himself pays little attention to criminal law and the institution of punishment.³¹⁹ He considers these institutions as justified, without spending too many words on the arguments supporting this claim.³²⁰ He holds that a just society needs an effective penal machinery, primarily because "[b]y enforcing a public system of penalties a government removes the ground for thinking that others are not complying with the rules".³²¹ Because of his rather appealing account of criminal law and punishment, Bonnie Honig has stated that Rawls probably understands punishment as "a practice in which there is no moral

³¹⁸ Ibid., 175.

³¹⁹ In his article 'Two Concepts of Rules' Rawls does state that "[t]he subject of punishment, in the sense of attaching legal penalties to the violation of legal rules, has always been a troubling moral question". Nonetheless in his *Theory of Justice* he hardly discusses the issue. Cf. Rawls, John, 'Two Concepts of Rules', *The Philosophical Review* 64, 1 (1955); Rawls, *A Theory of Justice*, 209-212, 237, 276.

Rawls' rather appealing attitude towards the institutions of criminal law and punishment fits within the liberal tradition that sees punishment as a legitimate institution. Cf. Bedau, Hugo Adam and Kelly, Erin, 'Punishment', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2010). For an argument that the institution of punishment does not fit within liberalism see: Hanna, Nathan, 'Liberalism and the General Justifiability of Punishment', *Philosophical Studies* 145, 3 (2009).

³²⁰ Honig, Bonnie, 'Rawls on Politics and Punishment', *Political Research Quarterly* 46, 1 (1993), 151.

³²¹ Rawls, *A Theory of Justice*, 211.

anguish, no unruly excess, no joy in another's suffering, no troublesome doubts, only a sense of justice.”

In any case, the under-determinacy of Rawls' principles of justice surely does not warrant an epistemically and morally reassuring picture of these institutions. These principles give little guidance as to how the institution of criminal law and the penal machinery should work, i.e. what kind of deeds should be criminalized and what kind of sanctions should be imposed in reaction to these deeds. Consequently, there is no guarantee whatsoever that the outcomes that justice allows for are compatible with equal dignity, the overall value that Rawls' theory seeks to protect.

Of course the first principle of justice, that of equal liberty, does point out that liberty is to be restricted only for the sake of liberty itself and that the requirements of the law and hence the demands of justice as regularity should also be observed.

Legislation and policy and their application to individual cases should not be biased. Citizens “must be able to know what the law is and should be given a fair opportunity to take its directives into account [...]”, Rawls states.³²²

We could again take recourse to the ‘four-stage-sequence’ that according to Rawls helps to make the viewpoint of justice more determinate. With respect to workings of the institutions of criminal law and punishment, on the level of legislation, policy and adjudication the following information may be used to do so: common sense views and expert knowledge about the chances of recidivism, views about the detrimental consequences of imprisonment to delinquents and their families, views about (the perceived) lack of safety and security in society, views about the retributive and preventive functions of penal law, views about free will and factors determining criminal behaviour and about the personal responsibility of delinquents for their behaviour, views about society's demand for punishment, and more.³²³ However and as said, justice itself does not provide any guidance how and on what grounds to select or rather ignore certain knowledge and views. Neither does it give any guidance in how to weigh the considerations stemming from the body of ‘selected knowledge and views’. Except for the all too general and unspecific ‘constraints’ that Rawls’

³²² Ibid., 212.

³²³ See for an interesting article on the influence of (beliefs of public officials about) public preferences on criminal justice policy: Roberts, Julian V., 'Public Opinion, Crime, and Criminal Justice', *Crime & Justice* 180, 16 (1992).

device of the original position offers, institutions and public officials will from the viewpoint of justice have strong discretion to decide whether and how to criminalize certain deeds and whether and how to react to these deeds.³²⁴

Take the way some societies deal with habitual ‘petty-offenders’, often people with psychiatric diseases who are home- and jobless and who frequently commit petty crimes that cause a lot of nuisance to society.³²⁵ In a ‘just’ society members of parliament may propose to be ‘tougher’ on this group in reaction to an increase of such petty crimes and public indignation. They could pass a law that allows the imprisonment of these repeat petty-offenders for a considerably longer period than fits the actual crime. These petty-offenders will then be punished relatively harsh, not so much because of the seriousness of their crimes, but because of the nuisance they cause to society.

Other politicians may adversely argue that it is common knowledge that many of these repeat petty-offenders have a history of drug-addiction, have some combination of psychiatric problems or even personality disorders, and have learning difficulties as well. They can point out that members of this group are notoriously in adverse socio-economic positions and need special help rather than punishment. They can argue that repeat petty offenders do not fit "into the prison community, where they are vulnerable and defenceless."³²⁶

At the same time, if arguments based on genuine knowledge with respect to the precarious psychological, economical and social position of these offenders and their need for help are not given due weight, their punishment may even further reduce

³²⁴ Cf. Rawls, *A Theory of Justice*, 212.

³²⁵ This sociological concept of ‘repeat petty offender’ was already in use in the second half of the last century and was coined to focus on a particular group of delinquents who did not often receive attention compared to the more spectacular and menacing types of crime. Irwin Deutscher defined the repeat petty offender as "a person who is defined legally as a criminal because his behaviour involves the persistent breaking of certain laws -usually city ordinances. He is arrested on such charges as being drunk in public view, committing public nuisance, disturbing the peace, loitering, trespassing, vagrancy, family disturbance and so on." Cf. Deutscher, Irwin, 'The Petty Offender: A Sociological Alien', *The Journal of Criminal Law, Criminology, and Police Science* 44, 5 (1953).

³²⁶ Goderie, Marjolein, 'Problematiek en Hulpvragen van Stelselmatige Daders', (Utrecht: WODC, Ministry of Justice, 2009).

their chances to develop and exercise their moral powers. Their liberties and chances will then be sacrificed simply because of the actual power-relations in parliament as an empirical fact, without a moral reason.

Or take the way a just society may deal with children and adolescents who commit crimes. Making use of the discretion that justice allows for, the legislator may for instance decide that juvenile delinquents between sixteen and eighteen years old who have committed serious violent crimes, must be tried and punished under adult penal law.³²⁷ Such a decision could be based on the importance of protecting the liberties of fellow citizens, on the consideration that the brains of these adolescents are almost fully developed and that violent adolescents should be given a stronger signal that their behaviour is not tolerated in society: these and many other considerations are allowed for by the 'four-stage-sequence'. These considerations may outbalance the contrary ones leading to the opposite conclusion that juveniles in this age-category should not be tried and sentenced as adults. Contrary considerations could be that adolescents have not yet fully developed their brain and personality, that they often need specific care and treatment, that adolescent delinquents often have suffered from a "rotten social background" that seriously impeded a normal development of their moral powers and many others.³²⁸

If the legislature happens to decide in favour of the more austere and repressive adult regime, this decision may come with residues of justice. For instead of providing these adolescent citizens the necessary societal and other support for them to become morally competent, society makes their chances to ever lead a dignified life dim and grim.³²⁹ As said, what Delgado has coined a "rotten social background" could point to

³²⁷ In the Netherlands the general rule is that delinquents who are older than twelve and younger than eighteen years have to be judged under the special juvenile criminal law. However, if the delinquent is older than sixteen the judge can decide to apply regular adult criminal law if he sees ground for this in the personality of the defendant, the circumstances under which the criminal deed is committed and/or the severity of the crime. Cf. article 77b of the Dutch Penal Code.

³²⁸ Cf. Delgado, Richard, "Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?', *Law and Inequality* 9, 3 (1995).

³²⁹ Cf. Brink, David O., 'Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes', *Texas Law Review* 82 (2004), 1571.

society not living up to Rawls' ideal and hence to a responsibility of society to help these juvenile delinquents and compensate them for their backward conditions and positions.³³⁰ If they instead receive unfit treatment and the stigma of having been imprisoned this can be seriously harmful and may haunt them for the rest of their lives.

It goes without saying that both examples are not to support the claim that punishment should be abolished -although one might of course consider arguing for it. Here the point has been that, other things equal, Rawls' justice does not offer a reason of justice to prefer a particular way of dealing with the groups of delinquents mentioned, even if one of the possible decisions may result in an outcome that seriously affects their chances to lead a life in accord with dignity. Research for instance suggests that imprisonment has serious effects on the (mental) health of convicts, especially on that of adolescents, and that it reduces their chances of social integration and intimate relationships, that it increases the likelihood of a breakup of their families and that it reduces their fair chances of finding a job and generating income in the future.³³¹

Also, it has been observed that imprisonment affects the chances and expectations of the children of convicts, indicating that "the effects of imprisonment on inequality are transferred inter-generationally."³³²

So, what we can establish is that because of the under-determinacy of justice the institutions of criminal law and punishment are certainly more troublesome than Rawls himself suggests. With Bonnie Honig we can indeed say that criminal law and

³³⁰ For instance by making room for a criminal defence based on socio-economical deprivation simpliciter. See: Delgado, "Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?'

³³¹ Cf. Schnittker, Jason and John, Andrea, 'The Long-Term Effects of Incarceration on Health', *Journal of Health and Social Behaviour* 48, 2 (2007), 117; Apel, Robert and Sweeten, Gary, 'The Impact of Incarceration on Employment during the Transition to Adulthood', *Social Problems* 57, 3 (2010).

³³² Cf. Wildeman, Christopher and Western, Bruce, 'Incarceration in Fragile Families', *The Future of Children* 20, 2 (2010). Fritsch, Travis A. and Burkhead, John D., 'Behavioral Reactions of Children to Parental Absence due to Imprisonment', *Family Relations* 30, 1 (1981).

punishment in a Rawlsian society “draw[...] on a palimpsest of justifications because no single set of assumptions or beliefs is capable of putting our doubts to rest.”³³³

To summarize, even in cases where citizens’ most basic interests are at stake the principles of justice -despite the ‘four stage sequence’- are too under-determinate to secure outcomes that in one way or another can sensibly be reduced to the value of equal dignity. These outcomes may amount to residues of justice, i.e. morally troublesome situations, for instance in the form of (arbitrary) serious restrictions of citizens’ opportunities to lead a dignified life.³³⁴

2.3.1 Under-determinacy in adjudication

The under-determinacy of Rawls’ principles of justice, the strong discretion it leads to and the residues of justice it allows, bear on the moral character of judicial decisions. Due to the strong discretion that the legislator and policy-makers sometimes have, also where fundamental interests of citizens are at stake, judges will as a matter of justice be duty bound to apply laws and policies that may seriously threaten the value of equal dignity. Above that, due to this under-determinacy judges themselves will sometimes also have strong discretion because the law is unclear. In those cases judicial decisions cannot sensibly be reduced to justice itself. These are situations in which the principles of justice cannot sensibly function as a commensurans or final justificatory ground that offers an exhaustive reason for a citizen to accept a particular decision. Moreover, because of its under-determinacy justice cannot prevent that the value of equal dignity will be compromised in and through adjudication. Rather to the contrary, because of the strong discretion that judges have -other things equal- their decisions may well lead to a genuine moral loss. Such an outcome flies in the face of a stabilizing approach to adjudication that relies on normative theory to prevent both arbitrariness and genuine moral losses. I will illustrate these implications of Rawls’ theory for the practice of adjudication by discussing two cases in which the workings of criminal law vis-à-vis a concrete citizen is indeed at stake.

³³³ Honig, 'Rawls on Politics and Punishment', 121.

³³⁴ Rawls, *A Theory of Justice*, 176.

The case of *John Gadget*³³⁵

As a result of a serious car accident John Gadget suffers from a posttraumatic frontal brain syndrome with epilepsy. He lost his job and in the end also his house. John is now homeless and starts to develop a serious alcohol problem. He spends his days in the streets, drinking, uttering aggressive speech and causing a lot of annoyance to his environment. One day John is arrested and brought to court. The public prosecutor wants him to be sentenced under the special regime for 'repeat petty-offenders' to two years imprisonment because of a long list of minor offences he has committed and because of the probability of recidivism. Gadget's lawyer argues by contrast that Gadget should receive adequate treatment in terms of healthcare, rather than be imprisoned. He moreover asserts that because there is no adequate care available in prison, recidivism is even more likely if John is sentenced to 'naked imprisonment'. He is sure that John's psychological situation will rapidly deteriorate if he does not get treatment.

In this case settled law allows the judge the discretionary power to identify, weigh and balance the relevant considerations when deciding whether to apply the regime for repeat petty-offenders or not. He also has discretion in how to weigh the fact that prison cannot offer John the treatment he needs. If the judge as part of his professional responsibility takes Rawls' principles of justice as his guide these will fail to offer him any direction: the judge can decide one way or the other. Neither do these principles show that certain facts that characterize Gadget's concrete position are of particular importance for the decision to be made. From the viewpoint of justice it is for instance indifferent whether the judge is sensitive to the argument that prison has no adequate treatment to offer.

If the judge decides that treatment is not a necessary condition for imposing the repeat petty offender-regime and if he sentences John to two years of imprisonment, this decision lacks a justificatory ground -by the same token another judge could have decided differently-. Moreover, from the viewpoint of the concerns that Rawls' theory aims to address -to provide for citizens' legitimate claims as both 'noumenal' and as 'phenomenal' creatures- such a decision may come with a genuine moral loss. That is, John will be sanctioned in a way that does not reflect his standing as a citizen with equal dignity -the sanction is 'more severe' than can be explained by the seriousness of his crimes-. Such a decision reflects that John's interests as a citizen who -if anything- is in need, are sacrificed for the good of his fellow citizens, even if this may be fatal for his chances to lead a human dignified life.

This case illustrates that Rawls' viewpoint of justice proves to be too under-determinate to function as final commensurans and to warrant a reliance on legal commensurability. It does not offer the necessary guidance so as to secure that citizens' dignity will be genuinely

³³⁵ For the discussion of this case I took inspiration from: Rechtbank Maastricht, May 29 2007, ECLI:NL:RBMAA:2007:BA7011; Rechtbank Utrecht, December 23 2005, ECLI:NL:RBUTR:2009:BL0134; Hoge Raad, March 24 2009, ECLI:NL:HR:2009:BH1451; Rechtbank Leeuwarden, November 10 2005, ECLI:NL:RBLEE:2005:AU5923.

honoured where the determination of their legal rights and duties is concerned. Hence, although fully in accord with Rawls' principles of justice, the resulting decision does not fit well with the moral reassuring picture that a stabilizing approach to adjudication presents us.

The case of *Melvin Bates*³³⁶

Melvin is a boy of sixteen who has lived in the streets since he was twelve. Later he was put in a residential school for male juvenile delinquents, a school well known for its extremely strict regime. When Melvin left this school after three years, he was home- and jobless. He soon supported himself by aggressively robbing supermarkets and casinos, threatening the employees with a gun, a knife or an axe.

Melvin was caught and brought to court. The public prosecutor requests the judge to sentence him under adult criminal law. He supports this request by a declaration of a psychiatrist stating that Melvin has never learned to emotionally attach himself to others and that he has a violent personality that makes recidivism very likely. He also refers to the fact that some of the victimized employees have been seriously traumatized by the extreme violence that Melvin used.

Melvin's lawyer emphatically asks the judge not to try Melvin under adult law. He pleads that Melvin must receive adequate treatment befitting his age and his age related needs, as he had an extremely traumatic and violent childhood. He also argues that the residential school has focussed solely on discipline and structure and did not teach its pupils how to socialize and deal with real life situations. At this school Melvin had structurally learned to repress his emotions instead of learning how to cope with them. The lawyer corroborates this claim by submitting empirical research on (the detrimental effects of) the regime of this particular school. He asks for a decision that is sensitive to Melvin's needs as he is still a minor, a decision that would open a perspective on a 'normal' life in the future.

In this case the law allows the judge considerable leeway to assess whether Melvin Bates must be tried under adult law. According to settled law the judge must take a decision on the basis of the extremity of the deeds, the personality of the defendant and the likeliness of recidivism. If a judge aims to decide in accord with justice, he will not get any guidance from Rawls' principles of justice. How he should assess and weigh all the facts, is from the viewpoint of Rawls' principles up to him -except for the formal demands of the rule of law-.

³³⁶ For this case I have drawn on the following cases: Rechtbank Amsterdam, May 7 2010, ECLI:NL:RBAMS:2010:BM3738; Hoge Raad, 22-11-2005, ECLI:NL:HR:2005:AU3887; Rechtbank Leeuwarden, October 20 2005, ECLI:NL:RBLEE:2005:AU4637; Rechtbank Amsterdam, April 4 2009, ECLI:NL:RBAMS:2009:BH1795. In the latter case a sixteen years old juvenile delinquent was sentenced to twenty years imprisonment for a brutal murder. In the sentence the judge considered the calculating attitude of the accused.

From this viewpoint and on the basis of the relevant psychiatric reports the judge may come to the conclusion that Melvin is unfit for penitentiary measures for juveniles that aim for rehabilitation and resocialisation, because his personality is 'beyond repair'. The judge may also assign considerable weight to the fact Melvin lacks any vocational training and does not have a home and argue that these facts make the chances of recidivism quite high, which points to sentencing in accord with adult law. From the viewpoint of justice -other things equal- and in accord with these considerations the judge may decide that Melvin must be sentenced to twelve years imprisonment.

At the same time and again: if we take Rawls' (Aristotelian and egalitarian) concerns seriously such a judicial decision is troublesome. If the value of equal dignity indeed means that citizens conceived of as concrete embodied creatures should be provided an equal chance to develop and realize their moral powers at least up to a certain threshold level, we cannot but hold that Melvin has not received such an equal chance. The decision to sentence Melvin to twelve years imprisonment increases the influence of the hardships that Melvin suffered beyond his fault rather than to diminish and compensate for it.³³⁷ The decision, although fully in accord with justice, implies that Melvin is 'given up'.³³⁸ But, given the fact that Melvin has never had an opportunity to develop his moral personality, this boils down to a genuine moral loss. This all the more so because another judge could well have made another decision by using his discretionary power differently: he could have seen Melvin as someone who deserves a chance, as someone "who deserves' to be seen as a kind of victim of life, one who did not get the support that life should have provided."³³⁹

Again, what these cases show is that Rawls' viewpoint of justice gives judges a legal license to make rather 'free' choices. It grants them strong discretion, for instance in deciding whether to apply and how to interpret valid or settled law, and how to substantiate open and vague legal norms, also when substantive interests of citizens

³³⁷ Cf. Nussbaum, Martha C., 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility', *Boston Review*, February/ March (1998).

³³⁸ As the examples are drawn from Dutch jurisprudence, in this regard it is of interest that the Committee on the Rights of the Child would like the Netherlands to sentence juvenile delinquents in accord with adult law. Cf.

<http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-NLD-CO3.pdf>.

See for a brief discussion of the sentencing of juvenile delinquents in the Netherlands: Doek, Jaap, 'De Jeugdige Delinquent: Toepassing van het Strafrecht voor Volwassenen en het IVRK', *Tijdschrift voor Familie- en Jeugdrecht* 5 (2001).

³³⁹ Cf. Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

are at stake. The under-determinacy of justice allows for judicial decisions that from a moral point of view are to some extent unintelligible because they cannot be reduced to the principles of justice, possibly arbitrary and perhaps also leading to a genuine moral loss.

3 Conclusion

The argument pursued in this chapter is that contrary to Rawls' own idea about the practical bearing of his principles of justice, these principles lead to residues of justice. These residues are situations in which citizens, other than due to negligible incidents, suffer a genuine moral loss that is sometimes due to arbitrary exercise of state-power. We have seen that even if all requirements of justice are fulfilled, these principles do not lead to a morally harmonious and transparent political order. A fully 'just' political order is (still) messy, painful, unintelligible and causing genuine moral losses. It was argued that the reasons for this are that Rawls' viewpoint of justice can be internally conflicted, is conceptually poor and under-determinate.

Through a discussion of concrete legal cases I showed how each of these reasons and the resulting residues of justice bear on the practice of adjudication. We saw that due to these residues Rawls' viewpoint of justice in any case cannot do the work that is necessary for the establishment of legal commensurability and hence it cannot ground a stabilizing approach to adjudication. Rawls' viewpoint of justice lacks the characteristics of a commensurans: it lacks sufficient action-guiding force because it is sometimes internally conflicted and under-determinate and it misses 'representative adequacy' due to its conceptual poorness. So, if a legal order and adjudication fully comply with his demands of justice, this practice will still be morally troublesome, messy, arbitrary, unpredictable and to some extent unintelligible. Rawls' theory of justice does not warrant a morally reassuring picture of adjudication. It does not bring the 'victory' of moral theory over the troublesome phenomenology of adjudication.

“ [...] Experience does not help [...] to escape the precept of theory, but it most only helps [...] to learn how theory could be better and more generally put to work, after one has adopted it into one’s principles.”³⁴⁰

“A political community has “good living” as its point, not just possessions and not just mere sustenance [...].”³⁴¹

6 The Fragility of Justice III. Nussbaum’s Capabilities Approach solving Rawlsian residues and stabilizing adjudication

1 Introduction

The previous chapter concluded that Rawls’ theory of justice does not warrant a stabilizing approach to adjudication.³⁴² This is of course not to say that a stabilizing approach as such is unfounded; there might be a better theory of political morality available that does warrant a reliance on legal commensurability and therefore also a stabilizing approach to adjudication.

In this chapter I make a case for the claim that Martha Nussbaum’s theory of justice, her Capabilities Approach, is indeed a stronger candidate to validate a stabilizing approach to adjudication.

Similar to Rawls, Nussbaum’s Capabilities Approach aims to secure that each and every citizen can live a life in accord with dignity. But the principles of justice that her theory offers are better suited to realize this goal. They bring the practical world to a larger degree under the control of reason and thus they can prevent some of the Rawlsian residues of justice to occur. This residue-solving potential also bears on the moral character of adjudication.

The structure of this chapter is as follows: first I offer an introduction to Nussbaum’s theory of justice and to her conception of adjudication. Subsequently, I discuss two

³⁴⁰ Kant, Immanuel, *Practical Philosophy*, ed. Guyer, Paul and Wood, Allen W., trans. Gregor, Mary J., The Cambridge Edition of the Works of Immanuel Kant (New York: Cambridge University Press, 1996), 290.

³⁴¹ Nussbaum, Martha C., 'Aristotle on Human Nature and the Foundations of Ethics', in *World, Mind and Ethics*, ed. Altham, J. and Harrison, R. (Cambridge: Cambridge University Press, 1995), 7.

³⁴² Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 177.

reasons as to why Nussbaum's theory can prevent some of the Rawlsian residues to occur and how this works out for the moral character of adjudication. Or to put it differently: I will show how Nussbaum's theory of justice can make adjudication more stable. I end this chapter with a conclusion.

2 Nussbaum's justice. Aristotelian with a Kantian twist (or addressing the needs of empirically situated citizens)

Nussbaum presents her Capabilities Approach as an amendment to Rawls' theory of justice.³⁴³ As did Rawls, she provides for a set of principles of justice "that should be respected and implemented as a bare minimum of what respect for human dignity requires."³⁴⁴ According to Nussbaum her principles are better suited for this task than Rawls' principles.

The fundamental mistake that Nussbaum identifies in Rawls' theory is that it deduces its viewpoint of justice from the wrong conception of personhood. It is based on an untenable dichotomy between personhood and animality.³⁴⁵ That is, Rawls' conception is cut off from the empirical, animal and situated dimensions of human life.³⁴⁶ The actual needs of human beings as empirical and situated creatures are treated as mere corollaries of moral personality that do not deserve any special attention, at least not from a moral point of view.³⁴⁷

Nussbaum explains Rawls' mistake by his main sources of inspiration, i.e. Kant's moral philosophy and the philosophies of social contract theorists like Hobbes and Locke.³⁴⁸ Nussbaum thinks that these philosophers have in common that they also are not sufficiently responsive to the embodied, needy, animal nature of a life in accord with dignity.

So, due to his mistaken conception of the person Rawls ends up with the wrong

³⁴³ Ibid., 6-10.

³⁴⁴ Nussbaum, Martha C., 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', *Journal of Legal Studies* XXIX (2000), 5.

³⁴⁵ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxiii.

³⁴⁶ Cf. ———, *Women and Human Development. The Capabilities Approach*, 72-73.

³⁴⁷ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 132.

³⁴⁸ Cf. Ibid., 35-54, 107-109; ———, *Creating Capabilities: The Human Development Approach*, 84-88.

conception of justice, Nussbaum argues. To infer the legitimate claims of actual citizens from the idea of a rational, independent human being is to put the horse behind the cart. Rather than actually securing the conditions under which citizens can make valuable choices in the central domains of their lives, Rawls offers principles of justice that are only of value if these conditions are already fulfilled. Hence, in a just society citizens will still end up unequally positioned where their chances to lead a humanly dignified life are concerned. Nussbaum holds that this is not what justice should justify, but rather should prevent.

In contrast to Rawls, Nussbaum sets off with a conception of the person as in essence an enmattered, vulnerable and temporal being.³⁴⁹ That human beings are “capable and needy” is a phrase we regularly encounter in her work.³⁵⁰ According to Nussbaum both dimensions, capability and neediness, are constitutive elements of human dignity.³⁵¹ Human dignity would be lost without the dimension of capability, but it would also be lost without the peculiar neediness that characterizes human life.³⁵² Nussbaum’s idea of human dignity thus points to a complex and dialectical relation between neediness and potentiality as essential for living a humanly dignified life.³⁵³ Nussbaum’s conception of the person is intimately linked to her discussion of ‘basic capabilities’.³⁵⁴ They are the set of potentialities that all human beings share -save for some extreme cases- in which the dimensions of neediness, vulnerability and ability

³⁴⁹ This conception of moral personality also implies that there is no dichotomous distinction between human beings and animals. Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 325-405; Stark, Cynthia A., 'Respecting Human Dignity: Contract Versus Capabilities', *Metaphilosophy* 40, 3-4 (2009), 374; Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 128.

³⁵⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 221; Nussbaum, Martha C., 'Capabilities as Fundamental Entitlements: Sen and Social Justice', *Feminist Economist* (2003), 54.

³⁵¹ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxvii.

³⁵² *Ibid.*, 2.

³⁵³ *Ibid.*, 52, 62, 223, xxiii.

³⁵⁴ ———, *Creating Capabilities: The Human Development Approach*, 22, 23, 28; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 278.

come together.³⁵⁵ They are the “innate faculties of the person that make later development and training possible”, such as the capability of thought, of perception, movement and speech.³⁵⁶ These basic capabilities imply that human beings are in need of “rich kinds of life activities.”³⁵⁷ This is not something we may ignore. Rather to the contrary, in Nussbaum’s theory the basic capabilities are direct sources of moral claims: they “exert a moral claim that they should be developed and given a life that is flourishing rather than stunted.”³⁵⁸ If people lack the opportunity to develop these potentialities, then this is “premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder.”³⁵⁹ Such situations will give us “a sense of waste and tragedy”, Nussbaum says.³⁶⁰

Nussbaum’s central sources of inspirations for her conception of the person are the Greek poets³⁶¹ and Aristotle³⁶², but also John Stuart Mill³⁶³, Karl Marx³⁶⁴ and Amartya

³⁵⁵ In this regard Nussbaum states: “the only limitation is that the person has to be the child of human parents and capable of at least some sort of active striving: thus a person in a permanent vegetative condition or an anencephalic person would not be qualified for equal political entitlements under this theory.” Nussbaum, Martha C., 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism', *Political Theory* 20, 2 (1992), 228. See also: Nussbaum, *Creating Capabilities: The Human Development Approach*, 24.

³⁵⁶ Nussbaum, *Creating Capabilities: The Human Development Approach*, 24.

³⁵⁷ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 221; ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 54.

³⁵⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 374.

³⁵⁹ *Ibid.*, 347.

³⁶⁰ ———, *Women and Human Development. The Capabilities Approach*, 83.

³⁶¹ ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

³⁶² Cf. ———, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism'; ———, *Women and Human Development. The Capabilities Approach*; Nussbaum, Martha C., 'Nature, Function, and Capability: Aristotle on Political Distribution', in *Working Paper, UNU-Wider* (1988); ———, 'Non-Relative Virtues: An Aristotelian Approach', in *The Quality of Life*, ed. Nussbaum, Marta C. and Sen, Amartya (Oxford: Oxford University Press, 1993); Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 125-146.

³⁶³ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 129; ———, *Women and Human Development. The Capabilities Approach*, 141-142; ———, *Frontiers*

Sen,³⁶⁵ all of them philosophers who have also largely drawn on the work of Aristotle. In her account of why empirically embodied creatures such as human beings do in fact have dignity Nussbaum also refers to the concept of *awe* as it figures in the works of the Greek poets and in Aristotle's ethical and political philosophy.³⁶⁶ In this Greek tradition, "[w]e see the person as having activity, goals, and projects -as somehow awe-inspiringly above the mechanical workings of nature, and yet in need of support for the fulfilment of many central projects", she says.³⁶⁷

Nussbaum also draws on the Greek tradition for the moral bearing she assigns to dependency and neediness as dimensions of a state of being that by itself gives rise to moral claims. The notion of suffering as it is conveyed by the Greek tragedies and accommodated for in Aristotle's work thereby plays an important role. In the Greek tragedies this suffering gives rise to pity and anger and in a rather immediate way calls for moral effort. According to Nussbaum we can for instance learn from Greek tragedy that "pity means action: intervention on behalf of the suffering, even if it is difficult and repellent. If you leave out the action, you are an ignoble coward, perhaps

of Justice: Disability, Nationality, Species Membership, 87-89, 159; ———, *Creating Capabilities: The Human Development Approach*, 127-128.

³⁶⁴ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 74; ———, *Women and Human Development. The Capabilities Approach*, 72-73.

³⁶⁵ Nussbaum, *Women and Human Development. The Capabilities Approach*, 11-15; Sen introduced his version of the Capabilities Approach in the early 1980. He presented the capabilities as the right metric for the comparative assessment of the quality of life. Sen's and Nussbaum's elaboration of the Capabilities Approach differ, but they mutually influenced each other. ———, *Women and Human Development. The Capabilities Approach*, 11; Robeyns and Brighthouse, 'Introduction: Social Primary Goods and Capabilities as Metrics of Justice', 3-6.

³⁶⁶ Nussbaum does not assign a conception of dignity to Aristotle. In the revised edition of the *Fragility of Goodness* she sternly criticizes Aristotle for the absence in his work of "any sense of universal dignity and a fortiori of the idea that the worth and dignity of human beings is equal." Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xx.

³⁶⁷ ———, *Women and Human Development. The Capabilities Approach*, 73.

also a hypocrite and a liar. If you help, you have done something fine.”³⁶⁸

This aspect of being a capable and needy creature does not merely give rise to moral, pre-political claims. In Nussbaum’s political philosophy they are the direct ground for political entitlements, for basic claims of justice, at least in the context of a nation.³⁶⁹

Again drawing on Aristotle, Nussbaum holds that it is the task of governments to ensure that citizens can lead a flourishing life.³⁷⁰ Governments must provide citizens “the conditions that are needed to flourish, to further develop their basic capabilities.”³⁷¹

In order to determine more precisely what the value of equal human dignity implies for the concrete rights and duties of citizens, Nussbaum uses a ‘narrative method’ which she also qualified as ‘internal realism’.³⁷² A defining mark of this method is that

³⁶⁸ ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxvii.

³⁶⁹ The conceptual and practical link that Nussbaum construes between on the one hand the pre-political entitlements to which the basic capabilities give rise and on the other hand the political entitlements is problematic. Not in the least because this link is only very briefly touched upon. The most straightforward answer as to why the mere fact that people have certain needs and potentialities generates claims of justice can be found in Nussbaum’s discussion of Aristotle’s ethical and political philosophy, more specifically in his view on the task of government. According to Aristotle this task is to secure for citizens the necessary conditions to lead a flourishing life. Cf. ———, ‘Nature, Function, and Capability: Aristotle on Political Distribution’, 20; ———, ‘Aristotle on Human Nature and the Foundations of Ethics’, 119. See for a critique on Nussbaum’s argument in this regard also: Düwell, Marcus, ‘Nussbaum, Capabilities en de Waardigheid van Dieren’, *Filosofie & Praktijk* 4, 27 (2006), 36; Claassen, Rutger and Düwell, Marcus, ‘The Foundations of Capability Theory: Comparing Nussbaum and Gewirth’, *Ethical Theory and Moral Practice* April (2012).

³⁷⁰ Nussbaum, *Creating Capabilities: The Human Development Approach*, 126.

³⁷¹ *Ibid.*, 128, 168.

³⁷² ———, *Women and Human Development. The Capabilities Approach*, 15; ———, *Creating Capabilities: The Human Development Approach*, 11, 81. In particular in her earlier work Nussbaum characterizes her method by referring to Hilary Putnam’s ‘internal realism’. According to Nussbaum this internal realism in turn resembles an Aristotelian dialectic in the sense that the aim of an internal realist is “to preserve the greatest number and the most basic ‘appearances’ -human perceptions and beliefs- on the subject.” According to her Aristotle is an ‘internal realist’. Cf. ———, ‘Human Functioning and Social Justice: In Defense of

it gives a prominent role to shared self-understandings of concrete situated human beings. In accord with Aristotle's dialectical method Nussbaum takes on board a wide range of imaginative understanding and embedded knowledge about what we deem crucial for the kind of beings that humans are. Nussbaum's account of justice is the result of many years of cross-cultural research and discussion, supported by empirical research on (indicators for) human flourishing, drawing on works of art and literature and on real life stories.³⁷³ The central question to be answered is what people must be able to do and be in order to lead a flourishing life, a life in accord with one's dignity.³⁷⁴

Having such an evaluative question at its core, it is not surprising that this 'narrative method' is a highly evaluative endeavour right from the start.³⁷⁵ It does not lead to a value neutral observation of human nature.³⁷⁶ Nussbaum states: "to find out what our

Aristotelian Essentialism'; ———, 'Aristotle on Human Nature and the Foundations of Ethics'. See for the term 'internal realism': Putnam, Hilary, 'Realism and Reason', *Proceedings and Addresses of the American Philosophical Association* 50, 6 (1977). Following Rawls, in her later discussions of the Capabilities Approach Nussbaum has also defended her list of Central Human Capabilities as the outcome of a 'reflective equilibrium' and also as the object of an 'overlapping consensus'. Cf. Nussbaum, *Women and Human Development. The Capabilities Approach*, 76, 151, 101; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*; ———, *Creating Capabilities: The Human Development Approach*, 77, 79. It is, however, not so clear how all these methods and justifications are connected. See for this critical point also: Claassen and Düwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth', 494-501.

³⁷³ In the use of concrete examples and narrative also lies a clear contrast with Rawls' Theory of Justice. The latter can be characterized by a total absence of concrete examples or narrative. Nussbaum, *Creating Capabilities: The Human Development Approach*, 11, 80; Nussbaum, Martha C., 'Aristotelian Social Democracy', in *Liberalism and the Good*, ed. Bruce, R. Douglass, Gerald, M. Mara, et al. (New York: Routledge, 1990), 217.

³⁷⁴ Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 4; ———, *Creating Capabilities: The Human Development Approach*, 18, 66.

³⁷⁵ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 366; ———, *Women and Human Development. The Capabilities Approach*, 83.

³⁷⁶ Nussbaum, *Creating Capabilities: The Human Development Approach*, 28.

nature is, seems to be one and the same as to find out what we deeply believe to be important and indispensable.³⁷⁷ Thus this narrative method must clearly be distinguished from methods that have deductive, analytical or abstract reasoning as their main instrument to arrive at moral knowledge. In this inquiry facts and value are inextricably linked. The concept of dignity is not defined prior to an understanding of what people should be able to do and be. Rather, this value gets its actual contour by answering this question.³⁷⁸

Nussbaum presents a list of ten Central Human Capabilities as the tentative outcome of this narrative method.³⁷⁹ This list offers a description of what citizens are entitled to by the mere fact of being a capable and needy creature, a creature with a range of potentialities in a gamut of spheres of life. The list describes what citizens should be able to do and be in the central spheres of life so as to be able to lead a humanly *dignified* life.³⁸⁰ This list is emphatically open-ended: Nussbaum welcomes new insights about elements that are possibly redundant or missing in her account of dignity and justice.³⁸¹ The list of Central Human Capabilities reads as follows³⁸²:

³⁷⁷ ———, 'Aristotle on Human Nature and the Foundations of Ethics', 106.

³⁷⁸ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 162.

³⁷⁹ ———, *Creating Capabilities: The Human Development Approach*, 33. Precisely by offering a list Nussbaum's Capabilities Approach differs from that of Amartya Sen. Sen is reluctant to identify a list because of his epistemological concern that such a list might not be warranted without knowing the context of its use. Sen also criticizes the attempt to use philosophical principles as an underpinning for public reason by arguing that this would limit the domain of public reason too much. Sen, Amartya, 'Elements of a Theory of Human Rights', in *Philosophy & Public Affairs* (2004), 333. See for Nussbaum's discussion of Sen's Capabilities Approach: Nussbaum, Martha C., 'Tragedy and Human Capabilities: A Response to Vivian Walsh', *Review of Political Economy* 15, 3 (2003), 33-59; Nussbaum, *Women and Human Development. The Capabilities Approach*, 11-15; ———, *Creating Capabilities: The Human Development Approach*, 19-20.

³⁸⁰ Here also we see a strong Aristotelian strand in Nussbaum's theory. She develops the list of capabilities thereby drawing on Aristotle's virtue-ethics who came up with his list of virtues when answering the question "what is it to choose and respond well within that sphere"? Nussbaum, 'Non-Relative Virtues: An Aristotelian Approach', 245.

³⁸¹ ———, *Women and Human Development. The Capabilities Approach*, 77. ———, *Creating Capabilities: The Human Development Approach*, 108.

1. LIFE. Being able to live a human life of normal length to the end; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. BODILY HEALTH. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. BODILY INTEGRITY. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. SENSES, IMAGINATION AND THOUGHT. Being able to use the senses, to imagine, think and reason and to do these things in a "truly human" way, in a way informed and cultivated by an adequate education, including, but by no means limited to, literacy, basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. EMOTIONS. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. PRACTICAL REASON. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection of liberty of conscience and of religious observance.)
7. AFFILIATION. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation and also means protecting the freedom of assembly and of political speech.)
B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. OTHER SPECIES. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. PLAY. Being able to laugh, to play and to enjoy recreational activities.
10. CONTROL OVER ONE'S ENVIRONMENT. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protection of

³⁸² Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76-78.

free speech and association.

B. Material. Being able to hold property (both of land and of other goods) and to have property rights on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being; exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Nussbaum presents this list as a partial account of social justice that is to be guiding for the central concerns of a constitutional democracy.³⁸³ Each and every citizen must be secured each and every capability on the list up to an adequate threshold level. If a citizen structurally ends up below the threshold level of one of the capabilities on the list, “this should be seen as a situation both unjust and tragic, in need of urgent attention -even if in other respects things are going well.”³⁸⁴

The Central Human Capabilities thus function as rights in the classical sense of the word: they grant people “justified and urgent claims to certain types of urgent treatment, no matter what the world around them has done about that.”³⁸⁵ Here we find a salient Kantian element in Nussbaum’s theory. Drawing on Kant’s moral philosophy Nussbaum holds that each and every citizen is to be treated as an end in himself, as a bearer of rights regardless of his social positions and all other kinds of empirical factors.³⁸⁶ So, in spite of the fact that from a moral point of view the person is vulnerable and dependent, this is not to deny that each person has fundamental rights that can be invoked against and trump other concerns of society. Therefore, similar to Rawls’ principles of justice, the Central Human Capabilities can also be compared to Kant’s categorical imperatives in that they have priority over all other pressing considerations, including for instance the protection of the interests of groups.³⁸⁷ As Nussbaum states: “the person not the group, is the primary subject of political justice, and policies that improve the lot of a group are to be rejected unless

³⁸³ ———, *Women and Human Development. The Capabilities Approach*, 75.

³⁸⁴ *Ibid.*, 71.

³⁸⁵ ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 40.

³⁸⁶ ———, *Creating Capabilities: The Human Development Approach*, 18; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 70; ———, *Women and Human Development. The Capabilities Approach*, 69.

³⁸⁷ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 119.

they delivered the central capabilities to each and every person.”³⁸⁸

Nussbaum moreover stresses that the list describes a set of ‘combined capabilities’, which are in turn constituted by both internal and external capabilities.³⁸⁹ Where the former point to certain developed states of persons in their emotional, intellectual and cognitive capacities, the latter have to do with the opportunities that a specific external context offers to someone who actually has the relevant internal capabilities. For instance, a child can be perfectly able to learn to play a musical instrument, but if it is not provided an instrument and training it will lack the external capability to actually learn to play music. Or, drawing on the famous example of Amartya Sen, without well-adapted public spaces a physically disabled citizen will experience genuine obstacles to freely move around.³⁹⁰ Whether a society honours the demands of justice depends on how well it secures the conditions needed if citizens are to have these combined capabilities at least up to an adequate threshold level.³⁹¹ The focus is thus on outcomes, not on procedures. “Justice is in the outcome and the procedure is a good one to the extent that it promotes this outcome”, Nussbaum says.³⁹²

³⁸⁸ Dworkin, Ronald, 'Rights as Trumps', in *Theories of Rights*, ed. Waldron, Jeremy (Oxford: Oxford University Press, 1984); Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 216. Here we can identify a Kantian element in the Capabilities Approach. All citizens should be treated as ends in themselves and no one may be sacrificed for the common good or the good of others.

³⁸⁹ Nussbaum, *Women and Human Development. The Capabilities Approach*, 84-85; ———, *Creating Capabilities: The Human Development Approach*, 20-21.

³⁹⁰ Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 12, 13; ———, *Creating Capabilities: The Human Development Approach*, 24.

³⁹¹ So, focusing on a threshold level of capabilities Nussbaum’s theory of justice is sufficientarian; it does not have distributive implications for the situation that all citizens have realized this threshold level. Nussbaum, *Creating Capabilities: The Human Development Approach*, 40.

³⁹² *Ibid.*, 95-96. Nussbaum makes the comparison with a top-cook who aims to convince his guests about the quality of the pasta he makes by referring to the tremendous quality of the pasta machine. By contrast, “[t]he outcome theorist says, the guests want to taste the pasta and see for themselves.” ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 82-84.

Thereby it is important to note that the capabilities on the list form an intimately related and coherent set of constituents for a life in accord with dignity. Nussbaum insists that they must be seen as separate elements of what constitutes human dignity. They are valuable by and in themselves; a loss regarding one capability cannot be compensated for by gain regarding another.³⁹³ The Capabilities Approach does not allow for trade-offs and balancing where the protection of the threshold level of each and every capability is concerned.³⁹⁴

At the same time Nussbaum assigns a special status to two of the capabilities. Affiliation and practical reason play an “architectonic” role.³⁹⁵ The idea is that these capabilities are assumed in all other capabilities on the list. This means that all areas and aspects of human life that find expression in the Central Human Capabilities must be permeated with the dimensions of choice and sociability if a life is to have dignity. Here we find another strong Kantian element in Nussbaum’s theory in the sense that respect for choice is to be secured in all areas of life. As Nussbaum states: “Part of this respect will mean not being dictatorial about the good, at least for adults and at least in some core areas of choice, leaving individuals a wide space for important types of choice and meaningful affiliation.”³⁹⁶

So, although Rawls’ theory may share the same actual concerns, Nussbaum holds that her conception of justice has a better chance of actually addressing these concerns. This because it starts with an empirically more realistic conception of the person. As a consequence the resulting principles of justice, the Central Human Capabilities, need no constant corrections or ad hoc amendments once they are applied to society, as is the case with Rawls’ theory.

To conclude this section, we could say that Nussbaum’s Capabilities Approach as a *theory* of justice claims to have the ‘best’ of two worlds. On the one hand this theory strives for the features of a theory: generality, objectivity, consistency and

³⁹³ Nussbaum, *Women and Human Development. The Capabilities Approach*, 81; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 84.

³⁹⁴ Nussbaum, *Creating Capabilities: The Human Development Approach*, 175.

³⁹⁵ *Ibid.*, 39.

³⁹⁶ ———, *Women and Human Development. The Capabilities Approach*, 69.

coherence.³⁹⁷ Similar to Rawls, Nussbaum considers her account of justice as an expression of theoretical reason rather than an articulation of what citizens happen to value in a certain place and time.³⁹⁸ The Central Human Capabilities are proposed as an objective viewpoint that is meant to have critical and aspirational potential. Nussbaum deems such a viewpoint to be necessary because citizens' actual desires and preferences may be distorted.³⁹⁹ An objective viewpoint of justice that is generated by theory can function as an important anti-dote to all kinds of irrationalities. On the other hand, the Capabilities Approach presents itself as a theory of justice that stands out because of its responsiveness to actual human experience, grounded as it is on "detailed knowledge of the variety of circumstances and cultures in which people are striving to do well."⁴⁰⁰ As a normative theory of political morality it nonetheless tries to give voice to the concerns that concrete human beings experience in their daily lives.

3 Nussbaum's conception of law and adjudication

Little has been written so far about the implications of Nussbaum's Capabilities Approach for political structures.⁴⁰¹ Nussbaum herself has focused extensively on the institutions of law and adjudication, on the latter both in the context of the Capabilities Approach as well as independently of it.⁴⁰² This section briefly discusses

³⁹⁷ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 1; ———, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour'.

³⁹⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 70, 78, 82, 181.

³⁹⁹ *Ibid.*, 279. Nussbaum stresses that convergence between the Capabilities Approach and informed desires approaches is a good thing, because this means that indeed the Capabilities Approach expresses human self-understanding.

⁴⁰⁰ ———, *Women and Human Development. The Capabilities Approach*, 69.

⁴⁰¹ ———, *Creating Capabilities: The Human Development Approach*, 179-180. The precise implications for institutions that bear responsibility for the realisation of justice and the consequences for our common understanding of these institutions is thus a field of inquiry that yet remains to be explored.

⁴⁰² In general Nussbaum has not often discussed the issue of political structure. Which private actors or public institutions are responsibility bearing institutions and to what extent, and what this implies for the workings of these institutions is an issue that she hardly addresses.

law and adjudication from the viewpoint of the Capabilities Approach, thereby offering a specification of the more general section of chapter three that discussed law and adjudication in the more general context of theories of morality.

Throughout her work Nussbaum clearly stresses that law and adjudication are crucial institutions for the realisation of citizens' Central Human Capabilities⁴⁰³, as they are two of the most important institutions that bear responsibility for the realization of justice.⁴⁰⁴ Through a system of taxation and welfare, contract-law, family law, criminal justice, educational law, environmental law and the like, the Central Human Capabilities can be served.⁴⁰⁵

Precisely because of its individualized character Nussbaum considers adjudication to be an institution that is particularly well-equipped to secure citizens' political entitlements.⁴⁰⁶ Through the piecemeal work of adjudication the abstract Central Human Capabilities can be made more specific. Judges "[...] have time to hear the entirety of a minority person's story, and their job is understood as involving the careful consideration of it in all its particularity."⁴⁰⁷ In their turn the Central Human Capabilities are to function as moral source for legally enforceable rights.

The institution of adjudication is an exception in this regard. See for a discussion of adjudication in the context of the Capabilities Approach: Dixon, Rosalind and Nussbaum, Martha C., 'Children's Rights and a Capabilities Approach. The Question of Special Priority', *Cornell Law Review* 97 (2012); Nussbaum, *Creating Capabilities: The Human Development Approach*, 166-180; Nussbaum, Martha C., *Poetic Justice. The Literary Imagination and Public Life* (Boston: Beacon Press, 1995).

⁴⁰³ Nussbaum, *Creating Capabilities: The Human Development Approach*, 180.

⁴⁰⁴ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 311.

⁴⁰⁵ Ibid.

⁴⁰⁶ ———, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 61.

⁴⁰⁷ Ibid. See for a critique on the role that Nussbaum's assigns to the judiciary in enforcing the list of Central Human Capabilities: Wood, Diana P., 'Constitutions and Capabilities. A (Necessarily) Pragmatic Approach', in *Justice and the Capabilities Approach*, ed. Brooks, Thom (Farnham: Ashgate, 2012). Wood holds that judges are ill equipped to determine in concrete cases where a threshold level of a political entitlement lies. For Nussbaum's reply to this critique see: Nussbaum, Martha C., 'Reply to Diane Wood. Constitutions and

Nussbaum thereby presents the Capabilities Approach as having highly explanatory force for actual constitutional democracies and their legal and judicial cultures. As she states: “[m]any nations by now enumerate entitlements in a way that connects them to the idea of a life worthy of human dignity [..].”⁴⁰⁸ Also, notions of dignity as Nussbaum understands it -albeit not explicitly- have played a role in jurisprudential practices in constitutional democracies.⁴⁰⁹

Nussbaum moreover identifies some clear practical implications of the Capabilities Approach for law and adjudication. One such implication is that judges must interpret the constitutional rights to which their legal orders are committed as the aforementioned ‘combined capabilities’, as a set of substantial freedoms, of modes of being and doing that should be open to each and every citizen. “The right to political participation, the right to religious free exercise, the right of free speech -these and others are all best thought of as secured to people only when the relevant capabilities to function are present. In other words, to secure a right to citizens in these areas is to put them in a position of capability to function in that area”, Nussbaum says.⁴¹⁰

This implies that the often-made distinctions between civil, political and social legal rights dissolve.⁴¹¹ According to the Capabilities Approach to secure a constitutional right, if anything, also means an investment in the social conditions that are necessary for citizens to really exercise that right. To protect civil and political rights only by non-interference is not to really secure these rights, according to the Capabilities Approach.⁴¹² Hence, assessing whether these rights are violated implies having a keen

Capabilities. A (primarily) Pragmatic Approach', *Chicago Journal of International Law* 10, 2 (2009).

⁴⁰⁸ Nussbaum, *Creating Capabilities: The Human Development Approach*, 166; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 155.

⁴⁰⁹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 156.

⁴¹⁰ ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 37.

⁴¹¹ *Ibid.* ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 286, 288-289.

⁴¹² Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 372. ———, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 434. ———, *Creating Capabilities: The Human Development Approach*, 67.

eye for “subtle impediments that stand between them and the full or equal access to the right”.⁴¹³

Next, the Capabilities Approach sees it as the professional responsibility of judges - other things equal- to interpret settled law in such a way that it maximally protects the threshold level of each of the Central Human Capabilities. These must at least function as a ‘compelling state-interest’ for limiting the (legally protected) freedom of citizens.

Finally and related to the former two implications: from the viewpoint of the Capabilities Approach imagination is a crucial quality for judges.⁴¹⁴ The Capabilities Approach “requires a particular method of interpretation, one that asks searchingly about the real opportunities and freedoms of people [...]”, Nussbaum says.⁴¹⁵ By definition judges cannot “afford to remain at the level of generality or to take refuge in an approach that is merely formalistic.”⁴¹⁶ Precisely because the Capabilities Approach focuses on what citizens are actually able to do and be Nussbaum takes great pains to argue against lofty formalism, or too cool an attitude on the part of the judiciary. Within the Capabilities Approach legal reasoning is thus not so much an analytical and detached activity, but rather boils down to a sympathetic understanding of and responsiveness to a citizen’s concrete legal case.⁴¹⁷

In this respect, Nussbaum’s conception of adjudication does not harmonize well with the rather rationalistic conception of adjudication that -as we saw earlier- characterizes normative theories of political morality and connected to this a stabilizing approach to adjudication.

Nussbaum’s focus on the competences of judges and the stress she puts on the

⁴¹³ Nussbaum, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 431.

⁴¹⁴ ———, *Poetic Justice. The Literary Imagination and Public Life*; ———, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 59.

⁴¹⁵ Nussbaum, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 410.

⁴¹⁶ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 176.

⁴¹⁷ Of course, this attention for the particular case is intimately linked with the conception of the person on which justice is grounded.

adequate discernment of the particulars of a legal case, may at the outset even suggest a full-fledged virtue-ethical approach to adjudication. Yet, this is mere appearance, as in the end the Central Human Capabilities offer the final background principles for the legal system, adjudication included. Within the Capabilities Approach adjudication is a principled practice. The judge must bring a vast and explicit set of principles of political morality to bear on a legal case, i.e. the Central Human Capabilities. In this sense the Capabilities Approach does fit with a reliance on legal commensurability. For in the end in the Capabilities Approach the justification and explanation of judicial decisions rests on a final measure offered by the Capabilities Approach itself.

That is, at pains of giving up on the primacy of theory that characterises the Capabilities Approach, in determining citizens' concrete legal rights and duties the judge must let himself be guided in his interpretation of settled law by the Central Human Capabilities above all, rather than by anything else. These are to function as a final commensurans, as a prior and independent measure that not only has guiding force for the judge, but that is also assumed to exhaustively enumerate the interests that may be at stake. Hence, if all is in place in society, within the Capabilities Approach adjudication is construed as a 'principled' institution that is highly transparent, intelligible and only incidentally the source of genuine moral loss. So conceived, Nussbaum's conception of adjudication does qualify as a version of stabilizing approach to adjudication.

4 Solving some of Rawls' residues, making adjudication more 'stable'

4.1 Conceptual richness

One reason why Nussbaum's Capabilities Approach can solve some of the residues of justice that Rawls' theory of justice allows for or generates is that to some extent it can solve the latter's 'conceptual poorness'. In the previous chapter we saw that Rawls' principles of justice exclusively focus on the primary social goods, i.e. liberties, income, wealth, opportunities, and the social basis of self-respect, as metric for justice. We also saw that as a consequence justice by itself does not offer the concepts that can secure that in practice citizens will also be able to convert these goods into valuable functioning. Because of its exclusive focus on the distribution of primary social goods, Rawlsian justice is unable to detect the serious obstacles that citizens may experience in using these goods in a valuable way.

By contrast Nussbaum's Capabilities Approach does offer a metric of justice that is relatively 'rich' in that its concepts are better suited to identify and address citizens' 'needs' when it comes to their capacity to convert the primary social goods into valuable functioning.⁴¹⁸ There are three reasons for qualifying this list as conceptually rich. First, as we saw above, to put the concept of a 'capability' at the heart of justice indicates that the central question to be asked when determining the concrete rights of citizens necessarily focuses on what they are *really* able to do and be. This implies that a just society will be highly sensitive to the concrete position of individuals. Justice will secure a highly individualized tailoring to the specific needs and endowments of citizens and to all other kinds of factors that influence their chances to function well, i.e. to use the primary goods in a valuable way.⁴¹⁹ By the mere fact of employing the concept of 'capability', the Capabilities Approach imports empirical realities as part and parcel of reasoning about justice. Justice is not merely to be

⁴¹⁸ In this discussion I largely draw on the insights gained from the debate between resourcist theorists and capability theorists and it will be clear that I take side with the latter. If the aim of this book was to offer an exhaustive discussion of Nussbaum's Capabilities Approach compared to Rawls' theory of justice, then an in depth study would be needed for all kinds of arguments on both sides. However, due to the scope of this book I limit myself to simply pointing out that there are strong reasons to prefer the Capabilities Approach above Rawls' theory. But this is not to suggest that Nussbaum's Capabilities Approach cannot be put in critical perspective. Such a more critical perspective of the Capabilities Approach I offer in the subsequent chapter. See for crucial contributions to the resources versus capabilities debate: Pogge, Thomas, 'Can the Capabilities Approach be Justified?', *Philosophical Topics* 30, 2 (2002); Anderson, Elisabeth, 'Justifying the Capabilities Approach to Justice', in *Measuring Justice: Primary Goods and Capabilities*, ed. Brighouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010); ———, 'What is the Point of Equality?', *Ethics* 109, 2 (1999); Daniels, Norman, 'Equality of What: Welfare, Resources, or Capabilities?', *Philosophy and Phenomenological Research* 1 (1990); See for a clear overview of this debate: Anderson, 'Justifying the Capabilities Approach to Justice'.

⁴¹⁹ This is not to deny that the Capabilities Approach allows for certain groups to be designated for the purpose of public policy and legislation. However, these categorisations are as good as they allow citizens to really flourish.

applied to practice, but it is also most directly and continuously informed by it.⁴²⁰

Citizens' rights and duties will thus be tailored in a way that allows citizens the opportunity to convert the primary goods into valuable functioning.

Second, as we also saw above, the list of Central Human Capabilities is a list of *combined* capabilities, indicating that justice is sensitive to all kinds of conditions that are needed for the development of an internal capability, as well as for the conditions under which external capabilities can be guaranteed. A just society therefore has the task to take care of the quality of the range of practices in which internal capabilities are developed, such as the family, all kinds of educational arrangements and others kinds of practices that add to physical and emotional health.⁴²¹ Next to that, in order to secure external capabilities a state must see to it that there are no genuine external obstacles to make meaningful choices in the designated contexts. Again, this will add to the conditions under which citizens can use the primary social goods.

Third, some of the capabilities on the list, in spite of being valuable in themselves, also point to such preconditions for a valuable use of primary social goods. The capabilities of play, emotions and affiliation are cases in point.⁴²² For instance, if citizens have not been provided the capacity for play and affiliation in their childhood because of domestic violence, they may experience serious obstacles in using their liberty rights, for instance the right to family life.

In brief, where Rawlsian justice provides for a standardized package of resources meant to enable citizens to live in accord with dignity -regardless whether they really are able to do so-, Nussbaum's Capabilities Approach focuses on a range of combined capabilities and thereby does take into account citizens' actual empirical needs where their ability to lead a life in accord with human dignity is concerned.

However, before we can grant this advantage to Nussbaum's theory of justice, fairness demands that we address the critical response of Thomas Pogge to capability-theorists like Nussbaum. This because Pogge, himself a Rawlsian, puts it that they

⁴²⁰ This point is strongly connected to the fact that the metric of capabilities points to outcomes rather than to means.

⁴²¹ Nussbaum, *Creating Capabilities: The Human Development Approach*, 21.

⁴²² See for a critique on the fact that Nussbaum has selected the capability of play as giving rise to a political entitlement: Claassen and Düwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth', 496.

overstate the difference with a resourcist like Rawls.⁴²³ Although the special needs of citizens as concrete embodied creatures are not directly relevant for Rawlsian justice or other resourcist theories, according to Pogge this does not exclude the possibility that such theories will take the concerns of the capability-theorists into account. They can do so, not so much as a matter of justice, but of ‘humanity’ or ‘solidarity’.⁴²⁴ Pogge in addition refers to the primary social good of self-respect, the importance of which Rawls himself has also stressed.⁴²⁵ For Pogge the fact that this good is of central importance in Rawlsian justice indicates that there is no strict divide between a resourcist and a capabilities approach. That is, the social good of self-respect encompasses a range of social conditions that are involved in the list of Central Human Capabilities. For instance, relative differences in income between citizens can be mitigated on the basis of this social good and other kinds of practices that negatively influence citizens’ sense of self-worth may also be regulated on the ground of protecting the social good of self-respect.

Indeed, on the basis of Pogge’s analysis we have reason to consider the divide between a resourcist approach and a Capabilities Approach to justice as not so deep and wide. However, this analysis does not weaken the argument that the Central Human Capabilities offer a conceptually richer metric of justice than that of Rawls’ social primary goods. Pogge’s argument leaves the rhetorical force of Elisabeth Anderson’s point fully intact: “why choose an indirect measure, when a direct measure is available?”⁴²⁶ This point is intimately linked to an important difference between a resourcist approach and a Capabilities Approach to justice: the former focuses on means, the latter takes ends or outcomes as the metric for justice. What is more, Pogge’s argumentation leading to reducing the difference between a Capabilities Approach to justice and a resourcist approach is troublesome on some points. As to his ‘humanity’ or ‘solidarity’ argument: whether in a concrete society officials or institutions (such as members of parliament, policy-makers, the judiciary,

⁴²³ Pogge, Thomas, 'A Critique of the Capabilities Approach', in *Measuring Justice*, ed. Brighouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010), 17, 32.

⁴²⁴ *Ibid.*, 32.

⁴²⁵ *Ibid.*, 21-22.

⁴²⁶ Anderson, 'Justifying the Capabilities Approach to Justice', 89.

or the majority of citizens) will see reasons of ‘compassion’ or ‘humanity’ to address the concrete needs of citizens so as to enable them to convert the primary goods into valuable functioning, will be a matter of contingent fact. In a resourceist approach these reasons will in any case not be built into the way the central institutions (should) work. Whether these needs will be addressed will be a matter of contingent facts -for instance how sensitive a legislator actually is to reasons of humanity. The question then arises why citizens who are not served and who ‘fall below the line’, should accept the burdens stemming from that particular normative political order. Pogge’s reference to humanity and solidarity is troublesome from the viewpoint of political legitimacy, to say the least.

In addition Pogge’s arguments do not change the fact that in securing the social basis for self-respect to each and every citizen, a resourceist approach will still typically focus on formal institutional arrangements -i.e. the arrangements that in fact have authority over these resources-, even if citizens need other things for the development of their self-respect. For instance, citizens may need “group stigmas, stereotypes, oppressive discursive norms and de facto group segregation” to be tackled.⁴²⁷ To adequately address these obstacles it does not suffice to focus on formal institutional arrangements.

Hence, although the divide with Rawls’ social primary goods may be less strict than first assumed, I think we still have a reason to prefer Nussbaum’s viewpoint of justice to that of Rawls’ primary social goods, because of its conceptual richness. I will further corroborate this claim by the way Nussbaum’s Capabilities Approach deals with the position of divorced mothers as well as with the position of cognitively challenged and socio-economically weak consumers. I use these examples because these were the cases of residues of justice that I discussed in the previous chapter in the context of the conceptual poverty argument against Rawls. We shall see that Nussbaum’s Capabilities Approach can indeed overcome these residues.

As to divorced mothers: in the previous chapter I pointed out that because of its focus on primary social goods Rawlsian justice cannot identify or address the troublesome character of their position. As it is not the result of a violation of Rawls’ principles of justice, their position is accounted for in terms of procedural justice as one of the outcomes that justice permits and thence as one for which these women can be held

⁴²⁷ Ibid.

responsible. By contrast, the Capabilities Approach can rather straightforwardly both identify and address this position as an injustice because of the concepts it deploys for its metric of justice.⁴²⁸

That is, recalling the description of the position of divorced mothers, we can establish that the threshold level of a range of capabilities is in peril, for instance the ability to enter into meaningful relationships of mutual recognition with other workers, the ability to live with others, the ability to recognize and show concern for other human beings, the ability to imagine, think and reason in a truly human way, the ability to enjoy recreational activities, the capability to seek employment in a competition on an equal basis with others and the capability of practical reason. In addition, this position is also troublesome because of a serious relative inequality: compared to divorced fathers, divorced mothers often have less substantive freedom in areas of life that are constitutive for their well-being. Therefore the capability of self-respect is also endangered. Nussbaum has put this point as follows: “It takes the average divorced man only about ten months to earn as much as the couple’s entire net worth. And

⁴²⁸ One could even say that it is the vulnerable and underprivileged position of women all over the world that -among other things- has functioned as a motive for Nussbaum to construe a theory of justice. The Central Human Capabilities are -among other things- introduced as an (more) adequate conceptual framework to address the plight of women as a matter of justice. Nussbaum starts her book *Woman and Human Development* as follows: “women in much of the world lack support for fundamental functions of a human life.” Nussbaum, *Women and Human Development. The Capabilities Approach*, 1. See for Nussbaum’s defence of the Capabilities Approach in relation to women also: ———, ‘Justice for Women!’, Nussbaum, Martha C. and Glover, Jonathan, eds., *Women, Culture and Development. A Study of Human Capabilities*. (Oxford: Clarendon Press, 1995); Nussbaum, *Women and Human Development. The Capabilities Approach*. At the same time it is important to note that Nussbaum herself stresses that Rawls has made it clear in his response to Okin in ‘The idea of Public Reason Revisited’ that he shares the same concerns as to the position of women in society, in particular their role within the family. ———, *Women and Human Development. The Capabilities Approach*, 270-283; Rawls, ‘The Idea of Public Reason Revisited’; Nussbaum, ‘Rawls and Feminism’. However, although Rawls may share the same concerns, this leaves the point of conceptual poorness unaffected.

divorced men are now more likely to meet their car payments than their child support obligations.⁴²⁹

So, within the Capabilities Approach the state has as a matter of justice a positive duty to take all measures necessary to get these women above the threshold level and thus also to reduce the inequality compared to the position of divorced fathers. It provides the responsibility bearing agents such as legislators and policymakers with reasons of justice to pay special attention to the position of divorced mothers and to come up with special measures to secure the threshold level of the Central Human Capabilities for them. Family law, matrimonial law, labour law, social welfare legislation, policies that guarantee child-care facilities and all kinds of public provisions that might affect women's educational opportunities must be arranged so as to counter-balance or prevent obstacles that divorced mothers face in deploying the primary social goods in valuable way.⁴³⁰ The Capabilities Approach may even indicate that the cultural entrenchment of gender itself must be targeted, for instance by programs raising consciousness among girls at primary and secondary schools.⁴³¹ In the preceding chapter on Rawlsian residues I also discussed the precarious position of cognitively and socio-economically weak consumers on the financial service market. This position was identified as one in which residues of justice may occur. These consumers may beyond their own clear fault end up 'below' the line, experiencing genuine obstacles to lead a life in accord with their dignity. I argued that Rawlsian justice cannot prevent such residues to occur. Measures to protect this group would be disqualified as incontrovertibly paternalistic.

Conversely, because it uses the Central Human Capabilities as metric of justice the Capabilities Approach does offer reasons of justice to regulate the consumer market with a keen eye for the vulnerable position of this particular group of consumers and hence to maybe limit the freedom of contract. Justice in any case indicates that there is no ground to a priori rely on the competences of consumers to meaningfully

⁴²⁹ Nussbaum, 'Justice for Women!'.

⁴³⁰ Giullari, Susy and Lewis, Jane, 'The Adult Worker Model Family, Gender Equality and Care. The Search for New Policy Principles, and the Possibilities and Problems of a Capabilities Approach', in *Social Policy and Development Programme Paper* (United Nations Research Institute for Social Development, 2005).

⁴³¹ Olson, Kevin, 'Recognizing Gender, Redistributing Labor', *Social Politics* 9 (2002).

exercise their freedom of contract, just because they do not belong to the limited group of citizens who are clearly cognitively incapacitated. Consumer law and policies should accommodate the facts that all consumers are both capable and needy, that they are all differently situated on a continuum of capability and vulnerability and that both these dimensions are inextricably linked. Thence, respect for consumers' freedom of contract should be combined with due care for their specific vulnerabilities regarding their potential to meaningfully exercise this right.

More specifically, the Capabilities Approach for instance offers reasons of justice to identify and address vulnerabilities that stem from the relatively low internal capability of practical reason of certain groups of consumers, for instance elderly people, adolescents and people who happen to have a low intelligence. The precarious socio-economical positions of consumers may be an indication of a lack of external capability that on that account should be addressed as a matter of justice. That is, both kinds of vulnerabilities make consumers prone to exploitation and abuse by traders and to ending up below the threshold level of the Central Human Capabilities. In securing that these vulnerabilities will not lead to a consumer ending up below this threshold level, the state may provide for consumer education⁴³², for legal rules establishing duties of care for financial institutions and companies⁴³³ and for rules that authorize judges to nullify contracts if their enforcement puts a threshold level of any capability in peril.

As to the latter: the list of Central Human Capabilities thus offers substantive criteria for distinguishing between relevant harm and irrelevant harm stemming from a

⁴³² See for instance the Directorate General for Health and Consumers of the European Union that aims to promote the financial education of consumers and aims to raise the level of awareness of consumers “so that they are better equipped to make informed, considered and rational choices in financial services.” Cf.

http://ec.europa.eu/consumers/rights/fin_serv_en.htm (visited in August 2013)

⁴³³ The European Consumer Rights Directive holds a special duty of care for suppliers and traders in providing information about products. They must “take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.” See:

<http://www.nottingham.ac.uk/business/forum/documents/researchreports/paper78.pdf>

contract. If for instance the debts that flow from financial service contracts are such that the contracting citizen is likely to end up below the threshold level of one of the capabilities on the list, -other things equal- this may be a ground for a compelling state interests to not effectuate such contracts.

As all this shows: within the Capabilities Approach the regulation of the position of consumers on the financial service market requires empirical knowledge regarding the cognitive powers of the consumers in question, their background situations and the consequences of certain contracts. This information is a matter of justice and highly pertinent for the regulation of financial service markets and the concrete legal rights and duties of consumers and traders.⁴³⁴

Let me summarize: because it uses the Central Human Capabilities as a metric of justice the

Capabilities Approach can, at least to a larger degree than Rawls' theory of justice, secure that citizens can make valuable use of the social primary goods. Due to its conceptual richness the Capabilities Approach can thus solve some of the residues of justice that Rawls' principles of justice allow for.

Before concluding this section two things must be noted. First, this 'conceptual richness' argument not only works for certain well-defined large-scale groups of citizens. I singled out two groups to make felt that the Central Human Capabilities can resolve residues of justice on a rather substantial scale. But as said, the Capabilities Approach claims that it does better for each and every citizen, also for those that are not categorized or identified as members of groups with relevant special vulnerabilities. What is more, precisely because it aims to address the actual vulnerabilities of citizens, justice as the Capabilities Approach sees it, implies a kind of decision-making that is highly tailored to the individual case, at least when these needs are relevant for getting citizens above a threshold level of the capabilities on the list.

Second and related, Western constitutional democracies of course already show many public arrangements, procedures and decisions that can be seen as attempts to meet the concrete needs and vulnerabilities of individual citizens. These can be seen as

⁴³⁴ See for a (brief) discussion of Nussbaum's Capabilities Approach in relation to (European) contract law also: Hesselink, Martijn, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', *European Journal of Private Law* 3 (2007).

specifications of fundamental social rights that are regulated under the regime of administrative law. This is a domain of law that has as one of its important characteristic that it grants discretion to policy-makers precisely to enable them to adequately tailor administrative decisions to the needs of individual citizens. In this sense the Capabilities Approach has considerable explanatory force for existing 'need-addressing arrangements'. As such it can also prevent residues of justice to occur because it can anchor these arrangements by a relative articulate viewpoint of justice. Without being able to anchor them in a viewpoint of justice and hence to conceive them as specifications of fundamental claims of citizens -other things equal- these practices can only be accounted for in terms of the aforementioned unstable and vague notions such as 'humanity' and 'solidarity'. Precisely because policies and decision-making that address citizens' needs are highly particularized, the list of Central Human Capabilities can be of value by making such 'need responsive practices' more principled and less likely to be determined by arbitrary factors. The Central Human Capabilities offer the conceptual tools that can justify why existing concerns and policies are in place and even required as matters of justice. This may of course be particularly valuable in times of adverse political or economical circumstances.

4.1.1 Conceptual richness in adjudication

As said in the introduction, this chapter also claims that the potential of the Capabilities Approach to solve some of Rawls' residues bears upon the moral character of adjudication. With the Central Human Capabilities at their disposal as moral background principles of law and adjudication, legislators, policy-makers and judges are conceptually better equipped to prevent that concrete citizens end up 'below the line'. Judges interpreting and effectuating settled law may draw legal reasons from the Central Human Capabilities to settle a case one way rather than another and on this account the Capabilities Approach has a better chance to successfully support a stabilizing approach to adjudication. Its metric manifests 'representative adequacy' to a larger degree. It covers more of the interests that we want to see served in concrete cases in order to protect the value of equal dignity. If judicial decisions accord with this metric, then citizens do have an exhaustive reason to accept the burden of such a decision. They are treated as equals, with equal respect and equal concern. Below I will illustrate how this conceptual richness works out for

adjudication by discussing the legal cases I introduced in the previous chapter, cases in which the precarious position of divorced mothers and of vulnerable consumers on the financial service market are at stake.

The case of Jamie Muller

Jamie Muller was the woman who after her divorce worked as a dental assistant and lived with her three children. When her employer, the dentist, asked Jamie to work more hours and on a more flexible basis she refused because of the care that she wanted to provide for her children, including her mentally handicapped son who needed a secure, stable and regular domestic situation. Thereupon she was dismissed. Muller went to court claiming that the dismissal was unreasonable. In court she argued that her employer had not adequately balanced the interests at stake. For the dentist it would have been relatively easy to find a second assistant for the extra hours, whereas she is not able to find another job as dental assistant as her employer was the only dentist in her residential area. She also argued that losing her job would bring her family in a precarious socio-economical position, ending up below the poverty line.

In the previous chapter I pointed out that according to Rawlsian justice, in interpreting the relatively open norm of ‘reasonableness’ the judge is allowed -other things equal- to ignore Muller’s specific situation as a divorced mother, including her limited flexibility and the severe consequences of a dismissal for her and her children. By contrast, if the judge is bound to the Central Human Capabilities as background principles of law and adjudication, he must interpret the applicable law such that, among other things, an adequate threshold level of these capabilities is guaranteed for Muller as well as for her children. Protecting this threshold level will then function as a compelling state interest to constrain the freedom of the employer to determine labour arrangements.⁴³⁵ For this case this may lead the judge to conclude that the dismissal was in fact unreasonable.

The case of Bill van Dyck

Van Dyck was the elderly man of almost eighty who lived a rather isolated life and who after an agreeable conversation with a bank employee signed a contract to borrow money in order to improve the financial situation of his handicapped son. Mister Van Dyck ended up with a debt of € 20.000, because he had to repay the loan with interest to the bank. He went to court and argued that the contract should be declared void because the bank had abused his vulnerable position and violated its duty of care. He had not understood that the contract said that the bank was to invest the credit in stock. Nor had he understood that after the term of the contract had passed he could end up with a serious debt and without any stock.

In the previous chapter I argued that from the viewpoint of Rawls’ principles of justice the judge is justified to interpret the applicable law in a way that ignores Van Dyck’s actual cognitive

⁴³⁵ Cf. Nussbaum, *Creating Capabilities: The Human Development Approach*, 207.

limitations⁴³⁶ and his vulnerability because of his old age and social isolation, as well as the actual consequences of the contract. This because Van Dyck -as has been established- does not belong to the group of "scattered individuals" who lack the minimal moral powers.⁴³⁷

By contrast, Nussbaum's justice indicates that the judge is duty bound to use his discretion to specify relevant concepts such as 'average consumer', 'good faith', 'duty of care', or 'abuse of circumstances' with a keen eye for (the protection of) the threshold level of capabilities of the parties involved. In a case like this the protection of the threshold level of the Central Human Capabilities does imply a state-interest to limit the freedom of contract. So, in determining whether the bank abused Van Dyck's situation or complied with its duty of care, the Central Human Capabilities provide the judge reasons of justice to take his actual situation and his limited capacities to affiliate with others and of practical reason into account: these may not be exploited, but rather demand due care. Taking advantage of this client's vulnerabilities would amount to an abuse of circumstances. Also, Nussbaum's justice indicates that the judge should take the consequences of enforcement of the contract into account.⁴³⁸ These may in any case not be such that Van Dyck will structurally end up below the threshold level of the Central Human Capabilities. Thus, in this case the Central Human Capabilities may well offer the judge a reason of justice to declare the contract void.

The case of *Lisa Burroughs*

Lisa Burroughs, age eighteen, was the girl who under the influence of her boyfriend entered a revolving credit contract for a grand total of € 60.000, which was rather excessive relative to their budget. Not surprisingly, soon the couple failed to pay the interest. The couple broke up and in the end -according to the terms of the contract- they were jointly and severally held liable for € 85.000. Thereupon Lisa Burroughs went to court and argued that the bank had violated its

⁴³⁶ Of course, in case of severe incapacitation on the part of the consumer Rawls' principles of justice could also indicate the nullification of a contract. But as said, from a Rawlsian perspective this only holds for a limited number of categories of people who, where their legal status is concerned, more generally are assumed to be unable to take care of their own interests.

⁴³⁷ Cf. Rawls, *A Theory of Justice*, 442-443; ———, *Political Liberalism*, 302.

⁴³⁸ Cf. Hesselink, Martijn, 'Capacity and Capability in European Contract Law', *European Review of Private Law* 4 (2005), 501. Hesselink has pointed out that judges in using their discretion in fact already effectuate such more substantive notions of social justice, for instance when nullifying what they deem 'unbalanced' contracts. The Capabilities Approach can offer conceptual clarity regarding the relatively inarticulate interpretations of legal standards of 'reasonableness', 'fairness', and to legal categories such as 'own fault' (on the side of the consumer), but also of 'average consumer' that judges use in what comes down to securing a threshold level of the Central Human Capabilities.

duty of care. The bank should have informed her better about the risks of the contract, all the more so in view of her young age, her financial illiteracy and the dominance of her boyfriend at the meetings with the bank employee who had advised the couple.

Again, Rawls' principles of justice allow the judge to interpret the applicable standards while ignoring all said obstacles that Lisa experienced in making valuable use of her freedom of contract. Contrary to this, if we take the Central Human Capabilities as background principles of law and adjudication these obstacles are precisely relevant for justice. In any case the judge is duty bound to take into account her youth, her ignorance in financial matters, her being dominated and the consequences of holding her fully liable according to the terms of the contract. He should weigh these factors in view of the interest of the state to secure the Central Human Capabilities up to an adequate threshold level for Lisa. Thence, the judge may well decide not to enforce the terms of the contract and this would not be an act of unjustified paternalism. Rather, from the viewpoint of the Capabilities Approach it should be seen as a way of treating Lisa as an equal, that is, as a citizen who is both capable and needy.

At the end of the previous section I stated that the conceptual richness of the Capabilities Approach not only bears upon the position of well-defined groups of citizens. Nussbaum's Capabilities Approach aims to get each and every citizen above a threshold level of the Central Human Capabilities and this by implication indicates the availability of decision-making arrangements that address the concrete individual needs of citizens. We pointed out that the Capabilities Approach by means of its list with the Central Human Capabilities can conceptually anchor 'need responsive practices' as they already exist in Western constitutional democracies. It can make these practices more principled and reduce the risk that these practices because of being so much focused on the specific position of concrete citizens will be determined by arbitrary factors. How this added value bears on adjudication we shall see by the discussion of a fresh case.

The case of *Oswald Brinkman*⁴³⁹

Oswald Brinkman is in his mid-fifties, he lost his job five years ago because the factory where he worked went bankrupt. Because of his age Oswald has a hard time to find a new job and

⁴³⁹ For the construction of this case I took inspiration from: Centrale Raad van Beroep, July 5 2005, ECLI:NL:CRVB:2005: AT9436; Centrale Raad van Beroep, March 29 2005, ECLI:NL:CRVB:2005:AT3483, Centrale Raad van Beroep, May 20 2008, ECLI:NL:CRVB:2008:BD2365.

already for quite some time he lives on welfare. Then his father dies. Oswald lacks the financial means to pay for the funeral and he does not have any siblings. He therefore submits a request for special and incidental financial support at the social welfare agency. The policy of the welfare agency is that this support will only be granted to citizens who are on welfare and who have to make exceptional costs that are necessary for their subsistence, costs that cannot be paid out of their 'regular' welfare support. The decisions of the social welfare agencies in this field of policy are by their very nature highly tailored to the concrete facts of the case. The policy rules therefore allow for quite some room of discretion for the public officials who have to decide about these requests.

In the case of Brinkman the agency refuses the request. It does not consider the costs of the funeral as 'necessary costs'. Brinkman thereupon goes to court and argues that in similar cases citizens have been granted financial assistance, for instance for the costs of the funeral of their children. In an administrative review procedure the judge now has to decide whether the decision is lawful. He has to determine whether the funeral costs of Brinkman's father qualify as 'necessary' costs for subsistence. From a Rawlsian viewpoint such a question -save for the demands of the rule of law- will exclusively be a matter of policy. From a Rawlsian perspective it may well be that the judge as a matter of 'solidarity' or 'humanity' will qualify Brinkman's costs as being covered by the relevant criteria, of course, only if the law allows him to. However, such a decision will be a mere expression of the judge's subjective understanding of the demands of humanity or solidarity. Another judge could well arrive at another conclusion and thus arbitrariness looms.

Nussbaum's Capabilities Approach by contrast does offer the conceptual tools for the judge to make a principled decision. The Central Human Capabilities offer a viewpoint in terms of which the judge can critically assess the considerations that possibly 'naturally' arise out of his sense of humanity and solidarity. On the basis of Nussbaum's list he may come to the conclusion that he has in fact a reason of justice to decide that the costs for a decent funeral for one's father do amount to 'necessary costs for subsistence'. That is, providing for these costs can be seen as a way to secure an adequate threshold level of the capability of affiliation -which includes the possibility of mourning and grieving about loved ones-, one of the architectonic and hence most crucial capabilities on the list. If the judge rejects the request, he will in any case have to motivate why this refusal does not boil down to a violation of the threshold level of said capability and hence to a violation of a basic right of Brinkman. In this way the Central Human Capabilities enhance the intelligibility and the principled character of the decision that the judge has to make.

In brief, through the discussion of some legal cases I have tried to show how the conceptual richness of the Central Human Capabilities bears upon the moral quality of adjudication. As a normative background theory of law and adjudication Nussbaum's principles of justice can prevent some of the moral losses and relatively

arbitrary decisions that occur when Rawls' principles would be used. We could say that because of their conceptual richness the Central Human Capabilities make for a better candidate-final commensurans, at least where the requirement of 'representative adequacy' is concerned. Compared to Rawls' theory of justice, Nussbaum's Capabilities Approach warrants a reliance on legal commensurability to a larger degree and connected to this, also offers more support for a morally reassuring conception of adjudication.

4.2 Relative determinacy

In the previous chapter we saw that the definite content of Rawlsian justice is to a large degree determined by contingent or arbitrary factors, rather than by a moral point of view. This because of the 'thinness' of its concepts, i.e. the primary social goods. Because of this 'thinness' the application of justice will largely depend on the choices of the relevant responsibility bearing agents and institutions in society. These choices may violate citizen's dignity and as such they may lead to residues of justice. The Capabilities Approach can solve some of these residues because its viewpoint of justice is more determinate. The Central Human Capabilities offer more guidance to and put more constraints on the decision-making by the responsibility bearing institutions, because they are 'thicker' than Rawls' primary social goods.⁴⁴⁰ As they are to a larger degree laden with factual content, these value concepts have a stronger 'internal' relation to a wide range of situations in the world: once certain factual conditions are fulfilled, this more or less directly invokes certain reasons of justice. Hence, these concepts of justice leave less room for 'discretion' or 'freedom' on the part of agents who bear responsibility to realize justice. The establishment of facts and valuation are interdependent activities.⁴⁴¹

⁴⁴⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 280. In chapter eight I will delve deeper into the features of 'thick value concepts'. Note that the relative 'thickness' of the Central Human Capabilities is a direct result of the narrative or 'internal realistic' method that Nussbaum deployed in developing her viewpoint of justice. As we saw above, these capabilities are to be taken as the discursive expression or as the articulation of concerns that concrete human beings actually experience in their daily lives throughout history and across different cultures.

⁴⁴¹ Putnam, Hilary, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, US: Harvard University Press, 2002), 62-63.

For instance, one of the Central Human Capabilities on the list is that of play. This concept suggests a relatively well-confined constellation of facts. No extensive reflection is needed to more or less directly know whether this capability is present, in peril or absent. Of course we may have doubts and disagreements at some points, but if we do, we generally need to take a closer look rather than simply determine our own stance on the matter and use discretion.

What is more, once we have recognized a situation in which for instance a child is unable to play, we do not need separate arguments for the assertion that this particular state of affairs is disturbing.⁴⁴² The evaluation accompanies the discernment of the ‘fact’, so to say. John Alexander has made this point about the Central Human Capabilities in a slightly different way: “when one invokes them in public discourse and tries to justify them, one has to necessarily assume a certain evaluative point of view.”⁴⁴³

Note that this ‘relative determinacy argument’ is far from suggesting that when applied to society the Central Human Capabilities point to one single or well-defined range of specifications. The account of justice that Nussbaum proposes is realizable in multifarious ways. As Nussbaum puts it, it can “be more concretely specified in accordance with local beliefs and circumstances. It is thus designed to leave room for a reasonable pluralism in its specification.”⁴⁴⁴

To further support the ‘relative determinacy’ argument, I will discuss how the Central Human Capabilities, to a larger degree than Rawls’ principles of justice, constrain the workings of criminal justice, in particular the institution of punishment.⁴⁴⁵ In the

⁴⁴² For this reason it has also been argued that democratic institutions will (naturally) address the concerns that are on the list because it is likely that citizens will recognize the concerns that Nussbaum designates on the list. Cf. Anderson, ‘Justifying the Capabilities Approach to Justice’, 95.

⁴⁴³ Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 133.

⁴⁴⁴ Nussbaum, *Women and Human Development. The Capabilities Approach*, 77.

⁴⁴⁵ Similar to Rawls, Nussbaum herself hardly discusses the institution of punishment or that of criminal law in general, at least not within the context of the Capabilities Approach. — —, *Creating Capabilities: The Human Development Approach*, 104; Dixon and Nussbaum, ‘Children’s Rights and a Capabilities Approach. The Question of Special Priority’, 572-573. See for a more elaborate discussion of Nussbaum’s views on criminal law: Nussbaum, Martha

previous chapter we saw that because of their ‘thinness’ Rawls’ principles of justice offer little guidance in this regard and that this may lead to residues of justice, situations in which citizens’ dignity is compromised. Because of its relative determinacy Nussbaum’s viewpoint of justice can prevent such situations to occur.⁴⁴⁶ For one thing, if a system of criminal justice is to comply with justice, then according to the Capabilities Approach the criteria for criminal liability must take into account the extent to which a defendant has an adequate threshold level of the capabilities on the list.

For this assessment the capabilities of practical reason and affiliation are the keys, as they pervade all other capabilities. Both capabilities have substantial factual content. As to affiliation: this capability at least implies that citizens "have the capability for both justice and friendship" and according to Nussbaum protecting this capability "means protecting institutions that constitute and nourish such forms of affiliation [...]."⁴⁴⁷ If a defendant has not realized these capabilities up to the threshold level, his criminal behaviour must at least also be seen as a possible indication that society has failed to provide him sufficient care. In any case it will be a potential ground to mitigate the repressive and retributive response and also to provide the defendant with due support and concern. As Nussbaum has put it, in these situations defendants must at least also be seen as “inhabitants of a complex web of circumstances, circumstances which often, in their totality, justify mitigation of blame or punishment.”⁴⁴⁸

The same goes for practical reason, i.e. “the ability to form a conception of the good and to engage in critical reflection of one’s life.”⁴⁴⁹ If a defendant does not have this capability up to an adequate threshold level, justice indicates that criminal responsibility should be mitigated or must even be excluded. From the viewpoint of the Capabilities Approach, holding citizens fully responsible for their deeds only

C., 'Equity and Mercy', *Philosophy & Public Affairs* 22, 2 (1993).

⁴⁴⁶ Similar to Rawls’ Justice as Fairness, the Central Human Capabilities offer a -albeit weak- justification for the institution of punishment in so far it can be said to protect citizens from violence and physical assault by their fellow citizens.

⁴⁴⁷ Nussbaum, *Women and Human Development. The Capabilities Approach*, 79.

⁴⁴⁸ ———, 'Equity and Mercy', 110-111.

⁴⁴⁹ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 77.

makes sense if they have at least had the opportunity to make meaningful choices in the areas of life as they are described on the list.

Next, the Central Human Capabilities invoke a range of considerations that constrain the kinds of punishment and measures that justice allows. These constraints are such that offenders will not (structurally) end up below a threshold level of one of the capabilities on the list. A criminal system can therefore only be just if it also takes into account the empirical information that is needed to assess whether this is the case. Penal law from the viewpoint of the Capabilities Approach have to arrive at a delicate equilibrium. On the one hand it must protect citizens against harmful behaviour by their fellow citizens that threatens capabilities. On the other hand it must secure that 'wrongdoers' who have not been provided the necessary conditions for the threshold level of the Central Human Capabilities will not further deteriorate regarding these capabilities and preferably get them to or above threshold level. Also, it must ensure that punishment itself does not push them below a threshold level of one of the capabilities. Whatever the actual outcome is, the Capabilities Approach provides for a range of reasons of justice that inform the decision-making of responsibility bearing institutions and officials in the domain of criminal justice. Again, as was the case in the conceptual richness argument: in so far the considerations of justice that the Capabilities Approach generates are already present and felt in society, they can be anchored and supported by the articulation that is offered by the list. In fact, precisely because of their thickness, the Central Human Capabilities are likely to have explanatory force for a range of prominent concerns that figure in society. Here also the offering of explicit anchor points can be useful in times of political and socio-economical upheaval, as these concerns may be blurred in the political turmoil.

4.2.1 Relative determinacy in adjudication

The relative determinacy of the Central Human Capabilities and their potential to reduce residues of justice also bear on the moral character of adjudication.

Adjudication will be more directly guided and constrained by justice so that citizens' concrete legal rights and duties will depend less on arbitrary factors and substantive outcomes that fit the value of equal dignity will be more likely to be secured. Once more I will illustrate this by a brief discussion of the legal cases that were already introduced in the context of the under-determinacy argument in the previous chapter.

The case of *John Gadget*

John Gadget was the man who due to a grave accident suffered from a posttraumatic frontal brain syndrome with epilepsy. Gadget lost his job, his wife and eventually ended on the street, drinking beer all day and causing nuisance to the neighbourhood. Gadget was verbally aggressive and regularly burgled cars. After being arrested by the police, he was prosecuted in accord with the legal regime for 'repeat petty offenders' that made it possible to sentence him to a substantially longer term than the crime in itself would allow.

In the previous chapter I argued that Rawls' principles of justice hardly guide the judge in deciding whether or not John should be sentenced as a 'repeat petty offender' and to a relatively long term of imprisonment. These principles will for instance not inform him how to weigh the (in)adequate care John received and the (detrimental) effects of imprisonment on his already precarious mental state.

Adversely, because of the determinacy of the Central Human Capabilities a judge will have a range of reasons of justice to take into account in this case, reasons that can in fact channel his decision-making. All kinds of facts, such as his homelessness, lack of social ties and both physical and emotional handicaps invoke considerations of justice. That is, these facts indicate that in this case the threshold level of a range of Central Human Capabilities is at stake.

Without adequate care, 'naked imprisonment' can for instance be genuinely harmful for John's capabilities. The judge should therefore as a matter of justice use his leeway to take into account that imprisonment may seriously endanger John's mental health. From the viewpoint of the Capabilities Approach John's interest in getting adequate care will override the importance of protecting other citizens from the nuisance he causes, not in the least because the threshold level of the Central Capabilities of other citizens is most likely not involved.

The case of *Melvin Bates*.

Melvin was the adolescent who was severely neglected and abused as a child. He lived on the streets committing all kinds of crimes until he was put in a residential school for male juvenile delinquents. This school was notorious for its extremely severe disciplinary regime. Directly after leaving this school Melvin started to rob supermarkets and casinos as a way to make a living. Melvin did not have any professional qualification and it was clear that he was not used to dealing with real life situations in a normal way. This was also expressed in the crimes Melvin committed: during the robberies he used extreme violence, assaulting employees and customers and threatening them with a gun.

In the previous chapter it was shown that from a Rawlsian point of view the judge has considerable leeway to decide whether to try Melvin under adolescent penal law or adult penal law. Indeed, the law prescribes that in case of a delinquent between the ages of sixteen and

eighteen, the judge may apply adult penal law if the personality of the defendant, the concrete circumstances of the crime or the severity of the crime demands it.⁴⁵⁰

What weight to assign to Melvin's rather extreme crime-inducing background and the neglect and abuse he suffered in his childhood? What weight to assign to the violent character of his deeds, to the fact that he has no job or vocational qualification and to his lack of social and emotional capacities? Rawls' principles of justice hardly inform or constrain the judge in answering these questions.

Nussbaum's Central Human Capabilities by contrast do invoke various concerns of justice that the judge must try to honour. From the perspective of these principles the judge must on the one hand see to it that citizens are protected against Melvin's violent personality as their right to physical integrity and control over their environment is at stake. On the other hand, the facts characterizing this case straightforwardly point to Melvin's legitimate claims to care and help and the judge's duty to honour these. The facts concerning Melvin, dismal, gloomy and depressing as they may be, are no reasons to abstain from efforts to socialize and educate him: important goals of juvenile penal law.⁴⁵¹ Even though the physical integrity of his fellow-citizens is at stake, according to the Capabilities Approach the judge may not 'give up' on Melvin, but rather is duty-bound to sentence so that he advances Melvin's chances of developing his capabilities up to the threshold level of functioning.⁴⁵²

Of course, the 'determinacy' argument is emphatically not limited to concrete legal cases in the domain of criminal law. The relative determinacy of the Central Human Capabilities potentially bears upon cases in all legal domains, none excluded. Rawls' primary goods are too indeterminate to actually function as a commensurans for a whole range of decisions: they cannot guide the reasoning of the judge (and that of policymakers and legislators). Therefore they allow incomplete and biased discretionary reasoning, also in domains where this is most problematic from the viewpoint of equal dignity.

5 Conclusion

This chapter argued that Nussbaum's Capabilities Approach offers more support for a stabilizing approach to adjudication than does Rawls' theory of justice. The main reason for this is that the conception of the person on which Nussbaum's theory hinges is to a larger degree empirically loaded. Nussbaum's theory seeks to give

⁴⁵⁰ Cf. Article 77b Criminal Code (Wetboek van Strafrecht).

⁴⁵¹ Dixon and Nussbaum, 'Children's Rights and a Capabilities Approach. The Question of Special Priority', 587.

⁴⁵² Ibid.

citizens, conceived of as dependent, needy and capable creatures, a life in accord with their dignity. As a consequence the viewpoint of justice she proposes to realize this goal accommodates for and is sensitive to all kinds of empirical knowledge in determining the legitimate claims of citizens. Because of being empirically laden, justice as Nussbaum sees it is not only conceptually richer; it is also more determinate, providing more guidance to the responsibility bearing institutions. Due to this Nussbaum's justice can solve some of the residues of justice that Rawls' conception of justice allows and this residues-solving potential bears upon the moral character of adjudication. To put it in the terms of a stabilizing approach to adjudication: the list with the Central Human Capabilities fits the criteria of a final commensurans better. This viewpoint has more representative adequacy for the actual interests that are at stake in legal cases and it is more determinate and as such has more action-guiding force for the judge than Rawls' principles. If judges as part of their professional responsibility use Nussbaum's list as a background theory of law and adjudication, their decisions will, at least from the viewpoint of equal dignity as both Rawls and Nussbaum understand it, be less likely to be arbitrary and cause moral loss. This of course adds to adjudication's morally reassuring character.

7 The Fragility of Justice IV. Nussbaum's residues and their bearing on adjudication

1 Introduction

Although Nussbaum's Capabilities Approach can solve some of the Rawlsian residues of justice and as such can also make adjudication more stable, the upshot of this chapter is that Nussbaum's theory does not validate a stabilizing approach to adjudication either. That is, even if society would fully comply with the demands of the Capabilities Approach, it would still lead to residues of justice, that is, to situations that conflict with the substantive goals it has set. Similar to Rawls' theory of justice, when applied to society the Capabilities Approach implies a fragility of justice and this fragility bears on the moral character of adjudication.

The argument of this chapter takes the following route: first, I will briefly discuss to what extent Nussbaum herself acknowledges the practical limits of her theory by examining her view on the role of tragedy in moral and political thought (2). Then I will point out three reasons why Nussbaum's Capabilities Approach will lead to residues of justice. I will present these reasons under the headings 'the conflict of justice argument' (3.1), 'the under-determinacy argument' (3.2) and 'the political legitimacy argument' (3.3). For each of these arguments I will show how the residues concerned bear on the character of adjudication, again, by discussing a range of concrete legal cases. I will end with some concluding remarks (4).

2 A 'tragic stance' towards political morality?

Before developing my argument there is a matter of importance that deserves prior attention. It is that, other than the typology of normative theories of political morality that I offered in chapter three says, Nussbaum's philosophy does show a deep sensitivity for the inherent fragile, messy, unintelligible and tragic aspects of human life and political orders. I shall therefore first elaborate why I hold that the Capabilities Approach is not merely a philosophical account of political morality, but indeed qualifies as a *theory* of political morality.

Nussbaum's sensitivity for the tragic and for the messy and unintelligible aspects of morality particularly surfaces in her highly acclaimed *The Fragility of Goodness*.⁴⁵³ Based on a discussion of the Greek tragedies and the writings of Aristotle, Nussbaum argues that it is an inherent characteristic of human existence that people will suffer moral losses due to a wide variety of contingencies, beyond clear faults of their own or of others. A good life will always and inherently be vulnerable to moral loss because it is dependent and relies on external heterogeneous goods, the realisation of which often depends on contingent facts. As she puts it: "some human values simply open the human being to risk. Caring about children, friends, loved ones; caring about political citizenship and political action; caring, in general about being able to act rather than simply to be -all of these concerns and attachments put the person who cherished them at the mercy of luck in at least some ways."⁴⁵⁴ In Greek tragedies like Aeschylus' *Agamemnon* and Sophocles' *Antigone*, Nussbaum finds support for the idea that due to contingent facts, values may "clash irreconcilably, so that one must be violated."⁴⁵⁵ In these tragedies she sees a kind of moral thought that does not "attempt to seize, hold, trap, and control, in whose values openness, receptivity, and wonder play an important part."⁴⁵⁶ We cannot control the practical world by means of prior principles or rules, as this practical world will surprise us and can never be exhaustively grasped by cognition.

In line with these thoughts she puts the Platonic tradition in a critical perspective because it is based on the idea that reflection can secure stability and self-sufficiency in human life. She criticizes the Platonic idea that the capacity of reason can safeguard a rational agent from moral loss, insecurity and messiness as well as from disturbing emotions such as regret and anxiety.⁴⁵⁷

In view of the argument expounded in *The Fragility of Goodness* one could come to think that the same sensitivity for the limits of theoretical reason in relation to practice would also be fully entrenched in Nussbaum's political philosophy. However, an overall reading of her political philosophy paints a different picture. Nussbaum

⁴⁵³ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

⁴⁵⁴ *Ibid.*, xxix.

⁴⁵⁵ *Ibid.*, 47.

⁴⁵⁶ *Ibid.*, 20.

⁴⁵⁷ *Ibid.*

strongly relies on the potential of political philosophy to either prevent or overcome tragic losses. The function she assigns to the notions of 'tragic' and 'moral loss' is primarily constructive and aspirational: they are presented as heuristic devices to detect situations that are unjust and need to be solved. These heuristic and constructive functions assigned to the tragic are particularly present in Nussbaum's Capabilities Approach.

The concept of the tragic is to be deployed as a useful tool to stimulate delicate designing of political institutions and 'wise' legal reasoning so as to prevent moral wrongs.⁴⁵⁸ As Nussbaum says: "When we see a tragic choice -assuming that the threshold level of each capability has been correctly set- we should think: "This is very bad. People are not being given a life worthy of their human dignity. How might we possibly work toward a future in which the claims of all the capabilities can be fulfilled?"⁴⁵⁹ Nussbaum thus considers tragic losses primarily as invitations for constructive political thinking, aiming to (constitutionally) put in place "a core group of basic entitlements, and then really securing them to all people".⁴⁶⁰ "If the whole list has been wisely crafted and the threshold set at a reasonable level, there usually will be some answer to that question."⁴⁶¹

Hence, according to Nussbaum public officials should always raise the 'tragic question' before taking a decision. They should ask themselves whether as a result of their decisions or of the theories that ground them, citizens will suffer a cost "that no human being ought to have to bear, a cost implicated in the idea of human dignity itself."⁴⁶² Asking the tragic question is of particular relevance for liberal societies, because these are committed to a plurality of values and as a consequence "the spectre of tragedy will rear its head".⁴⁶³

It is also largely for constructive and aspirational reasons that Nussbaum holds that citizens should be sensitive for the tragic predicaments of their fellow citizens. In *Upheavals of Thought* Nussbaum argues for the importance of compassion as an

⁴⁵⁸ ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1018.

⁴⁵⁹ ———, *Creating Capabilities: The Human Development Approach*, 38.

⁴⁶⁰ ———, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 416.

⁴⁶¹ ———, *Creating Capabilities: The Human Development Approach*, 37.

⁴⁶² ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1023.

⁴⁶³ *Ibid.*, 1018.

indispensable public emotion. This emotion enables citizens to perceive the sometimes tragic fate of others, which can contribute to their willingness to try to prevent similar situations in the future.⁴⁶⁴ Also, citizens should familiarize themselves with ‘tragic stories’ that “make the depth and significance of suffering, and the losses that inspire it, unmistakably plain.”⁴⁶⁵ This again not so much because of the inherent tragic character of a political order, but rather to prevent such situations to occur in the future.⁴⁶⁶

In Nussbaum’s work we can find two arguments in favour of the focus on the constructive and aspirational function of ‘the tragic’. Firstly, Nussbaum claims as a matter of empirical fact that what at first sight appears to be a tragic situation or a tragic decision, can after due reflection often be dismantled as the outcome of a ‘mistake’, ‘obtuseness’, ‘stupidity’ or ‘maliciousness’.⁴⁶⁷ As she puts it: “[m]uch needless suffering can be surmounted by a just political order”.⁴⁶⁸

Nussbaum thus highly relies on the potential of reflection to ensure that in a fully just

⁴⁶⁴ Nussbaum, Martha C., *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), 297-350.

⁴⁶⁵ *Ibid.*, 428.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Nussbaum, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 415; ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016.

⁴⁶⁸ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxi. See for a well considered and pioneering account of the tragic character of liberalism: Brink, Bert van den, *The Tragedy of Liberalism. An Alternative Defense of a Political Tradition* (Albany: SUNY Press, 2000). He argues for a constructive and heuristic role for the acknowledgment of tragic predicaments of citizens and yet also holds that tragedy is inherent to liberalism. Van den Brink (p.135) for instance says that “It may well be that the possibility of emancipation of both suppressed groups and individuals and our understanding of what liberal public reason demands exists only because of the painful but unavoidable incongruity between the two perspectives. It gives us a first glimpse of an understanding of the tragic that liberalism could actually benefit from.” At the same time he notes (p. 160) that liberal theories can only be genuinely liberal theories “insofar as they acknowledge their tragic predicament.”

society genuine conflicts between the Central Human Capabilities do not occur.⁴⁶⁹ Tragic situations that do occur must be seen as a sign that, as Nussbaum puts it, “society has gone wrong somewhere.”⁴⁷⁰ Society should then make an effort to “focus on long-term planning that will create a world in which all the capabilities can be secured to all citizens.”⁴⁷¹ Secondly, Nussbaum holds that in the end citizens and the social practices on which they depend for leading a flourishing life often are sufficiently flexible to meet new and tough situations.⁴⁷² Citizens have the potential to deal with such obstacles and difficulties, and this potential should be honoured rather than underestimated. Political philosophy and a society that strives to be just should honour the fact that “human ingenuity” and the “dynamics” of social practices can “surmount” tragedy, Nussbaum says.⁴⁷³ Respect for citizens’ dignity therefore also entails holding them responsible and leaving them to deal with such difficult situations.⁴⁷⁴ Nussbaum’s motive for the role she assigns to the tragic is most clearly revealed in

⁴⁶⁹ Nussbaum, *Creating Capabilities: The Human Development Approach*, 38-39. There Nussbaum states, as quoted before: “How might we possibly work toward a future in which the claims of all the capabilities can be fulfilled? If the whole list has been wisely crafted and the thresholds set at a reasonable level, there usually will be an answer to that question.”

⁴⁷⁰ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 401.

⁴⁷¹ *Ibid.*

⁴⁷² ———, *Women and Human Development. The Capabilities Approach*, 36, 212.

Nussbaum stresses the flexibility of human beings and social practices to adapt to new situations, particularly in relation to religion. Given the fundamental character of religious commitments, this reliance a fortiori seems implied where the flexibilities of citizens and social practices for other areas of life are concerned. If Nussbaum thinks that citizens are able to change their substantive religious practices, it is likely that she also holds that they can change their mind with regard to, for instance, their duty to pay taxes so as to secure good education for all citizens. Obviously, this raises the question of where to draw a line between situations in which it is justified to hold citizens responsible in view of their ability to adapt to new situations and situations where it is not.

⁴⁷³ *Ibid.*, 163.

⁴⁷⁴ Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 106.

her critique on Bernard Williams.⁴⁷⁵ Whereas Williams is very critical about the deep tendency of practical philosophy to bring ‘good news’ about the world and to claim that tragedy can be overcome by theoretical reflection, Nussbaum blames Williams for being fatalistic and offering “a recipe for social lassitude”.⁴⁷⁶ For her Williams insufficiently gives voice to the “sense that wrong has been done and that one had better go out and right it.”⁴⁷⁷ His view suggests that “there is nobody to blame and nothing more to do. It implies that we can sit back and resign ourselves to the world as it is, knowing that its horrors lie outside our control.”⁴⁷⁸ If anything, according to Nussbaum this attitude reduces the chances for moral progress. Nussbaum’s belief in the aspirations of a theory of political morality is instigated by a deep trust in the power of theoretical reflection. In the end philosophical reflection

⁴⁷⁵ This discussion is particularly interesting because it clearly exemplifies that a philosopher’s stance towards the tragic may express something about his or her own attitude to life. For instance, Nussbaum very lively describes how Bernard Williams expressed his ambivalence about her hopeful stance on whether moral theory can indeed make the world a better place. In a rather personal and moving anecdote she reports: “My do-good engaged attitude irritated him, as if I had become Major Barbara when I might have grown into someone interesting. A strain developed in our friendship, under pressure of my criticisms of his Nietzschean turn and his reaction to those public criticisms.” Cf. Nussbaum, Martha C., ‘Tragedy and Justice: Bernard Williams Remembered’, *Boston Review*, Oct/Nov 2003 (2003). For a similar critique on Bernard Williams’ view on the inherent tragic character of the political see Ronald Dworkin’s essay and his comments in a discussion at the New York Institute for the Humanities in 1998 in: Lilla, Mark, Dworkin, Ronald et al., *The Legacy of Isaiah Berlin* (New York: New York Review of Books, 2001), 73-90, 121-127. A rather personal and hopeful attitude towards life shines through in this critique, for instance where Dworkin argues that inherent conflicts between political values should not be acknowledged because it is a way of buying “failure in advance” (p.190) and of not being willing to do the hard work necessary to show why a particular conception of justice is the right one. As Dworkin (p.90) puts it: “perhaps, after all, the most attractive conceptions of the leading liberal values do hang together in the right way. We haven’t been given reason to abandon that hope.”

⁴⁷⁶ Nussbaum, ‘The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis’, 1026.

⁴⁷⁷ ———, ‘Tragedy and Justice: Bernard Williams Remembered’.

⁴⁷⁸ Ibid.

can lead to a fully just society that only leaves room for genuine tragedy by way of incidents. From this trust and hope springs the limiting of the tragic and tragedy to said constructive role. I think it is also this reliance on the practical force of theory and this hope that make Nussbaum's theory of justice fit the typology discussed in chapter three.

3 Nussbaum's residues of justice

3.1 Justice as internally conflicted

First of all Nussbaum's Capabilities Approach leads to residues of justice because the viewpoint of justice it proposes can lead to genuine conflicts of justice when applied to society. The resolution of these conflicts can result in genuine moral loss and possibly also in arbitrary exercises of state-power.

In the previous chapter we saw that within the Capabilities Approach justice is constituted by separate, central and non-negotiable elements, i.e. the Central Human Capabilities. It is therefore that the Capabilities Approach "does not invite and positively forbids, trade-offs and balancing" between them.⁴⁷⁹ Neither does it allow any priority rule between the listed capabilities because this would be at odds with the separateness and the intrinsic value of each capability.⁴⁸⁰ We also saw that in a just society *all* citizens have a right to these Central Human Capabilities, at least up to an adequate threshold level. This is what it means to be treated as ends in themselves. No citizen may be sacrificed for the good of others.

However, we have no reason to a priori assume that the practical world will order itself in a way that is friendly to these aspirations. This is a fortiori the case for the Capabilities Approach because the realisation and protection of the Central Human Capabilities depend on the fulfilment of a wide range of empirical conditions, more so than for instance Rawls' conception of justice. In this sense the Capabilities Approach is more vulnerable to 'luck' and more dependent on contingencies for the realisation of its own substantial goals.

⁴⁷⁹ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 83; ———, *Women and Human Development. The Capabilities Approach*, 211.

⁴⁸⁰ Also the interrelatedness of the Central Human Capabilities, that is, their being mutually supportive, is at odds with prioritizing one over the other because in that way the capability that is not 'privileged' will be harmed.

Hence, it is more realistic to accommodate for the possibility that in spite of all kinds of human efforts and reflection, due to the contingencies involved in practice citizens' legitimate claims to the protection of the capabilities may prove impossible. In such situations the legitimate claim of one citizen cannot be secured without violating a legitimate claim of another.⁴⁸¹

Sure, one could argue that such conflicts may prove to be nothing but *prima facie* conflicts that can be prevented or genuinely resolved through reflection and (better) reasoning. Conflicts between the claims of citizens should then be taken as preludes to genuine justice, rather than compromises of justice.

Such an argument dovetails well with the 'specificationist' stance that Nussbaum herself seems to embrace.⁴⁸² Specificationism here amounts to the idea that when applied to practice abstract values can be reconciled through clever practical reasoning, forming one coherent whole. Specifying the Central Human Capabilities, to phrase it in the words of Henry Richardson, boils down to "spelling out the ways or circumstances in which they are pursued, and the like."⁴⁸³ Through the process of specification, a process that takes all kinds of empirical information into account, these capabilities can be tailored to the demands of the situation at hand. Specification can make the at the outset abstract and relatively rigid meaning of the Central Human Capabilities 'fluid' in a way that allows them to be realised conjointly, without genuine compromise.⁴⁸⁴

Indeed, there is much to be said for specificationism. For one thing it is a strong antidote against 'obtuseness', 'laziness' or 'stupidity' in public reasoning regarding citizens' basic claims. In case of a social conflict we want both citizens and public officials to optimally use their reasoning powers so as to answer the challenge to

⁴⁸¹ Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

⁴⁸² See for a discussion of specificationism: Wenar, Leif, 'Rights', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2011); Wellman, 'On Conflicts between Rights'. See for a specificationist approach to reasoning about values also: Richardson, *Practical Reasoning about Final Ends*.

⁴⁸³ Richardson, Henry S., 'Specifying Norms as a Way to Resolve Concrete Ethical Problems', *Philosophy & Public Affairs* 19, 4 (1990), 29.

⁴⁸⁴ Cf. Richardson, *Practical Reasoning about Final Ends*, 139.

secure all the Central Human Capabilities for all citizens. We do indeed see this salutary work of reason in clever constitutional arrangements, adequate social policies and wise judicial reasoning and as such specificationism does reduce the likelihood and scope of conflicts between citizens' entitlements. In addition, because it presents a conception of public reasoning that is highly empirically informed, specificationism is a more plausible alternative for deduction as an account of justice that claims to be responsive to the experience of concrete situated citizens. It is also better than means-ends reasoning as the Capabilities Approach as a matter of justice aims to secure heterogeneous goods.

This being said, I nonetheless reject the idea that specificationism can make a convincing case for the thought that within the Capabilities Approach -save for negligible incidents- no genuine conflicts between citizens' legitimate claims will occur, i.e. that the viewpoint of justice suffices to rationally and exhaustively solve actual social conflicts as they exist in society. Irrationalities, obtuseness and injustices are not the only sources of conflicts between the Central Human Capabilities. As I also put forth in the discussion of Rawls' theory of justice: due to all kinds of contingent facts even the best institutional arrangements and reasoning cannot prevent that genuine conflicts occur, in this case between the Central Human Capabilities. The reasons that such conflicts occur can for instance lie in human nature, in current technology, in physical aspects of the practical world, in time-constraints and in characteristics of institutions that cannot be simply altered at the moment of choice.⁴⁸⁵ Sure, these are not all by definition 'necessary' or 'inherent' facts about the practical world, but they may nonetheless form genuine obstacles for the realisation of values. If such conflicts occur they must be treated as genuine conflicts rather than as apparent ones or as negligible incidents.

At pains of hollowing out the substantive scope of the Central Human Capabilities -by reducing their content to what we are de facto able to protect in practice-, it seems problematic to a priori push said conflicts to the periphery of society. A specificationist stance to the issue of conflicts of justice seems to underestimate the limits of reason in this regard.

Against this background I hold that it is more reasonable to acknowledge that genuine

⁴⁸⁵ Ibid., 34-35.

conflicts of justice are in fact part and parcel of a ‘just’ society.⁴⁸⁶

What is more, we may question the extent to which specificationism can account for the *rational* resolution of conflicts of justice. This can be clarified by the helpful definition of specification that Henry Richardson offers.⁴⁸⁷ He states that P specifies Q if “(a.) every possible instance of the absolute counterpart of p would count as an instance of an absolute counterpart of q; (b.) p qualifies q substantively by adding clauses describing what the action or end is or where, when, how, by what means, by whom, or to whom the action is to be done or the end is to be pursued; (c.) none of these added clauses is substantively irrelevant.”⁴⁸⁸

In this definition the criteria for what counts as a specification, are the identity of the ‘absolute counterparts’, being ‘substantively qualifying’ and ‘not being substantively irrelevant’.

These rather formal criteria show that what makes something a ‘specification’, particularly in the practical domain, is to a large degree to be determined by the decisions of responsibility bearing agents. But, without further arguments as to the quality of these decisions -why do we have reason to rely on them?-, it is unclear why a ‘specification’ will in fact count as a specification of the normative force of the Central Human Capabilities themselves.

If we apply this to our topic, i.e. the conflict-solving potential of the Capabilities Approach, it means that, at least as it stands, the normative guidance of theory in the process of specification is still hard to conceive. In so far the Capabilities Approach relies on a specificationist conception of public reasoning it is not clear how the rationality of the resolution of conflicts of justice is accounted for.

So, we should not too easily assume that the application of the Central Human Capabilities is a morally harmonious practice, for genuine conflicts of justice may arise on a regular basis. Neither should we rely too easily on the ‘rationality’ of the

⁴⁸⁶ For critical comments on Nussbaum’s attempt to toning down the prevalence of genuine practical conflicts between the Central Human Capabilities see: Hackett, Rosalind I.J., ‘Is Religion Good News or Bad News for Women?: Martha Nussbaum’s Creative Solution to Conflicting Rights’, *Soundings* 83, 3-4 (2001); Claassen and Düwell, ‘The Foundations of Capability Theory: Comparing Nussbaum and Gewirth’.

⁴⁸⁷ Richardson, *Practical Reasoning about Final Ends*, 72-73.

⁴⁸⁸ *Ibid.*

resolution of such conflicts. At least the rationality of these conflicts cannot be accounted for by the theory itself. A specificationist's conception of public reasoning in any case needs additional arguments where the rationality of its outcomes is concerned.

In the remainder of this section the claim that the Capabilities Approach leads to genuine conflicts of justice will be further corroborated by a discussion of the way justice works out for the regulation of family life. I have opted to discuss these conflicts of justice because in them both of the -what Nussbaum labels- 'architectonical' capabilities are at stake, that is, practical reason and affiliation as the capabilities that pervade all domains of human experience and therefore may not be taken lightly. In addition, if genuine conflicts are acknowledged in this area then they are indeed an endemic phenomenon in a society striving to be just, as family life can hardly be seen as a peripheral area of human experience.

In her book *Women and Human Development* Nussbaum envisages the family as a responsibility-bearing institution par excellence where the realisation of the Central Human Capabilities is concerned. The family is "among those institutions that the basic principles of justice are designed to regulate most directly" as it influences citizens' chances "for better or worse" and it does so in the broadest sense.⁴⁸⁹ Within the Capabilities Approach state-interference may be justified if family life is such that the capabilities of its members are seriously threatened.⁴⁹⁰ This is a fortiori the case for the protection of children, "for they are its future citizens, nor are they voluntary members in a family unit."⁴⁹¹ Hence, a state can have a 'compelling state interest' to interfere in family life, for instance in the case of orthodox parents who want to give their children a full-fledged religious upbringing and education.⁴⁹²

⁴⁸⁹ Nussbaum, *Women and Human Development. The Capabilities Approach*, 245.

⁴⁹⁰ *Ibid.*, 79, 275.

⁴⁹¹ *Ibid.*, 230.

⁴⁹² Cf. *Ibid.*, 231. The article "Evaluating Parents in Child Protection Decisions: An Innovative Court-Based Clinic Model" by Karen Budd can be seen as a contribution to making the Capabilities Approach operational for the entitlements of children to have their capabilities developed. Therein she presents a model to assess the competences of parents to rear their children. The indicators she introduces are on the one hand the competences that parents must have to meet the needs of their children and on the other hand independent

Obviously, from the viewpoint of the Central Human Capabilities parents also deserve respect as they are not mere instruments for the upbringing of their children.⁴⁹³ Like all other citizens, parents are entitled to a threshold level of the Central Human Capabilities. This means that they should at least be given “certain limited kinds of deference in making choices regarding their children.”⁴⁹⁴ But, if we take the protection of the threshold level of all capabilities for children and their parents seriously, it seems realistic to acknowledge that genuine conflicts of justice may occur. State-intervention in family life for the protection of children may genuinely conflict with the legitimate claims of parents. Such interventions can lead to a profound capability drawback for parents, in particular for their capability of affiliation, that of emotions and that of practical reason. The mere fact of intervention by and in itself already threatens the intimacy of the child-parent relation because parents are asked, to quote Ferdinand Schoeman, “to think of themselves as primarily

competences that nevertheless affect their parenthood. With regard to the physical needs of children she mentions the following skills: to provide regular, nutritious meals; to protect their home from hazards; to have the child vaccinated regularly. With regard to their cognitive needs she mentions: gets child to and from school regularly; teaches child basic concepts (e.g., colours, self-care); does not fail to seek professional services for a child with special needs; provides toys and activities to foster the child’s cognitive capability and its ability to play. With regard to their social/emotional needs: disciplines child fairly and realistically for its age; shows warmth and affection for the child; is emotionally responsive to the child’s needs. Cf. Budd, K.S., 'Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model ', *Clinical Child and Family Psychology Review* 4, 1 (2001), 6.

⁴⁹³ Nussbaum explicitly stresses that (also) in the domain of the family the separateness of its members should be honoured: “we focus on each person as bearer of a variety of associative rights and liberties and as a potential enjoyer of affiliative capabilities”. Even where the capabilities of love and care themselves are concerned, the appropriate goal of public policy is the capability to form such relationships, should they choose to do so. Such a focus on people and their choices has clear implications for public policy.” Nussbaum, *Women and Human Development. The Capabilities Approach*, 251.

⁴⁹⁴ *Ibid.*, 279.

serving public ends and as having public duties.⁴⁹⁵ As the aim of such an intervention is “abstract social well-being and not intimacy”, it can actually transform an intimate relation into an instrument for a public good.⁴⁹⁶ In any case parents’ chances to maintain an intimate bond with their children will be seriously reduced.

As it befits specificationism, in this context Nussbaum seems to suggest that reflection can help us to dismantle such conflicts as merely *prima facie* ones. That is, she proposes the abstract principle of ‘moral constraint’ as one way to go about it.

This principle indicates that immoral functioning does not deserve protection: “anything that is cruel or unjust, though it takes place in the family, doesn’t deserve to be included in what we value when we value and protect family life. The abuser puts himself outside the moral community for which ‘family’ rightly stands, insofar as it belongs on our normative list.”⁴⁹⁷ So, if parents intentionally and structurally abuse their children and show indifference towards their predicament, denying them their parental rights does not boil down to an infringement of their legitimate claim, according to Nussbaum. Rather, parents forfeit their claim to parental rights by acting immorally towards their children. In these cases their functioning as parents is not or - if at all- only to a limited degree protected by the Central Human Capabilities.⁴⁹⁸ As a consequence, part of respecting the dignity of parents will then amount to holding them responsible for the consequences of their own failure as parents.

Though this principle can of course be useful to dismantle some of the relevant conflicts as only *prima facie* conflicts, I do not think it suffices for marginalizing them in such a way that it would justify their being conceptualized as ‘negligible incidents’.

⁴⁹⁵ Schoeman, Ferdinand, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family', *Ethics* 91, 1 (1980), 16.

⁴⁹⁶ *Ibid.*, 16-17.

⁴⁹⁷ Nussbaum, *Women and Human Development. The Capabilities Approach*, 275.

⁴⁹⁸ John Alexander points out that for a capability theorist like Nussbaum, there is a difficulty in holding citizens fully responsible for their deeds and letting them bear the loss that is the consequence, “particularly when it concerns individual choices that are deeply tied to institutional failures.” Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 111. This difficulty indeed exists for instance when parents who have been abused in the past and have not received any help in their childhood, become domestically violent themselves.

That is, even in cases of ‘clear neglect’ it may be questioned whether the principle of moral constraint categorically applies. Neglectful behaviour is not by definition an equivalent of intentional immorality. Sometimes parents “injure their children or fail to protect them as part of their general inability to cope.”⁴⁹⁹ In these situations of - what can be labelled as- ‘benign’ neglect, the Capabilities Approach also seems to give the state a compelling interest to intervene in family life.

Moreover, even if parents have ‘good intentions’ and do not clearly neglect their children, they can nonetheless (temporarily) be incapable to sufficiently meet their children’s physical, emotional, moral and educational needs, needs that are protected by the Central Human Capabilities.⁵⁰⁰ In these cases the principle of moral constraint does not apply either, simply because the intervention is not called for by clear immoral behaviour.

Can these kinds of conflicts then be prevented through better policies or legislation? Surely one might envision a range of ‘solutions’. For instance, one could think of legislation that (temporarily) forbids parents who lack basic competencies to have (more) children and upholds this prohibition by means of contraceptive injections. In this way certain conflicts will not need to occur. However, in terms of the Capabilities Approach this is no acceptable solution, at least not if ‘solution’ implies real avoidance of genuine moral loss or of infringement on the entitlements of either parents or children. For such a solution would immediately raise the ‘Plato worry’: state-interference in family life, structurally putting the interest of the child first, would strictly speaking leave open “the possibility that it could be legitimate to redistribute children en masse.”⁵⁰¹ Such a resolution would imply that we give up on the Kantian strand of the Capabilities Approach that implies that each citizen, including a citizen who is a parent, is to be treated as an end in himself.

Another category of conflicts of justice that may occur in the domain of the family is that between the capabilities of parents and children in case of divorce. Provided that

⁴⁹⁹ Wald, Michael, 'State Intervention on Behalf of 'Neglected' Children: Standards for Monitoring the Status of Children in Foster Care, and Termination of Parental Rights', *Stanford Law Review* 626 (1976), 674.

⁵⁰⁰ Cf. *Ibid.*, 674-675.

⁵⁰¹ Hannan, Sarah and Vernon, Richard, 'Parental Rights: A Role-Based Approach', *Theory and Research in Education* 6, 2 (2008), 174.

they are both sufficiently competent to offer their children the necessary care, from the viewpoint of the Central Human Capabilities both parents have a legitimate claim to parental authority. This authority allows them to fulfil their parental role and hence also to exercise a range of capabilities. However, if the relationship between parents is such that joint parental authority is seriously harmful for the child, only one of the former spouses can be assigned parental authority. Even if there are two or more children and both parents are assigned authority over at least one of their children, genuine conflicts of justice are likely to arise. In these situations the legitimate claims of both parents are impossible due to an inescapable characteristic of human nature: each child is indivisible and unique. This means that the resolution of such conflicts will come with genuine loss for at least one of the parents involved and for the children. 'Losing' parents will arguably lose a relation that is central for their understanding of whom they are and without which their lives are likely to suffer a considerable loss in meaning.⁵⁰² Not surprisingly, time and again the resolutions of such conflicts are also experienced as a source of frustration by the public officials involved in deciding such matters.⁵⁰³

The domain of the family surely is but one domain in society in which the Central Human Capabilities may prove to genuinely conflict. But precisely because the realisation of the Central Human Capabilities so largely depends on certain empirical conditions being fulfilled, it is realistic to expect that conflicts of justice will arise in other domains as well. These conflicts will then also be sources of residues of justice; their resolution will cause a genuine moral loss that from the viewpoint of the Central Human Capabilities is to be lamented. Also in case of such conflicts the residual character of justice may stem from the fact that their actual resolution is arbitrary, i.e. not determined by a moral viewpoint itself. As said: in such situations the Capabilities Approach by itself does not offer any substantial criteria to solve said conflicts. In so far justice is considered a viewpoint that can exhaustively justify the reasons why citizens should bear a genuine moral loss, it fails to do this justificatory work in case of genuine conflicts.

⁵⁰² Cf. Schoeman, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family', 14.

⁵⁰³ Carolyn, Cox, 'Joint Custody: Dividing the Indivisible', *Utah Law Review* (1986), 577.

3.1.1 Conflicts of justice in adjudication

The conflicts of justice that may arise within the Capabilities Approach influence the moral character of adjudication, at least when this theory is used as a normative background theory of law and adjudication. Being committed to the realisation of the Central Human Capabilities, in applying the law and hence these principles judges will face genuine conflicts between legitimate claims of citizens. In such cases, whatever the judge will decide, the losing citizen will suffer a serious decrease in one or more capabilities. Also, the grounds of these decisions may from a moral point of view be opaque, contingent, or even arbitrary. In any case the reason why the particular citizen ‘loses’ and has to bear the consequences of the judicial choice cannot be reduced to justice itself.

In this section I will show how the conflictual character of justice bears upon adjudication by discussing some legal cases that concern family life, as it was this domain that I discussed above as one in which conflicts of justice arise.

The case of *Mary Jones*⁵⁰⁴

A woman in her early forties, Mary Jones has been addicted to drugs for quite some years. This was a serious threat to the physical and emotional safety of her children. With the help of psychological and medical treatment Mary succeeded in getting over her addiction. In therapy she particularly coped with the abuse she suffered in childhood. It was during this period of treatment that Mary’s children were placed under court custody for two years and with Mary’s permission her children lived with their grandparents. From then on the children functioned better at school and Mary’s daughter suffered less from anxiety attacks.

After the two-year term has passed, the Youth Protection Office goes to court and petitions for the permanent termination of Jones’ parental rights because both children had grown attached to their grandparents and because they really started to do better. In court it argued that insecurity for the children would recommence if Jones regained her parental authority.

Jones argues to the contrary. She puts it that with professional help she will be capable to give her children the necessary care and that therefore she at least should be granted the right to

⁵⁰⁴ For this case I have drawn on the following cases: Rechtbank Den Bosch, June 6 2006, ECLI:NL:GHSHE:2006:AY6904; Gerechtshof Arnhem, February 28 2006, ECLI:NL:GHARN:2006:AV3288; Gerechtshof Den Haag, June 9 2010, ECLI:NL:GHSGR:2010:BN2572; Rechtbank Haarlem, January 19 2010, ECLI:NL:RBHAA:2010:BL0980; Gerechtshof Den Haag, August 18 2010, ECLI:NL:GHSGR:2010:BV0519.

reclaim her parental authority at a later stage. Jones tells the judge that she is willing to do all that is necessary to prove that she is a good mother. She also asserts that it is impossible to know in advance what will eventually be in the best interest of the children, particularly where the matter of permanently terminating her parental authority is concerned. Each time she speaks to her children they tell her how much they miss her.

From the viewpoint of the Central Human Capabilities, this case confronts a judge with a genuine conflict of justice. On the one hand the judge is duty-bound to interpret settled law in a way that honours the legitimate claim of the children: to grow up in a context where they can develop their (internal) capabilities. This means that the judge should decide in way that secures continuity and stability for the children, that facilitates an unimpeded bonding with their 'foster parents' and that provides them clarity as to their future 'home'. If Jones would retain the legal right to regain parental authority later on, this could have a negative effect on the bond that has developed between the children and their grandparents. Drawing on international law, national precedents and national settled family law⁵⁰⁵ the judge has a reason of justice to permanently end Mary's parental authority.

On the other hand, the judge must also honour Jones' right to a threshold level of the Central Human Capabilities. If he decides to permanently end her parental rights, this right is violated. That is, against her wish Jones will then not be able to live and experience the intimate bond with her children. She might have the internal capability for affiliation, love and self-esteem, but due to the termination of her parental authority she would not be able to genuinely develop and use them. This severe interference with her private life may cause substantial and long-term emotional pain and trauma.⁵⁰⁶ She will be condemned to experience her motherhood through missing her children with detrimental consequences for her feelings of self-worth and self-respect.⁵⁰⁷

One could of course hold that this capability downfall is due to Jones' own fault because she has violated the principle of moral constraint and that therefore she is to be held responsible for her misbehaviour. But this comes at the price of ignoring the very facts for which the Capabilities Approach claims to be sensitive. That is, Mary Jones' inability to offer her

⁵⁰⁵ The relevant national legal rules are 1:266 and 1:268 of the Civil Code of The Netherlands. The relevant international rules are: article 3 and article 20 of the Convention on the Rights of the Child and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵⁰⁶ Wald, 'State Intervention on Behalf of 'Neglected' Children: Standards for Monitoring the Status of Children in Foster Care, and Termination of Parental Rights', 675.

⁵⁰⁷ Seemingly there is little research available on the social-emotional consequences for parents whose parental rights have been denied permanently. As we shall see in the chapter on the concept of a tragic legal choice, monitoring these consequences may be part of the responsibility of a legal order.

children the necessary care was caused by her addiction and that in turn was intimately linked to her being abused as a child. Jones did not intentionally commit unjust acts regarding her children. Such an interpretation also falsely ignores that Jones really loves her children and is willing to do everything that is needed to get on the right track and become sufficiently able and competent.

So, in this case a judge faces a genuine conflict of justice and justice by implication does not offer a measure for resolving it. The resulting judicial decision may therefore not only be the result of 'arbitrary' factors such as the subjectivity of the judge, it will in any case also result in a genuine moral loss. Justice cannot prevent this arbitrariness and moral loss to occur.

The case of *Clarissa and Peter Stock*⁵⁰⁸

Already from the beginning of their marriage Clarissa and Peter Stock had continuous and rather nasty fights. The couple wanted nonetheless to stay together for their son Tom and they tried counselling. However, things slowly got worse. At one point Clarissa fell in love with a man who lived in another country. After a period of serious reflection on all the pros and cons, Clarissa decided to divorce Peter and to move with her son to this country so as to live with her new found love. Peter was shocked by these plans. He strongly protested, but to no avail. As a last resort he went to court and filed a petition, claiming that his son Tom should have his domicile with him and that he should have sole parental authority. Subsidiary Peter requested arrangements for visits.

The judge now faces a genuine conflict of justice. The legitimate rights to an adequate threshold level of the Central Human Capabilities of both parents and of Tom prove in this case to be impossible. This impossibility is due to a deep fact of human nature: Tom cannot be 'divided' in two and this fact is particularly urgent now that both parents will live in different countries.

The judge may make an effort and reflect on a specification of these rights through which all the legitimate interests at stake can be reconciled, for instance by granting both parents parental rights and by imposing regular visiting arrangements for Peter and his son. However, the judge may conclude that such visiting arrangements would lead to too much insecurity for

⁵⁰⁸ For the discussion of these cases I took inspiration from the following cases: Rechtbank Den Haag, May 4 2010, ECLI:NL:RBSGR:2009:BL6139; Gerechtshof Den Haag, March 5 2003, ECLI:NL:GHSGR:2003:AG1643; Gerechtshof Amsterdam, February 23 2010, ECLI:NL:GHAMS:2010:BL9055BL9055. See for a brief and critical discussion of Dutch case law regarding whether a parent is entitled to move after a divorce: Schrama, W.M., 'Verhuizen na Scheiding: geen Winnaars, veel Verliezers', *Tijdschrift voor Familie- en Jeugdrecht* 88 (2010). Schrama notes that the outcomes of said proceedings are difficult to predict and identifies a potential tension between the idea of equal parenthood and the moving (to another country) of one of the parents.

Tom as both parents lack the financial means to accompany the child on travels between the two countries and Tom is too young to travel alone. To prevent Tom from entertaining unwarranted expectations about his parents' role, the judge may hold that their parental rights should indeed fit the actual circumstances and hence that sole custody should be granted to one of the parents and that the visiting arrangements will be limited. Hence, as it will be impossible to find an arrangement through which both parents can develop and maintain intensive relations with Tom, the judicial decision will at least put the threshold level of the capability of affiliation and practical reason of one of the parents in peril.

The judge can of course also decide that both parents must make an effort to ensure that there will be regular contact by telephone. But, this is not to take away the fact that the threshold level of said capabilities is harmed. Such a capability downfall cannot be compensated by telephonic contact.

Due to the particularities of the case justice is itself internally conflicted. Hence, not being guided by any final normative source in the interpretation of settled law it may well be that the subjective views of the judge, for instance his traditional view as to parental responsibilities, will be decisive for his decision. In such a case justice cannot prevent that the decision is arbitrary and neither does it prevent that it comes with a genuine moral loss.

In brief, by these cases I have aimed to illustrate how the conflictual character of justice influences the character of adjudication. Judges will be faced with genuine conflicts of citizens' rights to a threshold level of the Central Human Capabilities and the resolution of these conflicts may result in a genuine moral loss. What is more, in such cases it remains to be seen what reason the losing citizen has to accept the decision, as this resolution can in no way be reduced to justice itself.

3.2 Justice as under-determinate

Another reason why the Capabilities Approach's justice is rather fragile, e.g. leads to residues of justice, is the under-determinacy of justice. This not so much because of the thinness of its concepts –indeed, in the previous chapter we saw that Nussbaum's conception of justice is more determinate than Rawls's. Rather, this under-determinacy is due to the discretion that Nussbaum assigns to the responsibility bearing institutions to determine what justice minimally requires. What justice concretely requires will therefore depend on an amalgam of factors that are not guided by theory.

In the previous chapter we saw that within the Capabilities Approach justice requires that the Central Human Capabilities are secured to an 'adequate' threshold level for

all citizens.⁵⁰⁹ In a just society all responsibility-bearing institutions are duty bound to do everything within their power to ensure that citizens do not fall below this line.

At first sight this is a rather clear-cut public task, but the problem of under-determinacy surfaces because of the strong discretion that Nussbaum assigns to the responsibility bearing institutions to determine this threshold level. “Each nation, of course, makes its own list of core entitlements and sets a threshold to establish an adequate level of support. Nations make different decisions about which capabilities will get constitutional protection and which will be left to the majoritarian democratic process. What judges must interpret is the list validated by their own nation, together with the tradition of precedent that interprets it,” Nussbaum says.⁵¹⁰

Of course this is not to say that ‘anything goes’ within the Capabilities Approach: Nussbaum stresses that the level of social conditions that must be guaranteed as a minimal requirement of justice should be a matter of “wise practical reasoning”, that the discretion is curtailed by “parameters”⁵¹¹ and that differences between different societies may exist “at the margins.”⁵¹² Nonetheless, because of the discretion the concrete determinations of the ‘claims of justice’ can be the outcome of contingent institutional and political facts. It allows the institutions themselves to establish what justice minimally requires and -other things equal- there is no reason to expect that the substantive goals of the Capabilities Approach will be realized and that citizens will be able to lead a life in accord with their dignity. In any case, the range of outcomes that will qualify as an adequate threshold level cannot sensibly be reduced to the viewpoint of justice itself.

One could argue that the discretion Nussbaum assigns to institutions is unproblematic because we can rely on their good intentions and competence to use it in a way that indeed secures a life in accord with dignity for all citizens.⁵¹³ And one may of course

⁵⁰⁹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 79;———, *Creating Capabilities: The Human Development Approach*, 41.

⁵¹⁰ Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 60.

⁵¹¹ ——, *Frontiers of Justice: Disability, Nationality, Species Membership*, 79.

⁵¹² *Ibid.*, 79, 180.

⁵¹³ *Ibid.* If this assumption would be valid, the very range of ‘threshold levels’ that the Capabilities Approach accommodates could be considered a point of strength, rather than

be right. But, an argument pointing to the actual quality of ‘threshold determining practices’ in any case needs supportive arguments. Without such arguments, the danger of justifying each and every (institutional) status quo looms over the Capabilities Approach.

In addition, it seems a matter of uncontroversial fact that differences between the kinds of institutional arrangements that are current in Western constitutional democracies do in fact seriously influence the extent to which citizens’ capabilities will be secured.⁵¹⁴ For instance, it makes no small difference whether or not the Central Human Capabilities receive constitutional protection combined with judicial review.⁵¹⁵ It also matters a lot to what extent and with regard to which kinds of decision-making discretion is assigned to administrative agencies to decide what resources should minimally be granted to citizens.⁵¹⁶

We can illustrate how under-determinacy can in practice lead to residues of justice by the position of disabled citizens. For this group the Capabilities Approach emphatically claims to do a better job than does Rawlsian justice.⁵¹⁷ According to

troublesome. Because of this very latitude justice need not to be forcefully ‘imposed’, but rather can be ‘found’ in each society and concrete claims of justice can be established in a way that is fully sensitive to their histories and special circumstances.

⁵¹⁴ The idea that actual characteristics of institutions are significant for the determination of the threshold level is also indicated by Nussbaum’s critical discussion of the formalist style of legal reasoning employed by the Supreme Court of the United States during its 2007 term. See: ———, ‘The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: ‘Perception’ against Lofty Formalism’.

⁵¹⁵ Likewise, if certain capabilities do receive constitutional protection, but merely in the rather vague terms of aspirations, the criteria for the assessment of their realization are also vague and the corresponding ‘rights’ will not easily be susceptible for enforcement through judicial decisions.

⁵¹⁶ Control over policy-choices by the judiciary is often criticized by reference to the pejorative phrase ‘judges taking over from the government’, or by referring to an ‘activist’ or ‘undemocratic’ judiciary.

⁵¹⁷ See for Nussbaum’s discussion of the implications of the Capabilities Approach for the position of disabled citizens in society: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 155-216; Nussbaum, Martha C., ‘The Capabilities of People with Cognitive Disabilities’, *Metaphilosophy* 40, 3-4 (2009). See for a discussion of

Nussbaum Rawls wrongly holds that disabled citizens are such a special group, that they do not fall “within the normal range” and therefore the question how to deal with them should be answered by legislation, policies and adjudication, rather than by principles of justice. She asserts, by contrast, that their position must be determined by the viewpoint of justice, precisely because it is not categorically different from that of other citizens.⁵¹⁸ Within the Capabilities Approach all citizens are both capable and needy and hence they are situated on the same but gradual scale where their neediness is concerned.

However, because of the rather strong discretion that the Capabilities Approach leaves to authoritative institutions to establish the level of protection for disabled citizens, this level will depend on contingent institutional circumstances, similar to what is the case in Rawls’ theory. It may for instance well be that the constitution does not explicitly protect the position of citizens with a handicap.⁵¹⁹ The legislature

Nussbaum’s position in this regard also: Wasserman, David, 'Disability, Capability, and Thresholds for Distributive Justice', in *Capability Equality: Basic Issues and Problems*, ed. Kaufman, Alexander (Routledge, 2006); Kittay, Eva Federer, 'Equality, Dignity and Disability', in *Perspectives on Equality: The Second Seamus Heaney Lectures*, ed. Lyons, Mary Ann and Waldron, Fionnuala (Dublin: The Liffey Press, 2005). Kittay’s article addresses the questions whether and on what grounds dignity is assigned to persons with cognitive disabilities. She thereby praises (p. 108) Nussbaum as one of the rare philosophers “who has taken to heart the fact that those with cognitive disabilities should be squarely included within the human moral domain -who, while recognizing the importance of reason, maintains that there is so much more to a human life worthy of dignity”. She criticizes Nussbaum’s Capabilities Approach because in the end, due to the normative status of the Central Human Capabilities, it cannot accommodate the idea that persons with severe cognitive disabilities can indeed lead a ‘richly human life’ rather than a ‘tragic life’. Kittay proposes a care-based theory so as to better be able to understand the moral relation with persons with mental disabilities. See for Nussbaum’s response to Kittay on this point: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 217-223.

⁵¹⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 203.

⁵¹⁹ For instance, under the regime of the Act for Provisions for Disabled Persons (Wet Voorzieningen Gehandicapten), which was operative until 2006 in the Netherlands, it was delegated to the local authorities to flesh out the concrete extent of the governments’ duty of care towards disabled citizens.

may then grant local authorities discretion to provide ‘provisions’ with regard to housing, transportation, wheelchairs and other devices necessary to enable these citizens to develop and exercise their capacities and to participate in the social life of their community. The local authorities will then be relatively free to for instance decide whether the (extra costs of) transportation necessary for disabled citizens to visit friends or family fall under their duty of care and whether it is also part of this duty of care to compensate the costs of the disabled partaking in recreational activities.

From the viewpoint of the Central Human Capabilities these outcomes are obviously not indifferent, outcome oriented as the theory is. Whether citizens with disabilities will have the opportunity to recreate, work, and visit relatives and friends directly affects their level of capabilities, including that “to love those who love and care for us”⁵²⁰ and the capabilities of practical reason, of self-respect and of play. If the responsibility bearing authorities do not provide disabled citizens the means to overcome their specific obstacles, these citizens may find themselves below a threshold level with regard to one or (because they are intensely interrelated) more of the capabilities. Due to this discretion citizens may not only suffer from a genuine moral loss, but they it is also an urgent question why they in their status as equal citizen have a reason to accept a normative order that does not provide them with the opportunity to lead a life in accord with their dignity.

True, Nussbaum herself is rather clear about the concrete implications of justice for the claims of disabled citizens. A just society should “organise public space, public education and other relevant areas of public policy” to support the capabilities of disabled citizens, as many of them, and as fully, as possible.”⁵²¹ However, the argument is not to deny that Nussbaum’s view on the task of government to secure certain social conditions for disabled people is demanding, particularly if compared to that of Rawls. The argument is that because of the strong discretion it grants to the responsibility bearing institutions, the Capabilities Approach cannot secure substantial outcomes in this regard.

⁵²⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76.

⁵²¹ *Ibid.*, 222.

3.2.1 Under-determinacy in adjudication

In this section we shall see how the under-determinacy of justice and the resulting residues work out for the moral character of adjudication. Because of said under-determinacy judges who are committed to settled law and the Central Human Capabilities, will first of all largely depend on what the responsibility bearing institutions -such as parliament, policymakers- establish as an adequate threshold level for each of the Central Human Capabilities. This may lead to residues of justice, because the decisions made by for instance majority vote may conflict with the substantive level of protection that the Capabilities Approach had envisaged to secure that citizens will be *really* able to lead a life in accord with their dignity.

What is more, if these responsibility bearing institutions have not determined the threshold level clearly and settled law does not give an answer in this regard, from the viewpoint of the Capabilities Approach judges will have strong discretion to determine what this threshold level is. Hence, justice as the Capabilities Approach sees it cannot prevent that judicial decisions will lead to moral loss and that equal citizens will bear the consequences of judicial decisions that cannot, at least not sensibly, be accounted for in terms of justice, but only in terms of matters of empirical fact.

The case of *Andrew Hinz*

Andrew Hinz is condemned to a wheelchair because of his physical handicap.⁵²² Andrew's most prominent social activities are going fishing with his father and visiting other relatives. Thereto he is fully dependent on his father. Twice a week his father picks up Andrew with a specially adapted car.

However, one day the car breaks down and is beyond repair. Neither Andrew nor his father has the financial means to buy another car suited to transport a wheelchair. In an administrative procedure Hinz therefore requests financial support from the local municipality to buy a second-hand specially adapted car. The request is based on a law that aims to provide disabled citizens special support. The local municipality rejects the request arguing that Hinz can make use of a collective wheelchair taxi and all kinds of other means of transport.

Hinz goes to court arguing that the decision of the municipality is contrary to law because it gives a wrong interpretation of some of the applicable open norms, such as 'social isolation',

⁵²² For the discussion of this case I draw on the following legal cases: Rechtbank Almelo, June 13 2001, ECLI:NL:RBALM:2001:AE3953; Centrale Raad van Beroep, December 3 2002, ECLI:NL:CRVB:2002:AF5074; Centrale Raad van Beroep, May 3 2006, ECLI:NL:CRVB:2006:AX9519.

‘everyday life’ and ‘essential contacts’. Hinz argues that not having a car precludes him from maintaining the very ‘essential contacts’ that the applicable law sees to. Without the fishing and family visits he will definitely end up in social isolation as he does not have any relatives or friends in the vicinity of his home. Neither can he move to the village where his father lives because the care that he needs is located in his own village, nor can his father move to his residence because of his work.

From the viewpoint of the Capabilities Approach the judge has to decide whether the local municipality in its interpretation of settled law has violated the threshold level of the Central Human Capabilities. The law itself does not offer a clear substantive benchmark in this regard except for said relatively open norms.

Now, exercising the strong discretion that the Capabilities Approach allows for, the judge is justified to set the threshold level himself. In so doing he can decide that visits to relatives outside one’s municipality and fishing are not the kinds of ‘daily activities’ that local municipalities should be obliged to support. He can assert that Hinz’s opportunities to maintain ‘essential contacts’ are not in peril because his father and other relatives still have the opportunity to visit him. Without being able to make the excursions, Hinz will not necessarily end up in ‘social isolation’.

The judge can conclude that the threshold levels of the capabilities of affiliation and of practical reason do not imply that citizens themselves must be able to visit others and hence that the decision of the local municipality stays within the limits of the law.⁵²³

At the same time it is a serious question whether the judge’s interpretation of the threshold level of the capabilities of practical reason and of affiliation does not jeopardize one of the aims of the Capabilities Approach: to ‘really’ bring the capabilities of disabled citizens up to the same threshold level as that of ‘normal’ citizens, “even where that entails changes that may be expensive.”⁵²⁴ From this perspective it could be argued that Andrew Hinz should be

⁵²³ Note that the Dutch act that protects the disabled (Wet Maatschappelijke Ondersteuning) leaves administrative agencies discretion regarding how to balance between the interest of the disabled citizen and general interests. Administrative review in these cases is ‘marginal’ due to what in Dutch administrative legal doctrine is qualified as its ‘constitutional position’. See for this point in the Dutch context: Vermaat, Matthijs, Rooij, Hans van et al., ‘Compensatie in de Wmo: De Rechter als Plaatsvervangend Bestuurder?’, *Tijdschrift voor Gezondheidsrecht* 6 (2010).

⁵²⁴ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76. Moreover, in answering the question whether the entitlements of disabled citizens are guaranteed, Nussbaum -at least explicitly for citizens with cognitive disabilities- lays the burden of proof on the state. In order to be just a state must motivate why the social conditions necessary for disabled citizens to have the capabilities on the list are not (yet) realized. The only legitimate excuse for this would be that to not provide these conditions is

able to choose whom to visit and when, just like any other citizen. As a mature man in his thirties who is fully dependent on the willingness of others to visit him, Hinz cannot be said to genuinely have the chance to maintain social contacts, at least not if we also want there to be agency involved. The judge's interpretation is in any case at odds with the fact that practical reason is an architectural capability and as such is a necessary condition for all other capabilities, including that of affiliation. Hence, the decision itself, although justified because of the discretion the Capabilities Approach assigns to the responsibility bearing institutions, may nonetheless come with a genuine moral loss. This is even more troublesome because by the same token another judge could have determined the threshold differently. The burden of the decision that Hinz now has to bear may thus well be due to arbitrary factors rather than to reasons that Mister Hinz has to accept as a matter of justice.

The case of *Lory Mehdau*⁵²⁵

Lory Mehdau is a young woman who is severely mentally disabled. From childhood on she lived in a special care-centre. Lory's mother, who lives relatively far away from the care-centre, is unable to visit her daughter by public transport due to her own physical disability. Lory's guardian therefore requests financial support from the local municipality to pay for a specially adapted taxi at least twice a year so as to enable Lory to occasionally visit her mother.

On the basis of standing policy the local municipality decides that Lory Mehdau can do without the opportunity to visit her mother. It argues that because of her severe mental disability, Mehdau does not have the kind of independent pattern of desires that would render these visits indeed 'necessary'.

Lory's guardian appeals this decision in court. In support he submits a declaration of Lory's mentor at the care-centre stating that Lory's visits to her mother substantially add to the quality of her life. Compared to her normal state, Lory is always much more cheerful before, during and right after the visit to her mother.

The judge must now assess whether the administrative agency has used its discretionary power within the constraints of the law and hence also within the constraints of the threshold level of the Central Human Capabilities. If settled law does not give substantive guidance, the Capabilities Approach allows the judge strong discretion to set the threshold level himself.

The judge will then not be guided by theory, so to say.⁵²⁶ On the basis of his own personal

required as a matter of "compelling state interest", Nussbaum says. ———, 'The Capabilities of People with Cognitive Disabilities', 338.

⁵²⁵ For this case I have taken inspiration from: Rechtbank Den Haag, November 30 2006, ECLI:NL:RBSGR:2006:AZ5731.

⁵²⁶ Of course it is a serious question whether the decision complies with Nussbaum's views on how judges should reason and the attitudes they should have. However, it remains to be seen

views he will be free to decide that the decision of the local municipality is indeed within the constraints of law, because he thinks Lory's cognitive capacities are too limited to claim the provisions that are requested.⁵²⁷ At the same time, we may hold that the decision of the judge does violate the threshold level of the Central Human Capabilities. By such a decision the judge will structurally impede Lory to -albeit imperfectly- experience an affective, intimate bond with another person, an aspect of human life that is crucial according to the Capabilities Approach. Again, the discretion that the Capabilities Approach allows for may result not only in an arbitrary judicial decision but also in a decision that causes a genuine moral loss.

To conclude, the Capabilities Approach attributes rather strong discretion to responsibility bearing institutions to set the threshold level of justice. The under-determinacy that results bears on the moral character of adjudication. Due this under-determinacy the actual threshold level that will be protected in a concrete legal case will depend on contingent or arbitrary facts rather than on reasons of justice and the effectuation of this threshold level may also come with a genuine moral loss.

3.3 Justice at odds with political legitimacy

Finally, there is the 'political legitimacy-argument'. The crux of this argument is that when applied to society the Capabilities Approach leads to residues of justice because of its commitment to a (specific) principle of political legitimacy. Drawing on Rawls' 'political liberal' interpretation of political legitimacy, Nussbaum holds that it is a requirement of respect that exercises of state power can be defended to each and every citizen. Indeed, as it befits a normative theory of political morality, Nussbaum claims that the Central Human Capabilities can comply with this particular demand of political legitimacy.⁵²⁸ According to Nussbaum these principles offer -albeit on the most abstract and general level- the reasons why citizens must accept the exercise of

whether indeed these views are to qualify the discretion that she assigns to the responsibility bearing institutions to set the threshold level of the Central Human Capabilities.

⁵²⁷ If one thinks that this case is not really about the threshold level of the Central Human Capabilities, but more about *which* citizens must receive protection within the Capabilities Approach, there are a range of other examples that illustrate the same point. Think for instance of a request for financial support for the purchase a tandem for a blind citizen, or for that of a special saddle for a citizen missing one leg who nonetheless wanted to ride horseback. Cf. Social Security Tribunal, March 3 2004, ECLI:NL:CRVB:2004:AO5674.

⁵²⁸ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 1.

state power. By offering the underlying principles of justice, all practices in which state-power is exercised can be exhaustively justified, or so is the idea.

In grasping what the principle of political legitimacy precisely entails and thus demands of philosophy, Nussbaum's interpretation of the notion of 'overlapping consensus' is leading. Again, drawing on Rawls' 'political liberalism', Nussbaum holds that state power is only legitimate if it can be construed as the result of principles that are the object of an 'overlapping consensus' between reasonable citizens.⁵²⁹

Nussbaum is of two minds in her interpretation of this 'overlapping consensus'. On the one hand 'overlapping consensus' as Nussbaum understands it clearly has a normative dimension.⁵³⁰ That is, the Central Human Capabilities are clearly presented as a *philosophical* list that is to function as a set of normative principles underpinning a constitutional democracy. As such Nussbaum's theory aims to offer "some definite content" of political morality, rather than leaving the determination of these values for grabs to the forces in society.⁵³¹ This is also why the Capabilities Approach is characterized as a content-based approach to justice.⁵³² With regard to political

⁵²⁹ Ibid., 16; ———, *Women and Human Development. The Capabilities Approach*, 76. See for an argument that the Capabilities Approach is not 'really' committed to a political liberal principle of political legitimacy: Barclay, Linda, 'What kind of liberal is Martha Nussbaum', *Sats-Nordic Journal of Philosophy* 4, 2 (2003). See for Nussbaum's response: Nussbaum, Martha C., 'Political Liberalism and Respect: A Response to Linda Barclay', *Sats-Nordic Journal of Philosophy* 4, 2 (2003), 26.

⁵³⁰ Nussbaum, Martha C., 'Political Objectivity', *New Literary History* 32, 4 (2001), 890.

⁵³¹ Ibid. This normative interpretation is also implied by Nussbaum's critique on Sen and his view that the relevant kinds of capabilities that should be guaranteed in a particular society are the ones that are established through political processes and public deliberation.

Nussbaum thinks this would leave too much leeway to "whim and caprice, or even to the dictates of a cultural tradition." Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 47.

⁵³² John Alexander describes a content-based approach of public reasoning within a capability theory as one in which "a set of basic capabilities is chosen beforehand from a particular world-view or comprehensive conception of the good life." According to Alexander Nussbaum's Capabilities Approach is content-based insofar as "the universal list of (ten) basic capabilities serves as a set of political goals based on which legislators, policy makers

legitimacy this indicates that theory itself delineates which views fall within the domain of ‘overlapping consensus’ and hence which views in society can be ignored as being unreasonable.

This normative interpretation of ‘overlapping consensus’ and hence of ‘reasonableness’ is also indicated by the outcome-orientedness of the Capabilities Approach. The relevant criterion for assessing the workings of actual institutions and procedures -including that of democracy- is the extent to which they serve the realisation of the Central Human Capabilities. In order for the notion of ‘outcome-orientedness’ to have any substantive bearing these institutions and procedures will by themselves not be decisive for the determination of what falls within the ‘overlapping consensus’.

So conceived, Nussbaum’s interpretation of ‘overlapping consensus’ points to a consensus between the reasonable -i.e. philosophically defensible- view of citizens. In determining the legitimacy of state-power philosophical arguments will be given special weight and unreasonable views -philosophically untenable views- will be denied all weight. In this interpretation the principle of political legitimacy does boil down to a requirement of ‘moral justification’. Once principles of political morality can be morally justified they can also form the legitimate grounds for the exercise of state-power. This interpretation unmistakably points to the model of the ‘philosopher King’.

But on the other hand, and here lays the ambivalence, Nussbaum’s ‘overlapping consensus’ also clearly refers to a consensus in the empirical sense, i.e. an empirically identifiable state of affairs.⁵³³ Throughout her work we can find several places where

and citizens can conduct their public discussions and deliberations.” Cf. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 160.

⁵³³ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 163, 388. The weight assigned to consensus in the empirical sense is also exhibited by the fact that in some of her writings Nussbaum thought it premature to include in the list of Central Human Capabilities the right to non-discrimination on the basis of orientation, because “there was little consensus on this item”. Cf. ———, *Women and Human Development. The Capabilities Approach*, 79-80. Consensus obviously need not exist simultaneously with the exercise of state-power. At the same time, at pains of losing all substantive meaning, it must be

Nussbaum emphasizes that ideally the grounds for the exercise of political power must be derived from ‘common sense’, from shared ideas and from non-controversial scientific facts, even if some of these views are ‘really’ wrong or untrue.⁵³⁴ In a similar vein, Nussbaum holds that the (epistemic) guidelines for inquiry as to what justice entails in practice, should as a matter of respect stem from widely accepted ‘epistemologies’ so as to avoid “indulging” in a conception of objectivity of a “divisive sort.”⁵³⁵

Actual or expected factual acceptance is the key to answering the question whether a particular view or reason may be politically effectuated.⁵³⁶ Consequently, the specifications of the Central Human Capabilities, i.e. their normative implication for a concrete case, must not be determined by referring to ‘knowledge’, at least not if this knowledge is likely to give rise to controversy. If we take this empirical dimension of ‘overlapping consensus’ seriously and also its demand of epistemic abstinence, it will even be difficult to privilege the views of ‘reasonable citizens’ above ‘unreasonable views’ in the construction of the ‘overlapping consensus’. That is, at least if these qualifications are to keep their substantive meaning. The distinction can in any case not hinge on a controversial epistemology - regardless of its truth.⁵³⁷

Not surprisingly, it is this latter dimension of ‘overlapping consensus’ that may

reasonable to expect the consensus to come about in the near future. This substantive meaning is in peril where Nussbaum states that overlapping consensus means that “[w]e require only that there be a plausible path to that endorsement, such that, over time, it is not unreasonable to suppose that society could arrive at that consensus. Cf. ———, *Creating Capabilities: The Human Development Approach*, 91.

⁵³⁴ Nussbaum, ‘Political Objectivity’, 887. It is debatable whether Nussbaum excludes from the overlapping consensus only metaphysical and comprehensive conceptions of objectivity, or whether she rejects all conceptions of objectivity “of a divisive sort”, including the ones that from a philosophical point of view are most convincing. In her article ‘Political Objectivity’ Nussbaum chooses the second option; she dismisses convincing moral epistemologies such as those of Putnam and Cohen. Cf. ———, ‘Political Objectivity’, 897.

⁵³⁵ Nussbaum, ‘Political Objectivity’, 897.

⁵³⁶ Cf. Barclay, ‘What kind of liberal is Martha Nussbaum’, 12.

⁵³⁷ For this point I took inspiration from David Estlund’s fine article on Rawls’ political liberalism: Estlund, David, ‘The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth’, *Ethics* 108, 2 (1998), 265.

conflict with the substantive goals the Capabilities Approach has set: to *really* secure to each and every citizen an adequate threshold level of each of the Central Human Capabilities.⁵³⁸ There is no a priori reason to assume that the majority of citizens will be disposed to for instance protect the interests of minorities and appreciate them in the way the theory suggests, that is as citizens with equal dignity. Some of the implications of the Central Human Capabilities can in practice be highly controversial. For this reason Ingrid Robeyns refuted the idea of an ‘overlapping consensus’ as a ‘rhetorical trick’ where the political legitimacy of justice is concerned. She puts it that it falsely suggests that justice as a set of normative principles of political morality provided by philosophy will harmonize with the idea that state-power must be defensible to each and every citizen.⁵³⁹

In case some of the Central Human Capabilities are controversial it may thus be that what is philosophically right cannot be politically effectuated. In such situations residues of justice may occur. These residues can then not be ‘solved’ or prevented by the normative dimension of an ‘overlapping consensus’ because Nussbaum does not grant *privileged* knowledge any special status where it concerns the grounds for the exercise of state power. Again, state power should respect the “views of many people about what truth is and where it lies”, regardless of the plausibility of these views.⁵⁴⁰ That the commitment of the Capabilities Approach to the principle of political legitimacy can lead to a violation of its own substantive goals, i.e. to residues of justice, can be illustrated by the position of a minority group, for instance that of Muslims. It may well be that a dominant group or culture in society considers the Islam and Muslims a threat to liberal values such as autonomy, tolerance and the

⁵³⁸ It should be noted that this conflict between political legitimacy and the realisation of substantial values is not unique for the Capabilities Approach; it is an urgent question which all conceptions of justice that belong to the family of ‘political liberalism’ face. Clearly, the urgency of this potential conflict particularly surfaces in times when the public support for the basic rights of particular minorities weakens.

⁵³⁹ Robeyns, Ingrid, 'Nussbaum over Capabilities en Rechtvaardigheid', *Filosofie & Praktijk* 4 (2006), 10.

⁵⁴⁰ Nussbaum, 'Political Objectivity', 888.

emancipation of women and homosexuals.⁵⁴¹ If this is the case it goes without saying that such views and the corresponding attitudes will influence Muslims' opportunities to obtain an adequate threshold level of the Central Human Capabilities. A relatively offensive⁵⁴² dominant group or culture will influence their educational and job opportunities, their chances to participate in the public domain and in public debate, their sense of self-respect and the development of their children because of how they are treated at primary and secondary schools.⁵⁴³ Of course these risks increase if the

⁵⁴¹ See for an analysis of such a development in the Netherlands: Shadid, Wasif, 'Moslims in de Media: de Mythe van de Registrerende Journalistiek', in *Mist in de Polder: Zicht op Ontwikkelingen omtrent de Islam in Nederland*, ed. Vellenga, S. (Amsterdam: Aksant, 2009), 173. See for a general discussion of the position of Muslims in the Netherlands: Forum, 'Factbook 2010. The Position of Muslims in the Netherlands', (Utrecht: Forum. The Institute for Multicultural Development, 2010). Moreover, in its third report (2007) on the Netherlands the European Commission against Racism and Intolerance stated that: "the Netherlands witnessed a sharp rise in racist violence and other racist crimes, essentially targeted at its Muslim population. This comprises violence directed against individuals, but also violence directed against property, including arson attacks on mosques and Islamic schools and violence against shops owned by Muslim persons. Racist graffiti also often appeared on these establishments. Reports of racist insults in the streets, on public transport and during sports events rose dramatically around that time and leaflets expressing anti-Muslim sentiment appeared in many places in the Netherlands." See: Intolerance, European Commission Against Racism and, 'Third Report on the Netherlands', (Strasbourg: Council of Europe, 2008).

⁵⁴² See for the views of proponents of an offensive approach in the Netherlands: Ali, Ayaan Hirsi and Geert Wilders, ' in NRC Handelsblad, 'Het is Tijd voor een liberale Jihad [The Time has Come for a Liberal Jihad]', *NRC Handelsblad*, April 4 2003. For similar views on Islam see also: Boekstijn, Arend Jan, 'Over Waarheid en Wijsheid', in *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, ed. Luin, Ton van (Utrecht: Spectrum, 2005); Rooy, Wim van and Rooy, Sam van, *Islam: Kritische Essays over een Politieke Religie* (Aspekt, 2010). See for a clear explication of an accommodationist approach in the Netherlands: Breedveld, Willem, 'Geen Polarisatie, maar Debat', in *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, ed. Luin, Ton van (Utrecht: Spectrum, 2005).

⁵⁴³ Where they are for instance (unconsciously) treated as less clever and capable than other children. As to job opportunities: an empirical study on labour market discrimination in the

dismissive views find expression in the political domain and are effectuated through political power, for instance through laws or policies that ban the building of mosques, that prohibit Islamic schools and the wearing of niqabs, burqas or headscarves in public, or through discriminatory subsidy policies regarding social organisations and schools based on religious and secular views of life.

From the viewpoint of the Capabilities Approach all this is of course wrong because it would boil down to the violation of the Central Human Capabilities of Muslims.⁵⁴⁴

This group, just as any other religious minority, has a legitimate claim to have all their capabilities protected up to the threshold level. Nussbaum is very clear about the importance of protecting religious minorities: “even if a certain group of religious beliefs (or even all beliefs) were nothing more than retrograde superstition, we would not respect the autonomy of our fellow citizens if we would not allow them these avenues of inquiry and self-determination.”⁵⁴⁵ Nussbaum has been very clear about the discriminatory character of policies and laws aiming to curtail the liberties of Muslims, such as forbidding niqabs and burqas in the public domain. She considers such laws and policies as flagrantly unjust. “The opponents of the burqa are utterly inconsistent, betraying a fear of the different that is discriminatory and unworthy of a liberal democracy,” she says.⁵⁴⁶ Moreover, according to Nussbaum citizens who criticize the Islam “typically don’t know much about Islam and would have a hard time saying what symbolizes what in that religion.”⁵⁴⁷ She also says that criticizing the headscarf in name of the rights of women is rather hypocrite, as Western culture itself is “suffused with symbols of male supremacy that treat women as objects.”⁵⁴⁸

Netherlands concludes that “job applicants of non-Western origins have a significantly lower chance of being invited to attend a job interview”. Cf. Andriessen, Iris, Nievers, Eline et al., 'Liever Mark dan Mohammed? [Do employers prefer Mark over Mohammed?] Onderzoek naar Arbeidsmarktdiscriminatie van niet-Westerse Migranten via Praktijktests', (Den Haag: Sociaal en Cultureel Planbureau, 2010).

⁵⁴⁴ See for a discussion of potential discrimination in local subsidizing policies: Forum, 'Factsheet Subsidiëring Levensbeschouwelijke Organisaties', (Utrecht: Forum. The Institute for Multicultural Development, 2010).

⁵⁴⁵ Nussbaum, *Women and Human Development. The Capabilities Approach*, 180.

⁵⁴⁶ Nussbaum, Martha C., 'Veiled Threats', *The New York Times*, July 11 2010, 38.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

Yet, against the background of its principle of political legitimacy it is a serious question how the Capabilities Approach can protect Muslims against said attitudes, laws, policies and the resulting capabilities downfalls. If the dominant culture in a political order generally sees Islam and Muslims as genuinely unreasonable, then their capabilities downfall is the consequence of their being held responsible for their unreasonableness. The concrete specifications of the Central Human Capabilities will then be drenched in the views of dominant culture regarding Muslims as unreasonable citizens.

In addressing the issue of 'reasonableness' the Capabilities Approach can in any case not erase or 'counterbalance' generally shared but 'wrong' views by referring to specific kinds of knowledge or to the 'philosophical stance'. This would violate the principle of political legitimacy and the related epistemic abstinence. If we press this further then what kind of treatment is to be considered discriminatory, i.e. what kind of treatment violates the right to the capability of self-respect, will depend on the widely shared views about what are to be considered equal situations and positions.⁵⁴⁹ Hence, as it stands, being committed to the principle of political legitimacy, the Capabilities Approach cannot prevent that its own substantial goals will be seriously compromised.

3.3.1 Political legitimacy in adjudication

The principle of political legitimacy to which the Capabilities Approach is committed also bears on the character of adjudication. Particularly when 'watershed issues' of political morality are at stake, it implies that part of the professional responsibility of judges is that they should base their decisions on widely shared views and common sense ideas, even if these are wrong from the viewpoint of the substantive goals of justice.⁵⁵⁰ Judges are not allowed to use their political power to enforce views that are

⁵⁴⁹ This notwithstanding the fact that Western constitutional democracies have constitutional guarantees for the protection of minorities. These guarantees need to be specified for application and the principle of political legitimacy says that this will be done depending on common sense views and democratic procedures, rather than on 'privileged knowledge' or the views of 'philosopher-judges'.

⁵⁵⁰ Sometimes the principle of political legitimacy is also used as ground to reject the institution of 'strong' judicial review. By strong judicial review is meant that judges are

philosophically correct, but discordant with a dominant public culture. This of course has influence on the extent to which judges can protect minority groups, such as Muslims. I will illustrate this by discussion of two legal cases.

The case of Aisha Baykara

Aisha Baykara is a Muslim girl who lives in a predominantly Catholic village with only two schools, one Catholic and one public school. Aisha is a bright girl and wants to go to university to become a veterinarian. She and her parents think it would be best for her to go to the catholic school, as it is widely acknowledged as outstanding. The public school conversely has a rather bad reputation and scores poorly in the national ranking as to exam success rates. During the application procedure for the Catholic school Aisha has to declare that she will respect the Catholic principles of the school.

Once admitted, Aisha performs very well. She enjoys the courses on Catholicism -albeit from a 'detached' point of view- and she gets along very well with her teachers and her classmates. At one point when Aisha Baykara has reached the age of thirteen she starts wearing a headscarf. For her this is an expression of her Muslim identity. However, Aisha's teachers in a rather straightforward way make clear to her that they disapprove of her new style of clothing. The director of the school gives Aisha a warning: if she does not stop wearing a headscarf she will be expelled from school. Aisha and her parents are furious about this threat and they file a claim against the school.

In court Aisha argues that the decision of the school is discriminatory. It violates the principle of anti-discrimination as expressed in international treaties, in the national constitution and in more specific national laws. The school does not have any justificatory objective reason to forbid her to wear a headscarf. The mere fact of her wearing a headscarf by no means forms a genuine threat to the Catholic principles on which the school is based. Not in the least because, as the school itself acknowledges, Aisha has been very respectful towards the Catholic character of the school, attending all religious ceremonies. She has also proven to be

authorized to protect the constitutional entitlements of citizens against majority decisions that may be laid down in legislation. Jeremy Waldron in his article 'The Core of the Case Against Judicial Review' strongly opposes such judicial review on this ground. He argues (p. 1360) that "allowing decisions by courts to override legislative decisions on these matters fails to satisfy important criteria of political legitimacy".

Cf. Waldron, Jeremy, 'The Core of the Case Against Judicial Review', *The Yale Law Journal* 115 (2006). See for a similar critique on judicial review Kramer, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Tushnet, Mark, *Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999).

a committed student of Catholicism as she scored very high notes for the course on religion. In addition Aisha is a pupil, not a teacher who is to function as a role model for pupils.

The board of the school argues to the contrary: it holds that the Catholic principles of the school cannot be honoured and effectuated if other religious expressions are tolerated. The forbidding of headscarves is necessary to uphold the Catholic principles of the school. To corroborate this claim the school submits a letter from both the employees and the students declaring that they indeed feel affronted by Aisha wearing a headscarf. The board in addition refers to the 'in-house' rules that prohibit the wearing of all kinds of face covering clothes, including the headscarf.

The judge now has to determine whether the school has used its room for discretion unreasonably when balancing Aisha's interest of wearing a headscarf against the interests of the school. Being bound to the principle of political legitimacy, in interpreting the applicable law and the Central Human Capabilities the judge must take the connotations of the headscarf and views about the Islam as they exist in society into account. If it is in line with widely shared views that wearing a headscarf is a sign of Muslim orthodoxy and an offense to Catholic principles, then the judge should assign legal weight to these views. Following these views he must conclude that the school has an objective justification for prohibiting headscarves.

At the same time if the judge would effectuate such views and interpret or specify the Central Human Capabilities in a way that accommodates these views, it is obvious that some of Aisha's capabilities are threatened, at least if we take the Capabilities Approach's objective character and outcome-orientedness serious. A negative decision will demand of Aisha to make a choice between not wearing a headscarf and leaving the school and will seriously reduce her chances to develop the capability of practical reason, that of thought and that of self-respect. If the judge effectuates said widely shared views through his interpretation of settled law, Aisha's opportunities to both develop her talents and be able to develop and maintain her religious identity is seriously threatened and thence such a decision may come with a moral loss, a loss that is due to arbitrary facts rather than to reason.

The case of *Samir Boularouz*⁵⁵¹

For some years already Samir Boularouz, a Muslim in his late thirties, is very preoccupied with the fact that the social climate in society has become rather hostile and dismissive towards Muslims. He sees this tendency everywhere: in the political arena, in the media, on the streets, at birthday parties and also at his work. Samir is particularly upset by the rise of a

⁵⁵¹ For the description of this case I took inspiration from the following cases: *Rechtbank Den Haag*, April 7 2008, ECLI:NL:RBSGR:2008:BC8732; *Hoge Raad*, March 14 1978, ECLI:NL:HR:1976: NJ 1976, 551; *Rechtbank Amsterdam*, November 18 1998, ECLI:NL:RBAMS:1998: NJ 1998/118; *Rechtbank Amsterdam* June 23 2011, ECLI:NL:RBAMS:2011:BQ9001.

political party with the ambition to counterbalance what it calls the ‘Islamisation’ of society. The political leader of this party with considerable rhetorical talent and in rather provocative words ‘voices’ an outright negative attitude towards Muslims. In a brief period he has managed to gain the support of more than twenty percent of the electorate.

Not wanting to be a powerless bystander of this tendency, together with some other concerned Muslims Samir Boularouz decides to set up a foundation that aims to put a stop to discrimination against Muslims. His foundation organises several public debates to discuss the alleged danger of Islam and Muslims. It also invites the members of the anti-Islam party, but they categorically refuse to come.

The foundation also sends a public letter to the political leader of said party, requesting him to stop his discriminatory speech and to speak about Muslims as equal citizens. Therein it refers to the special responsibility that politicians have as to the protection of the value of equal dignity. The political leader in question, however, ignores the letter. His political speeches become even more offensive and the measures he proposes in parliament are increasingly discriminatory against Muslims.

Boularouz’ foundation then decides to seek recourse in the law. It files a claim against the politician for tort because his utterances amount to a violation of the rights of Muslims.⁵⁵²

Referring to international and national law the foundation argues that the freedom of speech is not absolute and that it should be constrained if the rights of other citizens are jeopardized. In court Boularouz rather emotionally cites some of the politician’s utterances that he sees as violations of the rights of Muslims: “the Islam is a threatening danger that must be combated”, “we should fight against an Islamic invasion, an invasion of Berber Apes”, “we must protect ourselves against the Islam, because we Western people are considered unbelieving pigs that should be slaughtered”, “in the end nothing but disaster for our society can come out of Islam” and “the Koran is a fascist book, it is the Islamic mein Kampf”. This speech, Boularouz

⁵⁵² The relevant provisions of valid criminal law against racism and racial discrimination in the Netherlands are particularly article 137c of the Criminal Code (racist insults); article 137d (incitement to racial hatred, discrimination and violence); article 137e (dissemination of racist material); article 137f (participation in, or support of racist activities) and articles 137g and 429quater (racial discrimination in the exercise of a public service, profession or trade). These legal prohibitions that include the prohibition of particular kinds of speech can be traced back to 1934, when these articles were introduced to put a stop to slander against the Jewish population. Later on, in 1971, these provisions were extended as an implementation of the International Convention Against Racial Discrimination which was itself a response to the outpour of anti-Semitism in West Germany in the beginning of the sixties, as well as to the Apartheidsregime in South-Africa and to the segregation laws in the South of the United States. Cf. Nieuwenhuis, A. J., *Over de Grens van de Vrijheid van Meningsuiting* (Nijmegen: Ars Aequi, 2006), 242-243.

argues, is an affront to Muslims' standing as equal members of society. To support this claim the foundation submits a declaration of Islam experts who qualify the utterances at issue as indeed unfounded forms of stereotyping, stigmatizing and racism and who state that contrary to what the politician suggests, there is nothing inherently illiberal to Muslims and the Islam.⁵⁵³ The foundation also puts afore an article of a renowned legal scholar. On the basis of a study of case law this scholar asserts that compared to their decisions concerning negative utterances against other minority groups and religions, judges appear to set the limits of the freedom of speech less strict when utterances against Islam and Muslims are concerned. The scholar supports this conclusion by showing that political parties have been criminalized or even dissolved as criminal organisations because of using such phrases and terms as "Away with the Surinam and Antillean people who are parasitizing on our welfare and employment", "illegal immigrants", and "asylum fraud", all utterances that suggest a correlation between immigrants on the one hand and criminality and actual problems in society on the other.⁵⁵⁴ Based on these arguments the foundation requests the judge to forbid the politician to qualify the Koran as a fascist book or as the 'Islamic mein Kampf' and to speak publicly about Islam in terms of a 'cancerous tumour' or an inherent threat to liberal society. It also asks the judge to order the politician to rectify his discriminatory and aggressive speech in national newspapers, stating that his speech about Muslims and Islam violates the rights of Muslims and that he regrets having done so.

From the viewpoint of the Capabilities Approach the judge has to decide on the basis of settled law, the Central Human Capabilities included, whether the utterances indeed boil down to a violation of the rights of Muslims. In such a watershed issue of rights the judge must be sensitive to the common sense views of citizens and at least assign weight to them if he takes the principle of political legitimacy to which the Capabilities Approach is committed to heart. His interpretation of the threshold level of the Central Human Capabilities should be influenced by these views. In any case this principle does not allow a judge to give special weight to *privileged* knowledge -for instance that of the Islam experts- when determining what criticism of Muslims and Islam to legally allow and what to legally prohibit.

Being responsive to these views the judge can in addition decide that in case of Muslims the utterances of the politician are contributions to a political debate, given the fact that the position of Muslims is experienced as troublesome by the majority in society. So conceived,

⁵⁵³ This point refers to the 'open letter' sent by Islam experts to a Dutch court that had to decide about the criminality of the utterances of the politician Geert Wilders about the Islam. In this letter they discussed the presumed violent character of the Islam. Cf.

<http://marliesterborg.blogspot.com/2010/02/persbericht-wilders-manipuleert.html>.

⁵⁵⁴ See for cases in which these kinds of utterances were indeed criminalized:

Hoge Raad, March 14 1978, NJ 1978/385; Rechtbank Amsterdam, November 18 1998, NJ 1999/377.

the principle of political legitimacy can in fact justify the inequality and inconsistency between 'similar cases' that the expert signalled. That is, the difference can be accounted for by the widely shared views as to the 'unreasonableness' of Muslims and Islam.

On the other hand, a judge who honours the principle of political legitimacy and hence ignores privileged knowledge in establishing the specifications of the Central Human Capabilities may cause a genuine moral loss. In this case by honouring this principle the judge will at the same time legally authorize practices that seriously harm the level of the Central Human Capabilities for Muslims, most prominently the capability of self-respect.⁵⁵⁵ Thus adjudication will not be an instrument for the protection of (the rights of) members of a minority group, but it will rather be a way of legally effectuating dominant views in society, even if these endanger the capability of self-respect of this minority group. Although justified by justice, such an outcome will constitute a genuine moral loss.

To summarize, in this section I aimed to show how the (political liberal) principle of political legitimacy to which the Capabilities Approach is committed bears on the moral character of adjudication. We have seen that by honouring common sense views judges can violate substantive values that Nussbaum's Capabilities Approach aims to protect -on their own accord or by effectuating policies or laws. In these cases the one ideal of this Approach, i.e. its substantial ideal of justice, clashes with another of its ideals, that of political legitimacy.

Losing citizens will suffer from genuine moral loss and the burden that they must face cannot be accounted for in terms of the principles of justice. Adjudication will for this reason also be less transparent, less morally reassuring and less legitimate towards the 'losing' citizen than a stabilizing approach to adjudication and connected to this a normative theory of political morality would suggest.

4 Conclusion

This chapter has established that similar to Rawls' theory of justice, Nussbaum's Capabilities Approach is rather fragile in that it cannot prevent that it leads to residues of justice. This is at odds with its aspirations as a normative theory of political morality.

More specifically I argued that these residues of justice and hence this fragility of the Capabilities Approach are due to conflicts of justice, due to the under-determinacy of justice and due to the principle of political legitimacy to which this approach is

⁵⁵⁵ Nussbaum, 'Veiled Threats'.

committed. Through a discussion of a range of legal cases I also showed how this fragility affects the moral character of adjudication. That is, the Capabilities Approach justifies or authorizes judicial decisions that are less transparent and morally reassuring than a stabilizing approach to adjudication would indicate. In spite of the Capabilities Approach's justificatory aspirations as a theory of political morality, under this theory the practice of adjudication is not simply reassuring and at least in part morally troublesome.

*“Ethical theory is essentially a moral invention... I will argue that the structures known as ethical theories are more threats to moral sanity and balance than instruments for their attainment.”*⁵⁵⁶

*“Theory typically uses the assumption that we probably have too many ethical ideas [...]. Our major practical problem now is actually that we have not too many but too few, and we need to cherish as many as we can.”*⁵⁵⁷

8 Justice without rails. An anti-theoretical critique and a quasi-phenomenological proposal

1 Introduction

So far the argument can be taken as an internal critique on a stabilizing approach to adjudication. This chapter offers a more fundamental or -if you like- external critique on the attempt to secure the moral quality of adjudication by means of normative moral theory. It does not zoom in on another substantial theory of justice as potential explanatory and justificatory ground for law and adjudication. It rather takes issue with the reliance of a stabilizing approach on normative moral theory as such.

There to I will first expound the central points of critique that anti-theorists have on normative theories of morality in general (2). Next, I will assess the validity of this critique (3). Then I will present the central features of a quasi-phenomenological approach to justice as an answer to the questions what remains of ‘justice’ when we give up normative theories of justice and what this entails for an account of moral quality of adjudication (4). Subsequently, I discuss how this quasi-phenomenological approach can account for social critique, moral progress and what role it does allow for theories of political morality (5). The chapter ends with a conclusion (6).

2 Normative theory under attack

This section expounds an anti-theoretical critique on normative theories of political morality, more generally on any attempt to account for moral quality in practice by means of a normative theory. It aims to grasp the kernel of the critique of the ‘anti-theorists’ within practical philosophy, roughly to be divided into neo-Aristotelians and followers of the later Wittgenstein. The anti-theoretical tradition includes such thinkers as

⁵⁵⁶ As cited in: Louden, 'Virtue Ethics and Anti-theory', 2.

⁵⁵⁷ Williams, *Ethics and the Limits of Philosophy*, 117.

Peter Winch, Elisabeth Anscombe, Annette Bayer, Iris Murdoch, Cora Diamond, John MacDowell, David Wiggins, Stanley Cavell, Bernard Williams, Michael Oakeshott, Raymond Geuss and others.

It is important to note that the anti-theoretical critique is content-neutral. It does not target any specific substantial moral values, but takes issue with any kind of attempt to put practice under the sway of a normative moral theory, criticizing “all kinds of theoretical or systematizing normative efforts in moral philosophy.”⁵⁵⁸ The anti-theoretical critique boils down to the claim that giving primacy to theory in practice, as normative theories tend to do, is inefficient, harmful and also dishonest.

The inefficiency critique engages the idea that normative moral theories are unfit to realize substantial aspirations in practice -whatever these aspirations are- because the central elements of theory, i.e. explicit normative principles and rules, are inadequate for this purpose. Principles that are generated by theoretical reason are considered to be too vague and too indeterminate to have sufficient practical force. That is, these principles are constituted by what Bernard Williams has qualified ‘thin concepts’ - “the most general expressions used in ethical discussion.”⁵⁵⁹ Characteristically, thin concepts (such as ‘right’ or ‘basic liberties’) contain little empirical content; the conditions of their application are only to a limited degree part of these concepts themselves.⁵⁶⁰ Therefore the application of these concepts is not so much guided by the ‘world’, but rather by interpretative choices of the people using them. Because of their ‘thinness’, according to the anti-theorist these constitutive concepts are unfit to constrain and guide practice.⁵⁶¹ Their application will be the result of an “opaque aggregation of actions and forces”.⁵⁶² It will be the outcome of “an interpretive act, which situates them within their relevant cultural institutions and moral practices.”⁵⁶³

⁵⁵⁸ Hämäläinen, Nora, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', *Ethical Theory and Moral Practice* 12, 5 (2009), 541.

⁵⁵⁹ Williams, *Ethics and the Limits of Philosophy*, 128. I introduced this notion in chapter three.

⁵⁶⁰ Cf. *Ibid.*, 141.

⁵⁶¹ Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 47.

⁵⁶² *Ibid.*, 28.

⁵⁶³ Loudon, 'Virtue Ethics and Anti-theory', 100.

Hence, in spite of their aspirations normative moral principles will ‘produce’ an amalgam of ‘specifications’ that cannot be reduced to these principles. These specifications do not have a morality tracking property to which they can be reduced. So, strictly speaking the notions of ‘specification’ and ‘application’ even lose their meaning, because what counts as specification or application is not determined by the theory. Paradoxically, the principles will allow for outcomes that cannot be reduced to theory itself. With these principles as normative guidance, practice will nonetheless determine the content of morality, only seemingly covered by theory.⁵⁶⁴ In brief: because of their ‘thinness’ normative principles of morality are not well-suited to offer the kind of guidance on which theorists rely.⁵⁶⁵

Even if normative principles were more specific or if we came up with very clear action guiding rules this would not change the inefficiency critique of the anti-theorists. Anti-theorists hold that if rules are to guide a practice, they must be intimately linked to and embedded in concrete practices. Otherwise they cannot sensibly have any practical role.

Stanley Cavell describes practices as “a matter of our sharing routes of interest and feeling, modes of response, sense of humour and of significance and of fulfilment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation -all the whirl of organism Wittgenstein calls “forms of life”.”⁵⁶⁶

Now, according to the anti-theorists these ‘forms of life’ can never be codified, formally explicated and precisely spelled out. The inefficiency argument therefore also points to a category mistake made by theorists: their reliance on the practical role

⁵⁶⁴ Ibid.

⁵⁶⁵ Of course, not all normative moral theories place equal emphasis on their normative potential for practice. It is however the case that moral theorists agree that moral theory “must be able to offer some sort of guidance concerning what to do and how to live [...]” Cf. ———, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 135.

⁵⁶⁶ Cavell, Stanley, *Must We Mean What We Say?* (New York: Charles Scribner's Sons, 1969), 52. McDowell also cites this phrase in his ‘Virtue and Reason’. Cf. McDowell, John, ‘Virtue and Reason’, in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 60.

of theory is “incompatible with various features of moral practices.”⁵⁶⁷ They falsely assume that thought (as produced by theory) and practice relate as a premise and a conclusion as if the former offers the rails that keeps the latter moving in the right direction.⁵⁶⁸ They mistake features of theoretical premises with practical norms. Abstract principles or rules are simply unsuited to function as ‘rails’ that keep a practice on track. So far the argument of inefficiency.

Next there is the harm critique. Anti-theorists hold that putting practices and society under the reign of normative moral theory is harmful for the kind of substantive ethical concepts that concrete agents need for practices to be of a certain quality.⁵⁶⁹ They assert that because of the reductive power of moral principles and because of the effort of systematisation that normative moral theory requires, a range of substantive concepts will be marginalized. That is, substantive ethical concepts that do not harmonize well with these normative moral principles are rejected as indications of arbitrary or even immoral beings and doings.⁵⁷⁰ And, in so far these concept do fit in, they lose their immediate authority: they are to be understood as ‘allowed for’ or ‘permitted’, rather than as valuable in their own right. The considerations and responses based on these concepts are to be understood as mere preferences and hence their normative force is weakened. And because moral theories by themselves do not and cannot offer any substantial ethical thought in return, Bernard Williams has come to the notorious phrase that “[r]eflection characteristically disturbs, unseats, or replaces those traditional concepts; [...] we reach the notably un-Socratic conclusion that, in ethics, reflection can destroy knowledge.”⁵⁷¹ This is problematic, as the “rationalized values may be hard to live with and to handle”, according to

⁵⁶⁷ Clarke, Stanley G., 'Anti-Theory in Ethics', *American Philosophical Quarterly* 24, 3 (1987), 238.

⁵⁶⁸ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 24. For the image of the ‘rails’ see: McDowell, 'Virtue and Reason', 61; McDowell, John, 'Non-Cognitivism and Rule-Following', in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 203.

⁵⁶⁹ Clarke, 'Anti-Theory in Ethics', 240-241.

⁵⁷⁰ Ibid.

⁵⁷¹ Williams, *Ethics and the Limits of Philosophy*, 148.

Williams.⁵⁷² So, as it reduces local knowledge, anti-theorists hold that normative moral theory distorts the ethical reality of a practice.⁵⁷³

Normative moral theory is also seen as harmful for practice because it takes (theoretical) reflection as the central moral capacity over other kinds of moral sensibilities that agents may have. Nora Hämäläinen paraphrases this critique as follows: “any attempts to theorize, or systematize, our understanding is bound to distort the actual moral competence which we rely on in practical moral thought and action.”⁵⁷⁴ Theoretical reflection takes up “psychological space” and will change people’s moral outlook.⁵⁷⁵ Consequently, we lose a range of dimensions in our moral landscape and hence also dimensions of moral evaluation, as only the capacities required for the application of normative theory are assumed to be relevant for evaluating the moral worth of agents. By focusing on principles and rules that are to guide actions of agents, moral theory wrongly ignores a variety of other ways of doing and being as relevant for the evaluation of practices. As Iris Murdoch says, moral theory leaves aside “the inner monologue and its like, but also overt manifestations of personal attitudes, speculations, or visions of life such as might find expression in talk not immediately directed to the solution of specific moral problems.”⁵⁷⁶

In addition, part of this anti-theorist harm critique is that moral theory is harmful for the practice of philosophy itself. According to anti-theorists focusing on moral theory leads to a form of blindness for what moral life and moral thought are like.⁵⁷⁷ ‘Real’ moral issues or the interesting aspects of moral life will in any case disappear from

⁵⁷² Williams, Bernard, *Philosophy as a Humanistic Discipline*, ed. Moore, A.W. (Princeton: Princeton University Press, 2008), 163.

⁵⁷³ Clarke, Stanley G. and Simpson, Evan, 'Introduction', in *Anti-theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 23.

⁵⁷⁴ Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 541.

⁵⁷⁵ Williams, *Ethics and the Limits of Philosophy*, 171.

⁵⁷⁶ Cf. Murdoch, Iris, 'Vision and Choice', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 78-82.

⁵⁷⁷ Diamond, Cora, 'Losing Your Concepts', *Ethics* 98, 2 (1988), 263.

philosophical discussions.⁵⁷⁸ By focusing so much on normative moral theory, practical philosophy gives a very poor and limited picture of moral thought. Cora Diamond has put this point as follows: “ideas about life which are not ideas about rightness, goodness, or virtue enter our moral thought in many ways, and [...] moral theory, which characteristically ignores such features of moral thought, thus gives a distorted picture of that thought.”⁵⁷⁹

Arguably part of the previous critique is that anti-theorists reject the way moral theory deals with moral conflicts. Normative moral theories typically dismantle such conflicts as only *prima facie* conflicts or ignore them as negligible incidents that violate the demands of theory, including its principle of non-contradiction. Anti-theorists by contrast see genuine moral conflicts as inherent to any kind of practice. They strongly reject the idea that for any apparent conflict “either one of the conflicting ought statements is not true or the two statements do not really enjoin incompatible actions.”⁵⁸⁰ Moral values are not like propositions that can be qualified as either right or wrong. Anti-theorists hold that to have any meaning at all, these values must be understood as having a ‘contour’. This contour is a local and contextual elaboration of the central concern.⁵⁸¹ Precisely because such values are always historically and socially mediated, they can perfectly and coherently conflict. Practice by itself does not order (the meaning of) these values into a seamless web, so to say. Stuart Hampshire even claims “there must always be moral conflicts which cannot, given the nature of morality, be resolved by any constant and generally

⁵⁷⁸ Cf. Williams, Bernard, *Morality. An Introduction to Ethics* (Cambridge: Cambridge University Press, 1972), xvii.

⁵⁷⁹ Diamond, Cora, 'How Many Legs?', in *Value and Understanding: Essays for Peter Winch*, ed. Gaita, Raimond (New York: Routledge, 1990), 170. In a similar vein Iris Murdoch states: “[W]e have suffered a general loss of concepts, the loss of a moral and political vocabulary”. Cf. Murdoch, Iris, 'Against Dryness', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 290.

⁵⁸⁰ Clarke and Simpson, 'Introduction', 13.

⁵⁸¹ Williams, 'Liberalism and Loss', 94.

accepted method of reasoning. There is no rational path that leads from these conflicts to harmony and to an assured solution [...]”⁵⁸²

For anti-theorists the categorical attempt to resolve moral conflicts through theory thus necessarily boils down to merely nominally redirecting certain concerns. It is nothing but a way of redefining certain words, while leaving the underlying concerns unaddressed.⁵⁸³

Against this background I now come to the final anti-theoretical critique: normative moral theory falsely brings ‘good news’ about the world and by doing so it is dishonest.⁵⁸⁴ Anti-theorists understand normative moral theory as a project that alienates people from the real character of the practices they live in, because they give too optimistic an understanding of it. Moral theory, in the words of Raymond Geuss “doesn’t make much sense as a contribution to understanding or dealing with the social and political world”.⁵⁸⁵ The gaps, edgy fringes, contingencies, arbitrariness and the painful losses that these practices show, are falsely portrayed as something that can be overcome or solved. Anti-theorists hold that this troublesome phenomenology can never be exhaustively “corrected by a more coherent, unitary perspective”.⁵⁸⁶ To nonetheless put these practices under the lens of a normative moral theory is for anti-theorists a rather evasive way to deal with their inherent troublesome nature. Normative moral theory boils down to a “consoling myth” which has its cause in “the inability to endure the vertigo” that comes with relinquishing a reliance on the normative force of explicit principles and rules.⁵⁸⁷

Anti-theorists thus hold that instead of using the philosophical viewpoint to seemingly dismantle or solve the troublesome phenomenology of practice, philosophy should

⁵⁸² Hampshire, Stuart, 'Morality and Conflict', in *Anti-theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 148. See also: Williams, 'Liberalism and Loss', 95.

⁵⁸³ Williams, 'Liberalism and Loss', 94.

⁵⁸⁴ Cf. ———, 'The Women of Trachis. Fiction, Pessimism, Ethics', 43.

⁵⁸⁵ Geuss, *Outside Ethics*, 31.

⁵⁸⁶ Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 549.

⁵⁸⁷ Wiggins, David, 'Deliberation and Practical Reason', in *Essays on Aristotle's Ethics*, ed. Rorty, Amélie O. (Berkeley: University of California Press, 1980), 237.

come up with a more honest account of moral quality in practice.⁵⁸⁸ Not in the least because in trying to get control over the practical world, normative moral theory is not only pervasive, but paradoxically it also increases the likelihood that practice will in fact be determined precisely by the kind of arbitrary factors of which it aims to mitigate the influence.⁵⁸⁹

So, on the basis of this discussion we can conclude that the anti-theoretical critique offers external support for the internal critique on Rawls' and Nussbaum's normative theories of political morality that was elaborated in the previous chapters. Indeed, this critique boiled down to the claim that in the end neither of these theories can realize their own aspirations and may also be harmful for practice, i.e. leading to genuine moral loss. So conceived, because of its reliance on a normative theory of political morality a stabilizing approach to adjudication may proved to be ineffective as regards the realisation of its own moral goals. Above that it may threaten the moral quality of adjudication and offer all too rosy, false picture of the moral nature of adjudication.

3 The dispute between anti-theorists and theorists

Before we definitely reject normative moral theory and connected to this also a stabilizing approach to adjudication, fairness demands that we address the replies a theorist might have on the anti-theoretical charges.⁵⁹⁰

⁵⁸⁸ Clarke and Simpson, 'Introduction', 23.

⁵⁸⁹ Raymond Geuss made the observation that the country that Rawls had in mind when elaborating his theory - the United States of America - has become increasingly unequal since he introduced his theory. For Geuss this is not to say that the central institutions of the United States should work harder to comply with Rawlsian justice. Rather it reveals that the strategy of normative theories of political morality is wrong. Cf. Geuss, *Outside Ethics*, 36.

⁵⁹⁰ Here it must be noted that the debate between theorists and anti-theorists cannot be reduced to the debate on ideal and non-ideal theory. Although there is an overlap between the concerns that are put afore in both debates, I think it is useful to distinguish them, most of all because the notion of ideals *per se* does not sufficiently cover the concerns that anti-theorists have. Their concerns are first and foremost about the influence of theory on practice and not necessarily about the status of the ideals that theories hold. That is, 'ideal' in 'ideal theory' by itself does not sufficiently explain the reasons why anti-theorists hold that theory may be irrelevant or harmful. See for illuminating contributions to the debate on ideal versus non-

As to the anti-theorists' charge that normative moral theory is inefficient because of its use of abstract and general normative principles and rules, a theorist could respond that these are the only resources left because in modern pluriform societies "shared understandings of lesser generality have broken down."⁵⁹¹ If practices were to be regulated by more substantial moral viewpoints this would lead to social conflicts and to violations of the demand for respect for citizen's conceptions of the good.⁵⁹² In addition, a theorist could stress that he is not committed to the naïve belief that principles of justice do apply themselves. A good theorist is well aware that even the best normative moral theory depends on the capacity of 'judgment', on what Kant has qualified a 'middle term'.⁵⁹³ A theorist can fully agree with the assertion that "many rules or principles are formulated in too coarse-grained a fashion to capture the relevant moral detail in a particular situation and thus require something beyond the rule itself to apply them adequately to the particular situation."⁵⁹⁴ He can even admit that, overall, theorists have paid insufficient attention to the importance of this capacity of 'judgment' and add to this that there is no inherent obstacle for normative moral theory to acknowledge the relevance of judgment.

So he may hold that the mere fact that a normative moral theory depends on agents who know how to bridge the gap between abstract principles and rules and the concrete case at hand, is insufficient a reason to claim that such theories are inefficient. All the more so because a theorist will rely on the fact that overall moral

theory: Simmons, A., 'Ideal and Nonideal Theory', *Philosophy and Public Affairs* 38, 1 (2010); Valentini, Laura, 'On the Apparent Paradox of Ideal Theory', *The Journal of Political Philosophy* 17, 3 (2009); Robeyns, Ingrid, 'Ideal Theory in Theory and Practice', (Nijmegen: Radboud University Nijmegen, 2007); Celikates, Robin, 'At Best Irrelevant, at Worst Ideological? Ideal Theory and the Case of Civil Disobedience', (Amsterdam: University of Amsterdam, 2011).

⁵⁹¹ Rawls, *Political Liberalism*, 46; Rawls, John, 'Social Unity and Primary Goods', in *Utilitarianism and Beyond*, ed. Williams, Bernard and Sen, Amartya (Cambridge: Cambridge University Press, 1982), 161.

⁵⁹² Rawls, *Political Liberalism*, 46; ———, 'Social Unity and Primary Goods', 161.

⁵⁹³ Kant states this point as follows: "[...] to a concept of the understanding, which contains a rule, must be added an act of judgment by which a practitioner distinguishes whether or not something is a case of the rule;[...]". Cf. Kant, *Practical Philosophy*, 279.

⁵⁹⁴ Blum, Lawrence, 'Moral Perception and Particularity', *Ethics* 101, 4 (1991), 701.

agents do possess this capacity of judgment. So far the replies of the theorist to the inefficiency argument.

I think that none of these replies will be convincing for an anti-theorist. As to the first reply: without any additional argument, it is a non-sequitur to put it that, compared to more substantive viewpoints, a more abstract or general account will lead to respect for agents with divergent conceptions of the good. That is, precisely because normative principles of morality cannot apply themselves and application will always be the result of an act of interpretation that is determined by all kinds of social factors and personal contingencies of the agent, the alleged ‘troublesome’ controversies are likely to return on the level of ‘application’. Thus, respect for citizens is not yet secured by the generality of principles. This respect may well be ‘violated’ on the level of application through the ‘judgments’ of the agents who apply said principles. Neither will the theorist’s acknowledgment that ‘judgment’ is needed to bridge the gap between theory and practice suffice to rebut the anti-theorist’s critique that normative moral theories allow for arbitrary outcomes. In order for a theorist to rebut this critique he must show that the capacity of judgment that he relies upon is indeed a ‘theory-tracking’ capacity and that agents in general will possess such a faculty. What is more, even if the theorist would succeed in producing these complementary arguments, the anti-theorist may object that said capacity of judgment cannot yet explain how agents with the task of applying a normative theory will be able to discern the relevant facts, i.e. the facts for which theory has a normative bearing.⁵⁹⁵ This ability cannot coherently be taken to be part of the capacity of judgment (when conceived of as the capacity to ‘bridge the gap’ between principles and a concrete case), as it logically must come prior to any kind of principles or rules.⁵⁹⁶ Also and again, an anti-theorist holds that practice cannot coherently be understood as if it was continuous with theory, neither ‘at bottom’ nor indirectly.⁵⁹⁷ According to

⁵⁹⁵ Ibid., 711-712.

⁵⁹⁶ Cf. Ibid.

⁵⁹⁷ Hence, for an anti-theorist Barbara Herman’s ‘rules of salience’ -that she deems an indispensable amendment to any kind of moral theory that aims to account for its practical force- is an incoherent notion in so far these rules point to explicable and codifiable rules. Cf. Herman, Barbara, 'The Practice of Moral Judgment', *Journal of Philosophy* 87 (1985), 418-436.

anti-theorists theory and practice belong to two heterogeneous fields. So an anti-theorist will be likely to reject the theorist's interpretation of 'judgment', because it suggests an incoherent view of practice, i.e. a view of practices and agents as moving on 'rails' that are provided by codifiable moral principles and rules.

Next, to the critique that normative moral theory is harmful for moral practice as well as for philosophy, a theorist will probably reply that it is unfounded for the simple reason that the charge is all about bad theory. A theorist may argue that this critique does not affect *good* moral theory, because good theory precisely seeks to accommodate the kind of moral judgments that anti-theorists are so keen to protect. A theorist can state, as Robert Louden has put it, that *good* moral theory anchors its normative concerns "in existing moral practices and attitudes, so that the theorist does not suddenly appear from nowhere to 'tell us what to do'."⁵⁹⁸

The theorist can in addition refer to John Rawls' 'reflective equilibrium' as the prototype procedure of normative moral theory, of which the very point is to accommodate a wide range of substantive moral views.⁵⁹⁹ This procedure only excludes judgments that violate the basic requirements of morality itself.

A theorist may in addition assert that theory is not merely 'friendly' to and accommodating for existing moral thought, but also makes it more stable. Theory provides the 'why' for the 'that' and on that account can explain why ordinary thought is not merely allowed to exist, but even "morally ought to exist."⁶⁰⁰ A theorist holds that this kind of articulation is particularly valuable in times of insecurity and crises. Theory may thus be seen as "ordinary moral thought pressed further", rather than as a threat to it.⁶⁰¹

The same goes for the charge that normative theory is harmful for philosophy itself. A theorist may argue that normative moral theory does not reduce the content of philosophy to a well-confined set of abstract concepts. Far from it: through procedures such as the 'reflective equilibrium' philosophy is fully in touch with and sensitive to ordinary moral thought, or so the theorist's response could be.

⁵⁹⁸ Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 136.

⁵⁹⁹ Cf. Rawls, John, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 18-19.

⁶⁰⁰ Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 136.

⁶⁰¹ See in this regard for instance: Gibbard, Allan, 'Why Theorize How to Live with Each Other?', *Philosophy and Phenomenological Research* 55, 2 (1995), 37.

For an anti-theorist these replies probably do not go to the heart of their critique either. For one thing, the kind of ‘ordinary thought’ as it is taken into account by normative moral theory already suggests a high level of reflection. In this regard an anti-theorist could point to Rawls’ description of the judgments that his theory aims to accommodate. These are judgements that are typically made under the conditions of the ‘original position’, which means that all immediate and embedded considerations stemming from a locally situated or personal perspective are excluded.⁶⁰² These judgments can hardly be conceived as ‘ordinary moral thought’, as they must be “duly pruned and adjusted considered judgements”.⁶⁰³

Also, the theorist’s replies do not tackle the anti-theoretical point that theory and hence systematization will impoverish the moral landscape because they distort “situationally bound considerations.”⁶⁰⁴ According to anti-theorists conceptual loss not only occurs because certain immediate substantive concepts do not survive the critical scrutiny of normative moral theory, but also because such a theory asks from agents to take a reflective point of view of a particular kind, i.e. to step back and detach themselves from their actual commitments. Even if theory would permit certain commitments and relations, these are not seen as required. They are regarded as the mere expressions of subjective preferences of the agents involved and this will change their meaning. For an anti-theorist normative theory by definition reduces the moral richness of practices.⁶⁰⁵

Moreover and related, the theorist’s replies do not address the anti-theorist’s charge that normative moral theory is harmful for practice because its focus is exclusively on the competences of agents to apply a theory: not on other ways of being and doing that uphold the moral quality of practice.

Next, to the anti-theorist’s charge that normative moral theory offers a conceptually mistaken picture of moral conflicts, a theorist can reply that he does not deny that troublesome conflicts between moral values will arise in practices that are guided by theory. A theorist can wholeheartedly admit that, for instance, a normative theory of

⁶⁰² Rawls, *A Theory of Justice*, 17-18.

⁶⁰³ Ibid.

⁶⁰⁴ Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 546.

⁶⁰⁵ Clarke and Simpson, 'Introduction', 23.

political morality will “exclude some ways of life that realize in special ways certain fundamental values”.⁶⁰⁶ His claim is just that conflicts between moral values are only *apparent* conflicts, meaning that they are soluble from a moral point of view. By this a theorist does not mean to deny that the losses that result deserve our attention, he only means that from a moral point of view these conflicts can exhaustively be resolved and that as a consequence their resolution does not end up in a genuine moral loss or wrongdoing.⁶⁰⁷

This reply will not convince the anti-theorist either. It again falsely suggests that conflicts between values can be treated as conflicting propositions or conflicts of beliefs, which because of the requirement of ‘non-contradiction’ can be resolved by means of theory. But as in the end moral conflicts are about genuine commitments, according to an anti-theorist they cannot be ‘dismantled’ or resolved up by the mere intervention of theory.⁶⁰⁸ To hold otherwise is to deny the moral facts of life. So, “[w]hy then should moral theorists -Kantians, utilitarians, deontologists, contractarians- look for an underlying harmony and unity behind the facts of moral experience?”, the anti-theorist will rhetorically asks.⁶⁰⁹

Finally, to the anti-theorists’ critique that normative moral theories are overly hopeful and even dishonest about the moral potential of practice, theorists could offer the following reply. Anti-theorist wrongly have it that to rely on normative moral theory is tantamount to having the naïve belief that in a particular practice everybody will be happy and all interests will be met.⁶¹⁰ Normative moral theory is simply premised on the idea that it makes sense to strive for the realisation of a moral ideal and to shape our social world according to our aspirations. This striving in itself is not to deny that

⁶⁰⁶ Rawls, *Political Liberalism*, 197.

⁶⁰⁷ ———, *A Theory of Justice*, 155. See for this kind of reply also: Herman, ‘The Practice of Moral Judgment’, 422. Louden even claims that normative moral theories can indeed accommodate for the fact of genuine moral conflicts. However, he does not explain how these genuine conflicts can be reconciled with the principle of non-contradiction that seems operative in his conception of theory. Cf. Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 131-132.

⁶⁰⁸ Williams, ‘Liberalism and Loss’, 95.

⁶⁰⁹ Hampshire, ‘Morality and Conflict’, 151.

⁶¹⁰ Rawls, *A Theory of Justice*, 85.

the social world evidently depends on the workings of fortune and of evil stepmother nature.⁶¹¹ But this kind of striving and trust is to be preferred to maintaining the fatalistic stance of the anti-theorists that practice is in essence beyond human control.⁶¹²

For an anti-theorist this reply probably hinges on the fallacy of false alternatives, as it suggests that there is nothing between on the one hand embracing normative moral theory and on the other fatalism about human aspirations. In any case, the theorist's reply is not yet an argument to show that normative moral theory is indeed an adequate instrument to realize moral aspirations. Nor does this reply give us reason to give up on the possibility that there are other, more viable ways to secure moral quality in practice.

What should we make of this reconstruction of the debate between theorists and anti-theorists? Of course, the debate is not settled and we need to continue to explore both views as regard the value of normative moral theory, but I think that the confrontation so far suffices for our purposes. It allows us to safely conclude that the burden of proof regarding the practical role of normative moral theory lies with the theorist. His replies to the anti-theoretical charges do in any case not offer convincing reasons to do rely on normative moral theory in our account for moral quality of adjudication. Rather, we may indeed agree with Hämäläinen that “[i]t is not the anti-theorist who is building her empire on intellectual quicksand. What is really loosely grounded here is the work of the theorist, who thinks that tradition and actual moral conditions can be set aside when looking for the ideal ones.”⁶¹³

The next section is a prelude to the second part of the book in which I propose an approach to adjudication that gives primacy to practice rather than to theory.

⁶¹¹ ———, *A Theory of Justice*, 76.

⁶¹² Cf. Rawls as quoted in: Weithman, 'John Rawls and the Task of Political Philosophy', 369. See also: Rawls, *A Theory of Justice*, 88.

⁶¹³ Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 543.

4 Justice without rails. A quasi-phenomenological approach

4.1 Three dimensions of justice

Giving up on normative moral theory and hence on the attempt to account for the moral quality of the central institutions in society -adjudication included- may lead to the concern that we open the door to nihilism or scepticism, that is to the idea that 'anything goes' where the quality of these institutions is concerned. Although understandable, there is no ground for this concern.

This section discusses a preliminary and tentative sketch of how we can approach the moral quality of said institutions under the heading of 'justice', without relying on the aspirations of normative theories of political morality. This quasi-phenomenological approach to justice must be seen as an attempt to offer a 'realistic philosophy', one that aims to stay close to the phenomenology (the 'what-they-are-like-ness') of the central institutional practices in society.⁶¹⁴ Only in the second part of the book will I develop the *fragility of rightness* as an elaboration of this approach for the institution of adjudication.

To set the stage it is useful to distinguish between the notions of a 'just person', a 'just state of affairs' and a 'just society as a whole'.⁶¹⁵ These notions are intimately linked. We have seen that normative theories of justice such as those of John Rawls and Martha Nussbaum typically deduce the first two notions from the third. Whether a certain policy, law, social practice or state of affairs is just depends on their compatibility with the principles of justice, i.e. with a description of (an ideal of a) society as a whole. Similarly, a citizen or public official is just in a derivative way, namely to the extent that he complies with said principles.⁶¹⁶ As Rawls has put it, one can be a just person "[...] only by acting on the principles of right and justice as having first priority."⁶¹⁷

⁶¹⁴ Cf. Guignon, Charles, 'Williams and the Phenomenological tradition', in *Reading Bernard Williams*, ed. Callcut, Daniel (New York: Routledge, 2009), 166; Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 165.

⁶¹⁵ Cf. Wiggins, David, 'Neo-Aristotelian Reflections on Justice', *Mind* 113, 451 (2004), 487-490.

⁶¹⁶ Cf. Annas, Julia, *The Morality of Happiness* (Oxford: Oxford University Press, 1993), 292.

⁶¹⁷ Rawls, *A Theory of Justice*, 503.

A quasi-phenomenological approach, by contrast, takes the notion of a just person as prior to that of a just state of affairs and of a just society, however without downgrading the importance of the latter.⁶¹⁸ Generally speaking, a just state of affairs is what a just person sees as the situation in which citizens receive their due. To quote David Wiggins: a just person can for instance discern “the need for the act that restores to Peter Peter’s proper portion; the need for an act that restores Paul to the condition where he was before he suffered the injury or loss that he suffered [...]”⁶¹⁹ These ‘needs’ appear to the just person as ‘practical necessities’, so to say, and if they are satisfied, the situation at hand is just.⁶²⁰

As said, giving primacy to practice does not entail giving up on the notion of justice as a virtue of society as a whole. However, compared to normative theories of justice it fundamentally differs both in its form and in its content. In a quasi-phenomenological approach this notion can at most be an inconclusive attempt to discursively express the active understandings of justice as it actually figures in all the ‘spheres of justice’ that are prominent in society. As we shall see below, precisely because primacy is given to practice such an articulation cannot exhaustively represent the demands of justice, as they exist for all the different and heterogeneous spheres.⁶²¹ In a quasi-phenomenological approach justice is “not susceptible to full, finite or a more than partial articulation”, as David Wiggins says.⁶²² Neither will this idea of a just society ‘guide’ the decision-making of the authoritative officials. In

⁶¹⁸ The notion of a just person as it is used here draws on Aristotle’s account of justice as “complete excellence, only not without qualification but in relation to another person.” Cf. Aristotle, 'Nichomachean Ethics', 1129b26-27. See also: Annas, *The Morality of Happiness*, 316.

⁶¹⁹ Wiggins, 'Neo-Aristotelian Reflections on Justice', 489.

⁶²⁰ Here I follow Bernard Williams in his interpretation of practical necessity. See: Williams, Bernard, 'Practical Necessity', in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981). 777

⁶²¹ In this regard Wiggins states: “It may appear that the fulfilment of this sum of citizenly obligations, expectations and concerns, lacking the formal beauty of some larger configurations in social geometry or the basic structure of a well-ordered society, is nothing very uplifting or magnificent. But it is nothing dispensable either.” Wiggins, 'Neo-Aristotelian Reflections on Justice', 490.

⁶²² *Ibid.*, 486.

understanding their responsibilities they cannot rely on such a viewpoint to determine how to respond to the concrete situations at hand.

4.2 Empty situational justice? On thick and thin concepts

Of course, if the notion of a just person is to have any substantive meaning the predicate ‘just’ must refer to a set of qualities that enable such a person to recognize what is needed if citizens are to receive their due. These qualities by themselves are not sufficient either, at least not if we want to steer clear of subjectivism or empty situational versions of justice. For these qualities to lead to any kind of moral knowledge we need to relate them in one way or another to the external world. In order to meet this requirement a quasi-phenomenological approach to justice stresses the importance of the availability of ‘thick’, or ‘entangled’ value concepts in public institutional practices, but also in background practices such as family life and education.⁶²³ It is through the internalisation of these concepts that just agents can bring the right concerns to bear on concrete situations.

We saw before that thick concepts characteristically contain considerable descriptive content. Other than thin value concepts such as ‘right’ and ‘good’, thick value concepts encompass the conditions of their application to a large(r) degree. Therefore, whether they apply is largely a matter of ‘fact’, not of choice and as a consequence they can be applied in a relatively direct, immediate way. Thick value concepts, as Bernard Williams has famously put it, are “world-guided”.⁶²⁴ They have a ‘contour’, a culturally and locally determined elaboration of the central concern that the concept aims to address and that is beyond the control of an individual agent.⁶²⁵

In addition to their descriptive content, it is also characteristic for these thick or entangled value concepts that they come with an evaluative dimension. Their application entails a ‘pro or con’ attitude towards the object so described.⁶²⁶ If a thick value concept applies, one does not need to separately add an evaluation, nor can this very valuation be ‘peeled’ off from the description “so as to stand as independently

⁶²³ See for a description of thick concepts: Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 34-45; Williams, *Ethics and the Limits of Philosophy*, 129, 140.

⁶²⁴ Williams, *Ethics and the Limits of Philosophy*, 141.

⁶²⁵ ———, ‘Liberalism and Loss’, 94.

⁶²⁶ Cf. Dancy, Jonathan, ‘In Defence of Thick Concepts’, *Midwest Studies In Philosophy* 20, 1 (1995), 263.

comprehensible.⁶²⁷ These concepts tell something about the world and at the same time imply a valuation.⁶²⁸

At this point it is important to note that the ‘world guidedness’ of value concepts is not to deny the possibility of disagreement regarding their application. Disagreements about the application of such concepts can and will occur. But what stands out is that such disagreements cannot be resolved by rigorous and abstract reasoning. In case of serious disagreement, at best a detailed and convincing characterisation of the situation at issue may bring an agent to change his view. In the words of McDowell: “[t]he explanatory capacity that certifies the special object of an evaluation as real, that certifies certain responses to them as rational, would need to be exactly as creative and case specific as the capacity to discern these objects themselves.”⁶²⁹ If disagreement nonetheless continues, silence or the acknowledgement of loss and difference will sometimes be the only recourse to ‘settle’ the matter. In the end the only thing left for a just agent is to say: ‘this is how I see it’.⁶³⁰

Which thick value concepts a just person brings to bear on a situation will depend on what Michael Walzer has qualified as the particular ‘sphere of justice’ in which this person operates.⁶³¹ In the literature divergent examples are given of thick value concepts, such as cruel, courageous, adulterous, rude, (dis)honest, inconsiderate, loyal, destructive, inelegant, beautiful, lie, vulgar, and gauche.⁶³² However, for an account of justice we do need more specific institutional value concepts in addition to

⁶²⁷ Ibid.

⁶²⁸ Cf. Williams, *Ethics and the Limits of Philosophy*, 141; Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 37.

⁶²⁹ McDowell, John, 'Values and Secondary Qualities', in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 149.

⁶³⁰ Not being able to provide an exhaustive explanation for a particular decision can in a quasi-phenomenological approach to justice be seen as an expression of rationality rather than as an indication of a lack of it.

⁶³¹ Walzer, Michael, *Spheres of Justice. A Defence of Pluralism and Equality* (Oxford: Oxford University Press, 1983). See for an insightful discussion of how best to understand these ‘spheres of justice’: Trappenburg, Margot, 'In Defence of Pure Pluralism: Two Readings of Walzer's Spheres of Justice', *The Journal of Political Philosophy* 8, 3 (2000).

⁶³² Cf. Williams, *Ethics and the Limits of Philosophy*, 129,140. Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 35.

such ‘background’ concepts. Which thick concepts play a role will thus depend on which social goods the particular sphere of justice or institutional practice seeks to produce, regulate or guarantee, be it for instance healthcare, fair trial, education or social welfare. These social goods themselves also function as ‘thick concepts’. They are descriptive, but in a concrete setting they at the same time suggest a whole range of self-explanatory concerns and rationales and concrete courses for action.⁶³³ What it means for citizens to receive ‘their due’ in a particular sphere of justice will depend on “what the goods mean, what parts they play, how they are created, and how they are valued, among those same men and women.”⁶³⁴

What is more, the very qualities that make for a ‘just’ agent are also ‘thick concepts’, and these will also depend on the particular sphere of justice that is at stake. The concepts that describe such qualities contain considerable factual content and more or less directly invoke a pro- or con- attitude. For instance, in the practice of health care we may find thick value concepts that refer to qualities of a person, such as ‘a quack’, ‘a butcher’, ‘irresponsible’, ‘impertinent’, ‘sexist’, ‘discrete’ and ‘rough’.⁶³⁵ In the practice of lawyers where legal assistance is the social good to be produced, we may find concepts like ‘go-getter’, ‘shady’, ‘botching’, ‘brave’, ‘convincing’ and ‘discrete’.⁶³⁶ As these examples show, such thick concepts are indeed intimately linked to the social good of a particular sphere of justice.

⁶³³ Oakley, Justin and Cocking, Dean, *Virtue Ethics and Professional Roles* (Cambridge: Cambridge University Press, 2001), 86.

⁶³⁴ Walzer, Michael, 'Spheres of Justice. An Exchange', *The New York Review of Books*, July 21 (1983).

⁶³⁵ These concepts are of course intimately linked to the character of health-care, to the kind of relation between a doctor and his patient that is considered desirable.

⁶³⁶ I have chosen these words because they came up in conversations I had with lawyers about the value concepts they thought to be dominant in their practice. The concepts mentioned refer to the relatively antagonistic and discursive character of being a lawyer, which in turn can be understood through the concept of fair trial as one of the social goods that is produced by the legal professions. Of course, social-judicial-ethical research is needed to establish which thick concepts actually figure in relevant institutional practices.

So, in a quasi-phenomenological approach justice as a state of affairs differs according to context and cannot be reduced to one articulate set of principles.⁶³⁷ In the end an amalgam of thick values that also include the qualities of actual agents makes up the moral quality of the main institutions in society. It is for this reason that this approach holds that these thick value concepts must be cherished and protected from influences that threaten them.⁶³⁸ Of course, in this regard it will be far from easy to distinguish between influences that can lead to improvement and progress on the one hand and influences that are disturbing and ‘threatening’ on the other.⁶³⁹ Note that cherishing thick value concepts should emphatically not be confused with a nostalgic longing for a homogeneous and unreflective political order.⁶⁴⁰ This not in the least because modern societies are de facto characterized by a high level of self-consciousness and individualism. In such a society, one that is, as Bernard Williams

⁶³⁷ So conceived, we can take Rawls’ four-stage sequence rather as a formal description of regulatory levels on which different, heterogeneous notions of justice are operative and not so much as an expression of one coherent ideal of justice to be realized on different levels of generality.

⁶³⁸ Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 49. One might for instance assess procedural rules that are meant to regulate public institutions on the basis of their ‘threatening’ potential for value concepts.

⁶³⁹ For instance, one might criticize the New Public Managerism in the domain of health-care as threatening to shared understandings of what makes this practice good, while at the same time and on the basis of ‘local knowledge’ holding that cost-benefit analyses that were absent in the past should play a more dominant role. This point is also clearly made by Oakley and Cocking: “[...] where efficiency in one’s allocation of health-care resources is a value that results from the application of a plausible notion of justice to health-care practice, then it would be excessive for a doctor to regard his being *governed* by the side-constraint of efficiency as redefining his practice as something other than medicine. Nevertheless, were efficiency -or some other value external to medicine - to become an overriding guiding ideal for a doctor in the way he used his skills, there would be real question about whether this doctor had now ceased to ‘practice medicine’ [...]”. Cf. Oakley and Cocking, *Virtue Ethics and Professional Roles*, 87.

⁶⁴⁰ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 43.

has put it, “self-conscious about its own origins and potentialities, we shall have less temptation to assume that it is a satisfactorily functioning whole [..].”⁶⁴¹

In this regard we must bear in mind that a focus on thick value concepts and the underlying critique on normative theories of political morality does not boil down to a categorical rejection of ‘thinner’ concepts, as they figure in abstract principles and rules.⁶⁴² Their exact role can, however, neither be a priori determined nor assumed. It depends on the constituents of the particular sphere of justice concerned. For instance, it will among others depend on the level of generality of the regulation, as well as on the kinds of social goods that are at stake in a particular institution. As to the former: the more general and regulatory the task of the institution, the more an appeal to and deployment of general and abstract concepts may be appropriate. On a more concrete level a just state of affairs will to a larger degree be determined by a range of thicker value concepts, concepts that more directly address the concrete concerns and needs of concrete citizens.⁶⁴³

Also, in domains in which state-power is most directly exercised, thin concepts may function as valuable instruments for the practice of political legitimation. This is for instance the case for law and adjudication. Precisely because of their potential coercive character they are bound to the requirements of the rule of law, which as a minimum demand generality, publicity and articulateness of the exercise of state power.⁶⁴⁴ In these domains thin concepts are of use to publicly defend exercises of state power. But their use is then a way of answering a political need, rather than a

⁶⁴¹ Ibid., 37.

⁶⁴² For instance laid down in a constitution, legislation, rules of policy and codes of professional ethics.

⁶⁴³ Here I draw on Bernard Williams’ proposal for a “kind of ethical federation, with denser considerations being deployed at more local levels, and “thinner”, more procedural, notions applying at higher levels [..].” Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 50.

⁶⁴⁴ Cf. Tamanaha, 'A Concise Guide to the Rule of Law', 3.

demand of public rationality itself.⁶⁴⁵ In these particular ‘spheres of justice’ there is a political -not a moral or a necessarily overriding- argument for their use.⁶⁴⁶ Nonetheless, having rejected normative theories of political morality, of course the question does arise what remains of political legitimacy within a quasi-phenomenological approach to justice. In any case, within this approach the demand for political legitimacy cannot be met through the concept of a just society as a whole. Justice will not offer each and every citizen the same ‘reason’ why they should accept the particular burdens of the society they live in. Here I follow Bernard Williams where he states that “we must thus think in terms of a structure (notably in contrast to the aims of traditional ethical theory) of public justification that did not try to justify what it was doing to everybody, or every possible person; it would justify it, so far as possible, within its own ethical constituency.”⁶⁴⁷ The demand of political legitimacy, if it can be guaranteed at all, can only be honoured in the particular spheres of justice, on a piecemeal and bottom up basis and in an embedded and inherently limited way: through the quality of the features and relations that constitute each sphere.⁶⁴⁸ Consequently, in order to fully grasp how political legitimacy might work within a quasi-phenomenological approach to justice we also need to zoom in on these specific spheres.

5 Social critique, moral progress and the (remaining practical) role of philosophy

We should bear in mind that giving up on an articulate viewpoint that grasps all that is morally relevant for determining citizens’ legitimate claims, is not tantamount to relinquishing the possibility of social critique or of moral progress of public institutions. Social critique, moral progress and reflection in general do not require

⁶⁴⁵ Cf. Williams, *Ethics and the Limits of Philosophy*, 18; Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 48-49.

⁶⁴⁶ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 48.

⁶⁴⁷ *Ibid.*, 49.

⁶⁴⁸ See for an illuminating critique on abstract notions of reciprocity and a proposal for a more embedded way of understanding this principle: Pessers, D.W.J.M., 'Liefde, Wederkerigheid en Recht. Een Interdisciplinair Onderzoek naar het Wederkerigheidsbeginsel', (Amsterdam: University of Amsterdam, 1999).

(the form of) normative moral theory.⁶⁴⁹ Irrationalities within public institutions can for instance be detected by means of the qualities of agents as well as by invoking thick ethical values concepts. However, compared to practices that are guided by a normative moral theory such irrationalities are understood differently. They are primarily understood as a form of self-deception, self-rationalisation or social deceit. Their identification demands an inquiry that is rather detailed and substantive, and schematic considerations based on philosophical theory will not suffice for this purpose. It requires a 'stepping forward', an understanding of the conditions under which the perception or judgment has come about. The 'stepping back' that normative moral theories imply certainly does not fit here.⁶⁵⁰ Michael Walzer has put this as follows: "[...] critics commonly don't, and certainly needn't, invent the principles they apply; they don't have to step outside the world they ordinarily inhabit. They appeal to internal principles, already known, comprehensible to, somehow remembered by, the people they hope to convince."⁶⁵¹

So, a quasi-phenomenological approach understands social critique as well as moral progress as expression of said thick value concepts and of the moral sensibilities of the agents participating in public institutional practices, and not of the normative force of an 'external' and detached all-encompassing perspective. This implies that in case of social conflicts one's opponents are not to be treated as 'bad reasoners' or as citizens that are unreasonable or simply mistaken. Such conflicts are to be understood as conflicts between 'opponents', conflicts that potentially lead to political decisions that come with genuine 'losers' and hence also lead to reasonable resentment on the part of the losers.⁶⁵²

⁶⁴⁹ Bernard Williams has put this point as follows: "What we are left with, if we reject foundationalism, is not an inactive or functionalist conservatism that has to take ethical ideas as they stand." Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 37. He thus disagrees with Robert. B. Loudon who holds that moral theories are necessary for effective criticism. Cf. Loudon, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 148.

⁶⁵⁰ Cf. McDowell, 'Values and Secondary Qualities', 149.

⁶⁵¹ Walzer, 'Spheres of Justice. An Exchange'.

⁶⁵² Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 13.

Finally, a quasi-phenomenological does assign a practical role to philosophy. Philosophy as a discipline that is, if anything, discursive, explicit and analytical can play a role in developing and explaining shared understandings of justice that are present in different spheres of society. Philosophy can offer “a nucleus of ideas or notions that at once reflect and enlighten practical reflection.”⁶⁵³ By these articulations it can help to conceptually ‘anchor’ these practices and make them more stable. Also, philosophy can assist in getting the right problems on the table. It can offer conceptual tools “to help particular people understand and define, and thus being able to deal with, certain problems.”⁶⁵⁴ For instance, philosophy can try to further our understanding of certain recurring social conflicts. As to its more critical role philosophy can, in the words of Raymond Geuss, “demonstrate the dependence of certain beliefs or desires on the continued existence of particular configurations of power that would otherwise remain hidden.”⁶⁵⁵

Actual *theories* of justice as specific creations of philosophy are also still of (practical) value, but not as exhaustive normative viewpoints and not in the role they assign to themselves in relation to practice. These theories, the Capability Approach of Martha Nussbaum among them, can offer vocabularies and procedures through which certain lines of thought can be further pursued and explored. As such they are in themselves valuable reflective practices.

Also, precisely because of their abstract and systematic character theories of political morality can through what we may call ‘the effect of estrangement’ shed new light on -for instance- certain widely accepted doctrines and interpretations that play a role in institutional practices.⁶⁵⁶ Because of this effect of estrangement these theories may cause agents of justice to ‘perceive’ differently and get new insights. However and again, this is not the same as to assign any normative task to these theories. Neither should they be considered to offer an adequate, actual understanding of a political

⁶⁵³ Wiggins, 'Neo-Aristotelian Reflections on Justice', 486.

⁶⁵⁴ Geuss, *Philosophy and Real Politics*, 44.

⁶⁵⁵ *Ibid.*, 55. See for this point also: Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 37.

⁶⁵⁶ Cf. Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour'. See also: Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics'.

order. In the words of Hämäläinen: “we should resist the temptation to consider theories as pictures, even temporary pictures, of reality.”⁶⁵⁷

In any case and as will probably be clear by now, within a quasi-phenomenological approach to justice philosophy does not necessarily bring ‘good news’ about society and its central public institutions where their moral potential is concerned. At most it offers what may be called ‘realistic hope’: moral aspirations can be accounted for, but at the same time a quasi-phenomenological approach acknowledges that the nature of practice both inherently and contingently limits the extent to which these aspirations can be realized. This approach does not obscure the troublesome character of public institutional practices as normative moral philosophy often does. It does not turn a blind eye to the fact that necessity and change can actually quash, annul or render obsolete what we are most committed to in our political order. The aim of a quasi-phenomenological approach is to enable citizens and officials “to grasp the truth and not perish from it” where the moral quality and potential of their practices is concerned.⁶⁵⁸

6 Conclusion

The last four chapters offered an introduction to and an internal criticism on (specific) normative theories of justice and their claims and aspirations as part of our assessment of the validity of a stabilizing approach to adjudication. The first line of argument in this chapter presented an anti-theoretical and thus external criticism on normative moral theory in general. The idea is that normative theories of justice in general and those of John Rawls and Martha Nussbaum as species by definition cannot live up to their aspirations. In addition it has been argued that we have serious reasons to hold that normative theory is an inefficient, harmful and evasive way of trying to secure moral quality in practice and to understand the troublesome phenomenology of institutional practices. On the basis of both this internal and external criticism we concluded that a stabilizing approach to adjudication is not tenable, precisely because of its reliance on normative moral theory in accounting for the moral quality of adjudication. The second line of argument in this chapter boiled down to a proposal

⁶⁵⁷ Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 548.

⁶⁵⁸ Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics', 52.

for an alternative, quasi-phenomenological approach to justice, one that gives primacy to practice.

In this approach a just state of affairs is a derivative of the notion of a just person and it also depends on the presence of thick value concepts. Justice as a state of affairs in which citizens receive their due will inherently have different meanings in different 'spheres of justice', because these domains are constituted by 'distinctive moral experiences'. These experiences will among others depend on the level of generality of the regulations at issue, as well as on the kinds of social goods or interests at stake and the extent to which a direct exercise of state-power is involved.⁶⁵⁹

In a quasi-phenomenological only limited explication of the notion of a just society is possible, as this notion hinges on the actual spheres of justice which cannot be understood as the practical implications of abstract principles. This has consequences for how to satisfy the demand of political legitimacy for the workings of concrete public institutions: this must among others be done on a bottom up and piece-meal basis. In addition, it was established that a quasi-phenomenological approach to justice can account for moral progress and social critique, and also for some practical tasks of philosophy -theory included.

In the next part of this book I will present the *fragility of rightness* as a specification of a quasi-phenomenological approach to justice for one sphere of justice, i.e. for the domain of adjudication.

⁶⁵⁹ Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 49.

Part II The instability of rightness. Giving primacy to practice

“To show respect is to bow down not before the law, but before a being who commands a work from me”⁶⁶⁰

“Since there can be no cognitive assurance in advance of action we are left with our responsibility for what we do.”⁶⁶¹

9 Adjudication without foundation. A postmodern approach

1 Introduction

In this part of the book I change horses. Rather than using and discussing the lens that a normative theory offers in accounting for moral quality in adjudication and hence staying within a framework of legal commensurability, I will present two versions of what I qualify as a *destabilizing* approach to adjudication. A destabilizing approach is a philosophical account that does not rely on the availability of a final commensurans, i.e. on an explicit normative idea of a just society as a whole. It accounts for moral quality primarily by drawing on an understanding of (potential) characteristics of the practice of adjudication itself, as one particular sphere of justice. This chapter starts with an exposition of one version of such an approach, a postmodern approach to adjudication.

One caveat must be made beforehand. Particularly from an ‘internal point of view’, that is from the perspective of legal practitioners, the central tenets of this postmodern approach are often experienced as rather counter-intuitive, uninformed, all too provocative and disrespectful for the profession of judges. Thence postmodern perspectives on law and adjudication are time and again ridiculed or even ignored in academia. Nonetheless and notwithstanding postmodernism’s reputation, for our purpose to offer an account of moral quality in adjudication something can be learned from the insights it does offer, as well as from its exaggerations and mistakes.

Below I will first briefly expound the central tenets of a postmodern approach to adjudication (2). Consecutively, I will discuss the weak and strong points of this approach and what we can learn from it (3). I will end with some concluding remarks

⁶⁶⁰ Levinas, Emmanuel, 'The Ego and the Totality', in *Collected Philosophical Papers*, ed. Lévinas, Emmanuel (The Hague: Martinus Nijhoff, 1987), 49.

⁶⁶¹ Cornell, *The Philosophy of the Limit*, 168.

(4).

2 Adjudication as honouring the (call of the) Other

2.1 Postmodern ethics

A postmodern approach to adjudication takes its inspiration from postmodern ethics or in the words of Simon Critchley, the ethics of deconstruction.⁶⁶² This ethics has both a critical and a constructive strand.

Its critical strand resembles the anti-theoretical critique that we saw in the previous chapter: postmodernists strongly reject the kind of normative theories of political morality that we discussed earlier because of their reliance on normative principles.⁶⁶³

More broadly speaking their arrows are directed against any kind of 'enlightened' or 'modernist' thinking, in particular against neo-Kantian practical philosophy.

In their own, often highly dense, theatrical and opaque vocabulary, postmodernists argue that practical philosophy more often than not boils down to a form of identity-thinking, a kind of thinking that falsely relies on the (possible) identity between concept and object, ignoring or suppressing the non-identical and privileging the products of 'reason' above actual reality.⁶⁶⁴

As to the constructive side: postmodernists claim to offer more than a destructive and suspicious philosophy. Jacques Derrida as one of the notorious proponents of 'deconstruction' for instance states that he "has done nothing but address the problem of justice."⁶⁶⁵ The discourse on "the incommensurable or the incalculable, or on singularity, difference and heterogeneity are also, through and through, at least

⁶⁶² See for a deep and illuminating discussion of this ethics of deconstruction: Critchley, Simon, *The Ethics of Deconstruction* (Edinburgh: Edinburgh University Press, 1992).

⁶⁶³ Cf. Douzinas, Costas and Warrington, Ronnie, *Justice Miscarried: Ethics, Aesthetics and the Law* (London: Harvester Wheatsheaf, 1994), 7; Stamatis, Costas M., 'Justice without Law: a Postmodernist Paradox', *Law and Critique* 2 (1994).

⁶⁶⁴ Critchley, *The Ethics of Deconstruction*, 6; Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 161. They are *postmodern* because of their rejection of the *modern* idea that morality can be captured in a system, by rules and principles or by any kind of cognition that is available to the subject.

⁶⁶⁵ Derrida, Jacques, 'Force of Law: The 'Mystical Foundation of Authority'', *Cardozo Law Review* 11, 920 (1989), 935.

obliquely discourses on justice", he says.⁶⁶⁶ The postmodern constructive proposal for ethics seeks to make sense of the inherent irreducibility of objects, particularly the uniqueness of every human being. Moreover, it claims to offer an understanding of the moral bearing of a phenomenology that is already out there in the world.⁶⁶⁷

For this latter element postmodernists largely draw on the philosophy of Emmanuel Levinas, in particular his ethics of Alterity. This ethics is based upon an understanding of the special nature of an encounter with the Other.⁶⁶⁸ Explaining whom or what is meant by this Other, Levinas invokes the phenomenology of the face, i.e. its uniqueness, indeterminateness, continually changing character and inescapability. In the words of Douzinas a face is "more unique than the leaf on a tree in the spring, more concrete than the species of a genus, more particular than the instance of an essence, more singular than the application of a law."⁶⁶⁹

By this emphasis on the uniqueness of a face postmodernists aim to underscore that the 'Other' cannot and may not be reduced to a stable general meaning or an intelligible essence. The phenomenology of the face cannot be reduced to a concept, at least not without doing it injustice, or so is the idea.

Postmodernists hold that by the mere fact of appearing this Other has a peculiar impact on us, an impact that crucially differs from the experience one has when confronted with an inanimate object, for instance a lamppost. An encounter with the Other makes us immediately responsible. This responsibility is not the result of the application of abstract categories or of any norms based on a prior foundation, but it simply 'happens' through the fact of the encounter. As such this responsibility is unconditional(ly demanding). That is, it cannot be rejected, dismantled or put between brackets, because it must be taken as if "it was already there".⁶⁷⁰ "The face opens the primordial discourse whose first word is obligation, which no "interiority" permits

⁶⁶⁶ Ibid., 929.

⁶⁶⁷ Cf. Critchley, *The Ethics of Deconstruction*, 4.

⁶⁶⁸ Cf. Bergo, Bettina, 'Emmanuel Levinas', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2013).

⁶⁶⁹ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 119.

⁶⁷⁰ Bauman, *Postmodern Ethics*, 74-75.

avoiding,” Levinas says.⁶⁷¹ So, drawing on this phenomenology of the face postmodernists see ethics primarily as an ethics of responsibility to the Other. In spite of its weight, for the postmodernists this kind of responsibility is not merely a burden. They see it also as an opening to experience one’s own individuality, as one cannot be replaced in relation to the Other. Being responsible is also an opportunity to come alive as individual. Again in Levinas' words: “[r]esponsibility is what is incumbent on me exclusively, and what humanly I cannot refuse. This charge is the supreme dignity of the unique. I am I in the sole measure that I am responsible, a non-interchangeable I.”⁶⁷²

2.2 Postmodern adjudication

A variety of legal scholars have fleshed out what they see as the implications of postmodern ethics for law, justice and adjudication respectively.⁶⁷³ It may come as no

⁶⁷¹ Lévinas, Emmanuel, *Totality and Infinity*, trans. Lingis, Alphonso (Pittsburg: Duquesne University Press, 1969), 200-201.

⁶⁷² Levinas, Emmanuel, *Ethics and Infinity: Conversations with Philippe Nemo*, trans. Cohen, Richard A. (Pittsburgh: Duquesne University Press, 1985), 100-101.

⁶⁷³ See for instance: Cornell, *The Philosophy of the Limit*; Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*; Sokoloff, William W., 'Between Justice and Legality: Derrida on Decision', *Political Research Quarterly* 58, 2 (2005); Smith, Nick, 'Incommensurability and Alterity in Contemporary Jurisprudence', *Buffalo Law Review* 45 (1997); Douzinas, Costas, 'Law and Justice in Postmodernism', in *The Cambridge Companion to Postmodernism*, ed. Connor, Steven (Cambridge: Cambridge University Press, 2004); Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*; Derrida, 'Force of Law: The 'Mystical Foundation of Authority''; Shepherd, Lois, 'Face to Face: A Call for Radical Responsibility in Place of Compassion', *St. John's Law Review* 77 (2003); Stamatis, 'Justice without Law: a Postmodernist Paradox'. Because of its rejection of any prior foundation, a postmodern approach is also intimately linked to the field of (radical) incommensurability in legal reasoning. In spite of Derrida's explicit rejection of the dichotomy incommensurability-commensurability, I thereby take it that an ethical postmodern approach to adjudication indeed takes radical incommensurability as its starting point. Cf. Derrida, 'Force of Law: The 'Mystical Foundation of Authority''. However, the overlap between postmodern accounts of adjudication and legal incommensurabilism has hardly been explored so far. Within the scope of this book the exact relation between the two frameworks need not further concern us, although it is an interesting topic to be explored. In the words of

surprise that in a postmodern approach to adjudication the encounter between the judge and the parties to the legal proceedings is understood as lying at the heart of adjudication's moral nature.⁶⁷⁴

From a postmodern perspective adjudication is a practice in which the judge must continually respond in the here and now to the pressing question that the parties involved unmistakably ask: "[...] where do you stand"?⁶⁷⁵ Citizens who participate in a legal proceeding "beckon[s] us to heed the call to judicial responsibility", Drucilla Cornell states.⁶⁷⁶ The judge is inescapably responsible for the parties that are facing him, because of the simple fact of their appearance.⁶⁷⁷

Postmodern legal scholars offer some -although limited- suggestions as to what 'responsible judging' boils down to. Being a responsible judge means most of all to respect the Other, i.e. the citizens involved in all their concreteness and hence irreducibility. Therefore, the judge should make an effort not to use rules, precedents or principles of valid law for -as the postmodernists call it- the appropriation, submission and 'digestion' of the uniqueness of the citizens involved. To the contrary, the judge must honour what can be called a pathetic imperative.⁶⁷⁸ Cornell has stressed this immediate and pre-reflective duty by quoting Adorno where he states: "The physical moment tells our knowledge that the suffering is not to be, that things should be different. Woe speaks, 'go'."⁶⁷⁹

Nick Smith, "[c]urrently, virtually no conversation between the two emerging fields of study exists". He in addition identifies a "seemingly untraversable distance between American legal theory and French deconstructive theory." Smith himself discerns two resemblances: "First, both schools reject Platonic metaphysics that assume the existence of a unified "science" of universal value and ethics. Second, these recognitions of incommensurability lead both movements to embrace anti-authoritarian forms of politics." Cf. Smith, 'Incommensurability and Alterity in Contemporary Jurisprudence', 3.

⁶⁷⁴ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 16.

⁶⁷⁵ Douzinas, 'Law and Justice in Postmodernism', 118.

⁶⁷⁶ Cornell, *The Philosophy of the Limit*, 66.

⁶⁷⁷ Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁷⁸ For the term 'pathetic imperative' I am indebted to: Hawkins, Anne Hunsaker, 'Ethical Tragedy and Sophocles "Philoctetus"', *The Classical World* 92, 4 (1999), 350.

⁶⁷⁹ Cornell, *The Philosophy of the Limit*, 26. Cornell quotes Adorno here. Douzinas and Warrington express this imperative as follows: "A face in suffering issues a command, a

In honouring this imperative a responsible judge uses what Cornell qualifies a 'mimetic capacity', a capacity "to identify with the other, in sympathy and in appreciation", over and against his ability to look through the lens of rules, precedents and principles.⁶⁸⁰ Thereto, instead of controlling his empirical self -as an Odysseus tying himself to the mast-, a responsible judge must allow his affections to play a role.⁶⁸¹ Only in this way will a 'constellation' arise, a set of concepts through which the Other can be approached in a non-violent way.⁶⁸² A constellation, in the words of Cornell, is "a metaphor for how one should uncover the object as it speaks to us, not as we define it."⁶⁸³

Legal postmodernists take great pains to show that all this does not lead to radical subjectivism.⁶⁸⁴ They firmly reject the idea that *Grundlosigkeit* (giving up on any prior grounds) ends up in *Sinnlosigkeit* (irrationality and senselessness).⁶⁸⁵ Neither do postmodernists discard valid law as they locate the encounter between the judge and the parties involved in the *nomos*, the normative legal order that encompasses both settled law and values of political morality.⁶⁸⁶ Derrida for instance stressed that a judge indeed violates the demands of legality "if he doesn't refer to any law, to any

degree of specific performance: "Welcome me", "Give me sanctuary", "Feed me". See: Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁸⁰ Cornell, *The Philosophy of the Limit*, 23; Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁶⁸¹ Cornell, *The Philosophy of the Limit*, 179.

⁶⁸² *Ibid.*, 23.

⁶⁸³ *Ibid.*, 178. Cornell here draws on Adorno's negative dialectics. He describes this idea of constellation as follows: "The constellation illuminates the specific side of the object, the side which to a classifying procedure is either a matter of indifference or a matter of burden." Cf. Adorno, Theodor W., *Negative Dialectics*, trans. Ashton, E.B. (New York: Continuum, 2007), 162.

⁶⁸⁴ Cornell is disturbed by this confusion that "is repeatedly made in the tirades against 'deconstruction' [...]". Cf. Cornell, *The Philosophy of the Limit*, 94.

⁶⁸⁵ *Ibid.*, 102.

⁶⁸⁶ In the words of Cover: "We inhabit a *nomos* - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void." Cover, Robert, 'The Supreme Court, 1982 Term. Foreword: Nomos and Narrative', *Harvard Law Review* 97, 4 (1982), 4.

rule” or “if he improvises and leaves aside all rules, all principles.”⁶⁸⁷ Postmodernists see legal principles as also indispensable for the resolution of conflicts. They are well aware that in legal proceedings there are more ‘Others’ involved who demand respect and that a ‘third’ viewpoint is always needed to adjudicate between competing positions and claims. “We need legal principles that guide us through the maze of competing legal interpretations, precisely because all claims cannot be vindicated”, Cornell states.⁶⁸⁸

But, at pains of reverting to ‘identity-thinking’, this *nomos* or these rules and principles are not allowed to function as a prior normative ground. They must not be ‘brought’ to the legal case in advance as this would impede the formation of constellations and hence violate the demand for respect of the Other, i.e. the concrete embodied citizen involved.⁶⁸⁹

Therewith we arrive at the point where we can appreciate Derrida’s notorious paradox of justice: “[..] for a decision to be just and responsible, it must in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.”⁶⁹⁰

On the one hand the judge should see to it that citizens who participate in legal proceedings are not absorbed by the abstractions of the legal system and on the other

⁶⁸⁷ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961.

⁶⁸⁸ Cornell, *The Philosophy of the Limit*, 105. Or as Costas Douzinas states: “When someone comes to the law, he or she is already involved in conflict with at least one more person and the judge has to balance the conflicting requests.” Cf. Douzinas, 'Law and Justice in Postmodernism', 213. These principles are to function as guiding lights for the settlement of such disputes. Cornell, *The Philosophy of the Limit*, 106.

⁶⁸⁹ In the words of Cornell: “We can only form constellations if we have grasped the misrecognition inherent in identity-logical thinking.” Cf. Cornell, *The Philosophy of the Limit*, 23.

⁶⁹⁰ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961. Or in other words: “How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form [..]?” ———, 'Force of Law: The 'Mystical Foundation of Authority'', 949.

hand he must also honour the *nomos*. Therefore at the moment of choice a responsible judge will always have an aporetic experience, an experience of undecidability.⁶⁹¹

It is this aporetic experience or negative moment that according to postmodernists gives a utopian trend to their account of adjudication and sets it apart from a fatalistic view.⁶⁹²

By paying attention to what escapes categories and rules of settled law a postmodern approach claims to open up the (conceptual) space for radical freedom and for pushing the limits of settled law.

Finally, a postmodern approach to adjudication puts the phenomenology of the aftermath firmly on the legal agenda, so to say. That is, according to postmodernists the judge will by definition be unfaithful to the Other's otherness. As he must after all make comparisons "which inevitably call for an analogy of the unlike and the same" the judge cannot escape identity-thinking.⁶⁹³ Hence, if judges fully live up to their professional responsibility, their decisions will still leave a disturbing remainder.⁶⁹⁴ Consequently, in postmodern legal writings one will find discussions about how to respond to this remainder. Cornell has for instance discussed the act of mourning as a way to deal with the 'Other's death' -a rather emphatic way of pointing to what can never be fully grasped. "It is through mourning, then, that we remember the remains", Cornell states.⁶⁹⁵ Wolcher takes 'ethical distress' to be a vital element of the

⁶⁹¹ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 961.

⁶⁹² Sokoloff, 'Between Justice and Legality: Derrida on Decision', 341.

⁶⁹³ Cornell, Drucilla, 'Post-structuralism, the Ethical Relation, and the Law', *Cardozo Law Review* 9 (1988), 1591. Cf. Bauman, *Postmodern Ethics*, 9.

⁶⁹⁴ In the words of Louis Wolcher, judges as "the agents of law and justice", as "law-doers", will always cause "a veritable tidal wave of human suffering as they go about performing law's task, whether they realize it or not." Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, xxi.

⁶⁹⁵ Cornell, *The Philosophy of the Limit*, 73. She thereby refers to Walter Benjamin's *chiffonier*, the rag picker who is "salvaging the remains", the one who "gathers what is left behind." ———, *The Philosophy of the Limit*, 76.

But again, as the Other and hence the loss are fundamentally unintelligible, for the postmodern legal scholar it is only through the failure to bring the Other fully to life that mourning the Other as indeed an Other can succeed. Cf. ———, *The Philosophy of the Limit*, 73.

experience of a responsible judge. He describes it as a kind of guilt “that cannot be argued for or willed away. This sort of guilt, at least, seems permanently stamped on the human heart, like a tattoo on the epidermis.”⁶⁹⁶

All this clearly shows that a postmodern approach by no means offers a reassuring picture of adjudication’s moral potential. Even in its best form adjudication will be an inherently messy -similar cases may have different outcomes-, intransparent -judicial decisions are largely unintelligible- and morally disturbing -judicial decisions always leave a remainder- practice according to postmodernists. As will be clear, this approach does not seek to dismantle or overcome the troublesome phenomenology of adjudication. It rather seems to be a way of making sense of it. Perhaps a postmodern approach -paradoxically- even prescribes it. In any case it strongly criticizes all attempts to overcome this troublesome phenomenology by means of Reason. How the postmodern approach to adjudication works out for the evaluation of concrete legal judgments I will illustrate by a concrete legal case.

The case of *Joan Gibbs*⁶⁹⁷

Joan is a woman of twenty-six who has lived in one and the same small village all her life. Already for quite some years Joan is married to Richard who works at the local petrol station. As Joan herself works as a cashier in the local supermarket and the couple is widely known in the village. Both are generally considered very pleasant, happy and sympathetic people. However, one day after receiving an anonymous tip the police finds three suitcases in the attic of Gibbs’ parents, each holding a baby’s corpse. Joan Gibbs is arrested. After a few days of interrogation Joan declares that she has indeed given birth to these babies and that their father was a colleague at the supermarket. She also declares that she killed them immediately upon birth and hid the corpses in her parents’ attic. Gibbs explained that she had always wanted to be a ‘perfect’ daughter for her parents and that she was most afraid for the consequences once her husband and the villagers would find out about her pregnancies. Gibbs also gives detailed accounts of how she had made efforts to conceal her pregnancies for her husband, her parents, her colleagues and fellow villagers.

⁶⁹⁶ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 85.

⁶⁹⁷ Cf. Rechtbank Leeuwarden, May 3 2011, ECLI: NL:RBLEE:2011:BQ3315; Rechtbank 's-Gravenhage, November 26 2004, ECLI:NL:RBSGR:2004:AR6518; Rechtbank Breda, July 7 2004, ECLI:NL:RBBRE:2004:AP8503; Rechtbank Breda, March 23 2010, ECLI:NL:RBBRE:2010:BL8559; Gerechtshof 's-Gravenhage, September 12 2005, ECLI:NL:GHSGR:2005:AU2469.

Gibbs is tried for triple baby murder. The public prosecutor holds Gibbs fully accountable and demands eight years imprisonment.⁶⁹⁸ The judge sentences accordingly and motivates his sentence by arguing that Joan has killed extremely vulnerable and defenceless creatures and that he thinks she has done so in a rather calculating and cold-hearted way. Joan has given birth to the three babies in silence, without anybody noticing, something which already requires an almost super-human form of self-control, the judge states. Above that Joan has killed them with her bare hands, which the judge also considers a sign of her cold-bloodedness. The judge blames Joan for not using contraceptives or not having an abortion as 'any normal person' would have done. As a modern woman she could have and Joan has willingly taken the risk of becoming pregnant, the judge holds. He is not sensitive to Joan's 'explanation' that she wanted to be a perfect daughter, as this indicates that Joan has given priority to her own interests and the approval of her parents, rather than to the lives of the babies. For the judge the 'calculus' that Joan made is incomprehensible. In his sentence he furthermore ponders that Joan must have some kind of psychiatric disorder, given the 'seriousness' and 'abnormality' of her crimes. However, because Gibbs refused to be examined in a forensic observational centre, he argues that he cannot take her mental state into account, neither in deciding whether to hold her responsible, nor in determining the actual sentence. The judge concludes that he must hold Gibbs fully accountable and sentences her to six years imprisonment, also because Gibbs' crimes have deeply shocked her family, the residents of the village and society at large.

From a postmodern perspective two aspects of this sentence are particularly noteworthy. First, the sentence shows how identity-thinking in adjudication conceals the performative side of judging. That is, the judge presents his decision as what he is bound to do according to law, merely establishing what the case is legally.⁶⁹⁹ The reasoning of the judge hides from view that in reaction to Joan's refusal to be observed in a forensic observational centre, he could have opted to consult psychiatric and psychological experts on the subject of mothers who kill their babies. The judge uses the concepts in a way that covers up that he in fact has *chosen* not to do so and that he has *chosen* to hold Joan fully responsible for her deeds and to sentence her the way he did.

Next, from the viewpoint of a postmodern approach it is seriously questionable whether this judgment will qualify as a judicially *responsible* decision, whether this decision shows sufficient respect to Joan as Other. Besides the 'naked facts', the judge used these concepts as if they were already 'validated' beforehand, prior to the case, and he consequently imposes them upon Joan. For a postmodernist this way of using these concepts blocks the judge from

⁶⁹⁸ In the Netherlands the relevant applicable legal rule is article 290 of the Dutch Criminal Code. This rule states that a mother who intentionally kills her baby during or right after giving birth will be sentenced to maximally six years imprisonment or to a fine of the fourth category.

⁶⁹⁹ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 75.

experiencing feelings of sympathy, which would make way for a ‘constellation’ of concepts to arise as a (more) non-repressive basis for his judgment.⁷⁰⁰ Moreover, by this digestive way of using concepts and by not using his ‘mimetic capacity’ the judge also denies Joan a sympathetic spectator who can adequately respond to the remains. His kind of reasoning impedes a perspective to arise that can be responsive to a rather disturbing remainder. It blocks the access to an underlying reality: that this is a case about a young woman who possibly due to a mental disorder killed her babies, and who due to the terrible events and the sentence will never be able to lead a ‘normal life’ again.

3 Taking postmodernism seriously? Pros and cons of a postmodern approach

In our search for an account of moral quality in adjudication we can learn from both the weak and strong points of a postmodern approach. Let me start with the weak points.

One such point is that in spite of its effort to argue to the contrary, a postmodern approach lacks sufficient discriminatory power to actually account for *moral* quality in adjudication. This is a pressing issue, all the more so because postmodernists such as Cornell emphasize the importance of the desiring being, the empirical self as crucial for respecting the Other. But, as this ‘empirical self’ or the subjectivity of the judge is not further qualified, it is difficult to conceive how a postmodern approach can avert legitimating a form of decisionism. The benchmarks that we have seen so far do not suffice in this regard, far from it.⁷⁰¹ Precisely because in a postmodern

⁷⁰⁰ Cornell, *The Philosophy of the Limit*, 34.

⁷⁰¹ At first sight Costas Douzinas seems to meet this concern. He portrays a right judicial decision as the result of a “dialectical relationship between the general principles to be derived from past cases, custom, and statute, and the specific facts involved in any particular dispute.” He thereby refers to *casuistry* as it appears for instance in common law traditions. Douzinas adds that the faculty of *conscience* is crucial for the judge to be able to find the right equilibrium between the particularities of the case and the prior rules and principles. However, I think it is a serious question whether the tradition of *casuistry* can be harmonized with giving primacy to the Other. That is, casuistry as it exists in common law traditions seems to suggest that the generality of the legal viewpoint can be harmoniously reconciled with the particularities of the case, and hence with the Other’s otherness. This does not fit with the more confrontational portrayal of the encounter with the Other that is so characteristic for postmodern ethics. Also, as Douzinas does not substantiate what ‘conscience’ means, it is unclear why it can secure a certain moral quality of judicial decisions. Moreover, it remains to be seen whether in this casuistic kind of reasoning the

approach the judge's decision must be *his* decision and a unique interpretation of law, we need to know what defines legal and moral quality.⁷⁰²

This all the more so if we are to take the demand of political legitimacy and the demand of reciprocity therein seriously: we need a more substantial answer as to why for instance a 'losing' or negatively affected citizen will have reason to accept the burdens stemming from the judicial decision and why he as 'another' 'Other' is not 'better' served.

Surely Derrida has conceded that within a postmodern approach there is indeed a very thin line between mere force and a responsible decision. "Left to itself, the incalculable and giving (donatrice) idea of justice is always very close to the bad, even to the worst for it can always be appropriated by the most perverse calculation," he says.⁷⁰³ However, these acknowledgments do not make the critique less urgent, as this 'thin line' may be due to an unnecessary lack of conceptual power on the part of the postmodern approach itself rather than to the inherent nature of adjudication. In any case, we need not be convinced that there is no middle ground between the kind of identity-thinking that postmodernists reject and their rather indeterminate account of honouring the Other. Without additional arguments, a postmodern approach not only risks to justify or celebrate judicial decisions that we do not want to be justified or celebrated. It also leaves unexplored the possibility that a range of other professional qualities can indeed prevent that decisions are merely subjective, or 'digestive' towards the Other.

Other can in fact survive as Other and not be usurped by the notion of *conscience*. Cf. Douzinas, 'Law and Justice in Postmodernism', 216.

⁷⁰² Douzinas describes this double character of justice as follows: "A community (and its law) based on justice is double: first, it is an ethical community of unequal hostages to the other and a network of undetermined but immediate ethical relationships of asymmetry, where I am responsible and duty bound to respond to the other's demand. But, second, community also implies the commonality of law, the calculation of equality, and the symmetry of rights. Here we approach the postmodern aporia of justice: to act justly one must treat the other both as equal and as entitled to the symmetrical treatment of norms, and as a totally unique person who commands the response of ethical asymmetry." Ibid., 214.

⁷⁰³ Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', 971.

Next there is what I call the ‘Hamlet objection’, the charge that the phenomenology that the postmodernists propose as leading will incapacitate the judge. Having penetrated the ‘true nature of things’, Hamlet cannot act. “Knowledge kills actions, to action belongs the veil of illusion -that is the lesson of Hamlet”, Nietzsche said.⁷⁰⁴ A postmodern approach is particularly sensitive to this lesson, because it sees the experiences of ‘mourning’, ‘anxiety’ and ‘ethical distress’ as *necessary* corollaries of responsible judging. It seems that within this approach judges should *always* experience their decisions as genuinely painful and epistemologically resting on quicksand: justice shows itself in anxiety. “I think that there is no justice without this experience, however impossible it may be, of aporia,” Derrida says.⁷⁰⁵ In a similar vein Wolcher asserts that in the end adjudication is “a long and emotionally difficult investigation of the dark and sorrow side of human experience, where buckets fall quietly every hour every day.”⁷⁰⁶ Thence according to a postmodern approach judges should feel guilty, anxious and insecure all the time. But if judges were to continually feel this way, it could lead them to either avoid hard decisions or to not accept the office at all.⁷⁰⁷ Continuous anxiety and distress are not what the judiciary needs, at

⁷⁰⁴ Nietzsche, Friedrich Wilhelm, *The Birth of Tragedy: Out of the Spirit of Music*, trans. Smith, Douglas, Oxford World's Classics (Oxford: Oxford University Press, 2000), 46.

Hamlet is used in philosophy to describe the inertia that may come from (too much) reflection. Hegel described Hamlet’s inertia as follows: “His noble soul is not made for this kind of energetic activity; and, full of disgust with the world and life, with decision, proof, arrangements for carrying out his resolve, and being bandied from pillar to post, he eventually perishes owing to his own hesitation and a complication of external circumstances.” Cf.

Hegel, George Wilhelm Friedrich, *Hegel's Aesthetics: Lectures on Fine Art*, trans. Knox, T.M. (Oxford: Oxford University Press, 1998), 1226.

⁷⁰⁵ Derrida, 'Force of Law: The 'Mystical Foundation of Authority"', 947.

⁷⁰⁶ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, xiv.

⁷⁰⁷ The latter is not something that postmodernists would deny. Again, as Wolcher states: “[..] it is hard to think too much about how justice is done without wanting to become neither a victim nor an executioner.” “It is hard to think too much about how sausage is made without wanting to become a vegetarian.” *Ibid.*, 84.

least not if it is to function.⁷⁰⁸ Again, postmodernist legal scholars do not offer the conceptual tools to differentiate between different kinds of judicial decisions and hence between different experiences to which they may give rise.

Next, a postmodern approach cannot prevent the sentimentalisation of adjudication. For the same reason, i.e. its lack of discriminatory power, it risks that feelings of regret, ethical distress and anxiety will become fetishes because judges should *always* feel genuinely troubled. It may bring judges to sentimentalize all kinds of consequences of their decisions, even if these consequences could have been prevented by better decisions or if the interests at stake are rather futile.

In addition, one may wonder whether a postmodern approach does not lapse into identity-thinking when it claims to already 'know' the kind of phenomenology that the confrontation with the Other gives rise to. How can we know in advance what kind of effect the Other has or should have on the judge? By seemingly also directly prescribing rather than merely understanding a particular phenomenology we may have reason to fear that the postmodern approach itself kind of takes 'possession' of this Other.⁷⁰⁹

These objections also point to a philosophically rather fundamental problem. As it stands, a postmodern approach to adjudication is unclear, to say the least, about its own relation to practice. On the one hand it rejects normative philosophies for the digestive role they assign to reason and in addition it gives priority to the Other as singular being that makes the judge responsible by the mere fact of appearing before him. In this sense a postmodern approach merely explains on a conceptual level what morally is the case already, rather than that it prescribes what must be on its own account. On the other hand, and paradoxically, as a philosophy the postmodernist approach also seems to more or less *directly* prescribe a particular way of judging and a particular kind of phenomenology.

⁷⁰⁸ Kronman has put it thus: "[t]he most significant fact about our courts today is the enormous number of cases they must handle." Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 320.

⁷⁰⁹ Cf. Jacobs, F.C.L.M., 'Ten Overstaan van Allen. Levinas en de Universaliteit in de Ethiek', in *Emmanuel Levinas over Psyche, Kunst en Moraal*, ed. Bleijendaal, Herman, Goud, Johan, et al. (Baarn: Ambo, 1991).

Finally, we cannot but mention that because of their attempt to apply postmodern insights to an institutional context postmodern *legal* scholars may unintentionally reaffirm what their sources of inspiration fundamentally reject.⁷¹⁰ For instance, Drucilla Cornell takes her inspiration for her own approach to law and adjudication from Theodor Adorno's negative dialectics.⁷¹¹ However, Adorno saw modern societies as radically evil because of the dominance of bureaucratic rationality and their bourgeois coldness, as they ignore more embodied cognitions and ask of citizens and officials to suppress their emotions, and as a result to stay unaffected when they are confronted with suffering.⁷¹² It was because of this radical critique on society that Adorno offered only *negative* ethical criteria to be used as *resistance* against the tendencies of modern society. For this very reason Adorno himself did not propose an ethics to be applied by the dominant institutions in modern societies. Thus, on the basis of the underlying conception of society that spurred postmodern views the -one on one- application of this ethics to actual institutions risks to suggest the overall legitimacy of adjudication and the institutions on which it hinges.

So far the critical points. As may be clear, these are reasons to not accept a postmodern approach to adjudication. But their identification is nonetheless productive because they can function as so many warnings against the kind of pitfalls that one must avoid if one tries to account for moral quality in adjudication without relying on normative theory.

As to the strong points in a postmodern approach, insights that we may want to take on board in the development of such an account: whatever one may think of its terminology, a postmodern approach rightly points to the specific relational dimension involved in adjudication, i.e. its being an encounter between concrete citizens and a concrete judge. It also rightly points to the moral bearing of this relational aspect, namely that the parties involved in legal proceedings deserve respect in all their concreteness. This aspect is valuable as a way of coming to grips with the liberal demand of political legitimacy for the context of adjudication, particularly if one finds that normative foundations cannot live up to this demand.

⁷¹⁰ For this point I am indebted to Professor Bert van den Brink.

⁷¹¹ Cornell, *The Philosophy of the Limit*, 100.

⁷¹² Cf. Freyenhagen, Fabian, 'Moral Philosophy', in *Theodor Adorno. Key Concepts*, ed. Cook, Deborah (London: Acumen Press, 2008), 109.

Again, in the eyes of the (legal) common sense, in view of run of the mill legal cases and the number of legal entities other than natural persons that are parties participating in legal proceedings, this dimension may be experienced as rather misplaced. Nonetheless, the points postmodernists make regarding the judge's responsibility towards the Other are important for the many cases in which natural persons are involved, cases about interests that may not be all that important on the scale of history, but that are crucial to those persons and their lives.

Next, a postmodern approach sheds light on a rather unexplored field of the practice of adjudication: that of the aftermath of legal decisions, i.e. the remainders and the question how we should respond to them. As said, this aspect of adjudication has hardly received attention in legal theory, legal discourse and (socio-)legal research. If we give primacy to adjudication's practice there is no a priori reason to ignore this field. Rather to the contrary, we should have a keen eye for it.

Finally, we can use the postmodern insight that *all* attempts to morally account for adjudication should be wary of the risks of identity-thinking and digestively imposing one's concepts on reality. The postmodern approach itself is thereby not excluded. It does not take a legal formalist as opponent to see the risks of identity-thinking. All accounts of moral quality in practice will by their very (aspirational) nature be prone to hostility towards phenomena that disturb or even block their aspirations. In situations where one faces such phenomena it is easier to impose one's concepts on them and stick to a rather self-congratulatory and appeasing account, rather than to honestly acknowledge the moral limits of practice and hence of one's endeavour.

4 Conclusion

In this chapter I discussed a postmodern approach to adjudication, an approach that rejects all forms of identity-thinking and at the same time claims to account for the moral bearing of adjudication. It explains this moral bearing principally by focusing on the encounter between the judge and the Other, i.e. the parties that are involved in legal proceedings. Because of the mere fact of this encounter the judge bears responsibility towards this Other as a concrete, singular embodied being.

I also discussed what I take to be the weak and strong points of a postmodern approach and concluded that if we want to come up with a plausible account of moral quality of adjudication, we must try to avoid the former and cherish the latter. Such an approach must in any case sufficiently explain the (un)reasonableness of legal

decisions and why they are morally defensible, and it must not lead to the incapacitation of judges or to the sentimentalisation of adjudication. Such an approach must also be clear about its relation to practice, and should in the end not relapse in the ‘normative trap’ of prescribing to practice how it should be, or what judges should experience.

At the same time I established that we can learn from some postmodern insights. One such insight is that we must be sensitive to the relational dimension of adjudication and its moral bearing. We must take seriously that adjudication is an encounter between a concrete judge and concrete parties, which in any case demands respect for the parties in all their concreteness. In addition, the sensitivity that postmodern legal scholars show for the phenomenology of the aftermath of legal decisions is of value, as well as their (sometimes all too) keen eye for the risks of identity-thinking and its digestive potential in all attempts to account for moral quality of practice. These sensitivities we should take on board.

“Occasion by occasion, one knows what to do, if one does, not by applying universal principles, but by being a certain kind of person: one who sees situations in a certain distinctive way.”⁷¹³

10 The Fragility of Rightness I. A virtue-ethical conception of adjudication

1 Introduction

This chapter and the subsequent two chapters expound the *fragility of rightness*, a proposal for a new quasi-phenomenological approach to adjudication.⁷¹⁴ Similar to a postmodern approach, it does not account for the moral quality of adjudication by means of normative moral theory. Rather, it stays close to its practice and hence also to its (troublesome) phenomenology, to the way adjudication 'appears' to be from a relatively unreflective viewpoint.

The *fragility of rightness* is constituted by three elements: a *virtue ethical conception of adjudication*, the *concept of civic friendship* and the concept of a *tragic legal choice*. The idea is that together these elements enable us to offer a plausible account of moral quality in adjudication that can adequately deal with the central problems we identified in a stabilizing approach and a postmodern approach to adjudication. In this chapter I elaborate the first element of the *fragility of rightness*, that is, a virtue-ethical conception of adjudication (2). After this exposition I will discuss the extent to which this conception satisfies the demand of political legitimacy and connected to this the demand of respect for the Other or the concrete citizen who participates in a legal proceeding (3). The chapter ends with a conclusion (4).

⁷¹³ McDowell, *Mind, Value & Reality*., 73.

⁷¹⁴ See also: Domselaar, Iris van, 'A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the troublesome character of) Right Judicial Decisions', in *Aristotle and the Philosophy of Law: Theory, Practice and Justice* ed. Huppes-Cluysenaer, Liesbeth and Coelho, Nuno (Dordrecht: Springer 2013); Domselaar, 'Zelfbevestigende' versus 'Ontregelde' Rechtspraak'.

2 A virtue-ethical conception of adjudication

2.1 Judicial virtues and giving primacy to the particular

As said, the *fragility of rightness* relinquishes the idea that we need theory in order to account for the moral quality of adjudication. Instead it offers, among others, a virtue-ethical conception of adjudication. This conception gives primacy to practice and as a result is premised on the idea that adjudication is about dealing with the concrete particulars of cases.⁷¹⁵ These particulars are considered the ultimate authorities against which the practice of adjudication is assessed.⁷¹⁶

Of course, particulars neither impose themselves on the judge's mind, nor do they jump into his sight of their own accord.⁷¹⁷ So, if we want to steer clear of a nihilist or sceptic approach to adjudication and thus from the idea that 'anything goes', we must establish under which conditions we have reason to think that judges adequately respond to these particulars.⁷¹⁸

It is a crucial insight of Aristotle's ethics that in the end practice is about particulars, but also that these particulars pertain to the domain of perception. Particulars are not

⁷¹⁵ This is an important Aristotelian element in the *fragility of rightness*. As it was Aristotle who so strongly asserted that practice, consisting of activity, action and notions of what to do, is in the end about particulars. Cf. Aristotle, 'Nichomachean Ethics', 1141b14-16. It is important to note however, that the notion of 'particulars' as it is used here also encompasses what in the postmodern ethical approach is meant by the 'Other'. In this context particulars must especially be distinguished from abstractions. Cf. Wolfram, Sybil, *Philosophical Logic* (London: Routledge, 1989), 55.

⁷¹⁶ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 301.

⁷¹⁷ Cf. Wiggins, 'Deliberation and Practical Reason', 233.

⁷¹⁸ Again, -as we have already seen in the previous chapters- reference to the judge's commitment to moral theory, (legal) principles, legal rules and legal precedents and his ability to apply them does not suffice. Particulars of a legal case will always come in different, unique constellations that are unfathomable and not sufficiently determinable in advance. Also, these particulars may invoke contradicting legal concerns. Hence rules, principles and other kinds of explicit general precepts can never fully take stock of all that might be relevant in a concrete legal case. Cf. Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 66-75; Wiggins, 'Deliberation and Practical Reason', 233; Aristotle, 'Nichomachean Ethics', 47.

the “object of systematic knowledge, but of perception”, Aristotle says.⁷¹⁹ In line with this view the *fragility of rightness* holds that for adjudication to be of a certain moral quality the judge must in any case have the capacity of judicial perception as a version of moral perception.⁷²⁰ In the literature the concept of this 'moral capacity' has also been coined as ‘perceptual capacity’⁷²¹, ‘situation sense’⁷²², 'situational appreciation'⁷²³ and ‘moral vision’.⁷²⁴ All these qualifications refer to the idea of sense-perception. This is not coincidental of course; moral perception resembles ‘sense-perception’ in several ways.⁷²⁵ One similarity is that judicial perception is a capacity through which the judge obtains knowledge about reality. In the same way that sense-perception can show a dress to be 'really' red, judicial perception can show a situation to be ‘really’ discriminatory. Judicial perception brings the judge in touch with practical reality, so

⁷¹⁹ Aristotle, 'Nichomachean Ethics', 1142a27-28. Cf. Wiggins, 'Deliberation and Practical Reason', 233.

⁷²⁰ For this discussion of moral perception I primarily draw on neo-Aristotelian accounts of practical wisdom that in particular focus on Aristotle’s concept of *aisthesis* (perception), on Iris Murdoch’s account of ‘moral vision’ and on works of others that are inspired by this latter account. A salient difference between the two traditions is that in neo-Aristotelian accounts of practical wisdom perception is directly linked to action, whereas in Murdoch’s account it is not. For Murdoch perception is a moral capacity that is relevant for and at work in all kinds of responses other than mere action or decision-making. See for an illuminating and deep discussion of the two conceptions of moral perception: Clarke, Bridget, 'The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception', (Pittsburg: University of Pittsburg, 2003).

⁷²¹ McDowell, 'Virtue and Reason', 51.

⁷²² Llewellyn, Karl, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Company, 1960), 59-61, 121-57, 206-208., as cited in: Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging'.

⁷²³ Wiggins, 'Deliberation and Practical Reason', 233.

⁷²⁴ Murdoch, 'Vision and Choice'.

⁷²⁵ By sense perception I mean here: "the awareness or apprehension of things by sight, hearing, touch, smell and taste". Cf. <http://plato.stanford.edu/entries/perception-problem/>

to say. It is the ability to grasp certain aspects of reality in a non-inferential, non-deductive way.⁷²⁶

Note that 'reality' here does not point to a Platonic idea of moral reality. I do not mean to suggest the existence of an external independent practical world, nor of a set of brute moral facts waiting to be discovered by the judge. The reality at issue does have an objective side to it, but at the same time it is agent- or response-dependent. In this sense it can be compared with the reality of colours. In the words of Mac Dowell reality is “not brutally there -not there independently of our sensibility- any more than colours are; though, as with colours, this does not prevent us from supposing that [it is] there independently of any particular apparent experience of [it].”⁷²⁷

Another resemblance with sense-perception is that precisely because it is a particular *sensitivity* of the judge, judicial perception does not lead to a 'cool' kind of knowledge, in the sense of impersonal and detached knowledge. The knowledge generated by judicial perception has an emotional and affective dimension. As it generates sensory and embodied sensations, judicial perception comes with a vivid, immediate and lively phenomenology, so to say.⁷²⁸

A judge who has the capacity of judicial perception will thus typically be able to *vividly* imagine the situations in which the citizens confronting him find themselves. For instance, if a judge has to decide whether a certain constellation of 'facts' warrant the qualification of 'domestic violence' as defined and criminalized in penal law, he must be able to form an image of these facts. The accused may assert that these facts should be seen as part of the mutual testing and provoking that is characteristic for his

⁷²⁶ Stuart Hampshire makes the comparison with the perceptual identification of a person. We can tell who the person in the distance is, although we are unable to account for the process leading to this judgment. Hampshire, Stuart, 'Public and Private Morality', in *Public and Private Morality*, ed. Hampshire, Stuart (Cambridge: Cambridge University Press, 1978), 25. See also Aristotle on this point: “So there will not be deliberation about particulars either, as e.g. about whether this is a loaf, or whether it has been cooked as it should; because these belong to the sphere of perception.” Cf. Aristotle, 'Nichomachean Ethics', 1112b350-1113a3.

⁷²⁷ McDowell, 'Values and Secondary Qualities', 146.

⁷²⁸ Cf. Chappel, Timothy, 'Moral Perception', *Philosophy*, 83 (2008), 427-428. The concept of moral perception can thus rather straightforwardly account for phrases like “the way she has treated him is simply disgusting!”

marriage, whereas the victim might qualify the same facts as a form of emotional torture. The judge must then be able to form mental representations of the facts that he gets to see about the situation, a situation that is not directly present to him and may not be familiar to him at all. Nonetheless, in order to know how to respond, these facts must 'strike' him in the right way.

This example also shows a crucial difference between judicial perception and sense-perception: the former is a character sensitive capacity while the latter is not. Where a sadist and an altruist are equally equipped to discern that a dress is red or that certain form is a triangle, things are different with grasping practical reality. Judicial perception is a capacity in which the entire personality of the judge is involved.⁷²⁹ Flaws in his or her character influence his or her understanding of practical reality.⁷³⁰ These flaws will possibly 'block' him from getting in touch with the practical bearing of the facts. The judge will only be able to perceive well if his character is of a certain sort -only then will he be able to take in the 'facts', as it were.

Another important way in which judicial perception differs from sense-perception that is pertinent in this context is that judicial perception as a version of moral perception can be morally valuable in itself. As Lawrence Blum has put it: "We praise, admire, and encourage correct perception and moral insight prior to and independent of its issuing in right action."⁷³¹ Awareness of practical reality and expressions thereof can be accomplishments in their own right. It provides the setting in which judicial responses in their broadest sense take place and as we have seen in the previous chapter, it is this setting that can enhance a non-violent relation with the Other, the concrete embodied citizen whom the judge faces. Judicial perception is thus valuable

⁷²⁹ In the words of Martha Nussbaum, moral "[p]erception is a complex response of the entire personality, an appropriate acknowledgment of the features of the situation on which action is to be based, a recognition of the particular." Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 309.

⁷³⁰ This is not to deny that one can be wrong about the moral bearing of a situation for reasons other than a character flaw. Cf. Blum, 'Moral Perception and Particularity', 704.

⁷³¹ *Ibid.*, 713.

if not necessary for a good perceptual, emotional and imaginative response to the situation at hand.⁷³²

So far the virtue of judicial perception. It goes without saying that this virtue does not suffice to account for the moral quality of adjudication. For instance, this virtue does not explain how and why judicial decisions differ from decisions that other citizens take. Reference to judicial perception does not suffice to account for the role that the law plays in adjudication. Also, the capacity to adequately perceive the legal bearing of a case cannot yet explain the fact that the judge will actually act, express himself and respond accordingly. For this, other judicial virtues are needed.

Besides judicial perception the *fragility of rightness* proposes a range of other judicial virtues. As the discussion of the virtue of judicial perception already implicitly suggested: virtues are character traits, stable dispositions or "reliable sensitivities".⁷³³ Above all they neither are some sort of competences that are separable from the person in the sense that they may fade without loss of personality, nor are they equivalent to a thoughtless habit or a mere skill. Judicial virtues are qualities that are "well entrenched in its possessor [...], unlike a habit such as being a tea-drinker" [...].⁷³⁴

⁷³² Note that judicial perception is not only at work in certain well-confined situations in which choices have to be made. Judicial perception pervades the judge's life. Hence, as we shall see later, the data pertinent for the moral evaluation of adjudication are not confined to these well-confined situations. See for this point also: *Ibid.*, 714.

⁷³³ McDowell, 'Virtue and Reason', 51.

⁷³⁴ Hursthouse, Rosalind, *On Virtue Ethics* (Oxford: Oxford University Press, 1999). This aspect, the virtues as character traits, is vital for appreciating the force of the situationists' critique on virtue ethics. Situationists argue that robust character traits do not exist because people are too inconsistent from one situation to another for such traits to play a role in the explanation of behaviour. I will not delve deeply into the debate between virtue ethicists and situationists. At this point three arguments against the situationists suffice to support the idea that a virtue-ethical approach to legal decision-making does make sense.

Firstly, virtue-ethics is particularly well-suited to account for the influence of situational factors on human behaviour. A virtuous person will take these into account and he will try to deal with or confront these as good as possible. In the words of Julia Annas: "The more you develop a virtue, the *less* important to you is mere habit, and the more complex and flexible your ability to reason about new and innovative kinds of situations you may be faced with."

Cf. Annas, Julia, 'Comments on John Doris's 'Lack of Character'', *Philosophy and Phenomenological Research* 71, 3 (2005), 637.

What is more, virtue-ethics offers a developmental account of the virtues and hence it is not refuted if people act wrongly, not in the least because particular acts are not the relevant loci of moral assessment. A 'wrong' decision can be part and parcel of the practice of a person who strives to be virtuous, because a virtuous person will reflect on this mistake and on the basis of his insights act differently the next time. It indicates that 'second thoughts' and reflection after one's choices and acts are part of the kernel of ethical life, professional life included. I will come back to this point in this chapter, but also in the next chapter when discussing the notion of 'tragic responsive reactions'.

Secondly, the outcomes of social psychological experiments that the situationists use to challenge virtue-ethics indicate that our common sense idea about virtues or folk psychology in general differs from a philosophical account of the virtues. The latter offers a more demanding picture of the virtues than our every day experience would suggest. So conceived, the findings based on said social psychological experiments show that the virtuous life is much more difficult than we often think and that virtuous persons are quite rare. In this regard Kupperman mentions -that he has been told- that the one person who immediately refused to participate in the notorious Millgram experiment "was also the person who in Viet Nam blew the whistle on the My Lai massacre." Cf. Kupperman, Joel J., 'The Indispensability of Character', *Philosophy* 76, 296 (2001), 243.

Thirdly, an important advantage of virtue-ethics over and above the situationists' explanation of human behaviour is that it allows for an integrative evaluation of the person. Whereas the situationists typically see a person as a set of fragmented selves, each responding differently to certain situations, a virtue-ethical approach understands the person as someone who tries to integrate -other things equal- his values in all areas of his life. As such virtue-ethics can explain why we may be 'shocked' if someone acts honestly in one domain and cheats in another situation without any justifying reason for this difference. Virtue-ethics can explain why we will then have reason to doubt whether that person was indeed honest in the first place. See for this point again: Annas, 'Comments on John Doris's 'Lack of Character'', 640. See for the situationists' critique on virtue-ethics: Harman, Gilbert, 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error', *Proceedings of the Aristotelian Society* 99 (1999); Doris, John M., *Lack of Character* (Cambridge: Cambridge University Press, 2002); Flanagan, Owen, *Varieties of Moral Personality. Ethics and Psychological Realism* (Cambridge, US: MIT Press, 1991). See for strong replies to this critique: Sabini, John and Silver, Mauri, 'Lack of Character: Situationism Critiqued', *Ethics* (2005); Annas, 'Comments on John Doris's 'Lack of Character''; Sreenivasan, Gopal, 'Errors

In exploring which judicial virtues judges should have beside that of judicial perception, I use what has been coined a dialectical method, hinging on the views of ‘the many and the wise’, on the *endoxa* as Aristotle would qualify them.⁷³⁵ Across different cultures and countries and throughout history and a wide range of philosophies there exists considerable convergence as to the virtues deemed necessary for social endeavours and practices in general.⁷³⁶ These are also pertinent for adjudication, albeit tailored to the specific context. Adjudication is a social endeavour par excellence, concerned as it is with the legal resolution of conflicts between citizens⁷³⁷ or between a citizen and the government. We do indeed find some elaborations of these virtues (sometimes under the heading of another term, such as ‘values’ or ‘competences’) in national and international guidelines that aim to regulate

about Errors: Virtue Theory and Trait Attribution', *Mind* 111, 442 (2002); Kupperman, 'The Indispensability of Character'.

⁷³⁵ Aristotle describes his dialectical method as follows: "I shall thus take into account the things people say about it: for a true view will have all the available evidence in harmony with it, while a false one quickly finds itself in discord with what is true". Cf. Aristotle, 'Nichomachean Ethics', 1098b10-12. This method assumes that these views do contain at least some truth as expressions of locally embedded insights of normal people and of philosophers and in our case also of legal practitioners and legal scholars who have used their intelligence in their own way in either dealing with judicial decisions in one or more concrete legal cases or who have gained insights through thinking about legal decision-making in general. However, because it does not give up the critical potential of philosophy and underscores the particular value of philosophy, the account offered will not simply be a description of dominant views about (judicial) virtues. Not in the least because there is disagreement about which judicial virtues are central to judging. Antony Duff for instance, is very critical about the virtues mentioned in Solum's virtue jurisprudence, in particular about the virtue of corruption. Cf. Duff, Antony, 'The Limits of Virtue Jurisprudence', *Metaphilosophy* 34, 1/2 (2003). It will be a philosophical account in the sense that I aim to offer a consistent and coherent account of those virtues that are indispensable for judging. See for the critical potential of a dialectical method also: Cooper, *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, 288.

⁷³⁶ Cf. Peterson, Christopher and Seligman, Martin E.P., *Character Strengths and Virtues* (Oxford: Oxford University Press, 2004); Annas, Julia, 'Being Virtuous and Doing the Right Thing', *Proceedings and Addresses of the American Philosophical Association* 78, 2 (2004).

⁷³⁷ Corporations included.

the judiciary.⁷³⁸ And in legal theory important views and accounts have been given of virtue-ethical conceptions of legal reasoning.⁷³⁹

On the basis of (my understanding of) these *endoxa* I propose the following judicial virtues as pertinent for our understanding of moral quality in adjudication: judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency.⁷⁴⁰ Judges must have these virtues to a sufficient degree if adjudication is to be a morally justified practice and judicial decisions are to be right. Let me elaborate these virtues. As said: the virtue of judicial perception is not sufficient for moral quality in adjudication. One reason was that even if the judge knows what to decide, that is not the same as him actually taking that decision. Here *judicial courage* kicks in as a cardinal virtue that the judges needs. This quality enables the judge to confront and overcome threats, fears and pressures that may

⁷³⁸ See for instance: 'The Bangalore Principles of Judicial Conduct', (The Hague: UN Judicial Group on Strengthening of Judicial Integrity, 2002); 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities', (Europe: Working Group European Network of Councils for the Judiciary, 2009); *Magna Carta of Judges (Fundamental Principles)*; See for Dutch codes that are concerned with judicial ethics: 'NVvR Guide to Judicial Conduct', (Netherlands: The Dutch Association for the Judiciary, 2011); Compared to these enumerations, the *fragility of rightness* seeks to offer a more consistent and internally coherent account of the judicial virtues, thereby also drawing on relevant philosophical traditions.

⁷³⁹ See for instance: Solum, Lawrence B., 'The Virtues and Vices of a Judge: an Aristotelian Guide to Judicial Selection', *California Law Review* 61 (1987); ———, 'Virtue Jurisprudence. Towards an Aretaic Theory of Law', in *Aristotle and the Philosophy of Law. Theory, Practice and Justice*, ed. Huppel-Cluysenaer, Liesbeth and Coelho, Nuno M.M.S. (Dordrecht: Springer, 2013); Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging'; Amaya, Amalia, 'Virtue and Reason in Law', (Coyoacán: UNAM Philosophical Research Institute, 2012); Amaya, Amalia and Lai, Ho Hock, eds., *Law, Virtue and Justice* (Oxford: Hart Publishing, 2013).

⁷⁴⁰ Note that I do not mention judicial integrity as a separate judicial virtue. This because I hold integrity to be a meta-virtue in the sense that it encompasses all others. See for an elegant and insightful philosophical analysis of the integrity of the judge: Soeharno, Jonathan, *The Integrity of the Judge* (Farnham: Ashgate, 2009).

bring him to not effectuate what he sees as the right thing to do.⁷⁴¹ In order to fulfil his judicial role well, the judge must be able to pay a price, be it in terms of his career, of exclusion within the judiciary or socially, criticism, unpopularity or loneliness.⁷⁴² He should be able to withstand and ignore all possible forces that may improperly influence him. This virtue is particularly needed in cases about which public opinion is rather outspoken -for instance in certain criminal cases against sex offenders, in immigration law cases if the public climate is more or less xenophobic, or in cases in which powerful parties are involved such as the state itself. In such cases he must be courageous and have the inner strength to remain stoical and do his virtuous duty. Judges should also have the virtue of *judicial temperance*. Judicial temperance is the quality of self-restraint, a quality that protects judges from excess.⁷⁴³ A temperate judge controls his impulses in a judicial setting, impulses produced by his frame of mind or temperament and the ensuing incidental urges, needs and desires.⁷⁴⁴ Temperance is a prerequisite for other virtues such as courage. It also contributes considerably to a judge's incorruptibility, a quality that according to Solum we should not assume too easily: "We know from experience that corruption is a real danger for judges. Judicial avarice expresses itself in the blatant and obvious form of soliciting or accepting bribes, and in more subtle financial conflicts of interest, such as trading on advance knowledge of the outcome of judicial proceedings or setting a precedent

⁷⁴¹ See for a general account of courage: Goud, Nelson H., 'Courage: Its Nature and Development', *Journal of Humanistic Counselling, Education and Development* 44 (2005); Walton, Douglas N., *Courage: A Philosophical Investigation* (Berkeley: University of California Press, 1986). See for a discussion of the importance of courage in the Dutch judicial context: Loth, Marc, 'De Goede Jurist. Over Morele Moed, Onafhankelijkheid en een Riskante Omgeving', in *Code en Karakter. Beroepsethiek in Onderwijs, Jeugdzorg en Recht*, ed. Kole, Jos and Ruyter, Doret de (Amsterdam: SWP Uitgeverij, 2009).

⁷⁴² 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities'.

⁷⁴³ Cf. Peterson and Seligman, *Character Strengths and Virtues*, 431.

⁷⁴⁴ For Aristotle moderation (*sôphrosunê*) is restricted to the pleasures of the flesh and primarily has to do with the functions of eating, drinking and sex, functions that we humans share with animals. "Moderation and self-indulgence relate to the sorts of pleasures that are shared in by all the other animals too, which is why they appear slavish and bestial [...]" Cf. Aristotle, 'Nichomachean Ethics', 1118a24-26.

that will benefit a company in which one owns stock.”⁷⁴⁵ Judicial temperance also means that a judge does not display improper anger or inappropriate humour in court, causing the parties to think him biased, to think that he ridicules their person, interests or claims, not to speak freely in court and to mistrust the judicial process.⁷⁴⁶ Then there is the virtue of *judicial justice*. This virtue goes to the heart of what constitutes the specific judicial role.⁷⁴⁷ A crucial task of the judge is that he authoritatively determines the legitimate claims that citizens have against one another and against the state. Judicial justice indicates that a judge is disposed to secure the values of political morality as they are worked out in settled (procedural) law, permeate the legal system and figure in society at large.⁷⁴⁸ The judge must bring these general commitments of a legal order to the case at hand, commitments that are constitutive -but not conclusive- for the idea of a just society as a whole.⁷⁴⁹ The idea is that it takes a (sufficiently) virtuous and just judge to know in concrete which considerations of justice bear upon the case at hand and how. Only a just judge is “ready to enter into the spirit of its requirements.”⁷⁵⁰ An important precondition for this virtue is of course legal intelligence. In order for the judge to be just he must be learned in the sense that he must know the law thoroughly and have the analytical and cognitive skills needed to cope with complex legal questions.⁷⁵¹

⁷⁴⁵ Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 186.

⁷⁴⁶ Under the heading of ‘seriousness and prudence’ the European Network of Councils for the Judiciary states that “seriousness requires behaving respectfully during legal proceedings, being courteous, without excessive solemnity, and without inappropriate humour.” Cf. 'Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities', 67.

⁷⁴⁷ Cf. ———, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 18.

⁷⁴⁸ Cf. The Magna Carta of European Judges puts it as follows: A just judge aims to “guarantee the very existence of the Rule of Law, and thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.” Cf. *Magna Carta of Judges (Fundamental Principles)*.

⁷⁴⁹ Cf. Nussbaum, Martha C., 'The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality', in *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 94.

⁷⁵⁰ Cf. Wiggins, 'Neo-Aristotelian Reflections on Justice', 481.

⁷⁵¹ So, contrary to Lawrence Solum, I do not hold that legal intelligence is a separate judicial virtue, but I consider it a precondition for the virtue of judicial justice. In order for the judge

It is important to note that in view of the primacy of the particular, the virtue of justice does not allow a judge to deductively apply legal concepts. A just judge honours the particulars of the case. Hence the general commitments of justice bear weight only to the extent that they can adequately grasp the particulars of the case. So, a judge must secure the ‘negative moment’ that Derrida so much stressed: he must for a moment try to postpone all the legal concepts that he has at his disposal, allowing the particular to invoke the relevant (legal) considerations. These concepts of justice, among other concepts, must ‘pop’ as it were in the form of a ‘constellation’, a group of interconnected concepts that contribute to the intelligibility of the particulars of the case.⁷⁵²

So far the enumeration of the judicial virtues that, as said, are specifications of the cardinal virtues that in the history of thought have been acknowledged as crucial for any kind of social endeavour. Two more specifically judicial virtues are also crucial for the moral quality of adjudication. These are judicial independency and judicial impartiality. Together with the virtue of justice they are most directly linked to the commonly acknowledged characteristics of the judiciary in Western constitutional democracies.

Judicial impartiality is the first virtue that comes to mind if one enumerates the character traits that a judge should have.⁷⁵³ Impartiality is pertinent for specific roles in society, especially those that imply functioning as a ‘third party’ with the authority to resolve conflicts between two or more conflicting parties.⁷⁵⁴ As such it strongly contrasts with the qualities we want ‘normal’ citizens to have in their private lives. Part of what constitutes living a good life is in fact a more or less unreflective and unquestioning attitude towards the world. As Lucy has put it: “for most ordinary human beings with their vast range of affective commitments -to loved ones, place, nation and various institutions, practices or groups- an impartial stance towards life

to adequately honour settled law and background values of political morality, he should have a ‘knowing how’ that implies a high level of cognitive and analytical skills.

⁷⁵² Williams, ‘Liberalism and Loss’, 94.

⁷⁵³ Of course this also has to do with the fact that the public symbol for adjudication is that of the blindfolded Lady Justice.

⁷⁵⁴ Lucy, William, ‘The Possibility of Impartiality’, *Oxford Journal of Legal Studies* 25 (2005), 7.

and its constituents is both impossible and undesirable.”⁷⁵⁵ By contrast judicial impartiality requires that the judge is disposed to distance himself from his attachments in daily life. He has to disregard his personal make-up and be disposed to recognize and ignore considerations stemming from his possible biases, passions and subjective commitments.⁷⁵⁶ Ideally, impartiality demands absence of all subjective factors. An impartial judge is disposed to have an open-minded attitude towards disputants’ persons, backgrounds and situations, circumstances and claims. Thereby it is important to note that impartiality it is not tantamount to relinquishing one’s experiences, commitments and concerns, that is, to giving up one’s personality. These factors are necessary for other virtues, for instance that of judicial perception. As we have seen: one cannot perceive well if one does not genuinely understand the meaning and the practical bearing of a wide range of ‘thick’ concepts such as discrimination, fraud or sexual abuse, either by one’s own experience or through the use of one’s imagination.

Finally, a virtuous judge possesses the virtue of judicial independency. This virtue stems directly from the institutional role assigned to the judiciary in a constitutional democracy as the final preserver of the rule of law. This virtue implies that a judge is independent of and not influenced by external factors and pressures, be it from litigating parties, governmental bodies, lobbyists or from the public at large.

According to the Bangalore Principles of Judicial Conduct judicial independence comes down to “not letting [one’s] judgments be determined by external influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”⁷⁵⁷ Sure, judicial independency is closely linked to or may even be seen as a species of judicial courage, as the latter includes the competence to generally confront and withstand all internal and external obstacles, threats and risks to taking right decisions. A judge who lacks this virtue may for instance fail to protect the right to religious freedom of a minority group out of fear for criticism, mockery and other repercussions from the public at large.

⁷⁵⁵ Ibid., 6.

⁷⁵⁶ Ibid., 15.

⁷⁵⁷ Tamanaha, B.Z., *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 59.

To summarize our discussion so far: the *fragility of rightness* takes the virtues of judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency to be constitutive elements of the moral quality of adjudication.

A few remarks must now be made. First, we must bear in mind that all of these judicial virtues also encompass the ability of judges to behave in such a way that these virtues are best expressed to the public at large. Because of the public character of adjudication, part of what these judicial virtues entail is that they must also be seen to be practised.

What is more, these virtues are an interrelated complex of qualities that are mutually supportive. The judicial virtues that are enumerated cannot clearly be separated from one another. For example, each and every judicial virtue presupposes the virtue of judicial wisdom as the latter implies ‘situational sense’. At the same time, judges need virtues such as courage, impartiality, independence and additional character traits to be able to give expression to what they, being judicially perceptive, see. Here we follow John McDowell who writes: “no one virtue can be fully possessed except by a possessor of all of them, that is, a possessor of virtue in general.”⁷⁵⁸ Yet, this is not to deny that a virtuous judge can experience a genuine conflict.⁷⁵⁹

Next, the list of judicial virtues describes the virtues that an *ideal* judge would possess. As such it offers a perfectionist or developmental account of moral quality in adjudication. A virtue-ethical conception demands that judges strive for these virtues as part of adequately fulfilling their professional role. As we shall see below, this is a piecemeal and slowly progressing undertaking. It requires practice, introspection and external support.⁷⁶⁰

In addition, this virtue-ethical conception implies that judges are only to a limited

⁷⁵⁸ McDowell, *Mind, Value & Reality*, 70.

⁷⁵⁹ I will come back to this point in the next chapter. Here, in any case, I depart from McDowell’s view that the virtues do not give rise to genuine practical conflicts.

⁷⁶⁰ It is for this very reason that Aristotle was keen to stress that the elderly are most likely to have a sharp eye for practical matters. “[...O]ne should pay attention to the undemonstrated assertions and judgments of experienced and older people, or wise ones, no less than to demonstrations; because they have an eye, formed from experience, they see correctly.” Cf. Aristotle, 'Nichomachean Ethics', 1143b10-b14.

degree 'free' to be or become a good judge and to take 'right' decisions accordingly. As the practice of becoming and being a virtuous judge boils down to a complex combination between "doing and being done", a judge does not have direct and full control over his own performances.⁷⁶¹ Therefore being a responsible judge means in the first place to strive to become judicially virtuous.⁷⁶² An (aspirant) judge does not have control over his being affected, but he does to a certain extent have control over the conditions under which the judicial virtues are to be realised.⁷⁶³

Finally, a virtue-ethical conception implies that the scope for the moral evaluation of adjudication is much broader than only the actual decisions that judges take. Besides these judicial decisions, relevant data also include all kinds of voluntary and involuntary, spontaneous and emotional responses of judges both in and out of court. For instance, a judge who regularly makes discriminatory jokes at social gatherings may be showing a lack of professional, virtuous character. These jokes may well be an indication that there is something wrong with the judge's professional being and doings, judicial decisions included. The *fragility of rightness* sees the actual judicial decision as but one aspect that is relevant for assessing the moral quality of adjudication.⁷⁶⁴

2.2 The relation to the *equity* tradition

So far it may be unclear how this virtue-ethical conception of adjudication and the stress it lays on the 'particular' relates to the 'equity' tradition.⁷⁶⁵ This tradition largely

⁷⁶¹ Kosman, L.A., 'Being Properly Affected', in *Essays on Aristotle's Ethics*, ed. Rorty, Amélie Oksenberg (Berkeley: University of California Press, 1980), 105. See for this point also: Murdoch, 'Vision and Choice', 84.

⁷⁶² Cf. Clarke, 'The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception'.

⁷⁶³ Cf. Kosman, 'Being Properly Affected', 112.

⁷⁶⁴ For this point I draw on and subscribe to Iris Murdoch's view that morality should not focus too much on the quality of actions and decision-making in clearly confined situations. Cf. Murdoch, 'Vision and Choice', 80-81.

⁷⁶⁵ See for discussions of this doctrine in both civil law and common law traditions among others: Beaver, Allan, 'Aristotle on Equity, Law, and Justice', *Legal Theory* 10, 01 (2004); Zahnd, Eric G., 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law', *Law and Contemporary Problems* 59, 1 (1996); Shiner, Robert A., 'Aristotle's Theory of Equity', *Loyola of Los Angeles Law Review* 26

draws on a particular understanding of Aristotle's idea of *epikei* and it is well-entrenched in common law and civil law orders. In it equity is predominantly understood as either a correction on settled law or an amendment to law for the (supposedly limited number of) situations in which the law shows 'gaps' -in the sense of Dworkin's 'holes in a doughnut'-.⁷⁶⁶ Looked at from that angle, equity corrects the deficiencies or lacunas of *legal* justice as a standard that gives the judge discretion to decide how to do justice to the particularities of the case. This idea has been qualified as the 'doctrine of equitable discretion'.⁷⁶⁷

A virtue-ethical conception to adjudication differs from this tradition in some respects. For one thing, it does not consider equity as a gap-filling or corrective instrument for situations in which the law falls short. For to assign this role to equity falsely suggests that in all the other cases a judge does not need this kind of 'measure' to adequately deal with a case. It sees this 'flexible' measure as an inherent and hence pervasive aspect of the practice of adjudication. It holds that adequately grasping the particular is the essence of adjudication and hence that the flexible kind of measure that is allegedly provided by equity will be relevant for all cases. A virtue-ethical conception thereto draws on Aristotle who in his discussion of equity states: "For the rule for what is indefinite is itself indefinite, like the leaden rule used in building

(1994). Sure, in spite of its being well anchored in legal practices and legal theories this doctrine has been the object of severe criticism. It has been criticized for opening the door to uncontrolled flexibility and individuality in judicial decision-making and to judicial tyranny, in brief to an exercise of state-power that is genuinely troublesome from the viewpoint of political legitimacy. As Deborah Demott has put it: "Equity, however large its triumphs, has long been trailed by challenges to its legitimacy." See: Demott, Deborah A., 'Foreword', *Law and Contemporary Problems* 59, 1 (1996), 1.

⁷⁶⁶ Dworkin, *Taking Rights Seriously*, 31.

⁷⁶⁷ Cf. Beever, 'Aristotle on Equity, Law, and Justice', 36; In the Netherlands this 'doctrine of equitable discretion' and its merits have also been widely discussed. See for instance: Schoordijk, H.C.F., *Oordelen en Vooroordelen. Rede uitgesproken bij de 45e dies van de Katholieke Universiteit Brabant* (Deventer: Kluwer 1972); Scholten, ed., *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*; Vranken, ed., *Asser-Vranken (Algemeen Deel)*; Wiarda, *Drie Typen van Rechtsvinding*.

Lesbian-style: the rule adopts itself to the configuration of the stone, instead of staying the same shape, and the degree adapts itself to actual events.”⁷⁶⁸

In this conception equity is the kind of standard that is always needed and that in the context of adjudication is provided by the virtue of judicial perception. As said, this because perception is the mode for appreciating the particular.

Here we arrive at another salient difference between a virtue-ethical conception of adjudication and the equity tradition -as it was described above-. Proponents of the ‘doctrine of equitable discretion’ are often most engaged in determining when exactly the law allows for discretion and hence when equity is needed and to what extent. Therefore they hardly pay attention to the reasons we would have to rely on the moral quality of the judgments generated under the heading of ‘equity’. In other words, at least at the outset equity more often than not seems to be deployed as an all-purpose word for all the occasions that the discretionary powers of judges are acknowledged. Surely, this is to put the horse behind the cart. The quality of equity judgments is often rather assumed than argued for or made intelligible.⁷⁶⁹

A virtue-ethical approach works along other lines: it starts from the thesis that by definition the person of the judge has and should have a decisive influence in judicial decision-making. Therefore it identifies a range of judicial virtues. Together these virtues form an argument for the claim that the virtuous judge will use his freedom how to respond to a case in a morally responsible way. So, a virtue-ethical approach is ‘radical’ in the sense that it considers equity -understood as judicial perception- as a measure that a judge needs for all cases. But it also claims to offer a description of the conditions under which we can indeed rely upon judges to make equitable decisions of moral quality.

2.3 The role of codified rules and codified principles

Giving primacy to the particular and hence to the judicial virtues, a virtue-ethical conception does not disregard the valuable function these legal sources have for

⁷⁶⁸ Aristotle, 'Nichomachean Ethics', 1137b29-b32. This understanding is supported by an alternative interpretation of '*elleipsis*' that is defended by Robert Shiner. Shiner argues that “The *elleipein* image, [...] an integral part of Aristotle's theory of equity, does not connote "gaps" in the hole-in-a- doughnut sense. The image, rather, connotes a distance between two things, a falling short.” Shiner, 'Aristotle's Theory of Equity', 1254.

⁷⁶⁹ Shiner, 'Aristotle's Theory of Equity', 1261.

securing the moral quality of adjudication. Neither does a virtue-ethical conception ignore the role of moral philosophy, theories of political morality included, as explicit and discursive resources par excellence.

Codified settled law and explicit values of political morality are particularly important for the virtue of justice. If a judge is just, he will be disposed to honour settled law and generally accepted values of political morality as they are codified in for instance the constitution. Codification is a particular way of expressing the commitments that a legal order has.

Codified legal rules and legal principles and explicit values of political morality are in fact important for all judicial virtues in that they can function as rules of thumb, as summaries of a wide range of good decisions. As such they are of practical use, particularly for junior judges who still need to develop their legal learning and their legal intelligence. They are also useful for judges who are insecure in a concrete case for other reasons, for instance because the case involves a legal field that they are not well acquainted with.⁷⁷⁰ What is more, codified rules and principles can work as helpful safeguards against distorted perception in situations where biases lurk and rationalisations loom. As such they are valuable tools for judges to critically assess their own practice. This is for instance expressed in the following consideration of a guideline for judicial ethics that states that its aim is “to invite judges to enter into critical self-reflection and discourse with their fellow judges.”⁷⁷¹

Another vital function of these explicit and discursive resources is that they provide judges with valuable discursive tools for motivating their decisions. Part of what we expect from judges is that they are able to publicly defend their decisions.⁷⁷² Codified rules and principles are useful and publicly accessible concepts in terms of which the judge can -albeit only partially- explain and defend his choice.

Related to the former point, explicit rules of judicial ethics can also function as public anchor-points in determining the legitimate expectations of society at large with regard to the institution of the judiciary. They can function “[...] as an indication of what society may expect from the judiciary and from judges’ conduct.” It “allows

⁷⁷⁰ Nussbaum, *Love's Knowledge. Essays on Philosophy and Literature*, 99.

⁷⁷¹ Cf. 'NVvR Guide to Judicial Conduct'.

⁷⁷² Hampshire, 'Public and Private Morality', 50.

society insight into the way in which judges perceive their role.”⁷⁷³ So, within a virtue-ethical conception explicit principles and rules are important, albeit not in the form of a (final) commensurans, an exhaustive explanatory and justificatory ground for actual judicial decisions or the practice of adjudication at large.

2.4 Developing the judicial virtues

As a virtue-ethical conception assigns a crucial role to judicial virtues in accounting for the moral quality of adjudication, we must of course address the question of *how* judges obtain these virtues. Due to reasons of scope, I will do so only briefly.

To be sure, by reading books on law and legal matters, attending courses and lectures and learning all kinds of legal precepts and codes by heart one does not become a virtuous judge.

Although these cognitive activities do contribute to the kind of judicial intelligence that is indispensable for several virtues, becoming virtuous has to do with developing one's dispositions and with developing one's emotions and affections. Judicial virtues are developed in practice. As Aristotle puts it: “our actions are also responsible for our coming to have dispositions of a certain sort.”⁷⁷⁴ He compares the learning of virtues with the learning of practical skills and illustrates this by the example of a builder, a discussion that Julia Annas paraphrases as follows: “The beginning builder has to learn by picking a role model and copying what she does, repeating her actions. Gradually, he learns to build better, that is, to engage in the practical activity in a way that is less dependent on the examples of others and expresses more understanding of his own. He progresses from piecemeal and derivative understanding of building to a more unified and explanatory understanding of his own.”⁷⁷⁵ So, in a similar vein: one becomes a virtuous judge by acting and responding as a virtuous judge would and thence the development of judicial virtues requires a set of practices that adequately engage the dispositions, affections, emotions and demands for concrete virtuous behaviour.⁷⁷⁶ Aspirant-judges must be raised and trained in an environment where they can become judicially virtuous.

⁷⁷³ 'NVvR Guide to Judicial Conduct'.

⁷⁷⁴ Aristotle, 'Nichomachean Ethics', 1103b30-32.

⁷⁷⁵ Annas, 'Being Virtuous and Doing the Right Thing', 69.

⁷⁷⁶ Cf. Oakeshott, 'The Tower of Babel', 188.

Because of the importance of practice, I will briefly pay attention to the social practices and institutions that are needed and to the possible obstacles for this development. To that end the insights of 'social moral epistemology' are also pertinent, i.e. the discipline that among other things studies "social practices and institutions that promote (or impede) the functioning of moral virtues so far as their functioning depends on true beliefs."⁷⁷⁷

Of course, a crucial institution for the development of the judicial virtues is the judiciary itself, including the special professional education and training it offers to aspirant-judges. This institution and the education and training it offers should be of a certain quality if it is to offer the necessary directional indicators, ambiance and support for (aspirant) judges to indeed develop the judicial virtues. As a whole of interconnected roles, the institution must first of all provide role models: judges who by simply doing their job display the judicial virtues and the right attitude and dispositions. What is more, there must be sufficient time and support for aspirant-judges to 'practice' in a context in which there is sufficient supervision. These practices must be such that judges will be confronted with the 'particulars' of a case, that is, with the kind of situation that gave rise to the legal case in the first place. Only by being confronted with this reality can he improve his judicial perception. On the negative side, obviously the judiciary should be free from factors that impede the development of judicial virtues, or that more likely contribute to the training of judicial vices.⁷⁷⁸ Efficiency criteria in terms of time and financial means can be such

⁷⁷⁷ Buchanan, Allen, 'Social Moral Epistemology', *Social Philosophy & Policy Foundation* 19, 2 (2002), 126. Allen Buchanan rightly made clear that both proponents of moral theory and of virtue ethics have not paid sufficient attention to the importance of social moral epistemology in order to guarantee that people act rightly. He defines social moral epistemology as "the study of the social practices and institutions that promote (or impede) the formation, preservation, and transmission of true beliefs so far as true beliefs facilitate right action or reduce the incidence of wrong action. A special department of social moral epistemology is the study of the social practices and institutions that promote (or impede) the functioning of moral virtues so far as their functioning depends on true beliefs." Cf. Buchanan, 'Social Moral Epistemology', 126.

⁷⁷⁸ See for a radical but telling critique on developments in the judiciary in the United States that threaten the formation of practical wisdom on the part of the judge: Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 315-352.

potential obstacles that arguably contribute to developing vices rather than virtues.⁷⁷⁹ Such criteria may force judges to cut corners, curtail investigations, interrogations and reflection and dedicate less time to a case than they deem fit. These factors may also result in judges only ‘reviewing’ draft sentences that the court clerk has prepared, without him being confronted with the ‘facts’ of the case and having dealt with the difficulties of legally qualifying these facts. If the judge only reviews draft sentences, in the words of Kronman this “will entail a reduction in the demand that his or her own work makes on the judge’s imaginative powers and the consequent enfeeblement of these powers themselves.”⁷⁸⁰

Other potential obstacles for the development of the judicial virtues are what Buchanan calls ‘elite-culture’⁷⁸¹, ‘surplus status-trust’⁷⁸² and ‘surplus epistemic deference’⁷⁸³ respectively. These are tendencies that are inherent to every professional context and that put the process of judicial character building in peril. The first, elitism, tempts judges to stick to an image of themselves that comes about through self-rationalisation and a lack of (self-)criticism.

Rather the same goes for surplus status-trust and surplus epistemic deference. In the context of adjudication surplus status-trust means that judges and citizens rely on the quality of other judges, without good reason. Surplus epistemic deference boils down

⁷⁷⁹ This is of course not to say that constraints in terms of time and finances should be absent in the organisation of the judiciary. However, they should simply not thwart the possibility of exercising the judicial virtues.

⁷⁸⁰ See for this point also: Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 326.

⁷⁸¹ Buchanan points here to a culture “within an institutional context in which a certain occupational group has attained elite status, thereby receiving special privileges that insulate the group’s members from criticism and that systematically impede the functioning of virtues that may operate quite effectively in areas of the elite’s lives in which the professional role is not implicated.” Cf. Buchanan, ‘Social Moral Epistemology’, 133.

⁷⁸² *Ibid.*, 135. Buchanan defines surplus-status trust as “status based trust that is accorded to the wrong people or is excessive.”

⁷⁸³ *Ibid.*, 136. Surplus epistemic deference is, according to Buchanan, “either deference that is misplaced, as when a person or a group is regarded as a reliable source of truths about matters on which he or it is not, or excessive, as when there is an overestimation of a person’s or group’s reliability as a source of truths.”

to the “disposition to form, sustain, and transmit false beliefs.”⁷⁸⁴ Lack of a critical attitude towards the higher courts, or the views of experts, for instance (forensic) psychiatrist and statisticians may lead to surplus epistemic deference. Surplus epistemic deference undermines the development and training of judicial virtues. For instance, the virtue of judicial independency is irreconcilable with simply accepting statements of experts as true. So, if the development of the judicial virtues is taken seriously, these kinds of obstacles should be removed or counter-balanced.

Evidently, law school is another crucial institution for the development and training of judicial virtues. In order for students to become virtuous judges, to phrase Sullivan, "legal education needs to attend very seriously to its apprenticeship of professional identity."⁷⁸⁵ Law school should contribute to the character building of their students, it should enhance the development of their 'lens', necessary to adequately perceive the legal bearing of the situations they will confront.⁷⁸⁶ They could for instance organize obligatory law-clinics that confront students with actual legal cases in which all kinds of questions arise and that allow them to focus on the importance and the complexity of perception. And what has been coined 'the pervasive method' is relevant: the issues of ethics should be integrated in each course of positive law.⁷⁸⁷ The legal questions that are discussed in classroom should be dealt with against the background of the social context in which they arise, by taking that context into account and by engaging the imagination so as to understand the perspectives and interests involved. All this to sharpen the judicial 'eye' and hence to develop the virtue of judicial perception.

A virtue-ethical conception thus also implies that legal education pays ample attention to the establishment of the facts of a case and to the 'deed' of legal qualification. Indeed, because it holds that adjudication is in the end about particulars, the

⁷⁸⁴ Ibid.

⁷⁸⁵ Sullivan, William M., 'Professional Identity and Purpose', in *Educating Lawyers. Preparation for the Profession of Law*, ed. Sullivan, William M., Colby, Anne, et al. (San Francisco: Jossey-Bass, 2007), 128.

⁷⁸⁶ See for an inspiring article on the importance of focusing on character in legal education: Hall, Timothy, 'Moral Character, The Practice of Law, and Legal Education', *Mississippi Law Journal* 60 (1990).

⁷⁸⁷ Cf. Sullivan, 'Professional Identity and Purpose', 151-152.

establishment of the facts and the issue of qualification are core-issues in the curriculum. On the critical side a virtue ethical conception rejects the kind of legal education that exclusively focuses on the development of legal intelligence and limits the curriculum to the development of knowledge of the law as a settled and explicit body of principles, rules and jurisprudence, as if these were distinct and independent authorities for practical knowledge that have value independently of the situations in which these principles and rules will be used.⁷⁸⁸ Such an approach would in fact be a way of giving primacy to the general rather than to the particular, in spite of the law's practical role.

Also, a virtue-ethical conception is strongly at odds with what Duncan Kennedy has so bluntly qualified as 'legal education as training for hierarchy'.⁷⁸⁹ This phrase points to an educational system that directs students away from a critical attitude towards legal problems and presses them to uncritically accept the authority of superiors if they want to be successful. Their educational environment is replete with what Buchanan coined as surplus epistemic deference, for in such training for hierarchy students have to internalize a specific ideologically laden view of law as 'true', simply because others tell them so.

Finally, it goes without saying that 'background' practices such as family life, other social practices and primary and secondary education and socialisation are also crucial for the development of the judicial virtues.⁷⁹⁰ These background practices should provide a preliminary contribution to the formation of the relevant judicial virtues by for instance paying attention to the social and personal reality of citizens belonging to different groups and walks of life and by offering room for a critical

⁷⁸⁸ In this regard Sullivan has nicely put it: "Intellectual mastery alone is, indeed, always a possible pathology of schooling -one that can subtly subvert the best efforts of professional schools by displacing the goal of learning the profession with a more self-contained academic aim of technical virtuosity, detached from attention to the ends of legal reasoning." Cf. *Ibid.*, 144.

⁷⁸⁹ Kennedy, Duncan, 'Legal Education as Training for Hierarchy', in *The Politics of Law: A Progressive Critique*, ed. Kairys, David (New York: Basic Books, 1982).

⁷⁹⁰ See for a neo-Aristotelian approach to legal education for instance: Nussbaum, Martha C., 'Cultivating Humanity in Legal Education', *The University of Chicago Law Review* 70, 1 (2003).

stance to inherent biases and inequalities that figure in society. Formation and development of judicial virtues in a culture that is highly discriminatory is next to impossible, or at least are faced with an obstacle that is difficult to overcome. If social practices, institutions and legal education fall short in developing the judicial virtues, this will result in a moral deficit of the practice of adjudication and as a result lead to a justificatory lacuna where legal decisions are concerned. Therefore if one takes seriously the moral quality of adjudication, then the quality of said social practices and institutions are relevant and deserve attention.

Above all, becoming a judicially virtuous judge is a demanding endeavour for the (aspirant) judge. In all stages of development, becoming a virtuous judge in any case requires reflection. It requires identifying one's egotistical interests, one's prejudices and fears. As moral agents of a particular kind judges have to try "to see justly, to overcome prejudice, to avoid temptation, to control and curb imagination, to direct reflection".⁷⁹¹ Becoming a virtuous judge is thus a continuous process of (self-)improvement which starts long before one actually becomes a judge. As Julia Annas succinctly says: "We don't become virtuous without effort, nor overnight."⁷⁹²

What this striving boils down to concretely depends on the judge's stage of development and on the orientations that fits a particular stage. In order to become a good judge an aspirant judge must for instance also rely on role-models and follow the lead of his more virtuous colleagues, whereas a senior judge with developed virtues may to a larger degree find his beacons in his own understanding of the law and political morality and in the interests at stake in the cases before him. He will be likely to possess a more elaborate and thorough view on the matter. He will also be likely to make an effort to take decisions that (better) honour the new and surprising aspects involved in the case. The more judicially virtuous he is, the less important it will be for him to stick to what is already known.⁷⁹³

2.5 Legal Rightness

So far I have expounded a list of judicial virtues and the way they can be developed.

⁷⁹¹ Murdoch, Iris, 'The Idea of Perfection', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 332.

⁷⁹² Cf. Annas, *The Morality of Happiness*, 57.

⁷⁹³ See in this regard also: ———, 'Comments on John Doris's 'Lack of Character'', 637-638.

But what does this mean for the idea of a legally right decision and for the reason we can offer to a ‘losing’ citizen as to why he must bear the specific burden of that decision? Within the *fragility of rightness* a right decision is in any case a decision that is typically made by a judge who has realised a certain threshold level of each and every virtue.⁷⁹⁴ If a judge indeed possesses the virtues above this threshold level, he will be able to recognize to a sufficient degree the amalgam of considerations that are relevant for the case, he will be able to assign them their due weight and respond accordingly, and he will do so for the right reasons. Rightness and the judge’s motives cannot be separated. Legal rightness is thus partly constituted by the person of the judge.

An important implication is that different judges may arrive at different outcomes in similar cases because the judicial virtues do not dictate particular outcomes.⁷⁹⁵ There will not be ‘one right answer’ for each and every case; it is logically possible and very likely that different and even contradicting decisions can simultaneously be legally right. Thus one point of critique on this approach is correct: it does not offer a decision-procedure or a systematic way that tells the judge what to decide. This because such decision-procedures overshoot their mark. The *fragility of rightness* by contrast proposes an ‘inside-out approach’ to legal rightness: in the words of MacDowell the conception of a legally right decision “is grasped, as it were, from the inside out.”⁷⁹⁶

There is no tension between this understanding of rightness and the prevalence of reasonable disagreements about what the right decision is. However, within the *fragility of rightness* the kernel of such disagreements is not so much the analytical

⁷⁹⁴ Also a relatively virtuous judge will surely be able to make legal mistakes and not all decisions of a judge who possesses the virtues up to the threshold level are necessarily right.

⁷⁹⁵ From the viewpoint of the *fragility of rightness* it is pertinent that these differences are articulated for internal, educational and organisational purposes. The level of development of judges is important, for instance for their appointment in a certain position within the judiciary and for the allocation of concrete cases. See for a virtue-ethical approach to the selection of judges also: Solum, 'The Virtues and Vices of a Judge: an Aristotelian Guide to Judicial Selection'.

⁷⁹⁶ McDowell, *Mind, Value & Reality*, 50. Hence, strictly speaking in this approach the legal point of view does not exist independently from the notion of a virtuous judge.

implication of a concept, but rather one's perception and qualification of a particular situation. Such disagreements are "less like differences of choice, given the same facts, and more like differences of vision."⁷⁹⁷ Hence, these disagreements cannot be rationally and conclusively solved by means of an independent measure and the intellect. Instead they require a "skilful presentation of an instance" and persuasion.⁷⁹⁸ In case such disagreements are not resolved they will typically end with something like "you simply aren't seeing it, are you"?

What is more, an important feature of this notion of rightness is that the *action-guidingness* of the losing considerations may be overridden, but not necessarily their moral and legal bearing. This because such a choice is not based on an 'exhaustive' ranking. The choice is not the result of ranking, but the ranking results from the choice.⁷⁹⁹ Because of the limitations of the practical world this choice necessarily cannot honour all the considerations that apply.

At this point one may still object to the claim that the judicial virtues are indispensable for a legal decision to be right. I will therefore conclude this section by arguing for their indispensability by discussing a concrete legal case.

The case of *Robert Dowsen*⁸⁰⁰

During his childhood Robert Dowsen was very quiet. He hardly played with other children and often ignored his parents. Besides going to school Robert engaged himself with the making of futuristic constructions and later on with writing essays dealing with his -almost exclusively negative- view about the essence of being human. As a student Robert lived an isolated life, up to the point that he quit his studies in physics because he had to collaborate with other students and work in groups, for instance when doing experiments.

Not long thereafter, an incident occurred between Robert and his father. In a sudden outburst of anger Robert almost literally threw his father out of the house. On advice of his sister Robert went to a psychiatrist. He was diagnosed with an anti-social disorder and with a paranoid-type of schizophrenia. Since then Robert received treatment in the form of medication coupled with therapy-sessions once a week.

His sister visited him regularly, brought him food and cleaned his house. But Robert decided to break off all contact with his family and he neglected both his personal hygiene and his

⁷⁹⁷ Murdoch, 'Vision and Choice', 82.

⁷⁹⁸ McDowell, 'Virtue and Reason', 65.

⁷⁹⁹ Wiggins, 'Deliberation and Practical Reason', 162.

⁸⁰⁰ Cf. Rechtbank Den Haag, March 20, 2008, ECLI:NL:RBSGR:2008:BC8225.

house. His family, the neighbours and his family doctor became increasingly worried about Robert's condition and thought he was unable to take care of himself.

After Robert started to also behave rather aggressively towards the children in his neighbourhood, his sister suggested that he should commit himself to a psychiatric hospital for a while. Robert was upset by this suggestion and refused to be hospitalized or "bourgeoisalized" as he called it. Nonetheless his sister addressed the public prosecutor and asked for a formal court order to have Robert committed to a psychiatric hospital.

The judge now has to decide whether Robert's situation meets the legal criteria for involuntary commitment. The applicable law states that such a request can be honoured only if compulsory admission is necessary to prevent serious harm or danger to the person concerned or to others.⁸⁰¹ The purpose of this law is to prevent serious self-neglect, self-injury, social downfall and the violation of fundamental interests and rights of others. The judge may only honour the request if harm or danger is imminent because of the psychiatric disorder and no lesser measures than compulsory admission are available. To assess the case the judge visits Robert and talks to him, talks with Robert's sister, his mother, the family doctor and Robert's landlord. He also consults an independent psychiatrist. On the basis of his inquiry the judge pictures Robert's situation and the way he lives and in the end he decides to deny the request. He holds that the criteria for compulsory admission are not fulfilled.

The judge motivates his decision carefully by giving a detailed account of his findings. Although Robert's house is messy, unhygienic and definitely differs from that of an 'average' adult citizen, these facts should according to the judge not lead to the conclusion that Robert is a danger to himself. For he has observed that Robert feeds himself with fresh food and vegetables, that he looks well fed and that he seems to provide for his most basic physical needs, albeit in his own way.

The judge moreover argues that he does not have the impression that Robert cannot live alone. To the judge it seems that Robert in his own antisocial way knows very well how to spend his time: he reads and writes and does not want to be disturbed by others. Precisely because Robert wants to be left alone, the judge thinks that things will probably get worse if he is forced to leave his home.

Neither does the judge see a danger of genuine social decline, because Robert has lived this way almost all of his life. His present situation cannot be seen as the commencement of a 'deteriorating trend', which is the legally relevant criterion.

As to the risk of Robert setting his house on fire, a risk that his sister mentioned, the judge stresses that the mere fact that Robert has magazines and newspapers lying close to his gas stove is not sufficient to conclude that Robert is a danger to himself and to others. The judge has not seen burning marks on the carpet and Robert has declared that he does not have a gas cylinder for his stove. Moreover, regarding Robert's aggression towards the children in the

⁸⁰¹ Cf. Wet Bijzondere Opnemingen in Psychiatrische Ziekenhuizen (Involuntary Commitment of Psychiatric Patients Act).

neighbourhood, the judge argues that in view of the intense and continuous provocations by the children -they throw little stones at Robert's window all day long-, Robert's verbal aggression is not likely to be due to his disorder. His reaction can be taken as an -albeit awkward- result of an understandable annoyance. Finally, the judge finds support for his decision in the fact that although Robert behaves rudely towards his family and social workers, he is willing to speak with others, that is, if necessary.

Now that we have established that it is a necessary condition for legal rightness that the judge possesses the judicial virtues to a sufficient degree, in the next section I will discuss whether this is also a sufficient condition for legal rightness.

3 Political legitimacy and respect for the Other

There is an important weakness in the virtue-ethical conception of adjudication as it is laid out so far. As it stands a virtue-ethical conception has difficulty to fully honour the relational dimension of adjudication, the fact that adjudication affects the interests of concrete embodied citizens. More specifically, a virtue ethical conception does not (evidently) fulfil the liberal demand of political legitimacy, nor the requirement of respect for the 'Others', the concrete citizens participating in the proceedings.

As to the former: this demand in any case entails that the exercise of political power should be made (rationally) acceptable to each and every citizen.⁸⁰² Part of political morality in Western constitutional democracies is that citizens are to be treated as ends in themselves, rather than as means or instruments. In a liberal society we do not want citizens' basic interests to be negatively affected just because this serves the common good or the good of a fellow citizen. This is a fortiori the case for the parties involved in adjudication. Adjudication is an institution par excellence that comes with the exercise of political power and hence it is reasonable to demand that adjudication is capable of explaining itself to the "tribunal" of the understanding of the parties involved in the proceedings.⁸⁰³

In the previous chapters we have seen that we cannot account for this requirement if we understand adjudication as a form of applied moral theory. Legal decisions cannot sensibly be conceptualized as the normative implication of principles of justice,

⁸⁰² Cf. Rawls, *Political Liberalism*, xiv.

⁸⁰³ Waldron, Jeremy, 'Theoretical Foundations of Liberalism', *The Philosophical Quarterly* 37, 147 (1987), 149.

among others because judges will for several reasons often have strong discretion to determine the concrete rights and duties of citizens. Hence these principles are too abstract to offer a meaningful reason for a concrete embodied citizen to accept the judicial decision that affects him. The presumed 'fairness' of these principles of justice can therefore not sensibly be 'transmitted' to the level of judicial decisions. However, a virtue-ethical conception of adjudication does not necessarily fare any better in this regard. The only reason it can give to a losing citizen for why he has to suffer the consequences of a particular decision, is that it is the result of the 'virtuousness' of the judge. In the end the judge can only say to the 'losing' litigant: "that's the way I see it, and I am a competent judge. I cannot say more than that."⁸⁰⁴ It goes without saying that this answer does work to some extent, because it at least indicates that a judicial decision is not the result of the will of a 'vicious' or incompetent judge, that it is not completely 'arbitrary' or outright 'bad'.⁸⁰⁵ Nonetheless, mere reference to the virtuousness of the judge is at odds with the principle of political legitimacy. For one thing, as we have seen, in a virtue-ethical conception two virtuous judges may well arrive at different decisions in similar legal cases or even in one and the same case. Citizens are thus asked to accept judicial decisions and bear their burdens, knowing that these could have been otherwise and still right. Not to additionally offer them a more specific reason that relates to their own concrete good or interest is to either presume that citizens will have some kind of deep trust in or even awe for the judge, or that citizens will not consider themselves worthy of respect.

In any case, exclusive reference to the virtuousness of the judge is an all too elitist answer as to why 'losing' citizens should bear the burden of a legal decision. This problem is even more urgent if judges form a relatively homogenous group in terms of social origin and other respects. Peter Simpson brought this point in more general terms against Aristotle's virtue ethics: "Aristotle's court of appeal is not reason or argument but opinion -and not the opinion of all, but only of a few. These few turn out to be generally identifiable with a particular social class, the class of

⁸⁰⁴ Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 201.

⁸⁰⁵ Thus, a virtue-ethical conception of adjudication can rebut the sceptical view that adjudication is merely the enforcement of the subjective insights of the judge, a view that certainly flies in the face of reciprocity.

gentlemen."⁸⁰⁶

This point is of course intimately linked to the demand of respect for the Other: merely referring to the notion of the virtues of the judge for an account of the moral quality of adjudication and the idea of legal rightness seems to boil down to a form of 'digestion' of the Other, i.e. of the concrete individual citizen whose interests are affected. True, a virtuous judge may be judicially perceptive, but this is not the same as being fully engaged with the concrete litigating parties and being concerned with their concrete good, because of the very fact that it is *their* good. A virtuous judge does not necessarily possess what Cornell has qualified 'mimetic capacity', the capacity to identify with the other in sympathy.⁸⁰⁷ In brief, a virtue-ethical conception insufficiently honours the principle of political legitimacy as well as the postmodern concern and respect for the Other.

If we indeed take these concerns seriously there is yet another problem with a virtue-ethical conception of adjudication. We have seen that it *logically* allows for the possibility of genuine moral loss. That is, in the end it is the choice of the judge that determines the ranking of the considerations involved. The mere fact of this choice does not dissolve the moral bearing of the losing claim. However, a virtue-ethical conception does not guarantee that judges will also be disposed to actually identify and acknowledge it when genuine losses occur. This is at odds with the idea of political legitimacy and with that of respect for the Other. These principles -albeit both in their own way- indicate that the moral loss that results from judicial decisions should not be 'silenced'⁸⁰⁸ or 'digested' by the viewpoint of the virtuous judge.⁸⁰⁹ On the contrary, they indicate that such losses should be identified and acknowledged. Let me illustrate both lacunas of a virtue-ethical conception by the following case.

⁸⁰⁶ Simpson, Peter, 'Contemporary Virtue Ethics and Aristotle', *Review of Metaphysics* 45, 3 (1992), 513.

⁸⁰⁷ Cornell, *The Philosophy of the Limit*, 23. Douzinas and Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law*, 165.

⁸⁰⁸ See for the notion of 'silencing' in a neo-Aristotelian conception of practical decision making: McDowell, *Mind, Value & Reality*, 56.

⁸⁰⁹ Wijze, Stephen de, 'Tragic Remorse: The Anguish of Dirty Hands', *Ethical Theory and Moral Practice* 7 (2004), 456.

The case of Mister Cleave⁸¹⁰

Mister Cleave is a man in his late sixties who due to his precarious financial situation has to sell his house and move to a smaller rental apartment. He has lived alone during all of his adult life, except for the company of the three dogs he invariably qualifies as ‘his little children’. The new apartment, however, does not have a garden. After moving to the new apartment the dogs were really disordered, barked often and loudly and regularly urinated on the carpet in the public hallway because they were used to a garden. Within a few days Mister Cleave received the first complaints of his neighbours and eventually he received a letter from all the neighbours, asking him to get rid of his dogs. With pain in his heart Mister Cleave decides to get rid of two of his dogs. He keeps the oldest dog, the one that he is most attached to.

However, disordered as it already was, the third dog is now even more upset because his two friends are gone and he keeps barking and urinating in the public hall. Although after a few weeks there is some improvement, the neighbours insist that Mister Cleave rids himself of his last dog. He refuses and the neighbours go to court. They demand a prohibition for Mister Cleave to keep dogs because of the hinder and nuisance it causes them, with a fine of fifty Euros a day in case of violation.

In such a case a virtuous judge has to make an all things considered judgment in view of all the particularities of the case and on the basis of settled law and background values of political morality. More specifically, he has to decide whether the hindrance justifies restricting Cleave’s liberty to live with a dog, e.g. whether it justifies restricting his right to privacy.

As said, a virtue-ethical approach does not offer a normative measure that can guide the judge in his reasoning. What is more, as in this approach rightness stems from the idea of a virtuous judge, two opposing decisions can both be right. From the viewpoint of political legitimacy and that of respect for Mister Cleave as a concrete embodied citizen, we may seriously doubt whether Cleave has a reason to accept a decision against him. For what reason will Cleave have to accept if he holds that the judge’s perception is wrong, i.e. that he assigns too much weight to the hindrance his dog causes and too little to his interest to live with his dog? Also, if the judge does not give weight to Mister Cleave’s particular interest to keep his dog, he may rightly feel that he is not treated with respect. What is more, if the judge decides against Cleave without expressing any sensitivity whatsoever for the particular loss that would result for him, he may well have a legitimate complaint that the judge has not really ‘faced’ him, that he has not really dealt with the particular interests that are at stake for him.

⁸¹⁰ Cf. Rechtbank Dordrecht, September 25, 2008, ECLI:NL:RBDOR:2008:BF2284; Rechtbank Leeuwarden, October 25, 2011, ECLI:NL:RBLEE:2011:BU2511; Gerechtshof Den Haag, March 12, 2013, ECLI:NL:GHDHA:2013:BZ6556; Gerechtshof 's-Hertogenbosch, December 28, 2010, ECLI:NL:GHSHE:2010:BP0257.

Sure, one may object that the interests involved in this case are too trivial to function as an illustration of the argument. Whether such an objection is valid is open for discussion, but I think it is not. For one thing, if we embrace a virtue-ethical approach we lack an ‘external’ viewpoint in terms of which we can trivialize these interests. And again, it will depend on the capacity for judicial perception what legal weight to assign to the interests at stake. Also, if this example already arouses some weak intuitions that support the argument, then all the more so will cases that involve ‘more fundamental interests’.

4 Conclusion

In this chapter I discussed a virtue-ethical conception of adjudication as one element of the *fragility of rightness*. I posited that in order for adjudication to have moral quality judges should at least to a certain threshold level possess a set of judicial virtues and strive to become completely virtuous. In expounding the central characteristics of the ideal of a virtuous judge I named judicial perception, judicial courage, judicial temperance, judicial justice, judicial independency and judicial impartiality. It was shown that this focus on judicial virtues has implications for a range of social practices and institutions, particularly for that of legal education and the judiciary itself. These must be such that the judicial virtues can be developed and flourish. On that account the *fragility of rightness* brings the discipline of social moral epistemology into play as a relevant discipline for enhancing the quality of adjudication.

Yet, I also argued that a virtue-ethical conception of adjudication does not suffice as an account of moral quality in adjudication or for the rightness of judicial decisions. Reference to the viewpoint of a judicially virtuous judge, although epistemologically ‘right’, is no sufficient reason for a losing citizen to accept the decision. All the less so, because another judge could have decided otherwise in the same case. A virtue-ethical conception of adjudication by itself is insufficiently sensitive to the relational aspect of adjudication. As such it falls short of honouring the liberal principle of reciprocity and the dimension of respect for the Other, i.e. for the concrete singular embodied citizens participating in legal proceedings. In the next two chapters I will present the concepts of *civic friendship* and *tragic legal choice* as valuable complements to a virtue-ethical conception of adjudication that may compensate these lacunas.

“[...*W*]hen men are friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality.”⁸¹¹

11 The Fragility of Rightness II. The judge as a civic friend

1 Introduction

This chapter introduces the Aristotelian concept of a *civic friend* (*philia*) as the second constitutive element of the *fragility of rightness*.⁸¹² The claim is that if we are to account for the moral quality of adjudication, a virtue-ethical approach to adjudication needs the concept of civic friendship as a way to live up to the liberal principle of political legitimacy and connected to this as a way to show respect for the concrete citizens who participate in legal proceedings. The concept of civic friendship can at least partially make intelligible why a citizen will have a reason to accept a decision that is negative or even detrimental for him, even if -as is the case in a virtue-ethical approach- the judicial decision could have turned out differently had another judge taken it.

I shall first expound the concept of civic friendship as it appears in Aristotle's philosophy (2). Subsequently, I will show how this concept works out for the context of adjudication (3) and engage the question whether this concept is applicable to all fields of law (4). Then I will offer a (partial) explanation as to why indeed the *fragility of rightness* can be qualified as a 'destabilizing approach' to adjudication (5). The chapter ends with some concluding remarks (6).

2 Civic friendship

For Aristotle friendship is a relation in which the parties involved have a genuine and effective concern for one another.⁸¹³ Friendship is “good will between reciprocating

⁸¹¹ Aristotle, 'Nicomachean Ethics', 1155a-24.

⁸¹² Part of this chapter has been published earlier. See: Domselaar, Iris van, 'A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the troublesome character of) Right Judicial Decisions', in *Aristotle and the Philosophy of Law: Theory, Practice and Justice* ed. Huppes-Cluysenaer, Liesbeth and Coelho, Nuno (Dordrecht: Springer 2013).

⁸¹³ Cf. Cooper, John M., 'Aristotle on the Forms of Friendship', in *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, ed. Cooper, John M. (Princeton: Princeton University Press, 1999), 312. There is little literature on the value of the concept of

parties”, Aristotle says.⁸¹⁴ It also suggests the inclination to do good for the other. In the words of Cooper, friendship means “that the fact that the other person needs or wants, or would be benefited by, something is taken by the agent as by itself a reason for doing or procuring that something [...]”⁸¹⁵

What is more, friends are also aware of each other’s well wishing.⁸¹⁶ This mutual awareness is necessary for developing the sense of mutual trust that characterizes friendships. “If there is to be friendship, the parties must have good will towards each other, i.e. wish good things for each other, and be aware of the other’s doing so [...]”, Aristotle says.⁸¹⁷

At the same time a friendship relation also serves the self-interest of each friend separately because of the good that is realized through the relation. Aristotle's concept of friendship thus points to a complex and delicate combination of self-seeking and selfless concern for the good of the other.⁸¹⁸ Cooper illustrates this subtle conjunction by the professional relation of a businessman with a regular customer. "Such a businessman looks first and foremost for mutual profit from his friendship, but that does not mean that he always calculates his services otherwise than as a means to his own profit. So long as the general context of profitability remains, the well-wishing can proceed unchecked; the profitability to the well-wisher that is assumed in the

friendship for law and adjudication. See for an important article on this topic: Leib, Ethan J., 'Friendship & the Law', *University of California Law Review* 54 (2006). For a discussion of the relevance of Aristotle’s concept of civic friendship for modern liberal political theory see: Leontsini, Eleni, 'The Motive of Society. Aristotle on Civic Friendship, Justice and Concord', *Res Publica* 19, 1 (2013). For a more sceptical position in this regard see: Hope, Simon, 'Friendship, Justice and Aristotle. Some Reasons to be Sceptical', *Res Publica* 19, 1 (2013). Within the scope of this book I will not go into the objections that are made in this article against assigning a role to Aristotle’s civic friendship in liberal political theory. I do not think these objections are fundamental, but surely they do deserve to be addressed.

⁸¹⁴ Aristotle, 'Nichomachean Ethics', 1155b33-34.

⁸¹⁵ Cooper, 'Aristotle on the Forms of Friendship', 314.

⁸¹⁶ Ibid., 332.

⁸¹⁷ Aristotle, 'Nichomachean Ethics', 1156a11.

⁸¹⁸ Cooper, 'Aristotle on the Forms of Friendship', 317.

well-wishing is not that of the particular service rendered (the particular action done in the other person's interest) but that of the overall fabric of the relationship."⁸¹⁹

This example also indicates that Aristotle's account of friendship is by no means limited to intimate relationships between persons who are not family. It equally applies to other relations, for instance between parents and children, siblings, spouses, between business partners, members of religious communities, social clubs and political parties, and of course between citizens.

Aristotle distinguishes three species of friendship: advantage friendship, pleasure friendship and character friendship. As the name indicates, advantage friendship is a friendship that works to the personal advantage of the friends involved. Pleasure friendship is based on the pleasure it gives the friends. In both types of friendship the persons involved "do not love by reference to the way the person loved is, but to his being useful or pleasant."⁸²⁰ These kinds of friendship are conditional in that "the one loved is not loved by reference to the person he is but to the fact that in the one case he provides some good and in the other some pleasure."⁸²¹ Character friendships, by contrast, are relations that exist exclusively because of (elements of) goodness in the character of the other. It is this kind of friendship that Aristotle sees as the most complete because it is unconditional and hence does not depend on someone giving pleasure or being useful.⁸²² But again, what these relations have in common is that they involve reciprocal and effective well-wishing (*eunoia*) of the persons involved. Civic friendship is a species of advantage-friendship according to Aristotle, the advantage being the overall good that living together brings to each and every citizen.⁸²³ In a political community and "animated by civic friendship, each citizen has a certain measure of interest in and concern for the well-being of each other citizen

⁸¹⁹ Ibid., 327.

⁸²⁰ Aristotle, 'Nichomachean Ethics', 1156a11-17.

⁸²¹ Ibid.

⁸²² Ibid., 1156b7-b12.

⁸²³ Ibid., 1160a9-a14; Cooper, 'Aristotle on the Forms of Friendship', 333. See for the assertion that civic friends cannot be genuine friends because they lack intimacy and are not genuinely living together: Annas, Julia, 'Comments on John M. Cooper's "Political Animals and Civic Friendship"', in *XI. Symposium Aristotelicum*, ed. e.d., Günther Patzig (Friedrichshafen/Bodensee: Vandenhoeck & Ruprecht, 1987).

just because the other *is* a fellow-citizen.”⁸²⁴ The good of a fellow citizen matters by and in itself.⁸²⁵ The idea of civic friendship is thus based on the psychological idea that once citizens have experienced the benefits of living in a political community, as a result they start caring for one another’s good.⁸²⁶ In the words of Cooper, as civic friends “[t]hey are accommodating rather than suspicious, anxious to yield a point rather than insisting on the full letter of their rights whenever some dispute arises.”⁸²⁷ In a society animated by civic friendship citizens are willing to sacrifice their own particular interests for one another, lest this does not cost too much. The sacrifice may for instance not endanger the overall profitability of being an active participant in a political community.⁸²⁸

This accommodating attitude is also due to the fact that (civic) friends characteristically see one another as 'another self' (*heteros autos*), as people with whom, depending on the character of their friendship, they share a fundamental aspect of their identity. In a society constituted by civic friendship fellow citizens conceive of one another as people with similar powers and vulnerabilities, with a similar overall interest in leading a good life.

3 The judge as a civic friend

As said, as part of our attempt to account for the moral quality of adjudication I put it that the concept of civic friendship forms a valuable complement to a virtue-ethical conception of adjudication. This because it can honour the relational character of adjudication, the fact that adjudication is a practice in which we ask the ‘losing’ citizen to bear the burden of a public decision. If we can understand the practice of adjudication as a specification of civic friendship, this means that citizens can be confident that these decisions are, if anything, also the result of an effective attempt to serve their concrete good. A judicial decision can be understood as an expression of well-wishing by the judge. This well-wishing together with the judge being virtuous

⁸²⁴ Cooper, John M., 'Political Animals and Civic Friendship', in *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, ed. Cooper, John M. (Princeton: Princeton University Press, 1999), 371.

⁸²⁵ Ibid.

⁸²⁶ Cooper, 'Aristotle on the Forms of Friendship', 323.

⁸²⁷ Ibid., 333.

⁸²⁸ Ibid., 328.

qualifies the discretion that the judge inherently has and together this well-wishing and virtuousness give meaning to the liberal principle of reciprocity, but also to the principle of respect for the Other.⁸²⁹ As to the first: a legal decision can be understood as in the best case embodying an equilibrium between the interests of the losing party on the one hand and the interests of his fellow citizens and the good of society on the other. Conversely, the judge and the legal order as a whole can in turn rely on citizens to accept the decision as part of their fulfilling their duty as good willing fellow citizens. As civic friends they have an accommodating attitude and are willing to make a sacrifice. Precisely by accepting the judicial decision, the losing litigant expresses his friendship and his commitment to the political order and the values it aims to protect.

As to respect for the Other, a judge who has the attitude of a civic friend will be sensitive for the particular good of the concrete parties to the proceedings. He will try to grasp and serve that good in the best way possible, in a way that is compatible with his role as judge and hence with the other considerations bearing upon him. The attitude of a civic friend implies that the judge indeed has respect for the Other's otherness, i.e. for the concrete good of the citizen in all his particularity. It also implies that the judge is aware of a shared kind of humanness that allows him to sympathetically appreciate the situation in which the citizen before him finds himself. From the viewpoint of both reciprocity and respect for the Other, civic friendship has yet another function. It can account for the kind of sensitivity that is necessary for the judge to acknowledge the loss that comes with a judicial decision as troublesome. As a civic friend he genuinely cares, he can feel the loss himself. Acknowledgement is likely, because the judge has the kind of attitude towards the parties participating in the proceedings that is conducive to such an acknowledgment. If the judge is both

⁸²⁹ It goes without saying that reciprocity in adjudication cannot be realized through the mere 'well-wishing' by the judge and the parties concerned. Whether the principle of reciprocity is satisfied, will obviously also depend on the background institutions and the workings of the main political institutions in society. It is doubtful whether citizens have reason to accept the burdens of judicial decisions if they at the same time cannot also rely on the 'well-wishing' of and in all political institutions, such as the constitution, legislation and policy.

virtuous and a civic friend then the good of the parties is part of his own good and therefore he will be sensitive for the suffering of the losing party.

At this point one may question what civic friendship does contribute to the idea of legal rightness. Within the *fragility of rightness* a right decision boils down to the judge adequately responding to a wide range of considerations, including his well-wishing for the parties to the proceedings. This range comprises different levels of abstractness and generality, and none of these considerations will by themselves have any claim to deliberative priority: neither the considerations drawn from what is considered settled law or from background principles of political morality, nor the ones that stem from his concerns as a civic friend or from his way of perceiving the particulars. In the end a right decision will be an all-things-considered judgement that is made by a (sufficiently) virtuous judge who at the same time has the attitude of a civic friend. As we shall see in the next chapter, such decisions will not necessarily be free of conflict.

4 Does civic friendship apply to all areas of law?

Above I have argued that civic friendship is an important concept for coming to grips with the requirement of reciprocity in adjudication. I proposed it as a complement to a neo-Aristotelian conception of judicial-decision making that is part and parcel of the *fragility of rightness*. In the next chapter I will introduce the concept of a tragic legal choice as the third constitutive element of this approach. However, at this point the question that needs to be addressed is whether the concept makes sense for all (kinds of) legal cases⁸³⁰ and whether it requires further elaboration or a particular caveat for some kinds of cases. Due to reasons of scope I will briefly discuss only one category of legal cases for which the concept of civic friendship arguably is not appropriate. This is the category of cases in which citizens are accused of having seriously violated the basic interests of other citizens and thence also the good of society, for instance in certain penal cases.⁸³¹ It could be argued that these cases are characterized

⁸³⁰ I am indebted to Professor Lawrence B. Solum for signalling that this category of cases at least requires special attention if we introduce the concept of civic friendship to the practice of adjudication.

⁸³¹ These cases may fall in the domain of criminal law, but may also come up in other areas of law, like tort cases in civil law or negligence and nuisance cases in environmental law. Here I simply accept the legitimacy of the criminal law. It remains to be seen whether civic

by disrupted or broken relations rather than by relations of civic friendship. If so, the judge's professional responsibilities may not demand that he decides as a civic friend. As a provisional answer to this important point I will make a few remarks. First, Aristotle's notion of advantage friendship and the interpretation of reciprocity implied therein, does not entail that each and every activity taking place in the context of the relation must be advantageous to the parties involved. This is also expressed in the fact that Aristotle sees failures and wrongdoings as part of the practices that constitute friendship. Some of the relations that Aristotle qualifies as forms of friendship, e.g. the relation between parent and child, or between teacher and pupil are clear examples of relations that cannot be characterized without pointing to such experiences of failure and wrong-doing.⁸³²

As we have seen, what matters is whether the overall fabric of the relationship is advantageous to the parties involved.⁸³³ In order to maintain a friendship both parties must be able and willing to provide for the good "in that respect in which they are friends."⁸³⁴ Thus, when a citizen fails or does wrong the question is whether he remains a person whose partaking in one way or another can be thought as advantageous to the political community. The advantageous character of a relation does not directly 'evaporate' when a citizen commits a serious crime or other kinds of unlawful wrongdoings: it does not indicate that the profitability of the relation and therefore the friendship has ended. Even if his behaviour is structural, the citizen in question may still maintain the properties that enable him to contribute to a mutually advantageous relation.

Because civic friendship implies considering the friend as 'another self', it comes with the acknowledgment that a fellow citizen is never "intrinsically evil, but a human being like us, with diverse frailties and weaknesses, who has encountered circumstances -whether personal or social- that bring out those weaknesses in the

friendship can also lead to a fundamental critique on the system of criminal law as it now is in Western constitutional democracies.

⁸³² Cooper, 'Aristotle on the Forms of Friendship', 312.

⁸³³ Ibid., 327.

⁸³⁴ Ibid., 326.

worst possible way.”⁸³⁵ Criminal citizens will be seen as citizens with similar potentials and frailties as all others, due to which they can be held responsible, but at the same time their specific good must be taken into account too.

Also, upholding a relation of civic friendship with a wrongdoer may further the likelihood of a future cooperative attitude of the ‘failing’ citizen and it is profitable for the common good because the wrongdoer may be able to perform or continue to perform several social roles.⁸³⁶ In addition, to approach citizens who have committed crimes as civic friends also has an epistemological value for society as a whole. This sympathizing attitude may enhance our understanding of what citizens in general need in order to be able to become good citizens, because it “creates incentives [...] to think hard about those circumstances, so that we do not put people under pressures that many normal agents cannot stand.”⁸³⁷

Hence, the provisional answer to the question whether the concept of civic friendship applies even in cases of serious crimes and other grave wrongdoings is affirmative. In case of serious wrongdoing the judge can confront the delinquent with the conditions of civic friendship and hold him responsible according to these conditions. He can highlight the fact that the wrongdoer is part of a practice that aims to serve the good of society, including his good and the good of his fellow citizens.

Of course, a judge may find it difficult to have a sympathizing view of criminals or citizens who otherwise deeply violate the interest of others. He may have a hard time trying to ‘see’ them as ‘other selves’. This not in the least because such a sympathizing view may confront the judge with serious moral dilemmas, because the commitments of a civic friend on the one hand and those of a virtuous judge on the other may not always harmonize. I will come back to this point in the next chapter. Obviously, in extreme cases the relation of civic friendship does come to an end, simply because reciprocity is lacking. This may for instance be the case if the wrongdoer lacks the cognitive and moral capacities to be effectively committed to the good of society and of others. It may also end if a citizen who has violated the

⁸³⁵ Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

⁸³⁶ This point is hypothetical and needs elaboration and empirical support.

⁸³⁷ Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

interests of others has structurally and genuinely expressed that he does not wish his fellow citizens well and that he has no concern for the good of society. Then there will be no way of seeing the relation as (potentially) advantageous for society. In these extreme cases the judge still has to comply with the basic values and rules of society on how to treat the wrongdoer in question, but he need not act as a civic friend.

5 The destabilizing character of adjudication: a first explanation

Having outlined a virtue-ethical conception of judicial decision-making and having complemented it with the concept of civic friendship, in this section I shall make a start with elaborating the ‘destabilizing’ character of the *fragility of rightness*. Yet, it is not until the next chapter, in which I outline the concept of a *tragic legal choice*, that we can fully grasp this destabilizing dimension.

One reason for the ‘destabilizing’ character of the *fragility of rightness* is that a virtue-ethical conception of adjudication complemented with the concept of civic friendship does not offer any action-guiding viewpoint for judges or citizens to rely upon. The *fragility of rightness* only offers an *indirect* answer as to why legal decisions are right, that is, by referring to the notion of a virtuous judge and that of civic friendship. Judges will thus have no recourse to any priori decisive ground to rely upon when fulfilling their professional responsibility. He will not have the apparent safety of the dictates of Reason, i.e. the Legal Point of View. He will to a large degree be left on his own, in the sense that his personality will be constitutive for his judicial decision. He must choose what practical conclusion to draw from the considerations that the case invokes. These considerations cannot a priori be ordered or ranked, but present themselves as a rather messy, intransparent constellation. Adjudication will therefore boil down to a rather personal and existentially demanding endeavour.⁸³⁸

As already suggested, this lack of an action-guiding viewpoint is also destabilizing for the affected citizens. This because the judge cannot offer a conclusive justificatory

⁸³⁸ Note that this is not to say that judging should be ‘personal’ in the sense that the judge is open about all kinds of details that characterize him as a person. The assertion that the profession of the judge is highly personal should not be confused with the idea that judges should share their personality and private lives with the public.

reason for why he makes a particular decision. He cannot offer a justification for seeing the case as he does. Again, in the end the judge can only say 'this is how I see it'.⁸³⁹ Hence the affected citizen will not be provided with exhaustive explanatory reasons for why he should accept the decision and its consequences. It is through a trust in the quality of the judiciary and through the concrete performance by the judge that the affected citizen can experience the reason why he should accept the decision and the burdens it brings as valuable for him. The limits of articulate reason should be filled in with nothing more than trust in the dispositions of the judge. Uncertain as this may seem, we should remember that the so called 'stabilizing approaches' do not live up to their promises of certainty and therefore do not fare any better.

The *fragility of rightness* is also destabilizing for the legal order as a whole, since a crucial element of it can at best be seen as a seemingly disordered, messy and opaque amalgam of decisions of judges. In any case, a legal order cannot be understood as an ordered whole of explicit propositions that together form one coherent system. It will be far from a 'seamless web' in which each and every decision can be taken as the normative implication of a theory. As we saw, according to this conception two opposing judicial decisions can even both be right in one and the same case or in similar cases.

6 Conclusion

In this chapter I discussed the concept of civic friendship as the second element of the *fragility of rightness*. We saw that the moral quality of adjudication not only consists in the fact that judges to a sufficient degree have developed a set of judicial virtues, but that they will also decide as a civic friend. A right judicial decision will typically be brought about not only by 'the lens of judicial virtue' but also by the well wishing by the judge who has a keen and sympathizing eye for the concrete good of the citizens involved. This good is part of the amalgam of considerations that are relevant for the judge and that he seeks to honour. At least partially this well-wishing provides a reason for a 'losing' citizen to accept a judicial decision, even if this selfsame decision could have turned out otherwise with another judge deciding.

⁸³⁹ Solum, 'Virtue Jurisprudence. A Virtue-Centered Theory of Judging', 201.

In addition we saw that the concept of *civic friendship* is even pertinent for domains of law where citizens who participate in legal proceedings have seriously violated the fundamental rights of their fellow citizens.

Finally, I showed why a virtue-ethical conception of adjudication complemented with civic friendship suggests an account of moral quality that is destabilizing for the judge, the parties involved in a legal procedure and the legal order as a whole. It is this destabilizing character of the *fragility of rightness* that returns in the next chapter when the concept of a tragic legal choice is introduced as its final constitutive element. There we shall again see the fragile character of moral quality in adjudication.

"[.S]ometimes Justice itself is fraught with harm"⁸⁴⁰

"[T]here is no need of irrational gods, to give rise to tragic situations."⁸⁴¹

12 The Fragility of Rightness III. Tragic choice as a legal concept

1 Introduction

This chapter introduces the concept of a tragic legal choice as the third and final constituent of the *fragility of rightness*. By bringing adjudication into the domain of the tragic, I argue for sensitivity for the morally ambivalent character of adjudication. I consider this ambivalence an inherent part of the practice of adjudication, something that cannot be exhaustively prevented, overcome, or dismantled as being a pre-reflective illusion. Even if everything is as it should be, adjudication will sometimes come with moral wrongdoing. Hence, in this sense the *fragility of rightness* brings bad news about adjudication.⁸⁴²

To establish the concept of a tragic legal choice I firstly discuss the concept of the 'tragic' in practical philosophy (2). Subsequently I will designate the central features of a 'tragic legal choice' (3). We shall see that it is the result of a genuine conflict between judicial commitments, that it causes a moral remainder and that it typically evokes a tragic responsive reaction. After this sketch, I shall briefly give some additional arguments for and against anchoring this concept in the practice of adjudication (4). Then I shall briefly discuss the compatibility of the *fragility of rightness* with the demands of the rule of law (5). I shall end this chapter with a conclusion (6).

There is one caveat that must be made at the outset. Tragedy cannot be argued for through an analytical line of reasoning. First and foremost the tragic is something that we experience, something that has a certain effect on us. In the words of Scheler "[t]he 'tragic' is, to begin with, a characteristic of events, fates, characters, etc. that

⁸⁴⁰ Sophocles, *The Complete Plays of Sophocles*, 143.

⁸⁴¹ Williams, Bernard, *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973), 173.

⁸⁴² For the use of the term 'bad news' I took inspiration from a deep and thought-provoking essay by Bernard Williams that discusses the value that tragedy as a literary genre might have for philosophy. Cf. Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics'.

we perceive and intuit in them. It is a heavy chilly breath that emanates from these things themselves [...].”⁸⁴³ Any attempt to offer decisive and exhaustive philosophical criteria for determining whether a particular judicial choice is tragic would not only be epistemically wrong, it would also be *morally* problematic. It would suggest that one is “more concerned with moral principles than with human realities and hence insufficiently sensitive to human suffering.”⁸⁴⁴ Such an approach would “deny tragedy its proper witness.”⁸⁴⁵

This chapter thus merely aims to offer a rough sketch of a tragic judicial choice and it does not stand on its own. It largely depends on the actual phenomenology of adjudication in everyday practice and also on all kinds of representations of this phenomenology, for instance in film and literature. What is more, as an attempt to stay close to the phenomenological character of the tragic and in order to bring the tragic sensitivity that the *fragility of rightness* in fact proposes to life, a wide variety of cases will be brought forward.

2 Interlude. The ‘tragic’ and (practical) philosophy

Before elaborating the concept of a tragic legal choice, some introductory remarks on the concepts ‘tragic’ and ‘tragedy’ in practical philosophy and legal theory are in order, explaining why the tragic is a relevant concept in accounting for adjudication. The meaning of ‘the tragic’ or ‘tragedy’ in practical philosophy is predominantly based on an understanding of Athenian tragedies that emerged at the end of the sixth century B.C.⁸⁴⁶ During the fifth century B.C. more than nine hundred tragedies were

⁸⁴³ As cited in: Kaufmann, Walter, *Tragedy and Philosophy* (Princeton: Princeton University Press, 1968), 302.

⁸⁴⁴ *Ibid.*, 315. Kaufmann also ridicules attempts to designate definitive criteria on the basis of which certain Greek tragedies are dismissed for not being 'really' tragic. He pointedly states: “There is no virtue in trying to be more tragic than Aeschylus and Sophocles, Euripides, and Shakespeare, claiming that much of what they considered tragic was merely pitiful.” Cf. Kaufmann, *Tragedy and Philosophy*, 315.

⁸⁴⁵ Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 221. See also: Kaufmann, *Tragedy and Philosophy*, 315.

⁸⁴⁶ Walter Kaufman puts this point as follows: “the plays in question were not called tragedies because they were so tragic -they merely had some connection with goats, and the Greek word for goat is *tragos*- but the word tragic was derived from tragedy.” Cf. Kaufmann,

performed, but only a few survived. These tragedies and their reception have been central to what we may call the tragic tradition. They were performed during the annual festival of the City Dionysia, a spring festival that was celebrated annually on the south slope of the Acropolis.

The classicists Vernant and Vidal-Naquet describe Greek tragedy as a “unique human achievement” because of its special style and its particularities as a social and to some extent political institution and because it introduced “tragic consciousness” as a hitherto unrecognized aspect of human experience.⁸⁴⁷

This consciousness was organised around the central question ‘what to do’, the protagonists being at crossroads or on the verge of a choice and asking themselves what course of action to take.⁸⁴⁸ One of the most well-known instances is Aeschylus’ *Agamemnon* who has to decide whether to kill his daughter in order to save his army: “Obey, obey, or a heavy doom will crush me! - Oh but doom *will* crush me once I rend my child, the glory of my house -a father’s hands are stained, blood of a young girl streaks the altar. Pain both ways and what is worse? Desert the fleets, fail the alliance?”⁸⁴⁹

The Greek tragedies display the world of practice as a troublesome world of suffering, conflict and unintelligibility.⁸⁵⁰ Moreover, they conceive of man and his actions not as stable realities that could be clearly defined as good or bad and right or wrong, but rather as giving rise to complex questions of responsibility and guilt and to morally ambivalent answers.⁸⁵¹ The protagonist of Greek tragedy is neither a flawless hero nor a vicious scoundrel. He is conceived as unable to offer clear-cut solutions to the

Tragedy and Philosophy, 310. So for the meaning of the tragic we do not follow the colloquial way of using the word, which is to point out bad or really sad situations. That we deduce the meaning of the tragic from the reception of the Greek tragedies obviously is not to say that the colloquial meaning of tragic should be neglected or ridiculed.

⁸⁴⁷ Vernant, Jean-Pierre and Vidal-Naquet, Pierre, *Myth and Tragedy* (New York: Zone Books, 1990), 21, 23.

⁸⁴⁸ *Ibid.*, 29.

⁸⁴⁹ Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*, trans. Fagles, Robert, Penguin Classics (New York: Penguin Group, 1975), 110.

⁸⁵⁰ Vernant and Vidal-Naquet, *Myth and Tragedy*, 43.

⁸⁵¹ *Ibid.*, 164.

practical questions at hand, also due to the workings of the external world and its ‘tragic flaw’ (*hamartia*) that produces troublesome ethical realities and suffering.⁸⁵²

“Whoever seeks a moral holiday in art will not find it in Attic tragedy”, Walter Kaufman writes.⁸⁵³

Greek tragedies often show human suffering for which there is no clear cause or justification, even though this suffering always comes in relation with choices and acts. They display a rather complex and troublesome relation between men, their actions and the external world, stressing the moral ambivalence of human realities.⁸⁵⁴

In Sophocles’ *Oedipus Rex* the course of events is such that Oedipus ends up causing precisely what he aimed to avoid.⁸⁵⁵

A first and notorious philosophical discussion of the ‘tragic’ based on an understanding of the Greek tragedies we find in Plato’s work. This discussion was outright antagonistic as he claimed that philosophy is the better teacher of moral wisdom to which tragedy is nothing but a threat.⁸⁵⁶ Although he was an aspiring author of tragedies in his youth, Plato aimed to show how tragic consciousness could be overcome by appealing to logic and reason. In his *Republic* he notoriously criticized the tragic poets for being deluded, for dwelling too much on the suffering of human beings, for giving too much room to irrational emotions and for thereby dangerously influencing and even spoiling the character of Athenian citizens.⁸⁵⁷

According to Plato, citizens should not be trained to lament their troublesome fate as this involved delusion about the values at stake and was both useless and cowardly. He did not want to admit the tragic poet “into a well-ordered State, because he [the tragic poet, IvD] awakens and nourishes and strengthens the feelings and impairs the

⁸⁵² See for a discussion of the different meanings assigned to Aristotle’s *hamartia*: Kaufmann, *Tragedy and Philosophy*, 61-63. In the context of this chapter the relevance of this concept lies in the fact that it conveys the idea of a moral error without implying a clear mistake or wickedness. See also: Aristotle, *Poetics*, trans. Heath, Malcolm (London: Penguin Books, 1996), xxxiii.

⁸⁵³ Kaufmann, *Tragedy and Philosophy*, xxi.

⁸⁵⁴ *Ibid.*, 315.

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Barbour, 'Tragedy and Ethical Reflection'.

⁸⁵⁷ *Ibid.*, 1-2.

reason.”⁸⁵⁸ For Plato the art of measuring, numbering and weighing could actually rescue citizens from their tragic predicaments. Hence, he proposed to outlaw tragedy and particularly to censor the plays of Sophocles and Euripides.⁸⁵⁹

Plato’s self-acclaimed triumph over tragedy has founded a dominant tendency in the history of practical philosophy -legal philosophy included- holding that philosophical or theoretical reason is able to overcome the tragic. This tendency is committed to the Platonic idea, paraphrased by Nietzsche: “Virtue is knowledge; man suffers only from ignorance, he who is virtuous is happy.”⁸⁶⁰ In this tradition tragic consciousness is an indication of ignorance, of insufficient use of one’s cognitive powers to either prevent tragic situations or to evaluate them differently.

The dominance of this Platonic or Socratic view explains the precarious position that the tragic and tragedy have had in practical philosophy. That is, concepts of the ‘tragic’, ‘tragedy’ or ‘tragedies’ seldom figure in that field. In the rare instances where these concepts do occur, it is often to criticize the meaning they convey. One could say that the tragic or tragedy has been an uncomfortable subject for practical philosophy. As Barbour puts it: “Tragedy has often been perceived as a "problem", to be either dissolved, or entirely avoided.”⁸⁶¹ The (neo) Kantian tradition in practical philosophy is for instance based on the idea that the moral quality of life can be exhaustively secured by reason and hence tragedy will not occur, or if it does, only on the phenomenal level without any moral bearing.

Arguably the dominance of this Socratic, highly rationalistic understanding of morality can also account for the fact that tragedy has seldom been a subject in philosophical reflections on law and adjudication: the concepts of the ‘tragic’ and ‘tragedy’ hardly occur in legal philosophy and legal theory.

Of course, in the history of philosophy some philosophers have embraced rather than avoided or criticized the tragic and they elaborated the concept into a theory of either

⁸⁵⁸ Jowett, Benjamin, *Dialogues of Plato: Translated into English, with Analyses and Introduction*, 4 vols., vol. 2, Cambridge Library Collection (Cambridge: Cambridge University Press, 2010), 447.

⁸⁵⁹ Barbour, 'Tragedy and Ethical Reflection', 2.

⁸⁶⁰ Nietzsche, Friedrich, *The Birth of Tragedy*, trans. Fadiman, Clifton P. (New York: Dover Publications, 1995), 50.

⁸⁶¹ Barbour, 'Tragedy and Ethical Reflection', 1.

the tragedies, or the tragic, or both. Aristotle was the first to develop a theory of the tragic. In his *Poetics* he famously gave a definition of tragedy as dramatic genre: “Tragedy is an imitation of an action that is admirable, complete and possesses magnitude, in language made pleasurable, each of its species separated in different parts; performed by actors, not through narration; effecting through pity and fear the purification of such emotions.”⁸⁶² Moreover, together with reversal, recognition and a tragic flaw of the hero he saw suffering as a necessary component of a tragic plot: “an action involving destruction and pain.”⁸⁶³ After Aristotle, Hume, Hegel, Nietzsche, Schopenhauer, Scheler and others have thoroughly paid attention to the Greek tragedies and used the insights gained from them to stress the tragic character of life and society.⁸⁶⁴ According to Hegel’s understanding the defining feature of Greek tragedy -and here he famously used Sophocles’ *Antigone* as an example- is that of a tragic collision between values, not of conflict between good and evil, but between positions that are both justified. He sees tragedy as predominantly conveying that “right collides with right”, a phrase we find in the *Libation Bearers*.⁸⁶⁵ In the last decades ‘tragedy’ reappeared in political and moral philosophy and also in legal theory. Bernard Williams⁸⁶⁶, Martha Nussbaum⁸⁶⁷, Lucinda Cornell⁸⁶⁸, Bonnie

⁸⁶² Aristotle, *Poetics*, 10.

⁸⁶³ *Ibid.*, 18.

⁸⁶⁴ Barbour, 'Tragedy and Ethical Reflection', 12.

⁸⁶⁵ Cf. Kaufmann, *Tragedy and Philosophy*, 203; Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*, 197.

⁸⁶⁶ Williams, Bernard, 'Ethical Consistency', in *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973); ———, 'Conflicts of Values', in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981); Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics'; ———, 'Liberalism and Loss'.

⁸⁶⁷ Cf. Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis'; ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*; ———, 'Tragedy and Justice: Bernard Williams Remembered'; ———, 'Tragedy and Human Capabilities: A Response to Vivian Walsh'.

⁸⁶⁸ Cf. Cornell, *The Philosophy of the Limit*.

Honig⁸⁶⁹, Simon Critchley⁸⁷⁰, Bert van den Brink⁸⁷¹ and others⁸⁷², each in their own way and in different contexts, have elaborated what we might call ‘tragic consciousness’ for moral, political and legal thought. Often this attention for the tragic is part of a critical reaction to foundational moral and political theories. At the same time the tragic is also invoked as part of a constructive attempt to enhance the ethical dimension of judicial and political practices, for instance by postmodern approaches to judging and justice.

3 Tragic legal choice. A tentative sketch

3.1 Conflicting judicial commitments

An important feature of a tragic legal choice is that it is the result of a genuine conflict between judicial commitments. The judge faces a situation in which he cannot solve the legal case without thereby forfeiting one judicial commitment, because right collides with right. The commitments are impossible, meaning that fulfilling one makes it impossible to fulfil the other.⁸⁷³ Below I will point out four categories of conflicts that may give rise to tragic legal choices. The tragic nature of these choices will become clear in the subsequent section when I discuss the idea of a moral remainder and that of a tragic responsive reaction.

3.1.1 Conflicting commitments to fundamental rights

One category of legal conflicts that may give rise to tragic legal choices are situations in which two or more fundamental values that are protected by settled law are impossible, i.e. cannot be realized simultaneously.⁸⁷⁴ The *fragility of rightness*

⁸⁶⁹ Honig, Bonnie, 'Antigone's Two Laws: Greek Tragedy and The Politics of Humanism', *New Literary History* 41, 1 (2010); ———, 'Antigone's Laments, Creon's Grief', *Political Theory* 37, 1 (2009).

⁸⁷⁰ Cf. Millar, John Douglas, 'Interview with Simon Critchley: The Tragic and Its Limits', <http://www.thewhitereview.org/interviews/interview-with-simon-critchley-the-tragic-and-its-limits-2/>.

⁸⁷¹ Brink, *The Tragedy of Liberalism. An Alternative Defense of a Political Tradition*.

⁸⁷² See for instance: Gowans, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing*.

⁸⁷³ Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

⁸⁷⁴ Ibid.

holds that genuine conflicts between fundamental values or rights are an inherent part of the practice of adjudication in Western constitutional orders. These orders protect a plurality of fundamental values, which in one way or another can prove to genuinely conflict. That is, the practical world does not order itself so that the values that a legal order aims to protect can form a seamless web. To believe otherwise would require an incoherent picture of the world, or "the existence of a rather interventionist God [..]"⁸⁷⁵

In mainstream legal thought conflicts between fundamental rights have received relatively little attention. Only incidentally have they been conceptualized as indicating a category that deserves special discussion. This is probably due to the fact that such conflicts are generally construed as *apparent* conflicts, conflicts that in the end can be exhaustively resolved through legal reflection. They are conceptualized as if they are conflicts of propositions, the resolution of which logically requires that one of the conflicting legal claims must be dismantled. Giving rise to an intellectual puzzle in the way any other legal case might do, such conflicts need not be set apart as a special kind of legal case, or so the idea seems to be.

Giving primacy to practice, the *fragility of rightness* follows a different logic, i.e. a logic that is more responsive to the features of the practical world and to the moral experience of everyday adjudication. Within this logic conflicts between legally protected values are not construed as part of a phenomenology that should be dismantled as irrational. In any case they are not treated as propositions to which the requirements of theoretical reason apply. Fundamental rights are assumed to have contour. These values are historically specified ways of dealing with general human needs and capacities. Hence, to treat such conflicts as conflicting propositions and to solve them accordingly would boil down to merely redefining these rights nominalistically. It leaves the actual concerns to which these rights point unaddressed.⁸⁷⁶ For the *fragility of rightness* a conflict between fundamental rights does not necessarily imply that one of the claims is wrong. It may well be that in such a case the source of the 'trouble' lies in the constellation of facts. To deny this is to hollow out the substantial meaning of fundamental rights. In fact it puts the horse behind the cart: the assessment of whether certain interests deserve legal protection

⁸⁷⁵ Williams, *Moral Luck. Philosophical Papers 1973-1980*, 75.

⁸⁷⁶ ———, 'Liberalism and Loss', 94.

would then depend on the workings of the “world’s contingent interventions” rather than on the commitments a legal order actually has.⁸⁷⁷

Of course this is not to deny that certain legal conflicts between fundamental rights can be exhaustively resolved with the help of reflection as it is at work in what has been coined specification and balancing.⁸⁷⁸ Reflection may for instance reveal that in a particular conflict the rights do not genuinely conflict but are reconcilable because only a peripheral aspect of one of the rights is at stake so that the ‘core’ or ‘essence’ of one right can be protected without having to sacrifice the other.

Acknowledging that genuine conflicts may occur, the *fragility of rightness* is thus not tantamount to endorsing some kind of laziness, fatalism or the like in relation to the use of reflection.⁸⁷⁹ It simply aims to accommodate for the fact that in spite of all their efforts judges can nonetheless find themselves in situations in which fundamental rights genuinely conflict, other than as negligible incidents. The *fragility of rightness* sees genuine conflicts between fundamental rights as an inherent feature of a legal order. An example of a potential genuine conflict between fundamental rights is that between the right to a fair trial and the right to protection of one’s private life, including the right to protection of one’s personal development. Take the case of *Jason Barkly and Nancy Rosenbaum*.

The case of *Jason Barkly and Nancy Rosenbaum*

Jason met Nancy’s mother right after she divorced the father of her children. They fell in love and decided to live together. Jason took up residence with Nancy’s mother, Nancy and her two brothers. On the surface everything seemed to be going fine. There were some incidents as Jason was a bit aggressive with the two boys, but this was not structurally the case.

⁸⁷⁷ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 49.

⁸⁷⁸ Note that in a virtue-ethical conception of legal decision-making specification and balancing should not be understood as fixed methods used to determine citizens’ concrete rights. They are descriptions of ways in which a virtuous judge will try to resolve a legal case.

⁸⁷⁹ Cf. Nussbaum, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 415. —, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016. Dworkin, Ronald, 'Do Liberal Values Conflict', in *The Legacy of Isaiah Berlin* (New York: New York Review of Books, 2001), 91.

When Nancy went to high school however, Jason became extremely strict towards Nancy and did not allow friends from school to visit her at home. Nancy felt isolated and one day in a chat session with one of her schoolmates she revealed that Jason, her mother's partner, had been sexually abusing her since she was young and that he was now very jealous regarding her contacts with boys. Jason was arrested that week and prosecuted for sexual abuse of a minor.

The judge has to decide whether Nancy should be mandated to testify in court and to be interrogated both by the prosecution and the defence-lawyers. On the one hand Jason's right to a fair trial is violated if a conviction would be based exclusively on accusations that cannot be further examined. A defendant must have a real opportunity to interrogate the witness, especially if her statement is the only evidence against him.

On the other hand there is Nancy's right to privacy, including her right to protection of her emotional development.⁸⁸⁰ A psychiatrist may point out that a cross-examination is likely to negatively affect Nancy's emotional health because she will have to again experience the traumatic events. He may argue that such an examination should therefore not take place, especially in view of Nancy's young age.⁸⁸¹

The judge may thus face a genuine conflict between fundamental rights: honouring Jason's right to fair trial versus the protection of Nancy's right to privacy. Sometimes there may be ways to reconcile conflicting rights -for instance by compensating the defendant-, but there is no a priori reason to assume that this will always be so.⁸⁸² A certain constellation of facts can form an obstacle to honour the legitimate claims involved at the same time.

⁸⁸⁰ See for similar cases: Hoge Raad, November 17 2009, ECLI:NL:HR:2009:BI3847; Hoge Raad, July 6 2010, ECLI:NL:PHR:2010:BL9001; Gerechtshof 's Hertogenbosch, August 20 2008, ECLI:NL:GHSHE:2008:BE9063; Rechtbank Middelburg, October 8 2007, ECLI:NL:RBMID:2007:BB5057; Rechtbank Alkmaar, April 23 2009, ECLI:NL:RBALK:2009:BI2163. See for a discussion of such a conflict in the context of European International law: Brems, Eva, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Human Rights Quarterly* 27, 1 (2005), 294.

⁸⁸¹ Cf. Hoge Raad, November 17 2009, ECLI:NL:HR:2009:BI3847.

⁸⁸² Eva Brems puts the conflictual character of such a case as follows: "In this type of case, the victim's statement is often the main evidence. Nevertheless it is in many cases judged undesirable to force the child victim to testify during trial. This is usually based on a concern to protect the human right of the child, in particular the right to protection of one's private life, including the right to protection of personal development. Yet, this may enter into conflict with the defence rights of the accused, specifically his right to examine witnesses." Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial

This example is but one of the range of conflicts that may occur between fundamental rights. Other examples of genuine conflicts are for instance conflicts between the right not to be discriminated and the right to freedom of expression, conflicts between the right to freedom of religion and the right to bodily integrity, conflicts between the right to privacy and personality rights.⁸⁸³

Surely, one could put afore that due to the proliferation of constitutional or human rights, conflicts of rights have indeed been put high on the scholarly agenda⁸⁸⁴ and that there is nothing new in asserting that *genuine* conflicts between fundamental rights are inherent to a legal order. However, even if this is true then it still seems that in so far conflicts of rights are acknowledged as genuine conflicts, they are more often than not conceptualized as rare anomalies or negligible incidents. Their conceptualisation as 'exceptions' in fact reveals a Platonic or 'tragedy evading' stance towards this phenomenon of genuine conflict.

A case in point is the conceptualisation of the landmark case of Miss Evans,⁸⁸⁵ as in the words of Bomhoff and Zucca this case "opened a veritable Pandora's box of incommensurability between rights in conflicts".⁸⁸⁶ At first sight this case and its

in the European Convention for the Protection of Human Rights and Fundamental Freedoms', 26.

⁸⁸³ As to the latter: think of the right of a child to know the identity of his biological father who is merely the sperm donor and the right of the father to stay anonymous.

⁸⁸⁴ Cf. Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms'; Zucca, Lorenzo, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007); Brems, ed., *Conflicts between Fundamental Rights*.

⁸⁸⁵ Cf. ECHR, March 7 2006, n.6339/05 (Evans. v. the United Kingdom); ECHR, April 10 2007, n. 6339/05 (Evans v. the United Kingdom). See for discussions of this case: Bomhoff, Jacco and Zucca, Lorenzo, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', *European Constitutional Law Review* 2, 3 (2006); Alvarez, Silvina, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions', *Ratio Juris* 24, 1 (2011); Ben-Naftali, Orna and Canor, Iris, 'Evans v. United Kingdom', *The American Journal of International Law* 102, 1 (2008).

⁸⁸⁶ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of

reception indeed seem to acknowledge the possibility of genuine conflict between basic rights and to show sensitivity for the tragic dimension of adjudication. However, as we shall see in the discussion below, closer scrutiny of this case and its reception reveal that it is construed as an ‘exception’ that affirms the rule: legal rationality requires that legal conflicts between fundamental rights can generally be dismantled as merely *apparent* conflicts and as a consequence tragedy can be expelled from the legal domain as a genuinely non-legal phenomenon.⁸⁸⁷

*The Evans case*⁸⁸⁸

Natallie Evans, a woman in her thirties, met *Howard Johnston* at work. They started dating and after a while they became engaged. At a certain point Miss Evans was diagnosed with ovarian cancer and her ovaries had to be removed. Before the removal the clinic offered Miss Evans the opportunity to extract some of her eggs for in vitro fertilization, which was possible because the tumours were growing slowly. Miss Evans agreed and Mister Johnston assured Miss Evans that she did not need to consider freezing some unfertilized eggs, because he really wanted to have children with her.

Six embryos were successfully created and frozen. For medical reasons Miss Evans had to wait two years before any of the embryos could be implanted in her uterus. However, the relationship between Miss Evans and Mister Johnston ended before two years had passed. Therefore Mister Johnston did no longer want to have a child with Miss Evans and he notified the clinic that he wanted the stock of embryos to be destroyed. Miss Evans objected and claimed her right to the stock.

The applicable (English) law, the Human Fertilisation and Embryology Act of 1990, provided that either party could withdraw his or her consent at any time before the embryos were implanted. The clinic told Miss Evans that it was under a legal duty to destroy the embryos. Subsequently Miss Evans brought proceedings before the English national courts seeking an injunction requiring Howard Johnston to consent to planting of one or more of the embryos in her uterus. Both the trial judge and the court of appeal denied her request. Thereupon Miss

Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 424.

⁸⁸⁷ See for instance Zucca, Lorenzo, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in *Conflicts between Fundamental Rights*, ed. Brems, Eva (Oxford: Intersentia, 2008).

⁸⁸⁸ Cf. *Evans v. the United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05'; Ben-Naftali and Canor, 'Evans v. United Kingdom'; Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05'.

Evans went to the European Court for Human Rights (ECHR). She claimed that the United Kingdom's Human Fertilisation and Embryology Act violated her right to respect for private life and family life (art.8), the right to life (art.2) and the provision on discrimination (art. 14) of the European Convention of Human Rights. With regard to the right to private and family life, Miss Evans argued “that the consent provisions of the 1990 Act prevented her from using the embryos she and J created together, and thus, given her particular circumstances, from ever having a child to whom she is genetically related.”⁸⁸⁹

If we take these elements -symmetrical rights and the indivisibility of the good that is needed for their realisation- to be decisive for whether fundamental rights genuinely conflict, such conflicts will indeed be rare. For it will not often be the case that two opposing rights have exact equal weight while the resource necessary for their realisation is indivisible. Such a case would be that of Siamese twins where one is parasitic on the other and the judge has to decide in a dispute between the parents and the doctor about what to do, or a custody case in which a mother wants to move with her child to her (foreign) country of birth, whereas the father wants the child to stay with him or at least in the country where he lives.⁸⁹⁰ If one considers symmetry and equal weight as the exclusive cause of genuine conflicts, it is not surprising that legal scholars such as Zucca conclude that genuine conflicts between basic rights are rare.

"[W]hen we define precisely what amounts to a genuine conflict of fundamental rights, most of the cases will appear to be spurious conflicts", Zucca says.⁸⁹¹

This way of conceptualizing genuine conflicts fits Dworkin's description of what he calls 'tie' situations, in which the legal argument for one position offers exactly as good a justification for a judicial decision as does the argument for the opposing position.⁸⁹² Indeed, according to Dworkin these situations need not concern us, because they will hardly occur: “The tie result is possible in any system, but it will be so rare as to be exotic in these”.⁸⁹³

But more importantly: to conceptualize a case as one involving symmetrical rights by itself already reveals a kind of Platonic reductionism that is at odds with acknowledging the genuine plurality of values. Such a conceptualisation implies a reliance on legal commensurability and the supposed availability of a prior moral measure in terms of which the values at stake can be measured meticulously. It is in fact a way of giving primacy to the commensurans, the measure produced by ‘reflective thought’ rather than by practice.

A second ‘Platonic’ aspect of the conceptualisation of the Evans case is that a genuine conflict is considered a threat to rational judicial decision-making. The idea seems to be that genuine conflicts of rights cannot be rationally solved and since law is about rationally solving

⁸⁸⁹ ECHR, April 10 2007, n. 6339/05 (Evans v. the United Kingdom).

⁸⁹⁰ Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', 24.

⁸⁹¹ Ibid.

⁸⁹² Dworkin, *Taking Rights Seriously*, 360.

⁸⁹³ ———, *A Matter of Principle*, 143.

conflicts, genuine conflicts of rights should not be accommodated within a legal order.⁸⁹⁴ This idea we find for instance in Silvina Alvarez' article on constitutional dilemma's in which she discusses the Evans case.⁸⁹⁵ She states: "as long as we can find a solution based on rational justification, the conflict is not a genuine moral dilemma or tragic choice" and "the solution reached within the framework of the legal system prevents the legal dilemma from becoming a tragic conflict in the sense of being a conflict with no solution."⁸⁹⁶

This Platonic idea also finds expression in the issue of 'forum' that often comes up in the discussion on conflicts of fundamental rights. Indeed, in relation to the Evans case Zucca and Bomhoff for instance suggest that the ECHR may have used the concept of incommensurability as a "ground on which courts can claim deference to representative institutions."⁸⁹⁷ The ECHR purportedly left the balancing to the national legislatures because there was a genuine conflict of rights and it held that no rational solution was possible. Again, this is not an idiosyncrasy of the judges in the Evans case: in discussions about conflicts of rights it is often questioned whether such conflicts should be solved through adjudication.⁸⁹⁸ Their resolution is held to belong to the domain of politics rather than that of law, as the latter is concerned with rationality and the former is more about a procedure of political legitimacy. Political bodies are generally thought to be the more appropriate authorities for 'solving' genuine conflicts, because they are democratically legitimated. A final relevant 'Platonic' aspect of the conceptualisation of the Evans case is that the qualification of its tragic character is made from a *human* point of view as opposed to a *legal* viewpoint.⁸⁹⁹ The judges in this case take great pains to distinguish between these points of view. One of the national judges stated: "In human terms, the greatest sympathy must, of course, be extended to Ms Evans, who, as a result of this case, now lacks the capacity to give birth to a child which is genetically hers."⁹⁰⁰ In a similar vein Zucca and Bomhoff state that

⁸⁹⁴ Alvarez, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions', 68.

⁸⁹⁵ Ibid., 60, 68.

⁸⁹⁶ Ibid., 60,68.

⁸⁹⁷ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 434.

⁸⁹⁸ Cf. Gerards, J.H., 'Rechterlijke Belangenafweging in het Publiekrecht', *Rechtsgeleerd Magazijn Themis* 4 (2006), 147-159.

⁸⁹⁹ Zucca says: "all the courts made ample use of the empathetic language of human tragedy. Most of the judges explained that Ms. Evans deserved the greatest sympathy even if in the end she lost the case." Cf. Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', 24.

⁹⁰⁰ See: Court of Appeal (United Kingdom) June 25 2004, N.B1/2003/2329 (Natalie Evans v. Amicus Healthcare Ltd & Others).

the legal viewpoint must be abandoned if one is to see the tragic dimension of the case: "*Stripped of all legal technicalities* [italics IvD], the plight of Ms Evans presented an obvious human tragedy."⁹⁰¹ From a human point of view one cannot deny the tragic character of the case, but from the legal point of view there is no genuine troublesome loss. Miss Evans deserves sympathy for her plight, but she has no legitimate legal claim.⁹⁰² Legally the decision is not tragic.

As said, the Evans case and its reception epitomize a Platonic way of conceptualizing genuine conflicts between fundamental rights, a way that is typical for mainstream ways of understanding such conflicts. As such it is at odds with the *fragility of rightness*. This approach sees conflicts between fundamental rights neither as limited to conflicts between symmetrical rights -not in the least because in this approach the notion of 'symmetrical rights' does not really make sense-, nor as negligible incidents. Next, for the *fragility of rightness* conflicts between fundamental rights do not put rational decision-making at risk. In the end the 'virtuous judge' will take in all relevant facts of the case, including the values that are at stake, and make an 'all things considered' rational decision.⁹⁰³

In this regard the dissenting judges in the Evans case offer a good example. Their way of judging is more or less in line with the *fragility of rightness*. They did not frame the case as a conflict between two rights with equal weight on the basis of a presumed prior measure. Rather they tried to come to a full and detailed understanding and assessment of the facts of the case. They gave priority to the particular and thereby thought it important that endorsing Mister Johnston's choice would "involve [...] an absolute and final elimination of the applicant's decision," i.e. Miss Evans would never be able to become a genetically related mother.⁹⁰⁴ The appreciation of the case by these judges also allows for the idea that the tragic character of the decision can be acknowledged from the legal viewpoint itself, rather than merely from a 'human' point of view.

⁹⁰¹ Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans v. The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No. 6339/05', 427.

⁹⁰² The Court of Appeal of the United Kingdom states it as follows: "[t]he sympathy and concern which anyone must feel for Ms Evans is not enough to render the legislative scheme of Sch. 3 disproportionate [...]". See: Court of Appeal (United Kingdom) June 25 2004, N.B1/2003/2329 (*Natallie Evans v. Amicus Healthcare Ltd & Others*).

⁹⁰³ This is not to deny that the grounds of the decision will to a considerable degree remain unintelligible in the sense that the judge will be unable to offer exhaustive and explicit reasons for seeing and deciding the case the way he does.

⁹⁰⁴ ECHR, April 10 2007, n. 6339/05 (*Evans v. the United Kingdom*).

To summarize: given the plurality of fundamental rights that legal orders protect, genuine conflicts between these rights should be understood as endemic to the practice of adjudication. Serving the one often comes at the cost of the other. Insofar mainstream legal thought does acknowledge genuine conflicts, their conceptualisation reveals a rather Platonic attitude that circumvents the tragic.

3.1.2 Conflicting commitments to law and values of political morality

Another category of genuine conflicts that a judge may face concerns the conflicts between his commitment to applicable settled law and to the values of political morality as they are concretely at stake.

Settled law by itself will surely not necessarily conflict with the values of political morality. On the contrary, ideally it will to a considerable degree be an articulation of these values and also give further room for their realisation, for instance by the use of open norms such as ‘reasonableness’, ‘equity’ and so on.

At the same time, the facts of a case do not order themselves in such a way that the values of political morality that a legal order (the *nomos*) aims to protect, will indeed be served and realised through the effectuation of settled law. To the contrary, the particularities of a concrete case may be such that a judge finds himself confronted with a genuine conflict between his commitment to settled law and his commitment to the values of political morality as they are at stake. In such a case he will not be able to reconcile the considerations to which these commitments give rise. In the resolution he may have to forfeit one of the commitments.

Such conflicts can for instance occur when settled law makes use of legal fictions.⁹⁰⁵ As the law is an institution that aims to regulate citizens’ behaviour in general, it will

⁹⁰⁵ Note that the term ‘legal fiction’ is used here in a looser fashion than the classical definition offered by Lon Fuller in his seminal article ‘Legal Fictions’. In this article Fuller states that a legal fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having utility." Cf. Fuller, Lon L., *Legal Fictions* (Stanford: Stanford University Press, 1967), 9. See for illuminating articles on legal fictions: Knauer, Nancy J., 'Legal Fictions and Juristic Truth', *St. Thomas Law Review* 23 (2010); Schauer, Frederick, 'Legal Fictions Revisited', *SSRN eLibrary* (2011), 14. See for an illuminating discussion of legal fictions in the context of medical bio-technology also: Beers, Britta van, *Persoon en Lichaam in het Recht. Menselijke Waardigheid*

inherently make use of legal fictions, that is, of assumptions that do not *necessarily* hold in concrete cases, but are nonetheless considered to be legally valid. In the words of Schauer: legal fictions "are little more than the occasional vivid embodiment of the way in which any enterprise that trades in generality -which law certainly does- will wind up drawing conclusions that may not always be literally correct."⁹⁰⁶ As they are unavoidable for the regulation of society these fictions should not be seen as anomalies. Hence, a virtuous judge, possessing the virtue of justice, will be committed to applying these fictions as part of what it means to bring general considerations to bear on a concrete case. However, the concrete particularities of a case may be such that this commitment implies that the judge feels duty bound to ignore facts that at the same time he does hold to be important from the viewpoint of political morality. Ignoring these facts may then come at the price of violating values of political morality. Let me illustrate this.

The case of *Joachim Mayer*

Joachim Mayer is a boy of seventeen who was raised as a Jehovah Witness.⁹⁰⁷ At the age of sixteen Joachim got acute leukaemia. The doctors told him that blood transfusions were imperative to save his life. However, strongly committed to the ethics of the Jehovah Witnesses and supported by his parents Joachim refused blood transfusions on the basis of his right to refuse care. In reaction to this refusal the Childcare and Protection Board petitioned the court to authorize the necessary treatment, because his parents indoctrinated Joachim and as a consequence he was not able to genuinely assess his interests. Joachim was hardly if at all acquainted with other points of view than the Jehovah's doctrine and therefore the board did not consider him sufficiently competent to make a meaningful choice.

In court Joachim eloquently motivated his refusal to give permission for treatment, citing by heart several passages from the bible in support of his claim that God forbids blood

en Zelfbeschikking in het Tijdperk van de Medische Biotechnologie (Den Haag: Boom Juridische uitgevers, 2009), 379-395.

⁹⁰⁶ Schauer, 'Legal Fictions Revisited', 4. In one of the previous chapters I discussed a case of consumer protection. There we saw that assumptions about the cognitive competence of citizens also form an important group of legal fictions.

⁹⁰⁷ See: Gerechtshof Amsterdam, August 31 2010, ECLI:NL:GHAMS:2010:BN7966; Rechtbank Amsterdam, March 12 2010, ECLI:NL:RBAMS:2010:BL9136.

transfusions.⁹⁰⁸ Accepting such a transfusion would amount to a sin and would break his bond with God, Joachim said. He also declared that he was fully aware that the final consequence of his standpoint would be his premature death. As a Jehovah Witness he was not genuinely troubled by the prospect of dying, because for him life on earth is but a relative matter. God promises him eternal life if he behaves like a good Jehovah Witness and fulfils his obligations towards Him.

In a case like Joachim's the judge must decide whether to authorize medical treatment and thus overrule Joachim's refusal to give his consent. The applicable law may hold the legal fiction that adolescents older than sixteen years are competent and able to make their own choices. Their consent is necessary to allow medical treatment. Nonetheless a virtuous judge may experience a genuine conflict between his commitment to (the rationale of) settled law that implies the legal effectuation of said legal fiction and his commitment to certain values of political morality that are at stake, such as the value of life and of not dying prematurely. The judge may find that he violates the latter if he indeed effectuates the legal fiction. He may 'see' that Joachim has hardly been in contact with other world views than that of the Jehovah Witnesses and that he did not genuinely form his own view of life independently of the views of his parents, that is, as a separate and autonomous person. At the same time, the judge may not feel free to make an exception to the rule that expresses the legal fiction, precisely because of the rationale of this fiction that serves formal equality, respect for the right to self-determination, and that is instrumental to efficiency. A case-by-case test whether the legal fiction of competency holds for each and every case, would undermine this rationale. Thus a virtuous judge who perceives all relevant considerations may find that he has to make a choice between genuinely conflicting commitments.

Another way in which settled law can conflict with values of political morality because of the limitations it puts on the information that may be taken into account has to do with the legal effectuation of procedural rules. Whereas substantive law directly provides the considerations that are relevant for defining concrete legal rights and duties, procedural rules prescribe how these rights should be determined. Among many other things, these rules tell us how, where and when one may file a lawsuit and how to proceed. Part of the rationale behind procedural rules is the need for efficient, fair and orderly procedures that ensure legal certainty. Statutes of limitation are part of this group of rules. However, the effectuation of these statutes may conflict with values of political morality: the facts of a case do not come ordered in a way that

⁹⁰⁸ The relevant passages in the Bible are among others: "Only flesh with its soul -its blood- you must not eat." (Genesis 9:3-4); "Abstain from ... fornication and from what is strangled and from blood." (Acts 15:19-21).

makes the effectuation of these rules perfectly harmonize with said values. The effectuation of procedural rules may thus lead to ignoring information that from the viewpoint of the values of political morality is crucial. In such a case the judge may face a genuine conflict between his commitments to reasonable procedural rules on the one hand and values of political morality on the other.⁹⁰⁹ Again, an example.

The case of Mister Hampton

During his holiday in Turkey *Mister Hampton*, a man in his late fifties, fell of his bike and ended up in coma. After he woke from his coma he suffered from aphasia, causing him serious difficulties in speaking and writing. The doctors told him that he would be unable to work as a teacher again.

It was only after some time that Mister Hampton came to think about how to continue his life. At a certain point and on advice of a lawyer he decided to file a claim for a disability benefit because he would not have any prospects on the labour market. However, partly due to a mistake of his lawyer, Mister Hampton filed his claim three weeks past the deadline set by the applicable procedural rule. The social security agency rejected his claim. Mister Hampton appealed this decision, arguing that it was an unreasonable, because disproportionate decision. His claim being overdue did not really threaten the rationale of the limitation, namely to secure a fair, efficient and orderly procedure to all citizens. He also argued his lawyer did not warn him about the deadline. According to Hampton holding him responsible for violation of the statute of limitation would lead to a disproportionate consequence that he should not be asked to bear: forfeiting his claim to the financial means necessary to lead a decent and relatively independent life.

A virtuous judge who now has to decide about the reasonableness of the decision may feel torn between conflicting commitments. On the one hand he may find that the applicable law does not allow a case-by-case assessment whether the violation of the statute of limitations undermines an orderly process or whether it leads to reasonable outcomes. On the other hand, taking all particularities into account, he may find it rather troublesome to hold Mister Hampton responsible, given what has happened to him and in view of the severe consequences. He may experience that from the viewpoint of political morality Mister Hampton still has a right to a social minimum.

⁹⁰⁹ See for instance: *Rechtbank Alkmaar*, November 17 2010, ECLI:NL:RBALK:2011:BU4978; *Centrale Raad van Beroep*, July 4 2012, ECLI:NL:CRVB:2012:BX0565; *Rechtbank Roermond*, October 5 2006, ECLI:NL:RBROE:2006:AZ6714; *Hof Amsterdam*, October 10 2002, ECLI:NL:GHAMS:2002:AV4911.

Again, this is but one example of the way in which a judge might face a genuine conflict between his commitment to effectuating procedural rules and his commitment to the values of political morality that the legal order aims to serve. Here the idea is that resolution of these kinds of conflicts is an inherent part of what the judicial task amounts to.

3.1.3 Conflicting commitments to law and the concrete embodied Other

Another category of conflicts that may give rise to a tragic legal choice are those between the judge's commitment to law and his commitment to the right to respect of the concrete embodied citizen.

Earlier, in chapter seven I discussed this right to respect in the context of an ethical postmodern approach to adjudication based upon Levinas' 'ethics of alterity'.

Although I rejected this approach, the *fragility of rightness* does take the ethical dimension of the concrete encounter between the judge and the citizen participating in the proceedings on board, particularly through the virtue of humanness and the concept of civic friendship.⁹¹⁰ If the judge is both virtuous and a civic friend -albeit qualified by his viewpoint as a judge-, then he will also be committed to honouring the concrete good of the concrete citizen. In effectuating settled law, legal principles and values of political morality the judge should also make a genuine effort to limit the violations of the concrete interests of the embodied citizen. More positively put, it means that as a requirement of reciprocity the judge takes the concrete good of the citizen partaking in the proceedings into account when exercising his discretion. Ideally a judicial decision as a decision by a civic friend can be understood as an expression of well-wishing by the judge.

However, again, as a virtuous judge is a just judge, he is also committed to settled

⁹¹⁰ More specifically, I rejected this approach because it does not give a satisfactory account of how it can be distinguished from a sceptical approach to law. It does not give an answer on how judicial decisions can be justified at all. That is, at least if we want 'justification' to have any substantial meaning which minimally entails that some decisions can be said to be 'better' than others. Also, I asserted that this postmodern approach does not make clear how to distinguish between a *judicial* decision and any other kind of decision that is used to legitimize the exercise of state power. It does not have a clear answer as to the role of law in the kind of judging it proposes.

law. Therefore such a judge may face situations in which the generality of law and the singularity of the good of a concrete citizen are irreconcilable. In such a situation the judge will have the impossible task of treating the citizen before him “both as equal and as entitled to the symmetrical treatment of norms, and as a totally unique person who commands the response of ethical asymmetry.”⁹¹¹ Such conflicts are not necessarily due to mistakes in the law or in the legal system and hence they cannot by definition be prevented or resolved. They belong to the very nature of law as having to deal with both the general and the particular.⁹¹² The case of *Mister Wood* may be an illustration.

The case of *Mister Wood*

Mister Wood is a man in his seventies, married and father of three and grandfather of two.⁹¹³ During the Second World War he fought against the Nazis, was captured and spent two years in a concentration camp. Since then Mister Wood suffered from a posttraumatic stress syndrome. At the same time he was doing relatively well in life. He decided not to think and speak about his war experiences and refused treatment because he did not believe that psychiatrists could really help.

However, things started to go wrong when his wife got Alzheimer. She got very suspicious and read Mister Wood’s behaviour as proof that he was seeing somebody else. Mister Wood tried hard to convince her of his innocence and that he loved only her, but to no avail.

According to the doctor the suspicious and even paranoid attitude of Mrs. Wood was due to her Alzheimer. After Mrs. Wood insisted that she wanted a divorce, Mister Wood became deeply stressed and emotionally instable. He desperately tried to convince his wife that a divorce would not be the right solution, but in vain. As Mrs. Wood indeed started to file for a divorce, Mister Wood lost all hope and came to think that it would be best to kill his wife and commit suicide. A few days after having written his testament, Mister Wood indeed killed his wife by stabbing her in the chest and suffocating her with a cushion. He thought this to be the least painful way. He subsequently took an overdose of sleeping pills, loaded his wife’s body in his car and drove to a canal, intending to drive his car into the water. But Mister Wood fell asleep and the police found him in his car, still alive.

Mister Wood stood trial for murder and the public prosecutor demanded twelve years of imprisonment. In court Mister Wood declared that he felt extremely guilty for having taken the life of the mother of his children, the grandmother of his grandchildren, but that he was

⁹¹¹ Douzinas, 'Law and Justice in Postmodernism', 214.

⁹¹² Cf. Schmidt, 'Can Law Survive: On Incommensurability and the Idea of Law', 151.

⁹¹³ Cf. Rechtbank Middelburg, August 25 2011, ECLI:NL:RBMID:2011:BR5781.

extremely desperate and had not seen another way out because of Mrs. Wood's Alzheimer. In such a case a virtuous judge who at the same time deals with the case as a civic friend will not 'hide' behind legal rules and principles. Giving Mister Wood due respect he will try to decipher the story of Mister Wood and to consider his good. Arguably, in his confrontation with Mister Wood the judge may become convinced that he really loved his wife and that he indeed acted out of anxiety over the continuous paranoid behaviour of his spouse. In view of the psychiatric reports on Mister Wood he could come to the conclusion that his behaviour may at least to some extent be explained by his traumatic war experiences for which he never received treatment. The judge may also come to 'see' that Mister Wood suffers tremendously because of the death of his wife and his feelings of guilt towards her and towards their (grand)children. Confronting Mister Wood in all his particularity the judge may come to experience that the ethical demand for respect implies that he really should not sentence Mister Wood to imprisonment, and that given his age and bad physical condition imprisonment would not make sense. During the criminal proceedings it also became clear that Mister Wood has a tumour in one of his lungs. To sentence Mister Wood to imprisonment would merely add to Mister Wood's suffering and it would mean that he would not be able to mend his relation with his (grand)children. The virtuous judge takes these aspects as legal considerations that he cannot simply ignore or dismantle as 'non-legal' factors. However, he will also feel responsible for upholding criminal law and public norm endorsement. He may think that it would be unfair to others who were sentenced for killing their spouses and that society would not approve if Mister Wood were to go free. To act upon the demand for respect that he experiences as a civic friend would in another sense mean to jeopardize the value of justice and his commitment to settled law and its background principles. It would possibly violate the legitimate claims of the 'third', i.e. the public at large and perhaps those of other citizens who have committed similar crimes.⁹¹⁴ Save for the ethical demand that the judge experiences, he may have difficulty to find an objective reason to treat the case of Mister Wood as an exception. As a consequence the judge can feel torn between his judicial commitments, since honouring one will mean to forego the other. This case is not isolated, but one that epitomizes an inherent conflictual aspect of the practice of adjudication. The concrete good of a particular citizen and his legitimate claim to respect for his concrete good can genuinely conflict with the dimension of generality that also characterizes the law.

⁹¹⁴ In this kind of case different dimensions of 'time' are involved. Where the commitments that the judge experiences towards the concrete embodied citizens relate to the 'here and now' of judgment, the commitment to the generality of law points to the past and to the future. See Douzinas, 'Law and Justice in Postmodernism', 219.

3.1.4 Conflicting commitments due to epistemic uncertainty

The last category of genuine conflicts that may give rise to tragic legal choices is one that puts the categories discussed above in perspective. It adds a layer to them, so to say. For the categories of conflicts that were designated so far the determinacy and hence the intelligibility of the values involved was assumed. However, if we give primacy to practice, this assumption cannot be categorically maintained. We have no reason whatsoever to assume that the practical world will always allow a virtuous and civic friendly judge to perceive the legal bearing of a concrete case at the moment of choice. We must take seriously that in the practical world “it is immensely difficult to see clearly”, as MacDowell has put it.⁹¹⁵

Because of all his qualities a judge may be in a relatively 'good condition' to perceive well, nonetheless he can experience serious difficulties in identifying the legal bearing of the case.⁹¹⁶ He can be confronted with a situation that appears unintelligible and beyond what he can make sense of. This will not necessarily be due to his lack of legal reflection or his lack of knowledge about technicalities that can be completed by expert-knowledge. In such a situation of radical epistemic insecurity a responsible judge will be confronted with a genuine conflict. On the one hand his sense of epistemic insecurity will give him a strong reason not to make a judicial choice at all. On the other hand, it is precisely part of his professional duty to make such a choice, and to do so to the best of his ability -he cannot just flip a coin or refuse to decide. Of course, these kinds of conflicts are most likely to arise in domains of law where reality itself is indeterminate or uncertain due to all kinds of factors, such as the unpredictability of consequences of certain choices, or the limited knowledge about the people or objects involved that should be judged about. Let me illustrate this by the cases of *Joan Gibbs* and *Mary Jones* that we both already discussed in previous chapters.

⁹¹⁵ McDowell, *Mind, Value & Reality*, 72. We find this theme also and very prominently in Iris Murdoch's writings on morality. Cf. Murdoch, 'Vision and Choice'; ———, 'The Idea of Perfection'.

⁹¹⁶ Here it is again worth noting the difference between 'perception' as such and moral perception. Where, other things equal, good conditions of and for the eye suffice for a clear perception, this is not the case for practical wisdom or moral perception.

The case of *Joan Gibbs*⁹¹⁷

Joan was prosecuted for murdering her three babies immediately upon birth. Joan declared that she was scared that her parents, her husband and the villagers would find out about her being made pregnant by a colleague, not being her husband. In a case like that of Joan a judge may well have difficulty to 'see' clearly. On the one hand he may be sensitive for the facts that fit the picture of a heartless killer who acted in a callous, calculating and cold-blooded manner and was fully aware of what she did. On the other hand through his attention for other characteristics of the case -that Joan wanted the corpses of the babies close by and therefore hid them in her parents' house- the judge may also be struck by another image. This could be the image of a woman who has repeatedly given birth in extreme solitude and killed out of her own pathological desperation and insecurity. If forensic psychiatrists also disagree about how to diagnose and evaluate the personality of the accused, the judge may be knee-deep in doubts. He may feel torn between not wanting to make a choice because of a lack of epistemic certainty and his judicial duty to make a choice.

The case of *Mary Jones*⁹¹⁸

Mary Jones was the mother who overcame her addiction and wanted to start anew and be a good mother. However, the Youth Care Office claimed that it was in the interest of the children to let them stay with their grandparents to secure stability and their future. In such a case a virtuous and civic friendly judge -who is well informed by child psychologists- may be in serious doubt about whether all the values of political morality and settled law that are at stake in fact point to a structural termination of Mary's parental rights. Take for instance a criterion like 'the interest of the child' that allows the limitation or even the termination of parental rights. In spite of the help by experts it will sometimes be difficult for a judge to know it is indeed in the interest of a child to limit or terminate these rights. Among the many unknown and uncertain factors are the long-term effects on the development of the children of not having a bond with their biological parents, based on a daily relationship. Neither is it clear how this would compare to the prospect of children living with their parents in a situation of relative neglect. So, in this case the epistemic insecurity follows from the fact that the consequences of the judge's choice will only become clear long after the decision is made. If a judge is fully aware of this, he may be likely to experience a genuine conflict between his duty of having to make a choice and his reluctance to take a drastic decision of which the bearing is not clear.

So far the different categories of conflicts for which the concept of tragic legal choice may be relevant. These conflicts are not due to injustices in settled law, mistakes in

⁹¹⁷ See chapter nine.

⁹¹⁸ See chapter seven.

legal reasoning or vices of the judge, but due to the very nature of the practical world. Hence, rather than putting our hopes in better laws or more judicial reflection to either circumvent or exhaustively resolve such conflicts, it is more realistic to accept that conflict is part and parcel of the moral nature of adjudication.

3.2 Moral remainders and tragic responsive reactions

Thus far I have explained that a tragic choice is characterized by a genuine conflict. Yet there is more to a tragic legal choice than a judge facing such a conflict. The actual *tragic* character of such a choice has to do with the nature of and responses to its consequences.

Earlier in this chapter I referred to the complex notion of *hamartia* that figures in Greek tragedy and its reception. It refers to a wrongdoing that is not due to a clear mistake or a serious moral flaw of the agent. The ‘wrong’ is understood as constituted by a complex interplay between the character of the agent, his actual choice and circumstances and influences lying outside the agent’s control.

Bernard Williams’ notion of a moral remainder can be of help for our understanding of the wrong involved in a tragic legal choice, as it points to a genuine disvalue that results from an in itself justified choice.⁹¹⁹ In this vein a tragic legal choice can be seen as a right legal choice that nonetheless comes with a genuine and legally relevant moral cost. This moral cost can, but need not necessarily be fully clear for the judge at the moment of choice.⁹²⁰ It may also appear *after* the actual legal choice is made.

A tragic legal choice thus points to an inescapably morally ambivalent side to adjudication. For even if the *nomos* is in order and a judge fulfils his professional role adequately, then the resulting legal choice can still lead to a morally disturbing outcome.⁹²¹ In case of a tragic legal choice a judge will morally ‘stain’ or ‘pollute’ himself, he will make dirty hands⁹²² without the actual legal choice being wrong.⁹²³

⁹¹⁹ Williams, *Moral Luck. Philosophical Papers 1973-1980*, 61.

⁹²⁰ That one’s choices can be morally troublesome due to factors unknown at the moment of choice is of course radically epitomized in the person of Oedipus who did not and could not know the actual bearing of his deeds at the relevant moments.

⁹²¹ Cf. Williams, *Moral Luck. Philosophical Papers 1973-1980*, 37, 72, 60-64, 175, 179.

⁹²² Hursthouse, *On Virtue Ethics*, 75. The term ‘dirty hands’ stems from a play by Jean Paul Sartre and has been famously worked out for the domain of political philosophy by Michael

Consequently, as this shows, the concept of a tragic legal choice suggests that there is moral luck involved in adjudication as the actual moral character of a legal choice will be partly determined by factors that are beyond the judge's and a legal order's control.⁹²⁴ Similar to the protagonists of Greek tragedies, judges will "always risk [...] being trapped by their own decisions."⁹²⁵ Being engaged in practical matters, they have put their "stake on what is unknown and incomprehensible [...]"⁹²⁶ As said, a tragic legal choice also concerns the reaction to the consequences of such a choice. As a moral remainder by and in itself exerts a claim to attention, a tragic legal choice opens the door for the notion of 'tragic responsive reactions'.⁹²⁷ In Greek tragedy these reactions can for instance be found in the responses of the protagonists to the consequences of their deeds and in the comments of the Chorus on these

Walzer. See: Walzer, Michael, 'Political Action: The Problem of Dirty Hands', *Philosophy & Public Affairs* 2, 2 (1973).

⁹²³ Cf. Greenspan, Patricia S., 'Guilt and Virtue', *The Journal of Philosophy* 91, 2 (1994), 63; Williams, *Moral Luck. Philosophical Papers 1973-1980*, 74.

⁹²⁴ See for a discussion of moral luck: Nelkin, Dana K., 'Moral Luck', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2013); Williams, *Moral Luck. Philosophical Papers 1973-1980*, 20-40; Nagel, Thomas, *Mortal Questions* (New York: Cambridge University Press, 1979).

⁹²⁵ Vernant and Vidal-Naquet, *Myth and Tragedy*, 44. See for a discussion of moral luck in relation to ancient philosophy and Greek tragedies: Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

⁹²⁶ Vernant and Vidal-Naquet, *Myth and Tragedy*, 44.

⁹²⁷ For illuminating discussions of what I call 'tragic responsive reactions' see for instance: Bauman, Peter and Betzler, Monica, eds., *Practical Conflicts: New Philosophical Essays* (Cambridge: Cambridge University Press, 2004). Williams, 'Ethical Consistency'. Landman, Janet, *Regret: The Persistence of the Possible* (Oxford: Oxford University Press, 1993). Cunningham, Anthony P., 'The Moral Importance of Dirty Hands', *The Journal of Value Inquiry* 26 (1992). Wijze, 'Tragic Remorse: The Anguish of Dirty Hands'. Greenspan, Patricia S., *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms* (Oxford: Oxford University Press, 1995). Williams, 'Liberalism and Loss'; Montague, Phillip, 'Rights and Duties of Compensation', *Philosophy & Public Affairs* 13, 1 (1984).

selfsame consequences and responses.⁹²⁸ Greek tragedies convey that reactions such as feelings of guilt, regret or anxiety can be rational responses to in itself excusable deeds. Contrary to the Platonic view these responses are not or not necessarily considered a sign of irrationality, misunderstanding or a pre-reflective point of view. In the same vein, the concept of a tragic legal choice suggests that a range of responses to the remainder of a legal choice can be seen as rational and legally pertinent given the moral and legal bearing of the loss involved. Such reactions are acknowledgments that the losing claim has not been sufficiently honoured by the legal choice and that this very fact is morally disturbing.⁹²⁹ They are envisaged as part and parcel of the legal viewpoint itself, rather than as unreasonable, subjective, ‘non-legal’ or peripheral to the actual judicial decision.

Tragic responsive reactions can be merely internal responses -a judge may feel extremely confused or burdened by a particular choice-, but they can also be expressed towards ‘losing’ citizens. In the latter case, they can involve explicit acknowledgments of a certain loss in legal sentences or during court-sessions, attempts to avoid similar conflicts in the future -for instance through suggestions to the legislator or policymakers to change current laws or policies-, or offerings of (financial) compensation.⁹³⁰ In so far these reactions are indeed expressed to the

⁹²⁸ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 44. That tragedies also suggest a particular emotional reaction of the audience because of certain ‘consequences’ of the protagonist’s deeds is of course clear in Aristotle’s definition of tragedy where he states that tragedy (as a literary genre) typically evokes pity and fear. Cf. Aristotle, *Poetics*, 10.

⁹²⁹ Arguably one could compare the judge who reacts responsively to the moral remainder with a rag picker who is “salvaging the remains”, a figure that we discussed in the chapter dealing with a postmodern approach to adjudication. For in the end a judge who is responsive to the moral remainder caused by his decisions does a kind of ‘dirty’ work, paying attention to the troublesome limits of his choice and to the ‘garbage’ left by his choice. Cf. Cornell, *The Philosophy of the Limit*, 76.

⁹³⁰ For an interesting discussion of ‘wetgevingsbevelen’ -judicial orders for particular legislation or policy- in the Netherlands see: Boogaard, Geerten, *Het Wetgevingsbevel: Over Constitutionele Verhoudingen en Manieren om een Wetgever tot Regelgeving aan te Zetten* (Oisterwijk: Wolf Legal Publisher, 2013). Boogaard (p. 74-85) locates these ‘wetgevingsbevelen’ or orders in the tradition of what in the United States has been qualified

'losing' citizen, they can also be seen as a way for the judge to show due respect to the losing citizen. Such a reaction expresses that the losing citizen is asked to bear a burden that the judge does not want him to bear if he takes this citizen seriously. Through the lens of the concept of a tragic legal choice all kinds of 'obiter dicta' may qualify as tragic responsive reactions. Possibly they can be understood as the moral - and thus not merely rhetorical- art of talking to the loser. In any case such dicta should not too easily be taken for a merely subjective caprice of the judge or negligible legal phenomena, for as said, they can be rational responses to the morally ambivalent character of the legal choice. We can learn from these as they can be expressions of the moral bearing of a losing claim. Recall for instance the case of Mister Wood who killed his wife and was sentenced to imprisonment. It may well be that a virtuous judge, after he made the actual decision, expresses in his sentence that in this case criminal law reaches its limits and that the actual outcome is morally disturbing because of the plight of Mister Wood.⁹³¹ Through such a reaction the judge can express that in spite of having made a choice to the best of his ability, he acknowledges that the concrete good of Mister Wood has not been wiped from the 'legal field'.⁹³²

Thus, through the concept of a tragic legal choice, the *fragility of rightness* sheds light on what can be called the 'phenomenology of the aftermath' of judicial decision-making.⁹³³ It takes this phenomenology to be part and parcel of the moral nature of adjudication. As such the concept of a tragic legal choice may have explanatory potential for a range of legal phenomena that otherwise will remain unnoticed or will

as 'public law litigation' in which the improvement of laws and policies form the kernel of the legal dispute at hand. See for the introduction of the notion of public law litigation: Chayes, A., 'The Role of the Judge in Public Law Litigation', *Harvard Law Review* 89, 7 (1976).

⁹³¹ We indeed find this kind of tragic responsive reaction in the judgment from which I have drawn for my discussion of the case of Mister Wood. See: Rechtbank Middelburg, August 25 2011, ECLI:NL:RBMID:2011:BR5781.

⁹³² Nussbaum, 'Aeschylus and Practical Conflict', 243.

⁹³³ Bagnoli, Carla, 'Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience', in *New Trends in Moral Psychology*, ed. Tenenbaum, Sergio (Alphen aan den Rijn: Kluwer., 2007).

be ignored for being negligible, non-legal or legally peripheral aspects of judicial decision-making. This idea of a tragic responsive reaction also implies that the *fragility of rightness* opens a relatively broad domain for moral and legal evaluation (and hence also for legal research). If we accept the relevance of the concept of a tragic legal choice, then the moral quality of adjudication also depends on the way judges respond to the consequences of their decisions. Of course, whether and how a judge will respond to a moral remainder will inherently depend on his judicial character. Such reactions can by definition not be prescribed as they imply a certain emotional state. That is, one cannot ‘reason’ for the ‘tragic’; rather, tragedy is experienced through the emotions that indicate loss.⁹³⁴ Hence, and inescapably: different virtuous judges will react differently to the plight of the ‘losing’ citizen.⁹³⁵ I will illustrate how a ‘tragic responsive reaction’ may work out in a concrete legal case by the following case:

The case of *Patricia Bateson and her father*⁹³⁶

Patricia Bateson is a seventeen-year old adolescent who has been seriously and persistently suicidal due to a severe depression. Patricia lives with her father, Tom Bateson. Her mother passed away when she was young. Out of the fear that Patricia would commit suicide, her father rarely leaves the house. However, the tremendous effort to keep his daughter alive starts to exhaust him. Eventually he decides to submit a request for her compulsory admission in a psychiatric hospital. He seeks relief for himself, but he also thinks that intensive treatment is the only way to avert Patricia’s suicide.

‘All things considered’ and on the basis of settled law a judge may choose not to authorize the admission. He may assign decisive weight to the principle of subsidiarity, which says that compulsory admission is only allowed if there are no less intrusive ways of averting the danger. Moreover, if the psychiatric hospital in question does not offer constant care and surveillance, the judge has reasons to doubt whether compulsory admission can in fact prevent Patricia’s suicide.

At the same time, on the basis of his understanding of the fundamental rights that the legal order protects, of his understanding of ‘fatherhood’ and of ‘suicide’, the judge may hold that the interest of the father -the compulsory admission of his daughter- is legitimate. As part of

⁹³⁴ See for a theory about the (important) role that emotions have for legal decision-making: IJzermans, Maria, *De Overtuigingskracht van Emoties bij het Rechterlijk Oordeel* (Den Haag: Boom Juridische uitgevers, 2011).

⁹³⁵ Cf. Stocker, *Plural and Conflicting Values*, 93.

⁹³⁶ Cf. Rechtbank 's-Hertogenbosch, March 31 2010, ECLI:NL:RBSHE:2010:BL9792.

his judicial role he may therefore feel bound to address the troublesome character of the remainder that his choice leaves. He may for instance explain, in addition to the actual decision, why he holds that the father indeed has a legitimate claim to some relief from the responsibility of preventing his daughter's suicide. The judge may also suggest that it would be desirable if policymakers and legislators would reflect on the precarious position of parents living with a seriously suicidal child, for instance by arranging specific provisions for such adolescents. These considerations may be understood as 'tragic responsive reaction' because these are ways in which the judge tries to adequately address the troublesome remainder of his choice.

Before concluding this section it is worth noting that the introduction of the concept of 'a tragic legal choice' is not tantamount to promulgating a 'taximeter-sensibility' for the consequences of legal decisions. For instance, when a local administrative agency denies a citizen a permit to build a shed in his garden and an administrative court authorizes this decision, such a choice is *-ceteris paribus-* not tragic. A tragic legal choice suggests a loss of *high* value, not merely a loss of any kind of interest. If the interest of the losing citizen is merely peripheral to a good life, if it is temporarily affected rather than structurally, if the interest can easily be served by other means, or if the loss is caused by a clear 'fault' of the losing party, then a virtuous and civic friendly judge is not likely to experience this loss as a moral remainder.⁹³⁷

In the end, the concept of a tragic legal choice implies that the remainder is a moral loss that a virtuous judge who decides as a civic friend would experience as a genuine disvalue, committed as he is to settled law and its background values of political morality and to the concrete good of the parties involved.

4 Tragic legal choice in practice. Arguments for and against

In the previous chapter we have seen that the *fragility of rightness* is not meant to be a normative action-guiding approach to judicial decision-making. This is a fortiori the case for the concept of a tragic legal choice. Tragedy cannot be (analytically) argued

⁹³⁷ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 27-28. Western constitutional democracies and international human rights treaties do of course give hints as to what kinds of values qualify as high and hence can be at stake in a tragic legal choice. The interests that are protected by these rights are generally considered to be crucial for leading a good life. But, again, from the viewpoint of the *fragility of rightness* explicit, discursive enumerations only serve as rules of thumb.

for, nor can it be imposed. Yet, what we can say is that if the concept of a tragic legal choice would have a (more) stable place in the practice of adjudication, including the practice of legal scholars dealing with issues of adjudication, it would improve said practices.

One advantage of accommodating this concept is that it can enhance the integrity of both judges and legal orders as a whole, at least if we take this integrity to mean staying committed to the moral backbone of the legal order. The concept offers conceptual room for judges to acknowledge that even if they make a right choice, it might involve a genuine wrong. When anchored in practice it can counterbalance the tendency to rationalize legal decisions by denying the moral and legal import of the losing claim, a tendency that is stimulated by mainstream theories of adjudication⁹³⁸, but is also encouraged by human psychology.⁹³⁹ Being in a state of conflict and hence experiencing a sense of anxiety is something that people tend to avoid.⁹⁴⁰ Of course, the concept of a tragic legal choice does not change this, but it does enable judges to more honestly deal with the moral nature of the choices they face.

Next, as I indicated before, the concept of tragic legal choice also has practical value where it comes to the realisation of the principle of liberal reciprocity. This principle minimally entails that each and every citizen should have a reason to bear the burden that the exercise of state-power brings. In the previous chapter I argued that a virtue-ethical approach complemented with the concept of civic friendship could at least to some extent live up to this demand. Still the requirement of reciprocity is difficult to fulfil in case of a genuine conflict between judicial commitments. Not only because in such cases it will largely depend on the person of the judge what choice he will make, but also because the choice will possibly come with a genuine loss. With the concept

⁹³⁸ Earlier we have seen that theories of adjudication that cannot account for genuine moral losses other than as a result of a legal mistake or an injustice, such as Dworkin's theory of adjudication, invite judges to categorically dismantle and deny the rationality of the claim of the losing party.

⁹³⁹ Cf. Freud, Anna, *The Ego and the Mechanisms of Defence* (London: Karnac Books, 1966 (1937)).

⁹⁴⁰ Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, 50. ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016.

of a tragic legal choice it will be more likely that losing citizens will be respected in their experience of having to bear a genuinely troublesome cost.⁹⁴¹ A tragic legal choice offers judges at least some support for expressing that the claim of the losing party is legitimate.⁹⁴² In any case, tragic responsive reactions are ways of giving a ‘losing’ citizen a witness to the loss, the kind of witness that mainstream theories of adjudication tend to repress.⁹⁴³

What is more and as we have already seen, an advantage of the accommodation of the concept of tragic legal choice is that it can explain certain legal phenomena that otherwise will be dismissed as mere ‘anomalies’ or arbitrary incidents that may be ignored. Without the concept of tragic legal choice it will be difficult to *coherently* account for all kinds of responses (emotional or practical) that judges do in fact give after their actual decision or in relation to it.⁹⁴⁴ The concept of a tragic legal choice offers a conceptual foothold for such responses.

In addition, allowing conceptual room for the possibility that legal choices have a tragic character advances the moral progress of a legal order. Greek tragedy has shown that it often takes the shock of pain to rightly appreciate the moral bearing of a situation or a choice. Wisdom comes through suffering, as a famous comment made by the chorus in Aeschylus' *Oresteia* says.⁹⁴⁵

In a similar vein the painfulness of tragedy can inform the judge about the nature of the case he confronts. Without the ‘pain’ that a tragic choice brings, the judge and the legal order as a whole may remain ‘blind’ to certain morally relevant aspects of its

⁹⁴¹ Singer, Joseph W., 'Normative Methods for Lawyers', in *Harvard Public Law Working Paper* (Cambridge, US: Harvard Law School, 2008), 948-950.

⁹⁴² Cf. Williams, *Moral Luck. Philosophical Papers 1973-1980*, 37.

⁹⁴³ Cf. Wolcher, *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, 221.

⁹⁴⁴ For instance, the fact that an administrative agency offers compensation to citizens for an in itself legally right decision of a public agency is difficult to understand without conceiving the loss as a genuine moral remainder. See for a discussion of compensation for in itself legally right law policy: Hennekens, H.Ph.J.A.M., 'Nadeelcompensatie: Wanneer en Waarom?', *De Gemeentestem* 2000 (2000).

⁹⁴⁵ Cf. Kaufmann, *Tragedy and Philosophy*, 187. As to one of the protagonist in Sophocles' *Philoctetes* Nussbaum states that “Philoctetes does not know what it is to respect another person’s pain until he, too, is made to cry in pain”. Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

own practice. The concept, and connected to it the 'tragic responsive reactions', can help to 'refresh' a legal order, can lead to new insights and possibly to changes in actual laws and policies. Hence, in case of a tragic legal choice it may well be that the 'drama' will often be written 'off court' and in the dialectical process between all legal and political institutions that are concerned with the realisation of values of political morality.⁹⁴⁶

Finally, the concept of tragic legal choice adds to the self-critical potential of both law and adjudication. The concept expresses law's grief about its own limitations that cannot be surmounted or overcome. Precisely because it sheds light on the moral remainders that result from legal choices, the concept prevents an unquestioning attitude towards the practice of adjudication. As such it can be an important antidote against the potential self-congratulatory and morally self-reassuring character of notions of 'rightness' and 'justification'.

In addition to these advantages of acknowledging the tragic character of adjudication two objections remain to be discussed. These are the objections that we already considered in the chapter on a post-modern approach to adjudication. One is the 'Hamlet objection' that says that knowledge about the troublesome character of adjudication leads to incapacitation and inertia of judges. The second objection is that sensitivity for the tragic leads to sentimentalisation of the legal order.

Where the postmodern approach proved vulnerable to these objections, I think the *fragility of rightness* is not. First of all, the *fragility of rightness* does not mean to prescribe tragic consciousness, nor does it suggest that each and every judicial choice is tragic.⁹⁴⁷ The concept aims to first and foremost make sense of a phenomenology that already exists. The dangers of inertia and sentimentalisation are avoided through the virtuousness of the judge. The *fragility of rightness* relies on the virtuous judge to respond in a judicially wise way to the losses resulting from his decisions. This in any case means that the judge will have sufficient courage to take decisions, even though he is fully aware of the troublesome nature of his actual choices. Courageous judges

⁹⁴⁶ Cf. Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1013. Again, see for an illuminating discussion of the role of the judiciary for the improvement of laws and policies: Boogaard, *Het Wetgevingsbevel: Over Constitutionele Verhoudingen en Manieren om een Wetgever tot Regelgeving aan te Zetten*.

⁹⁴⁷ Wijze, 'Tragic Remorse: The Anguish of Dirty Hands', 470.

are able to be honest about the conflictual character of the case and to nonetheless make a choice. Also, a judicially wise judge will take care that the loss that is caused by his decision is not unwarrantedly sentimentalized or exaggerated. Through the judicial virtues the judge will be able to reasonably distinguish between mere losses and tragic losses. Again, the *fragility of rightness* does not downplay the importance of reason for adjudication. By focusing on the tragic it merely aims to give expression to the inherent limits of viable human aspirations in relation to law and adjudication.

5 The Fragility of Rightness and the rule of law

To conclude this exposition of the *fragility of rightness* we still need to more directly discuss whether and how this approach to adjudication can live up to the ideal of the rule of law, one of the ideals that constitutes political morality in Western constitutional democracies. “The Rule of Law is one star in a constellation of ideals that dominate our political morality,” to quote Jeremy Waldron.⁹⁴⁸

This ideal addresses the ongoing concern that the exercise of state power may boil down to one group of people ruling another group of people, leaving the latter potentially vulnerable, un-free and coerced.

However, the concept of the rule of law is obviously highly contested. In the course of history contrasting meanings have been assigned to the concept by citizens, lawyers and (legal) theorists and philosophers. One could indeed say that “[t]here are almost as many conceptions of the rule of law as there are people defining it.”⁹⁴⁹

This is not the place to go into those discussions. Rather, I will confront the *fragility of rightness* with one straightforward demand: that the exercise of state-power, also in the form of adjudication, should be based on and bound by rules that are clear, general, public, prospective and relatively stable.⁹⁵⁰ As Brian Tamanaha has put it: “The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law.”⁹⁵¹

This requirement, which can be qualified as rule by law, formal justice, legality, or in

⁹⁴⁸ Waldron, Jeremy, 'The Rule of Law and the Importance of Procedure', in *New York University Public Law and Legal Theory Working Papers* (New York: New York University School of Law, 2010), 1.

⁹⁴⁹ Cf. Tamanaha, *On the Rule of Law: History, Politics, Theory*, 4.

⁹⁵⁰ ———, 'A Concise Guide to the Rule of Law', 3.

⁹⁵¹ *Ibid.*

the words of Rawls as “justice as regularity”⁹⁵², is of course not an end in itself, but an important warrant for the protection of citizens’ liberties, for legal certainty and against abuse of power. Ruling by law “allow[s] people to plan their activities with advance knowledge of its potential legal implications”.⁹⁵³ If a state governs by rules it provides a ground for legitimate expectations, or so is the idea. From this perspective it is the case that even if laws are unjust it is still considered a good that they are general, public and consistently applied and that citizens can plan their lives and activities accordingly.⁹⁵⁴

When we take this requirement strictly, the *fragility of rightness* does not live up to it. That is, it understands adjudication as a practice in which the exercise of state-power is primarily determined by people and not by rules. In this approach the outcomes of legal proceedings are the result of how a particular judge perceives and qualifies the particularities of the concrete case and how he weighs the considerations he finds pertinent for that case. What is more, the *fragility of rightness* allows for judicial decisions to be ‘inconsistent’: in similar cases two ‘opposite’ decisions can be right and even in one and the same case inconsistencies may arise: a right legal decision can nonetheless imply wrongdoing by the judge. This surely makes predictions for future cases problematic, to say the least. The ‘outcomes’ that the *fragility of rightness* allows for cannot sensibly be reduced to a set of rules or principles in the sense that they can all be considered as the implications of these rules and principles for a concrete legal case.

In addition, the concepts that the *fragility of rightness* proposes all suggest an important role for the judge’s emotional and affective state, although to a different degree. That is, these concepts indicate that the moral quality of adjudication is partly secured by judges having the right attitude, emotions and affections. But these aspects of the judge can by definition not be regulated by means of rules or principles, although they at the same time do and must influence the decisions that are made. Therefore, this too is a reason why the *fragility of rightness* cannot live up to the formal requirements of the rule of law.

At the same time, the *fragility of rightness* can relate to the concern underlying the

⁹⁵² Rawls, *A Theory of Justice*, 207.

⁹⁵³ Tamanaha, *On the Rule of Law: History, Politics, Theory*, 94.

⁹⁵⁴ Rawls, *A Theory of Justice*, 51.

requirement of legality or formal justice, i.e. the prevention of arbitrary exercises of state-power and connected to this respect for the autonomy or agency of citizens. As to the first: by proposing a range of judicial virtues the *fragility of rightness* can at least offer an answer as to why the decisions that are made by virtuous judges are not arbitrary.

Moreover, by its focus on the virtues and civic friendship the *fragility of rightness* relies on the judge drawing upon a shared social context in which mutual expectations arise that, if possible, are also acknowledged. Having the judicial virtues and the disposition of a civic friend suggests that judges in trying to honour the particular, will deploy a range of ‘thick concepts’ that are highly concrete and that have a ‘contour’, a locally intelligible elaboration with which citizens are therefore also familiar. Ideally citizens can thus make ‘sense’ of the decisions of judges relatively easily, and as such they are able to relate to these decisions, also in terms of their own views on the matter. This shared social context that the judge brings to bear on his decisions adds to the predictability of legal decisions as regards the kinds of considerations that a judge will address. It also compensates for the fact that written law is often to a large degree inaccessible to average citizens and that most citizens simply do not know the law. However and again, the predictability that is at stake here does not refer to actual outcomes.

It must be added to all this that part of the argument leading to the *fragility of rightness* was to show that conceptions of adjudication that rely on legal commensurability -conceptions that stress the normative role of rules and principles-themselves have difficulty to live up to the demand of legality, to say the least. These conceptions -‘other things equal’- generate outcomes that contrary to their claims are unpredictable and possibly also arbitrary. More generally we may thus question the plausibility and feasibility of the demand of legality, at least as it is often understood.

6 Conclusion

In this chapter I discussed the concept of a tragic legal choice as a constitutive element of the *fragility of rightness*. It complements the other two elements: a virtue ethical conception of judicial decision-making and the concept of civic friendship. By introducing the concept of a tragic legal choice the *fragility of rightness* conceptually makes sense of a certain aspect of the phenomenology of adjudication, i.e. its messiness, its unintelligibility, its moral ambivalence and its painfulness. Rather than

understanding it as irrational or as something to be dismantled, the *fragility of rightness* envisages this phenomenology as a potential expression of the moral limitations of adjudication. We have seen that the concept of tragic legal choice indicates that neither the judge nor the legal order as a whole can stay morally ‘pure’ and ‘clean’. Even in its most ideal form adjudication will be a morally ambivalent practice. Justified legal choices will come with genuine wrongdoing, with genuine loss. In the words of John Barbour: “Tragedy requires a recognition of the fallibility of particular moral ideals and aspirations [...]”⁹⁵⁵

I have elaborated the concept of a tragic legal choice by designating four categories of genuine conflicts between judicial commitments to which the concept possibly applies. Moreover, as part of the characterization of a tragic legal choice I discussed the notions of a moral remainder and ‘tragic responsive reactions’. Subsequently I pointed out why the concept of a tragic legal choice has a valuable role to play in practice. It can enhance a more respectful way of dealing with judicial loss, it can stimulate moral progress and it can add to the integrity of a legal order. Also, through the concept of a tragic legal choice the *fragility of rightness* can (better) account for the rationality of certain legal phenomena that often go unnoticed, remain unaddressed, or are simply misunderstood and dismissed as rare anomalies.⁹⁵⁶ In the end the concept of a tragic legal choice is a way to deal honestly with the fact that adjudication is “pervasively and perpetually vulnerable” to the contingencies of the practical world.⁹⁵⁷ Finally, I have confronted the *fragility of rightness* and the three concepts that it proposes with a basic demand of the rule of law, i.e. that of legality. We have seen that strictly speaking this approach cannot live up to this demand, but that it can serve the rationale underlying it through its proposal of the rule of judicial virtue.

⁹⁵⁵ Barbour, 'Tragedy and Ethical Reflection', 25.

⁹⁵⁶ Williams, *Problems of the Self: Philosophical Papers 1956-1972*, 73; Wiggins, 'Incommensurability. Four proposals', 53.

⁹⁵⁷ Harris, George W., *Reason's Grief* (Cambridge: Cambridge University Press, 2006), 3.

13 Concluding summary and some practical implications

1 Concluding summary

The starting point of this book was the troublesome phenomenology of adjudication.

Adjudication is -among other things- a form of state-power exercised vis-à-vis concrete citizens that at least from a relatively unreflective perspective seems messy, unpredictable, unintelligible, and for losing citizens genuinely painful.

This phenomenology naturally gave rise to the question how we can account for the moral quality of adjudication. We saw that this question cannot exclusively be answered by common sense views, that is, by the views that are often held by legal practitioners and citizens. These views insufficiently explain how it is that adjudication can possess *moral* quality, the requirement of political legitimacy included. At this point philosophy entered the stage as the discipline that is fitting to provide an adequate answer.

The first part of the book proceeded by examining the plausibility of one rather dominant philosophical way of understanding moral quality in adjudication which I called a *stabilizing approach to adjudication*. This way is also relatively dominant in practice. A stabilizing approach relies on *legal commensurability* and related to this on a normative background theory of political morality. It understands adjudication, at least in its ideal form, as applied theory, i.e. as the institutional specification of a normative theory of political morality.

In this approach normative theory is reason's reassuring answer to the (potentially) troublesome phenomenology of adjudication. Theory is assigned the power to either prevent this phenomenology to occur or to dismantle its being troublesome as an irrational delusion, the consequence of merely a subjective point of view. Because of this purported power of normative theory a stabilizing approach offers a morally and epistemically reassuring picture of adjudication for the judge, for the affected citizens and also for the legal order as a whole. Morally speaking, it can provide for stability in all kinds of ways, or so it is thought.

In assessing the validity of this stabilizing approach to adjudication I examined whether normative theories of political morality can fulfil the task such an approach assigns to them, and connected to this whether they can live up to their own practical aspirations.

Through both an internal and an external critique I argued that even the best available theories of political morality cannot validate a stabilizing approach, its corresponding reliance on legal commensurability, or the epistemic and morally reassuring picture it has of adjudication.

As to the internal critique: for this purpose two normative theories of political morality have been scrutinized as strong candidate background theories of law and adjudication, i.e. Rawls' theory of justice and Nussbaum's Capabilities Approach.

For each of these theories it was established that when applied to society they lead to *residues of justice*. They allow or even produce situations that are at odds with the substantive practical goals that they have set: to secure that citizens can lead a life in accord with their dignity and to prevent arbitrary exercises of state-power. Discussion of a range of legal cases showed how these theories' limitations bear upon the moral character of adjudication. If a legal order and all judges fully comply with the demands of justice, i.e. the principles of political morality, this will not prevent that adjudication will sometimes be arbitrary, messy and lead to morally ambivalent outcomes that harm citizens' chances to lead a humanly dignified life. Therefore these theories are unfit to support a stabilizing approach to adjudication.

At the same time it was argued at length that Nussbaum's Capabilities Approach is a better candidate for supporting such an approach, compared to Rawls' theory of justice. Her theory can solve at least some of Rawls' residues of justice and thus make adjudication more 'stable', that is, less arbitrary and causing less moral loss. It was pointed out that the main reason for this advantage is that Nussbaum's theory of justice is based on a conception of the person that is more embedded and situated than that of Rawls. Hence, the claims that are derived from this conception to a larger degree accommodate for actual empirical knowledge as it already figures in society. By staying closer to and accommodating more of the moral reality of everyday life Nussbaum's theory is more sensitive to the information that matters if we want to secure citizens a life in accord with dignity. Because of this sensitivity her principles of political morality are conceptually richer and able to address more of the concerns that from the viewpoint of equal dignity matter concretely. Also, these principles are more determinate, containing more factual information and hence leaving less room for (strong) discretion. But as said, despite of these advantages, it was established that Nussbaum's theory cannot prevent residues of justice to occur, with dire consequence for the moral nature of adjudication. In the end the Capabilities Approach does not warrant a stabilizing approach to adjudication either.

As to the external critique: the question whether a stabilizing approach and its way of understanding adjudication's troublesome phenomenology can in the end be saved by a better normative theory of political morality was answered negatively. It was argued that normative theories of political morality are by definition unfit to secure the moral quality of a political

order and its main institutions. This not so much because of their specific content but because of the instrument that they deploy to realize their aspirations: normative theory.

I argued that to put a political order and its central institutions under the reign of a normative theory of political morality would not produce the desired outcomes. On the contrary, it may even reduce the moral quality of such an order. So I concluded that in spite of its psychological attractiveness a stabilizing approach to adjudication is not tenable. No normative theory of political morality can have the morally and epistemically reassuring function that a stabilizing approach asks from them. No such theory can warrant a reliance on legal commensurability as it cannot sensibly perform the function of a final commensurans. Against the background of these conclusions, it made sense to reject a stabilizing approach as the way to account for moral quality in adjudication and to change horses, i.e. to try an approach that does not rely on a normative theory of political morality. To this end, as a first preparatory step I proposed a quasi-phenomenological way of thinking about justice. Such an approach accounts for the moral quality of the central institutions in society on a piecemeal basis and bottom up, rather than in an all-encompassing way and top down with the help of normative principles of political morality.

An abstract and general articulation of a just society -also in the form of principles of political morality- can in this approach still be of value, but not as the (normative) rails that must keep the central institutions on their moral track. In a quasi-phenomenological approach the moral competences of the responsibility bearing agents and thick value concepts play a key role in understanding and securing the moral quality of institutions. What the moral quality of a particular institution concretely boils down to, depends on the particular 'spheres of justice' that are at stake and the distinguishing features of these spheres.

Hence, the second part of the book discussed how a quasi-phenomenological approach to justice works out for adjudication as one such sphere of justice. In this part I presented the *fragility of rightness* as my understanding of moral quality in adjudication.

As part of the argument leading to *the fragility of rightness* I first discussed a postmodern approach to adjudication as another philosophy that seeks to come to grips with moral quality in adjudication without relying on normative theory. Although this approach is often dismissed off hand for its all too extreme and over-simplified positions, I argued that there were constructive lessons to be learned from it. According to a postmodern approach the crucial moral moment in adjudication is that of the encounter of the judge with the Other as a concrete embodied unique human being. The moral quality of adjudication depends on the quality of this relation, i.e. on the extent to which the judge succeeds in honouring the Other.

I rejected a postmodern approach primarily because of its self-defeating normative positions and aspirations and its failure to account for adjudication's 'reasonableness', but nevertheless we took two postmodern elements on board. These were the respect that is due to the concrete embodied and unique citizens who participate in legal proceedings and a concern with the potential so-called 'violence' that may come with any kind of moral project that is pursued and executed in the name of 'reason' vis-à-vis concrete citizens.

So, I proposed the *fragility of rightness* as my constructive understanding of moral quality in adjudication that does not rely on normative moral theory. It encompasses three elements: *a virtue-ethical conception of adjudication*, the concept of *civic friendship* and the concept of a *tragic legal choice*. It was asserted that through these elements we can -albeit only partially and indirectly- grasp what it means for adjudication to have moral quality. They were not proposed as normative, action-guiding concepts and thence they do not offer the terms in which judges or citizens should think and act. They are predominantly meant to better understand what it means for adjudication to have moral quality and as such they can have only indirect practical force.

As to the first element, *a virtue-ethical conception of adjudication*, we saw that it is intimately linked to the uncontroversial idea that adjudication is a particular sphere of justice that is most prominently concerned with 'particulars'. These particulars include, but are not limited to the dimension of the unique, concrete embodied citizen. We saw that in order for judges to be able to adequately respond to these particulars and to make right decisions they must possess a range of *judicial virtues*, a set of character traits and reliable sensitivities, expressed in both their doings and beings, in their actions and feelings. In expounding the central characteristics of the ideal of a virtuous judge I named judicial perception, judicial courage, judicial temperance, judicial justice, judicial independency and judicial impartiality.

It was established that if we define moral quality by referring to the judicial virtues, adjudication couldn't exclusively be assessed on the basis of actual decisions. Within the *fragility of rightness* adjudication is more than a set of judicial decisions, the relevant data for its moral evaluation are wide(r) ranging. They include all kinds of voluntary and involuntary, spontaneous and emotional responses of judges both in and out of court.

Subsequently, it was argued that a *virtue-ethical conception of adjudication* by itself does not suffice as an account of moral quality of adjudication. At least it does not if we want such an account to also accommodate for the liberal demand of political legitimacy and connected to this respect for the concrete embodied citizen who participates in a legal procedure. Indeed, we saw that the idea of a (sufficiently) virtuous judge is not yet a convincing reason for a

negatively affected citizen to accept *this* particular exercise of state-power. It does not render the decision acceptable for *him*. This is all the more disturbing because within a virtue-ethical conception of adjudication different judges can take different, even opposite but both right decisions in similar cases.

As a way to mitigate and compensate for the potentially elitist and in this sense -at least vis-à-vis the 'losing' party- disrespectful side of a virtue-ethical conception of adjudication, I argued that the concept of *civic friendship* has complementary value. An ideal judge not only decides as a judicially virtuous judge, but also as a civic friend. In his role the judge aims to genuinely address the concrete good that is at stake for the parties concerned. In this way he can pay respect to the concrete embodied citizens who are involved in the legal proceedings, i.e. he can (try to) live up to the moral demand stemming from the mere fact of his encounter with these citizens.

The third element of the *fragility of rightness* is the concept of a *tragic legal choice*. I argued that this concept is indispensable if we want to understand moral quality in adjudication. We saw that tragic legal choices stand for *genuine* conflicts between judicial commitments that result in a *moral remainder* and as such typically lead to a *tragic responsive reaction*. If judges face such conflicts their decisions may be justified but nonetheless have a morally ambivalent side to them.

On the basis of the exposition of these three elements it became clear that the *fragility of rightness* boils down to a *destabilizing* approach to adjudication in the sense that it surely does not offer an epistemically and morally reassuring picture of adjudication. Although it offers an understanding of moral quality, it does not categorically dismantle the troublesome phenomenology of adjudication as either due to mistakes or as the result of a subjective and irrational point of view; far from it. Messiness, unintelligibility, insecurity, moral ambivalence and painfulness are considered inescapable parts of the moral nature of adjudication itself and hence of what moral quality in adjudication 'looks like'.

So, despite the fact that *the fragility of rightness* has a strong aspirational side to it in that it takes the practice of adjudication as one that can and should have moral quality, it also shows the inherent limitations and precariousness of its aspirations.

2 Some practical implications

As said, in spite of its evaluative language the *fragility of rightness* does not claim to be normative in the sense of having direct action- or reasoning-guiding force. By giving primacy to practice and by providing the 'why' for the 'that', this approach offers conceptual anchor

points for moral quality that can account for quality as it already exists in practice.

But all this is not to deny that the *fragility of rightness* has some practical implications. For instance, by the concepts it introduces it offers a (critical) perspective that can further spur moral improvement. Also, these anchor points may lead to ad hoc interventions on a local level. Whether this will be the case, depends on the extent to which the concepts of the *fragility of rightness* make sense in a concrete context.

Here I will briefly and tentatively ponder on what I consider to be some practical implications of the *fragility of rightness*, with the reservation that these implications need further thought and must be tailored to a concrete local context. Further (empirically informed) research is needed.

One practical implication concerns the establishment of the facts. We saw that the *fragility of rightness* in its account of moral quality in adjudication gives priority to the particulars of the case. Hence, the establishment of the facts and the practice of legal qualification are seen as key judicial activities and legal education should above all be a training of the ‘judicial eye’. This means that the aspirant-judges, while learning settled law in the abstract, must at the same time be confronted with the particulars, that is, either with real-life situations or with representations of such situations (for instance in literature, films and documentaries).⁹⁵⁸ Learning about the particulars and learning about the law ideally are integrated activities. More generally, from the viewpoint of the fragility of rightness it is vital that a set of practices and institutions of sufficient quality are available in society in which the judicial virtues and the attitude needed for civic friendship can be developed and further strengthened. This in any case also indicates the necessity of alertness regarding tendencies in professional and educational practices that may undermine this development, such as ‘elite-culture’, ‘surplus status-trust’ and ‘surplus epistemic deference’.⁹⁵⁹ On that account the *fragility of rightness* brings the discipline of social moral epistemology into play as relevant for enhancing the

⁹⁵⁸ This idea of course fits within the law and literature tradition. See for the argument that lawyers and judges should read literature in order to train their ‘judicial eye’: Nussbaum, *Poetic Justice. The Literary Imagination and Public Life*.. For discussions by legal theorists and legal practitioners about the importance of novels for law see also: Witteveen, Willem and Taekema, Sanne, eds., *Verbeeldingsmacht. Wat Juristen Moeten Lezen* (Den Haag: Boom Juridische uitgevers, 2000)..

⁹⁵⁹ These phenomena were discussed in the chapter on a virtue-ethical conception of adjudication.

moral quality of adjudication.

As the focus lies on the judicial virtues, due attention should also be paid to the psychological obstacles that may impede the judge having the right emotions or affective states. For instance, knowledge about the influence of a peer-group on one's emotional state can be helpful for the training of the virtue of judicial courage.

Next, because the virtues and civic friendship play such a crucial role in guaranteeing moral quality, ideally these should also be expressed in the indicators that are used for the selection of judges and the assessment of their quality. Obviously further inquiry is needed to develop such indicators adequately and to identify possible drawbacks of character-based assessments. Another practical implication is that efforts to systematize adjudication must be limited. As the particular and not the rule is the measure, these efforts should not be such that the particulars are 'lost' and vanish from judicial sight due to the lens that the 'system' imposes. Although the explication of regularities in and among judicial decisions can add to the quality of the justification of legal decisions -by providing for discursive material-, and can also be of assistance in detecting biases and 'distorted' perceptions, systematisation as such does not add to legal rationality, but rather to the contrary: it can threaten it. Again, within the *fragility of rightness* moral quality by itself does not require that similar cases be decided similarly or like cases be decided alike. Offering an 'inside out approach' to moral quality, it allows for different virtuous judges 'perceiving' differently and hence they can rationally arrive at different conclusions.

Related to this point: within the *fragility of rightness* the *content* of a legal decision and the judge's *treatment* of the citizens involved in legal proceedings cannot conceptually be separated. Both aspects of adjudication are held to be integrally and intimately related elements of realizing moral quality. The treatment of the parties consists in ways of being (not) responsive to the good of the concrete citizens involved in the proceedings, something that has moral import by itself and also plays a vital role in arriving at the right judicial decision.

Hence, in legal education and in monitoring the quality of adjudication these dimensions should not be separated. The *treatment* of citizens who are involved in legal proceedings is not a corollary, non-legal aspect of adjudication, but an integral part of realizing moral quality. Again, within the *fragility of rightness* the moral quality of adjudication cannot exclusively be deduced from the actual decisions of judge, because all kinds of other data are relevant as well -the treatment of parties included.

The focus that the *fragility of rightness* puts on the relational aspect also means that the

‘setting’ in which the encounter takes place -the procedural setting included- must allow for the judge to experience a ‘negative moment’, a relatively passive moment in which he can indeed ‘face’ the parties involved. (From this perspective the digitalisation of adjudication may of course have serious drawbacks for moral quality.)

Next, the *fragility of rightness* has consequences for our appreciation of *obiter dicta*, the range of considerations in judicial decisions that cannot sensibly be understood as part of the *ratio decidendi*. It does not take these *obiter dicta* as necessarily subjective, non-legal and hence irrelevant utterances of a judge. Rather, they are considered potential expressions of the moral sensitivities of a virtuous judge who in his role of civic friend also seeks to be responsive to the concrete good of the citizens. If the quality of judges is up to standards, they can be seen as part of adjudication’s moral backbone, i.e. as expressions of legal knowledge, of judicial understanding of the particulars of the case generated in the confrontation with these particulars. In case of a *tragic legal choice* these *obiter dicta* possibly also qualify as a ‘tragic responsive reaction’, as part of the art of talking to the losing citizen who has to bear a burden that from a judicial viewpoint we do not want him to bear.

In any case, the *fragility of rightness* indicates that *obiter dicta* are to be taken (more) seriously as valuable phenomena for legal research, not only by judges themselves but also by scholars.

Finally, because of its focus on the potential tragic character of judicial decision-making the *fragility of rightness* implies a vital monitoring task for local judiciaries and councils for the judiciary to identify and record tragic remainders. If similar remainders seem to occur on a regular basis, this may be a reason for the judiciary to give a signal to policy-makers and legislators and thus ask them to take measures that prevent these situations in the future. In accord with the lesson taught by Greek tragedies that it often takes suffering to come to insight, the ‘tragic remainders’ can thus contribute to moral progress in a legal order

Bibliography

- Adorno, Theodor W. 2007. *Negative Dialectics*. Translated by E.B. Ashton. New York: Continuum.
- Aeschylus. 1970. *The Eumenides*. Translated by Hugh Lloyd-Jones. Edited by Hugh Lloyd-Jones. New Jersey: Prentice-Hall.
- . 1975. *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*. Translated by Robert Fagles, Penguin Classics. New York: Penguin Group.
- Alexander, John M. 2008. *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*. Hampshire: Ashgate.
- Alexy, Robert. 2003. Constitutional Rights, Balancing and Rationality. *Ratio Juris* 16, 131-140.
- . 2010. The Dual Nature of Law. *Ratio Juris* 23, 167-182.
- . 2004. The Nature of Legal Philosophy. *Ratio Juris* 17, 156-167.
- Ali, Ayaan Hirsi, and ‘ in NRC Handelsblad Geert Wilders. 2003. Het is Tijd voor een liberale Jihad [The Time has Come for a Liberal Jihad]. *NRC Handelsblad*, April 4.
- Altman, Andrew. 1986. Legal Realism, Critical Legal Studies, and Dworkin. *Philosophy and Public Affairs* 15, 205-236.
- Alvarez, Silvina. 2011. Constitutional Conflicts, Moral Dilemmas, and Legal Solutions. *Ratio Juris* 24, 59-74.
- Amaya, Amalia. 2012. *Virtue and Reason in Law*. Coyoacán: UNAM Philosophical Research Institute.
- Amaya, Amalia, and Ho Hock Lai, eds. 2013. *Law, Virtue and Justice*. Oxford: Hart Publishing.
- Anderson, Elisabeth. 2010. Justifying the Capabilities Approach to Justice. In *Measuring Justice: Primary Goods and Capabilities*, edited by Harry Brighouse and Ingrid Robeyns. Cambridge: Cambridge University Press.
- . 1999. What is the Point of Equality? *Ethics* 109, 287-337.
- Andriessen, Iris, Eline Nievers, et al. 2010. Liever Mark dan Mohammed? [Do employers prefer Mark over Mohammed?] Onderzoek naar Arbeidsmarktdiscriminatie van niet-Westerse Migranten via Praktijktests. Den Haag: Sociaal en Cultureel Planbureau.
- Annas, Julia. 2004. Being Virtuous and Doing the Right Thing. *Proceedings and Addresses of the American Philosophical Association* 78, 61-75.
- . 2005. Comments on John Doris's 'Lack of Character'. *Philosophy and Phenomenological Research* 71, 636-642.
- . 1987. Comments on John M. Cooper's "Political Animals and Civic Friendship. In *XI. Symposium Aristotelicum*, edited by Günther Patzig e.d., 220-241. Friedrichshafen/Bodensee: Vandenhoeck & Ruprecht.
- . 1993. *The Morality of Happiness*. Oxford: Oxford University Press.
- Apel, Robert, and Gary Sweeten. 2010. The Impact of Incarceration on Employment during the Transition to Adulthood. *Social Problems* 57, 448-479.
- Aristotle. 2002. *Nicomachean Ethics*. In *Nicomachean Ethics: Translation, Introduction, and Commentary*, edited by Sarah Broadie and Christoffer Rowe. Oxford: Oxford University Press.
- . 1996. *Poetics*. Translated by Malcolm Heath. London: Penguin Books.

- Bagnoli, Carla. 2007. Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience. In *New Trends in Moral Psychology*, edited by Sergio Tenenbaum. Alphen aan den Rijn: Kluwer.
- The Bangalore Principles of Judicial Conduct 2002. The Hague: UN Judicial Group on Strengthening of Judicial Integrity.
- Barak, Aharon. 1987. *Judicial Discretion*. New Haven: Yale University Press.
- Barber, Benjamin. 1975. Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls. *The American Political Science Review* 69, 663-674.
- Barbour, John D. 1983. Tragedy and Ethical Reflection. *The Journal of Religion* 63, 1-25.
- Barclay, Linda. 2003. What kind of liberal is Martha Nussbaum. *Sats-Nordic Journal of Philosophy* 4, 5-24.
- Bauman, Peter, and Monica Betzler, eds. 2004. *Practical Conflicts: New Philosophical Essays*. Cambridge: Cambridge University Press.
- Bauman, Zygmunt. 1993. *Postmodern Ethics*. Oxford: Blackwell.
- Bedau, Hugo Adam, and Erin Kelly. 2010. Punishment. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Stanford: Metaphysics Research Lab, Stanford University.
- Beers, Britta van. 2009. *Persoon en Lichaam in het Recht. Menselijke Waardigheid en Zelfbeschikking in het Tijdperk van de Medische Biotechnologie*. Den Haag: Boom Juridische uitgevers.
- Beever, Allan. 2004. Aristotle on Equity, Law, and Justice. *Legal Theory* 10, 33-50.
- Ben-Naftali, Orna, and Iris Canor. 2008. Evans v. United Kingdom. *The American Journal of International Law* 102, 128-134.
- Benston, George J. 2000. Consumer Protection as Justification for Regulating Financial Service Firms and Products. *Journal of Financial Service Research* 17, 277-301.
- Bergo, Bettina. 2013. Emmanuel Levinas. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Stanford: Metaphysics Research Lab, Stanford University.
- Bix, Brian. 1995. *Law, Language and Legal Determinacy*. Oxford: Clarendon Press.
- Blum, Lawrence. 1991. Moral Perception and Particularity. *Ethics* 101, 701-725.
- Boekestijn, Arend Jan. 2005. Over Waarheid en Wijsheid. In *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, edited by Ton van Luin. Utrecht: Spectrum.
- Bomhoff, Jacco, and Lorenzo Zucca. 2006. The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05. *European Constitutional Law Review* 2, 424-442.
- Boogaard, Geerten. 2013. *Het Wetgevingsbevel: Over Constitutionele Verhoudingen en Manieren om een Wetgever tot Regelgeving aan te Zetten*. Oisterwijk: Wolf Legal Publisher.
- Bouwens, W.H.A.C.M, Houwerzijl, et al. 2013. *H.L. Bakels, Schets van het Nederlandse Arbeidsrecht*. Deventer: Kluwer.
- Brakel, Marion van den, and Reinder Lok. 2010. *De Inkomenssituatie van Alleenstaande Moeders: Trends and Dynamiek*. Den Haag: Statistics Netherlands.
- Brand-Ballard, Jeffrey. 2010. *The Ethics of Lawless Judging*. Oxford: Oxford University Press.
- Breedveld, Willem. 2005. Geen Polarisatie, maar Debat. In *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, edited by Ton van Luin. Utrecht: Spectrum.
- Brems, Eva. 2005. Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Human Rights Quarterly* 27, 294-326.
- , ed. 2008. *Conflicts between Fundamental Rights*. Oxford: Intersentia.

- Brink, Bert van den. 2000. *The Tragedy of Liberalism. An Alternative Defense of a Political Tradition*. Albany: SUNY Press.
- Brink, David O. 2004. Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes. *Texas Law Review* 82.
- Buchanan, Allen. 2002. Social Moral Epistemology. *Social Philosophy & Policy Foundation* 19, 126-152.
- Budd, K.S. 2001. Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model *Clinical Child and Family Psychology Review* 4, 1-18.
- Budde, Kerstin. 2007. Rawls on Kant. *European Journal of Political Theory* 6, 339-358.
- Carlson, David Gray. 1994. Jurisprudence and Personality in the Work of John Rawls. *Columbia Law Review* 94, 1828-1841.
- Carolyn, Cox. 1986. Joint Custody: Dividing the Indivisible. *Utah Law Review* 577-589.
- Carter, Stephen L. 1987. Evolutionism, Creationism and Treating Religion as a Hobby. *Duke Law Journal* 1987, 977-995.
- Casey, Timothy, and Laurie Maldonado. 2012. 'Worst Off'. Single-Parent Families in the United States. A Cross-National Comparison of Single Parenthood in the U.S. and Sixteen Other High Income Countries. New York: Legal Momentum.
- Cavell, Stanley. 1969. *Must We Mean What We Say?* New York: Charles Scribner's Sons.
- Celikates, Robin. 2011. At Best Irrelevant, at Worst Ideological? Ideal Theory and the Case of Civil Disobedience. Amsterdam: University of Amsterdam.
- Chang, Ruth. 1997. Introduction. In *Incommensurability, Incomparability and Practical Reason*, edited by Ruth Chang. Cambridge, US: Harvard University Press.
- Chappel, Timothy. 2008. Moral Perception. *Philosophy*, 421-37.
- Chayes, A. 1976. The Role of the Judge in Public Law Litigation *Harvard Law Review* 89, 1281-1316.
- Claassen, Rutger, and Marcus Düwell. 2012. The Foundations of Capability Theory: Comparing Nussbaum and Gewirth. *Ethical Theory and Moral Practice* April, 1-18.
- Clarke, Bridget. 2003. The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception. Pittsburg: University of Pittsburg.
- Clarke, Stanley G. 1987. Anti-Theory in Ethics. *American Philosophical Quarterly* 24, 237-244.
- Clarke, Stanley G., and Evan Simpson. 1989. Introduction. In *Anti-theory in Ethics and Moral Conservatism*, edited by Stanley G. Clarke and Evan Simpson. New York: State University of New York Press.
- The Common Law and Civil Law Traditions. 2010. *The Robbins Collection*, <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.
- Cooper, John M. 1999. Aristotle on the Forms of Friendship. In *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, edited by John M. Cooper, 312-336. Princeton: Princeton University Press.
- . 1999. Political Animals and Civic Friendship. In *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*, edited by John M. Cooper, 356-377. Princeton: Princeton University Press.
- . 1999. *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory*. Princeton: Princeton University Press.
- Cornell, Drucilla. 1992. *The Philosophy of the Limit*. New York: Routledge.
- . 1988. Post-structuralism, the Ethical Relation, and the Law. *Cardozo Law Review* 9, 1587-1628.
- Cover, Robert. 1982. The Supreme Court, 1982 Term. Foreword: Nomos and Narrative. *Harvard Law Review* 97, 4-68.
- . 1985. Violence and the Word. *Yale Law Journal* 95, 1601-1629.

- Critchley, Simon. 1992. *The Ethics of Deconstruction*. Edinburgh: Edinburgh University Press.
- Cunningham, Anthony P. 1992. The Moral Importance of Dirty Hands. *The Journal of Value Inquiry* 26, 239-250.
- Dancy, Jonathan. 1995. In Defence of Thick Concepts. *Midwest Studies In Philosophy* 20, 263-279.
- Daniels, Norman. 2003. Democratic Equality: Rawls's Complex Egalitarianism. In *The Cambridge Companion to Rawls*, edited by Samuel Freeman. Cambridge: Cambridge University Press.
- . 1990. Equality of What: Welfare, Resources, or Capabilities? *Philosophy and Phenomenological Research* 1, 273-296.
- Darwall, Stephen L. 1976. A Defense of the Kantian Interpretation. *Ethics* 86, 164-170.
- Deakin, Simon. 2006. 'Capacitas: Contract Law and the Institutional Preconditions of a Market Economy'. In *CBR Research Programme on Corporate Governance*. Cambridge: Centre for Business Research University of Cambridge.
- Delgado, Richard. 1995. 'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation? *Law and Inequality* 9, 9-90.
- Demott, Deborah A. 1996. Foreword. *Law and Contemporary Problems* 59, 1-6.
- Derrida, Jacques. 1989. Force of Law: The 'Mystical Foundation of Authority'. *Cardozo Law Review* 11, 919-1045.
- Deuchser, Irwin. 1953. The Petty Offender: A Sociological Alien. *The Journal of Criminal Law, Criminology, and Police Science* 44, 592-595.
- Diamond, Cora. 1990. How Many Legs? . In *Value and Understanding: Essays for Peter Winch*, edited by Raimond Gaita. New York: Routledge.
- . 1988. Losing Your Concepts. *Ethics* 98, 255-277.
- Dixon, Rosalind, and Martha C. Nussbaum. 2012. Children's Rights and a Capabilities Approach. The Question of Special Priority. *Cornell Law Review* 97, 550-594.
- Doek, Jaap. 2001. De Jeugdige Delinquent: Toepassing van het Strafrecht voor Volwassenen en het IVRK. *Tijdschrift voor Familie- en Jeugdrecht* 5, 144-149.
- Domselaar, Iris van. 2013. A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the troublesome character of) Right Judicial Decisions. In *Aristotle and the Philosophy of Law: Theory, Practice and Justice* edited by Liesbeth Huppel-Cluysenaer and Nuno Coelho. Dordrecht: Springer.
- . 2011. 'Zelfbevestigende' versus 'Ontregelde' Rechtspraak. *Nederlands Juristenblad* 86, 1032-1039.
- Doris, John M. 2002. *Lack of Character*. Cambridge: Cambridge University Press.
- Douzinas, Costas. 2004. Law and Justice in Postmodernism. In *The Cambridge Companion to Postmodernism*, edited by Steven Connor. Cambridge: Cambridge University Press.
- Douzinas, Costas, and Ronnie Warrington. 1994. *Justice Miscarried: Ethics, Aesthetics and the Law*. London: Harvester Wheatsheaf.
- Duff, Antony. 2003. The Limits of Virtue Jurisprudence. *Metaphilosophy* 34, 214-224.
- Duivenvoorde, Bram. 2010. De 'Gemiddelde Consument' als Rationele Actor. *WPNR* 533-534.
- . 2013. The Protection of Vulnerable Consumers under the Unfair Commercial Practice Directive. *Journal of European Consumer and Market Law* 2, 69-79.
- Düwell, Marcus. 2006. Nussbaum, Capabilities en de Waardigheid van Dieren. *Filosofie & Praktijk* 4, 29-41.
- Dworkin, Ronald. 2001. Do Liberal Values Conflict. In *The Legacy of Isaiah Berlin*. New York: New York Review of Books.
- . 1975. Hard Cases. *Harvard Law Review* 88, 1057.

- . 1997. In Praise of Theory. *Arizona State Law Journal*, 353-580.
- . 2008. *Justice in Robes*. Cambridge, US: Harvard University Press.
- . 1986. *Law's Empire*. Cambridge, US: Harvard University Press.
- . 1985. *A Matter of Principle*. Cambridge, US: Harvard University Press.
- . 1983. A Reply by Ronald Dworkin. In *Ronald Dworkin & Contemporary Jurisprudence*, edited by Marshall Cohen, 247-301. London: Duckworth.
- . 1984. Rights as Trumps. In *Theories of Rights*, edited by Jeremy Waldron. Oxford: Oxford University Press.
- . 2005 (1977). *Taking Rights Seriously*. London: Duckworth.
- Eddy, Katharine. 2006. Welfare Rights and Conflicts of Rights. *Res Publica* 12, 337-356.
- Eisenberg, Melvin Aron. 1995. The Limits of Cognition and the Limits of Contract. *Stanford Law Review* 47, 211-259.
- Estlund, David. 1998. The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth. *Ethics* 108, 252-275.
- Finnis, John. 1997. Commensurability and Public Reason. In *Incommensurability, Incomparability, and Practical Reason*. Cambridge, US: Harvard University Press.
- . 1987. On Reason and Authority in Law's Empire. *Law and Philosophy* 6, 357-380.
- Flanagan, Owen. 1991. *Varieties of Moral Personality. Ethics and Psychological Realism*. Cambridge, US: MIT Press.
- Forum. 2010. Factbook 2010. The Position of Muslims in the Netherlands. Utrecht: Forum. The Institute for Multicultural Development.
- . 2010. Factsheet Subsidiëring Levensbeschouwelijke Organisaties. Utrecht: Forum. The Institute for Multicultural Development.
- Frank, Jerome. 1931. *Law and the Modern Mind*. New York: Brentano's Publisher.
- Franz, M., H. Lensche, et al. 2003. Psychological Distress and Socio-Economic Status in Single Mothers and their Children in a German City. *Social Psychiatry and Psychiatric Epidemiology* 38, 59-68.
- Freeman, Samuel, ed. 1999. *Collected Papers. John Rawls*. Cambridge, US: Harvard University Press.
- . 2007. *Rawls*. New York: Routledge.
- Freud, Anna. 1966 (1937). *The Ego and the Mechanisms of Defence*. London: Karnac Books.
- Freyenhagen, Fabian. 2008. Moral Philosophy. In *Theodor Adorno. Key Concepts*, edited by Deborah Cook. London: Acumen Press.
- Fried, Charles. 1981. *Contract as a Promise: A Theory of Contractual Obligation*. Cambridge: Harvard University Press.
- Fritsch, Travis A., and John D. Burkhead. 1981. Behavioral Reactions of Children to Parental Absence due to Imprisonment. *Family Relations* 30, 83-88.
- Fuller, Lon L. 1967. *Legal Fictions*. Stanford: Stanford University Press.
- Gathergood, John. 2012. Debt and Depression: Causal Links and Social Norm Effects. *The Economic Journal* 122, 1094-1114.
- George, Robert. 1992. Does the 'Incommensurability Thesis' Imperil Common Sense Moral Judgements? *American Journal of Jurisprudence* 37, 185-195.
- Gerards, J.H. 2006. Rechterlijke Belangenafweging in het Publiekrecht. *Rechtsgeleerd Magazijn Themis* 4, 147-159.
- Geuss, Raymond. 2005. *Outside Ethics*. Princeton: Princeton University Press.
- . 2008. *Philosophy and Real Politics*. Princeton: Princeton University Press.
- Gibbard, Allan. 1995. Why Theorize How to Live with Each Other? *Philosophy and Phenomenological Research* 55, 323-342.
- Giullari, Susy, and Jane Lewis. 2005. The Adult Worker Model Family, Gender Equality and Care. The Search for New Policy Principles, and the Possibilities and Problems of a

- Capabilities Approach. In *Social Policy and Development Programme Paper*: United Nations Research Institute for Social Development.
- Goderie, Marjolein. 2009. Problematiek en Hulpvragen van Stelselmatige Daders. Utrecht: WODC, Ministry of Justice.
- Goud, Nelson H. 2005. Courage: Its Nature and Development. *Journal of Humanistic Counselling, Education and Development* 44, 101-116.
- Gowans, Christoffer W. 1987. Introduction. The Debate on Moral Dilemmas. In *Moral Dilemmas*, edited by Christoffer Gowans. Oxford: Oxford University Press.
- Gowans, Christopher W. 1994. *Innocence Lost: An Examination of Inescapable Moral Wrongdoing*. Oxford: Oxford University Press.
- Gray, John. 2001. Where Pluralists and Liberals Part Company. *International Journal of Philosophical Studies* 6, 17 - 36.
- Greenawalt, Kent. 1975. Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges. *Columbia Law Review* 75, 359-399.
- Greenspan, Patricia S. 1994. Guilt and Virtue. *The Journal of Philosophy* 91, 57-70.
- . 1995. *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms*. Oxford: Oxford University Press.
- Grimm, Stephen. 2007. Easy Cases and Value Incommensurability. *Ratio* 1, 26-43.
- Guignon, Charles. 2009. Williams and the Phenomenological tradition. In *Reading Bernard Williams*, edited by Daniel Callcut, 166-189. New York: Routledge.
- Hackett, Rosalind I.J. 2001. Is Religion Good News or Bad News for Women?: Martha Nussbaum's Creative Solution to Conflicting Rights. *Soundings* 83, 615-25.
- Hall, Timothy. 1990. Moral Character, The Practice of Law, and Legal Education. *Mississippi Law Journal* 60, 511-554.
- Halpern, Cynthia. 2002. *Suffering, Politics, Power. A Genealogy in Modern Political Theory*. New York: State University of New York Press.
- Hämäläinen, Nora. 2009. Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics. *Ethical Theory and Moral Practice* 12, 539-553.
- Hampshire, Stuart. 1989. Morality and Conflict. In *Anti-theory in Ethics and Moral Conservatism*, edited by Stanley G. Clarke and Evan Simpson. New York: State University of New York Press.
- . 1978. Public and Private Morality. In *Public and Private Morality*, edited by Stuart Hampshire. Cambridge: Cambridge University Press.
- Hampton, Jean. 1980. Contracts and Choices: Does Rawls Have a Social Contract Theory? *The Journal of Philosophy* 77, 315-338.
- Hanna, Nathan. 2009. Liberalism and the General Justifiability of Punishment. *Philosophical Studies* 145, 325-349.
- Hannan, Sarah, and Richard Vernon. 2008. Parental Rights: A Role-Based Approach. *Theory and Research in Education* 6, 173-189.
- Harman, Gilbert. 1999. Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error. *Proceedings of the Aristotelian Society* 99, 315-331.
- Harris, George W. 2006. *Reason's Grief*. Cambridge: Cambridge University Press.
- Hart, H.L.A. 2012 (1961). *The Concept of Law*. 3th ed, Clarendon Law Series. Oxford: Oxford University Press.
- . 1983. *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press.
- . 1973. Rawls on Liberty and Its Priority. *University of Chicago Law Review* 40, 534-555.
- Hawkins, Anne Hunsaker. 1999. Ethical Tragedy and Sophocles "Philoctetus". *The Classical World* 92, 337-357.

- Hawthorn, Geoffrey, ed. 2005. *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*. Princeton: Princeton University Press.
- Hegel, George Wilhelm Friedrich. 1998. *Hegel's Aesthetics: Lectures on Fine Art*. Translated by T.M. Knox. Oxford: Oxford University Press.
- Hennekens, H.Ph.J.A.M. 2000. Nadeelcompensatie: Wanneer en Waarom? *De Gemeentestem* 2000, 569-575.
- Herman, Barbara. 1985. The Practice of Moral Judgment *Journal of Philosophy* 87, 414-36.
- Hesselink, Martijn. 2005. Capacity and Capability in European Contract Law *European Review of Private Law* 4, 491-507.
- . 2007. European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice? *European Journal of Private Law* 3, 323-348.
- Holmes, Oliver Wendell. 1897. The Path of the Law. *Harvard Law Review* 10, 457-478.
- Honig, Bonnie. 2009. Antigone's Laments, Creon's Grief. *Political Theory* 37, 5-43.
- . 2010. Antigone's Two Laws: Greek Tragedy and The Politics of Humanism. *New Literary History* 41, 1-33.
- . 1993. Rawls on Politics and Punishment. *Political Research Quarterly* 46, 99-125.
- Hope, Simon. 2013. Friendship, Justice and Aristotle. Some Reasons to be Sceptical. *Res Publica* 19, 37-51.
- Horn, Laurence R. 2012. Contradiction. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Stanford: Metaphysics Research Lab, Stanford University.
- Hsieh, Nien-hê. 2008. Incommensurable Values. Metaphysics Research Lab, Stanford University, URL = <<http://plato.stanford.edu/archives/fall2008/entries/value-incommensurable/>>.
- Hulshoff, Caro. 1997. *Psychische Klachten en Schulden: Preventie en Hulpverlening bij zowel Immateriële als Materiële Problemen. Een Onderzoek bij Allochtone en Autochtone Cliënten*. Amsterdam Riagg-Zuid Oost.
- Hursthouse, Rosalind. 1999. *On Virtue Ethics*. Oxford: Oxford University Press.
- IJzermans, Maria. 2011. *De Overtuigingskracht van Emoties bij het Rechterlijk Oordeel*. Den Haag: Boom Juridische uitgevers.
- Intolerance, European Commission Against Racism and. 2008. Third Report on the Netherlands. Strasbourg: Council of Europe.
- Jacobs, F.C.L.M. 1991. Ten Overstaan van Allen. Levinas en de Universaliteit in de Ethiek. In *Emmanuel Levinas over Psyche, Kunst en Moraal*, edited by Herman Bleijendaal, Johan Goud, et al., 139-147. Baarn: Ambo.
- Jacoby, Jacob. 1999. Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory. In *Working Paper*. New York: New York University.
- Johnson, Oliver A. 1974. The Kantian Interpretation. *Ethics* 85, 58-66.
- Jowett, Benjamin. 2010. *Dialogues of Plato: Translated into English, with Analyses and Introduction*. 4 vols. Vol. 2, Cambridge Library Collection. Cambridge: Cambridge University Press.
- Magna Carta of Judges (Fundamental Principles)*.
- Judicial Ethics Report 2009-2010: Judicial Ethics, Principles, Values and Qualities. 2009. Europe: Working Group European Network of Councils for the Judiciary.
- Kamerman, Sheila B., and Alfred J. Kahn. 1989. Single-parent, Female-Headed Families in Western Europe: Social Change and Response. *International Social Security Review* 42, 3-34.
- Kant, Immanuel. 1996. *Critique of Practical Reason*. Translated by T.K. Abbott. New York: Prometheus Books.

- . 1993. *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*. Translated by James W. Ellington. Indianapolis: Hackett Publishing Company.
- . 1996. *Practical Philosophy*. Translated by Mary J. Gregor. Edited by Paul Guyer and Allen W. Wood, The Cambridge Edition of the Works of Immanuel Kant. New York: Cambridge University Press.
- Kaufmann, Walter. 1968. *Tragedy and Philosophy*. Princeton: Princeton University Press.
- Kennedy, Duncan. 1982. Legal Education as Training for Hierarchy. In *The Politics of Law: A Progressive Critique*, edited by David Kairys, 54-75. New York: Basic Books.
- Kittay, Eva Federer. 2005. Equality, Dignity and Disability. In *Perspectives on Equality: The Second Seamus Heaney Lectures*, edited by Mary Ann Lyons and Fionnuala Waldron, 95-122. Dublin: The Liffey Press.
- Knauer, Nancy J. 2010. Legal Fictions and Juristic Truth. *St. Thomas Law Review* 23, 1-50.
- Kordana, Kevin A., and David H. Tabachnick. 2005. Rawls and Contract Law. *The George Washington Law Review* 73, 598-632.
- Kosman, L.A. 1980. Being Properly Affected. In *Essays on Aristotle's Ethics*, edited by Amélie Oksenberg Rorty. Berkeley: University of California Press.
- Kramer, Larry D. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.
- Kramer, Matthew. 2009. When Is There Not One Right Answer. *The American Journal of Jurisprudence* 53, 49-68.
- Kramer, Matthew H. 2007. *Objectivity and the Rule of Law*, Cambridge Introductions to Philosophy and Law. Cambridge: Cambridge University Press.
- Kronman, Anthony T. 1995. *The Lost Lawyer: Failing Ideals of the Legal Profession*. Cambridge, US: Harvard University Press.
- Kupperman, Joel J. 2001. The Indispensability of Character. *Philosophy* 76, 239-250.
- Landman, Janet. 1993. *Regret: The Persistence of the Possible*. Oxford: Oxford University Press.
- Leib, Ethan J. 2006. Friendship & the Law. *University of California Law Review* 54, 631-707.
- Leontsini, Eleni. 2013. The Motive of Society. Aristotle on Civic Friendship, Justice and Concord. *Res Publica* 19, 21-35.
- Levinas, Emmanuel. 1987. The Ego and the Totality. In *Collected Philosophical Papers*, edited by Emmanuel Lévinas. The Hague: Martinus Nijhoff.
- . 1985. *Ethics and Infinity: Conversations with Philippe Nemo*. Translated by Richard A. Cohen. Pittsburgh: Duquesne University Press.
- Lévinas, Emmanuel. 1969. *Totality and Infinity*. Translated by Alphonso Lingis. Pittsburgh: Duquesne University Press.
- Lilla, Mark, Ronald Dworkin, et al. 2001. *The Legacy of Isaiah Berlin*. New York: New York Review of Books.
- Llewellyn, Karl. 1960. *The Common Law Tradition: Deciding Appeals*. Boston: Little, Brown and Company.
- Loth, Marc. 2009. De Goede Jurist. Over Morele Moed, Onafhankelijkheid en een Riskante Omgeving. In *Code en Karakter. Beroepsethiek in Onderwijs, Jeugdzorg en Recht*, edited by Jos Kole and Doret de Ruyter. Amsterdam: SWP Uitgeverij.
- Louden, Robert B. 2000. *Kant's Impure Ethics. From Rational Beings to Human Beings*. Oxford: Oxford University Press.
- . 1992. *Morality and Moral Theory. A Reappraisal and Reaffirmation*. New York: Oxford University Press.
- . 1990. Virtue Ethics and Anti-theory. *Philosophia* 20, 93-114.

- Luban, David. 1990. Incommensurable Values, Rational Choice, and Moral Absolutes. *Cleveland State Law Review* 38, 65-84.
- . 2001. Value Pluralism and Rational Choice. In *Georgetown Law School Research Paper*. Georgetown: Georgetown Law School.
- Lucy, William. 2005. The Possibility of Impartiality. *Oxford Journal of Legal Studies* 25, 3-31.
- Lyons, David. 1984. Justification and Judicial Responsibility. *California Law Review* 72, 178-199.
- MacCormick, Neil. 1978. *Legal Reasoning and Legal Theory*. Oxford: Oxford University Press.
- Mather, Henry. 2002. Law-making and Incommensurability. *McGill Law Journal* 47, 345-388.
- Mayerfeld, Jamie. 1999. *Suffering and Moral Responsibility*. Oxford: Oxford University Press.
- McDermott, Daniel. 2008. Analytical Political Philosophy. In *Political Theory. Methods and Approaches*, edited by David Leopold and Marc Stears. Oxford: Oxford University Press.
- McDowell, John. 1998. *Mind, Value & Reality*. Cambridge, US: Harvard University Press.
- . 1998. Non-Cognitivism and Rule-Following. In *Mind, Value and Reality*, edited by John McDowell. Cambridge US: Harvard University Press
- . 1998. Values and Secondary Qualities In *Mind, Value and Reality*, edited by John McDowell. Cambridge US: Harvard University Press
- . 1998. Virtue and Reason. In *Mind, Value and Reality*, edited by John McDowell, 50-77. Cambridge US: Harvard University Press
- Millar, John Douglas. 2012. Interview with Simon Critchley: The Tragic and Its Limits. <http://www.thewhitereview.org/interviews/interview-with-simon-critchley-the-tragic-and-its-limits-2/>.
- Montague, Phillip. 1984. Rights and Duties of Compensation. *Philosophy & Public Affairs* 13, 79-88.
- Morgan, Fred W., Drue K. Schuler, et al. 1995. A Framework for Examining the Legal Status of Vulnerable Consumers. *Journal of Public Policy and Marketing* 14, 267-277.
- Moschis, George P., Jill Mosteller, et al. 2011. Research Frontiers on Older Consumers' Vulnerability. *Journal of Consumer Affairs* 45, 467-491.
- Murdoch, Iris. 1997 Against Dryness. In *Existentialists and Mystics: Writings on Philosophy and Literature*, edited by Peter Conradi. Harmondsworth: Penguin Books.
- . 1997 The Idea of Perfection. In *Existentialists and Mystics: Writings on Philosophy and Literature*, edited by Peter Conradi. Harmondsworth: Penguin Books.
- . 1997. Vision and Choice. In *Existentialists and Mystics: Writings on Philosophy and Literature*, edited by Peter Conradi. Harmondsworth: Penguin Books.
- Nagel, Thomas. 1979. *Mortal Questions*. New York: Cambridge University Press.
- . Rawls on Justice. In *Reading Rawls*. New York: Basic Books
- Nelkin, Dana K. 2013. Moral Luck In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Stanford: Metaphysics Research Lab, Stanford University.
- Nietzsche, Friedrich Wilhelm. 2000. *The Birth of Tragedy: Out of the Spirit of Music*. Translated by Douglas Smith, Oxford World's Classics. Oxford: Oxford University Press.
- Nietzsche, Friedrich. 1995. *The Birth of Tragedy*. Translated by Clifton P. Fadiman. New York: Dover Publications.
- Nieuwenhuis, A. J. 2006. *Over de Grens van de Vrijheid van Meningsuiting*. Nijmegen: Ars Aequi.
- Nussbaum, Martha C. 1985. Aeschylus and Practical Conflict. *Ethics* 95, 233-267.

- . 1990. Aristotelian Social Democracy. In *Liberalism and the Good*, edited by R. Douglass Bruce, M. Mara Gerald, et al. New York: Routledge.
- . 1995. Aristotle on Human Nature and the Foundations of Ethics. In *World, Mind and Ethics*, edited by J. Altham and R. Harrison. Cambridge: Cambridge University Press.
- . 2003. Capabilities as Fundamental Entitlements: Sen and Social Justice. *Feminist Economist*, 33-59.
- . 2009. The Capabilities of People with Cognitive Disabilities. *Metaphilosophy* 40, 331-351.
- . 2000. The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis. *Journal of Legal Studies* XXIX, 1005-1036.
- . 2011. *Creating Capabilities: The Human Development Approach*. Cambridge, US: Harvard University Press.
- . 2003. Cultivating Humanity in Legal Education. *The University of Chicago Law Review* 70, 265-279.
- . 1990. The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality. In *Love's Knowledge: Essays on Philosophy and Literature*. Oxford: Oxford University Press.
- . 1993. Equity and Mercy. *Philosophy & Public Affairs* 22, 83-125.
- . 2001 (1986). *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*. Rev. ed. New York: Cambridge University Press.
- . 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, US: Harvard University Press.
- . 1992. Human Functioning and Social Justice: In Defense of Aristotelian Essentialism. *Political Theory* 20, 202-246.
- . 1992. Justice for Women! *The New York Review of Books*, October 8.
- . 1990. *Love's Knowledge. Essays on Philosophy and Literature*. Oxford: Oxford University Press.
- . 1988. Nature, Function, and Capability: Aristotle on Political Distribution. In *Working Paper, UNU-Wider*.
- . 1993. Non-Relative Virtues: An Aristotelian Approach. In *The Quality of Life*, edited by Marta C. Nussbaum and Amartya Sen. Oxford: Oxford University Press.
- . 1995. *Poetic Justice. The Literary Imagination and Public Life*. Boston: Beacon Press.
- . 2003. Political Liberalism and Respect: A Response to Linda Barclay. *Sats-Nordic Journal of Philosophy* 4.
- . 2001. Political Objectivity. *New Literary History* 32, 883-906.
- . 2003. Rawls and Feminism. In *The Cambridge Companion to Rawls*, edited by Samuel Freeman, 488-520. New York: Routledge.
- . 2009. Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach. *Chicago Journal of International Law* 10, 431-436.
- . 2007. The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism. *Harvard Law Review* 121, 4-97.
- . 2003. Tragedy and Human Capabilities: A Response to Vivian Walsh. *Review of Political Economy* 15, 413-418
- . 2003. Tragedy and Justice: Bernard Williams Remembered. *Boston Review*.
- . 2001. *Upheavals of Thought: The Intelligence of Emotions*. Cambridge: Cambridge University Press.
- . 2010. Veiled Threats. *The New York Times*, July 11.
- . 1998. Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility. *Boston Review*.

- . 2000. Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour. In *The Path of the Law and its Influence. The Legacy of Oliver Wendell Holmes, Jr.*, edited by Steven J. Burton. Cambridge: Cambridge University Press.
- . 2000. *Women and Human Development. The Capabilities Approach*. Cambridge: Cambridge University Press.
- Nussbaum, Martha C., and Jonathan Glover, eds. 1995. *Women, Culture and Development. A Study of Human Capabilities*. Oxford: Clarendon Press.
- NVvR Guide to Judicial Conduct. 2011. Netherlands: The Dutch Association for the Judiciary.
- Oakeshott, Michael. 1989. The Tower of Babel. In *Anti-Theory in Ethics and Moral Conservatism*, edited by Stanley G. Clarke and Evan Simpson, 185-205. New York: State University of New York Press.
- Oakley, Justin, and Dean Cocking. 2001. *Virtue Ethics and Professional Roles*. Cambridge: Cambridge University Press.
- Okin, Susan Moller. 1989. *Justice, Gender and the Family*. New York: Basic Books
- Olson, Kevin. 2002. Recognizing Gender, Redistributing Labor. *Social Politics* 9, 380-410.
- Ommeren, C.M. van, L.S. de Ruig, et al. 2009. Huishoudens in de Rode Cijfers. Omvang en Achtergronden van Huishoudens met een Risico op Problematische Schulden. Zoetermeer: Panteia.
- Oomen, Barbara. 2011. Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands. *Human Rights Quarterly* 33, 175-200.
- Oomen, Barbara, Joost Guijt, et al. 2010. CEDAW, The Bible and the State of the Netherlands: The Struggle over Orthodox Women's Political Participation and their Responses. *Utrecht Law Review* 6, 158-174.
- Pessers, D.W.J.M. 1999. Liefde, Wederkerigheid en Recht. Een Interdisciplinair Onderzoek naar het Wederkerigheidsbeginsel. Amsterdam: University of Amsterdam.
- Peterson, Christopher, and Martin E.P. Seligman. 2004. *Character Strengths and Virtues*. Oxford: Oxford University Press.
- Peterson, Richard R. 1989. *Woman, Work and Divorce*. New York: State University of New York Press.
- Pildes, Richard H. 1992. Review: Conceptions of Value in Legal Thought. *Michigan Law Review* 90, 1520-1559.
- Plato. The Republic. edited by Benjamin Jowett: The Internet Classics Archive.
- Pogge, Thomas. 2002. Can the Capabilities Approach be Justified? *Philosophical Topics* 30, 167-228.
- . 2010. A Critique of the Capabilities Approach. In *Measuring Justice*, edited by Harry Brighouse and Ingrid Robeyns, 17-61. Cambridge: Cambridge University Press.
- Posner, Richard. 2010. The Question of Consumer Competence. <http://www.becker-posner-blog.com/>.
- Putnam, Hilary. 2002. *The Collapse of the Fact/Value Dichotomy and Other Essays*. Cambridge, US: Harvard University Press.
- . 1977. Realism and Reason. *Proceedings and Addresses of the American Philosophical Association* 50, 483-498.
- Quinton, Anthony. 1995. The Ethics of Philosophical Practice. In *The Oxford Companion to Philosophy*, edited by T. Honderich. Oxford.
- Rawls, John. 1981. The Basic Liberties and Their Priority. In *The Tanner Lectures on Human Values*. Michigan: University of Michigan.
- . 1997. The Idea of Public Reason Revisited. *The University of Chicago Law Review* 64, 765-807.

- . 1980. Kantian Constructivism in Moral Theory. *The Journal of Philosophy* 77, 515-572.
- . 2005. *Political Liberalism*. New York: Columbia University Press.
- . 1982. Social Unity and Primary Goods. In *Utilitarianism and Beyond*, edited by Bernard Williams and Amartya Sen. Cambridge: Cambridge University Press.
- . 1999 (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- . 1971. *A Theory of Justice*. Cambridge: Harvard University Press.
- . 1955. Two Concepts of Rules. *The Philosophical Review* 64, 3-32.
- Raz, Joseph. 1997. Incommensurability and Agency. In *Incommensurability, Incomparability and Practical Reason*, edited by Ruth Chang. Cambridge, US: Harvard University Press.
- Richards, David. 1979. The Theory of Adjudication and the Task of the Great Judge. *Cardozo Law Review* 171, 171-217.
- Richardson, Henry S. 1997. *Practical Reasoning about Final Ends*. Cambridge: Cambridge University Press.
- . 1990. Specifying Norms as a Way to Resolve Concrete Ethical Problems. *Philosophy & Public Affairs* 19, 279-310.
- Roberts, Julian V. 1992. Public Opinion, Crime, and Criminal Justice. *Crime & Justice* 180, 99-180.
- Robeyns, Ingrid. 2010. Gender and the Metric of Justice. In *Measuring Justice*, edited by Harry Brighouse and Ingrid Robeyns, 215-235. Cambridge: Cambridge University Press.
- . 2007. *Ideal Theory in Theory and Practice*. Nijmegen: Radboud University Nijmegen.
- . 2006. Nussbaum over Capabilities en Rechtvaardigheid. *Filosofie & Praktijk* 4, 17-28.
- Robeyns, Ingrid, and Harry Brighouse. 2010. Introduction: Social Primary Goods and Capabilities as Metrics of Justice. In *Measuring Justice*, edited by Ingrid Robeyns and Harry Brighouse. Cambridge: Cambridge University Press.
- Rooy, Wim van, and Sam van Rooy. 2010. *Islam: Kritische Essays over een Politieke Religie: Aspect*.
- Sabini, John, and Mauri Silver. 2005. Lack of Character: Situationism Critiqued. *Ethics*, 535-562.
- Scanlon, Thomas. 2004. Adjusting Rights and Balancing Values. In *Fordham Law Review*, 1477-1486.
- Scharffs, Brett G. 2000. Adjudication and the Problems of Incommensurability. *William and Mary Law Review* 42, 1369-1435.
- Schauer, Frederick. 1993. Commensurability and its Constitutional Consequences. *Hastings Law Journal* 45, 785-812.
- . 2011. Legal Fictions Revisited. *SSRN eLibrary*.
- Schmidt, David J. 1994. Can Law Survive: On Incommensurability and the Idea of Law. *University of Toledo Law Review* 26, 147-158.
- Schnittker, Jason, and Andrea John. 2007. The Long-Term Effects of Incarceration on Health. *Journal of Health and Social Behaviour* 48, 115-130.
- Schoeman, Ferdinand. 1980. Rights of Children, Rights of Parents, and the Moral Basis of the Family. *Ethics* 91, 6-19.
- Scholten, P., ed. 1974. *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*. Zwolle: W.E.J. Tjeenk Willink.
- Schoordijk, H.C.F. 1972. *Oordelen en Vooroordelen. Rede uitgesproken bij de 45e dies van de Katholieke Universiteit Brabant*. Deventer: Kluwer
- Schrama, W.M. 2010. Verhuizen na Scheiding: geen Winnaars, veel Verliezers. *Tijdschrift voor Familie- en Jeugdrecht* 88.

- Schroeder, Jeanne. 2001. Apples and Oranges. In *Research Paper Series*, 1-30. New York: Cardozo Law School.
- Sen, Amartya. 2004. Elements of a Theory of Human Rights. In *Philosophy & Public Affairs*, 315-356.
- . 1980. Equality of What? . In *The Tanner Lectures on Human Values*, edited by S. McMurrin, 196-220. Salt Lake City: University of Utah Press.
- . 1990. Justice: Means versus Freedoms. *Philosophy and Public Affairs* 19, 111-121.
- Shadid, Wasif. 2009. Moslms in de Media: de Mythe van de Registrerende Journalistiek. In *Mist in de Polder: Zicht op Ontwikkelingen omtrent de Islam in Nederland*, edited by S. Vellenga, 173-193. Amsterdam: Aksant.
- Shapiro, Daniel. 1989. Conflicts and Rights. *Philosophical Studies* 55, 263-278.
- Shepherd, Lois. 2003. Face to Face: A Call for Radical Responsibility in Place of Compassion. *St. John's Law Review* 77, 445-514.
- Shiner, Robert A. 1994. Aristotle's Theory of Equity. *Loyola of Los Angeles Law Review* 26, 1245-1264.
- Silber, Norman I. 1990. Observing Reasonable Consumers: Cognitive Psychology, Consumer Behaviour and Consumer Law. *Loyola Consumer Law Reporter* 2, 69-74.
- Simmons, A. 2010. Ideal and Nonideal Theory *Philosophy and Public Affairs* 38, 5-36.
- Simpson, Peter. 1992. Contemporary Virtue Ethics and Aristotle. *Review of Metaphysics* 45, 503-524.
- Singer, Joseph W. 2008. Normative Methods for Lawyers. In *Harvard Public Law Working Paper*. Cambridge, US: Harvard Law School.
- Smith, Carel E. 1998. *Feit en Rechtsnorm. Een Methodologische Studie naar de Betekenis van de Feiten voor de Rechtsvinding en de Legitimatie van het Rechtsoordeel*. Maastricht: Shaker.
- . 2005. *Regels van Rechtsvinding*. Den Haag: Boom Juridische uitgevers.
- Smith, Nick. 1997. Incommensurability and Alterity in Contemporary Jurisprudence. *Buffalo Law Review* 45, 503-553.
- Soeharno, Jonathan. 2009. *The Integrity of the Judge*. Farnham: Ashgate.
- Sokoloff, William W. 2005. Between Justice and Legality: Derrida on Decision. *Political Research Quarterly* 58, 341-352.
- Solum, Lawrence B. Legal Theory Lexicon.
http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html.
- . 2003. Virtue Jurisprudence. A Virtue-Centered Theory of Judging. *Metaphilosophy* 34, 178-213.
- . 2013. Virtue Jurisprudence. Towards an Aretaic Theory of Law. In *Aristotle and the Philosophy of Law. Theory, Practice and Justice*, edited by Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho. Dordrecht: Springer.
- . 1987. The Virtues and Vices of a Judge: an Aristotelian Guide to Judicial Selection. *California Law Review* 61, 1735-1756.
- Soper, Philip. 1977. Legal Theory and the Obligation of A Judge. The Hart/Dworkin Dispute. *Michigan Law Review* 75, 473-519.
- Sophocles. 1924. *The Complete Plays of Sophocles*. Edited by Richard Claverhouse Jebb. Cambridge: Cambridge University Press.
- Sreenivasan, Gopal. 2002. Errors about Errors: Virtue Theory and Trait Attribution. *Mind* 111, 47-68.
- Stamatis, Costas M. 1994. Justice without Law: a Postmodernist Paradox. *Law and Critique* 2, 265-284.
- Stark, Cynthia A. 2009. Respecting Human Dignity: Contract Versus Capabilities. *Metaphilosophy* 40, 366-381.

- Statman, Daniel. 1996. Hard Cases and Moral Dilemmas. *Law and Philosophy* 15, 117-148.
- Steinberg, Laurence. 2004. Risk Taking in Adolescence: What Changes, and Why? *Annals of the New York Academy of Sciences* 1021, 51-58.
- Stocker, Michael. 1990. *Plural and Conflicting Values*. Oxford: Oxford University Press.
- Sullivan, William M. 2007. Professional Identity and Purpose. In *Educating Lawyers. Preparation for the Profession of Law*, edited by William M. Sullivan, Anne Colby, et al., 126-144. San Francisco: Jossey-Bass.
- Sunstein, Cass. 1997. Incommensurability and Kinds of Valuation. In *Incommensurability, Incomparability and Practical Reason*, edited by Ruth Chang. Cambridge, US: Harvard University Press.
- Symposium. 1998. Law and Incommensurability. *University of Pennsylvania Law Review* 146.
- Tamanaha, B.Z. 2007. A Concise Guide to the Rule of Law. In *Florence Workshop on The Rule of Law* edited by Neil Walker and Gianluigi Palombella. Florence: Hart Publishing.
- . 2004. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.
- Trappenburg, Margot. 2000. In Defence of Pure Pluralism: Two Readings of Walzer's Spheres of Justice *The Journal of Political Philosophy* 8, 343-362.
- Tushnet, Mark. 1999. *Taking the Constitution away from the Courts*. Princeton: Princeton University Press.
- Valentini, Laura. 2009. On the Apparent Paradox of Ideal Theory. *The Journal of Political Philosophy* 17, 332-355.
- Vermaat, Matthijs, Hans van Rooij, et al. 2010. Compensatie in de Wmo: De Rechter als Plaatsvervangend Bestuurder? *Tijdschrift voor Gezondheidsrecht* 6, 444-451.
- Vernant, Jean-Pierre, and Pierre Vidal-Naquet. 1990. *Myth and Tragedy*. New York: Zone Books.
- Vranken, J.B.M., ed. 1995. *Asser-Vranken (Algemeen Deel)*. Zwolle: W.E.J. Tjeenk Willink.
- Vrouwenbond, FNV. 2010. Manifest Meer Kansen voor Alleenstaande Ouders in Lokaal Beleid.
- Wald, Michael. 1976. State Intervention on Behalf of 'Neglected' Children: Standards for Monitoring the Status of Children in Foster Care, and Termination of Parental Rights. *Stanford Law Review* 626.
- Waldron, Jeremy. 2006. The Core of the Case Against Judicial Review. *The Yale Law Journal* 115, 1348-1406.
- . 1989. Rights in Conflict. *Ethics* 3, 503-519.
- . 2010. The Rule of Law and the Importance of Procedure. In *New York University Public Law and Legal Theory Working Papers*, 1-25. New York: New York University School of Law.
- . 1987. Theoretical Foundations of Liberalism. *The Philosophical Quarterly* 37, 127-150.
- Walton, Douglas N. 1986. *Courage: A Philosophical Investigation*. Berkeley: University of California Press.
- Walzer, Michael. 1973. Political Action: The Problem of Dirty Hands. *Philosophy & Public Affairs* 2, 160-180.
- . 1983. *Spheres of Justice. A Defence of Pluralism and Equality*. Oxford: Oxford University Press.
- . 1983. Spheres of Justice. An Exchange. *The New York Review of Books*.
- Warner, Richard. 1992. Incommensurability as a Jurisprudential Puzzle. *Chicago-Kent Law Review* 147, 247-168.

- Wasserman, David. 2006. Disability, Capability, and Thresholds for Distributive Justice. In *Capability Equality: Basic Issues and Problems*, edited by Alexander Kaufman, 214-234: Routledge.
- Wasserstrom, Richard. 1983. Roles and Morality. In *The Good Lawyer*, edited by David Luban. New Jersey: Rowman and Allanheld.
- Weithman, Paul. 2009. John Rawls and the Task of Political Philosophy. *The Review of Politics* 71, 113-125.
- Wellman, Christopher Heath. 1995. On Conflicts between Rights. *Law and Philosophy* 14, 271-295.
- Wenar, Leif. 2011. Rights. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. Stanford: Metaphysics Research Lab, Stanford University.
- Wiarda, G.J. 1999. *Drie Typen van Rechtsvindend*. Deventer: W.E.J. Tjeenk Willink.
- Wiggins, David. 1980. Deliberation and Practical Reason. In *Essays on Aristotle's Ethics*, edited by Amélie O. Rorty. Berkeley: University of California Press.
- . 1997. Incommensurability. Four proposals. In *Incommensurability, Incomparability and Practical Reason*, edited by Ruth Chang. Cambridge, US. : Harvard University Press.
- . 2004. Neo-Aristotelian Reflections on Justice. *Mind* 113, 477-512.
- Wijze, Stephen de. 2004. Tragic Remorse: The Anguish of Dirty Hands. *Ethical Theory and Moral Practice* 7, 453-471.
- Wildeman, Christopher, and Bruce Western. 2010. Incarceration in Fragile Families. *The Future of Children* 20, 157-177.
- Williams, Bernard. 1981. Conflicts of Values. In *Moral Luck: Philosophical Papers 1973-1980*. Cambridge: Cambridge University Press.
- . 1973. Ethical Consistency. In *Problems of the Self: Philosophical Papers 1956-1972*. Cambridge: Cambridge University Press.
- . 1985. *Ethics and the Limits of Philosophy*. London: Fontana Press.
- . 2001. Liberalism and Loss. In *The Legacy of Isaiah Berlin*, edited by Mark Lilla, Ronald Dworkin, et al. New York: The New York Review of Books.
- . 1981. *Moral Luck. Philosophical Papers 1973-1980*. Cambridge: Cambridge University Press.
- . 1972. *Morality. An Introduction to Ethics*. Cambridge: Cambridge University Press.
- . 2008. *Philosophy as a Humanistic Discipline*. Edited by A.W. Moore. Princeton: Princeton University Press.
- . 1981. Practical Necessity. In *Moral Luck: Philosophical Papers 1973-1980*, 124-131. Cambridge: Cambridge University Press.
- . 1973. *Problems of the Self: Philosophical Papers 1956-1972*. Cambridge: Cambridge University Press.
- . 1995. Replies. In *World, Mind, and Ethics*, edited by J.E.J. Altham and Ross Harrison, 170-184. Cambridge: Cambridge University Press.
- . 1996. The Women of Trachis. Fiction, Pessimism, Ethics. In *The Greeks and Us. Essays in Honor of W.H. Adkins*, edited by Robert B. Loudon and Paul Schollmeier. Chicago: The University of Chicago Press.
- Witteveen, Willem, and Sanne Taekema, eds. 2000. *Verbeeldingsmacht. Wat Juristen Moeten Lezen*. Den Haag: Boom Juridische uitgevers.
- Wolcher, Louis. 2008. *Law's Task. The Tragic Circle of Law, Justice and Human Suffering*, Applied Legal Philosophy. Hampshire: Ashgate.
- Wolfram, Sybil. 1989. *Philosophical Logic*. London: Routledge.
- Wood, Diana P. 2012. Constitutions and Capabilities. A (Necessarily) Pragmatic Approach. In *Justice and the Capabilities Approach*, edited by Thom Brooks. Farnham: Ashgate.

- Wright, R. George. 1989. Does Free Speech Jurisprudence Rests on a Mistake? Implications of the Commensurability Debate. *Loyola of Los Angeles Law Review* 23, 763-790.
- Yong-Soon, Kang, and Nancy M. Ridgway. 1996. The Importance of Consumer Market Interactions as a Form of Social Support for Elderly Consumers. *Journal of Public Policy & Marketing* 15, 108-117.
- Yoona, Carolyn, Catherine A. Coleb, et al. 2009. Consumer Decision Making and Aging: Current Knowledge and Future Directions. *Journal of Consumer Psychology* 19, 2-16.
- Zahnd, Eric G. 1996. The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law. *Law and Contemporary Problems* 59, 263-295.
- Zucca, Lorenzo. 2008. Conflicts of Fundamental Rights as Constitutional Dilemmas. In *Conflicts between Fundamental Rights*, edited by Eva Brems. Oxford: Intersentia.
- . 2007. *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA*. Oxford: Oxford University Press.

Samenvatting

De Breekbaarheid van Rechtspraak. Het primaat van de praktijk

Hoofdstuk 1, de inleiding van dit boek, opent met een beschrijving van een rechtbankscène uit de film *Ladybird* van Ken Loach waarin Maggie, moeder van vier kinderen, door een rechterlijke beslissing permanent uit de ouderlijke macht wordt ontzet. Als toeschouwer voelen we mee wanneer Maggie bij het horen van de beslissing het uitschreeuwt van boosheid en verdriet en de onderkoelde rechter veelvuldig voor ‘bastard’ uitmaakt. Door haar pijn en woede, maar ook door de persoon van de rechter vragen we ons af: is deze beslissing wel de juiste? Zou een andere rechter anders hebben besloten? Is er eigenlijk wel een juiste beslissing in dergelijke zaken? Heeft Maggie een reden om boos te zijn?

We hebben natuurlijk geen films nodig om te weten dat rechters regelmatig beslissingen nemen die voor de verliezende burgers ingrijpende gevolgen hebben en die wellicht met een andere rechter anders zouden uitpakken. Rechtspraak kan in ieder geval door ‘leken’ ervaren worden als een soms moeilijk te doorgronden, mogelijk willekeurige en in ieder geval veelal pijnlijke praktijk.

Deze problematische verschijningsvorm (hierna fenomenologie) van rechtspraak werpt als vanzelf de vraag op naar de rechtvaardiging van rechterlijke beslissingen en meer algemeen naar de morele kwaliteit van rechtspraak. Deze vragen staan centraal in dit boek en in samenhang daarmee ook de vraag hoe we genoemde problematische fenomenologie van rechtspraak vanuit moreel oogpunt het beste kunnen begrijpen.

De methodologie van dit filosofische onderzoek is die van het ‘waarnemend evenwicht’. Het boek behelst een combinatie van conceptuele analyse en abstracte argumentatie enerzijds en aandacht voor het particuliere geval door de bespreking van op de realiteit gebaseerde casuïstiek anderzijds. De gevoelens en intuïties die worden opgeroepen door de bespreking van deze casuïstiek maken integraal onderdeel uit van het filosofische argument.

Het eerste deel van het boek, ‘de stabiliteit van het juiste’, is een kritisch onderzoek naar een stabiliserende benadering van rechtspraak, een benadering die morele kwaliteit begrijpt in termen van de realisering van een normatieve morele theorie. Het tweede deel, ‘de instabiliteit van het juiste’, bespreekt twee benaderingen die morele kwaliteit van rechtspraak juist begrijpen aan de hand van inherente en contingente kenmerken van de praktijk. Een van deze benaderingen is de *breekbaarheid van rechtspraak*, de benadering die uiteindelijk in dit boek wordt verdedigd.

Omdat het voor juristen niet vanzelf spreekt dat de filosofie van betekenis kan zijn voor een onderzoek naar (de morele kwaliteit van) rechtspraak, begint **hoofdstuk 2** met de bespreking van een alledaagse, niet filosofische, ‘common sense’ visie op rechtspraak, die ook vrij gangbaar is onder juristen. Deze benadering wordt gereconstrueerd aan de hand van Hart’s befaamde beschrijving van het ‘interne gezichtspunt’ van de praktiserende jurist. Echter, analyse van dit ‘interne gezichtspunt’ laat zien dat het vanwege gebrek aan conceptuele overtuigingskracht, kritisch potentieel en apaiserend karakter niet volstaat voor een opvatting over de *morele* kwaliteit van rechtspraak. Het 'interne gezichtspunt' biedt eerder een rationalisering dan een rechtvaardiging voor rechtspraak. Onderzoek naar de *morele* kwaliteit van rechtspraak heeft de filosofie nodig, juist vanwege haar analytische, conceptuele vermogen en het psychologische voordeel van relatieve distantie die zij meebrengt. Als start van dit filosofische onderzoek wordt in hoofdstuk 2 tevens een *stabiliserende* benadering van rechtspraak gepresenteerd, een prototype van denken over rechtspraak dat we (in afgeleide vorm) vaak in de rechtstheorie aantreffen.

Kenmerkend voor deze filosofische benadering is dat zij uitgaat van *juridische commensurabiliteit*, de idee dat voor alle rechterlijke beslissingen een *commensurans* beschikbaar is, dat wil zeggen een vooraf gegeven, van de rechter onafhankelijke en voldoende bepaalde maatstaf die ‘representatieve adequaatheid’ (representative adequacy) heeft. Deze commensurans kan zijn een regel, een precedent of een rechtsbeginsel en is uiteindelijk, als finale commensurans, in ieder geval een normatieve theorie van politieke moraliteit die een uitputtende rechtvaardiging en verklaring biedt voor een specifieke rechterlijke beslissing. Een stabiliserende benadering van rechtspraak ziet rechtspraak uiteindelijk als institutioneel toegepaste morele theorie.

Juridische commensurabiliteit impliceert verder maximalisatie als invulling van juridische rationaliteit: de rechter dient in deze opvatting als eis van juridische rationaliteit de commensurans maximaal te dienen. Kenmerkend voor juridische commensurabiliteit is dan ook dat het verliezende belang als een louter subjectief verschijnsel dient te worden begrepen. Immers, wanneer de rechter de commensurans met zijn beslissing maximaal heeft gediend, is er geen juridisch perspectief meer op basis waarvan we aan het restbelang gewicht kunnen toekennen. In een stabiliserende benadering ontvalt aan het verliezende belang definitief zijn juridisch gewicht. Daadwerkelijke conflicten tussen rechten van burgers worden in deze benadering dan ook niet erkend.

Deze benadering is stabiliserend omdat zij zowel in epistemologisch als in moreel opzicht houvast en geruststelling biedt aan de rechter, de rechtsorde als geheel en de burger die

betrokken is bij een rechtszaak. Moreel hoogstaande rechtspraak is volgens deze benadering volledig transparant, verklaarbaar, ordentelijk en zonder moreel verlies en voldoet op een vrije directe manier aan de eis van politieke legitimiteit. De finale commensurans biedt uiteindelijk aan iedere partij in een rechtszaak een finale, verklarende en rechtvaardigende grond voor de lasten die hij door een rechterlijke beslissing mogelijk moet dragen.

In een stabiliserende benadering wordt de problematische fenomenologie van rechtspraak dan ook begrepen als louter het gevolg van irrationaliteit, van een fout in het recht, in de beslissing van de rechter, of van een foutief begrip van de aard van de beslissing bij de burger. Dit past ook in de Socratische traditie van het denken over de moraal waarin commensurabiliteit als noodzakelijke en voldoende voorwaarde wordt gezien voor stabiliteit in het menselijk bestaan.

Hoe moeten we de geldigheid van deze benadering beoordelen? Die geldigheid hangt in ieder geval niet af van de mate waarin zij een 'goede' beschrijving biedt van de concrete praktijk van rechtspraak. Immers, het kan zijn dat deze praktijk 'fouten' vertoont. Een beter aanknopingspunt voor een onderzoek naar de houdbaarheid van een stabiliserende benadering is de verklarende en rechtvaardigende rol die deze toekent aan normatieve theorieën van politieke moraliteit. Zoals gezegd: deze theorieën dienen in een stabiliserende benadering als finale commensurans, als uitputtende verklarende en rechtvaardigende maatstaf voor rechterlijke beslissingen. Dit vertrouwen op deze werking van theorie is niet zonder meer gegrond. In een kritisch onderzoek moeten we in ieder geval nagaan of dit vertrouwen terecht is.

Als opmaat voor dit kritische onderzoek biedt **hoofdstuk 3** een typologie van de soort normatieve liberale theorieën van politieke moraliteit waarop deze stabiliserende benadering steunt. Deze theorieën passen in de eerder genoemde Socratische, rationalistische traditie binnen de praktische filosofie, waarin de theoretische rede een set van normatieve beginselen voorschrijft als finaal en objectief gezichtspunt om de morele kwaliteit van de praktijk uitputtend te garanderen.

Vanwege hun kritisch potentieel en hun vertrouwen in de kracht van reflectie zijn deze theorieën ook te begrijpen als typisch uitvloeisel van het Verlichtingsdenken. Met behulp van normatieve beginselen kunnen lokale praktijken, instituties en specifieke actoren worden geëvalueerd en kan een moreel nastrevenswaardig objectief geldig ideaal worden gerealiseerd.

Normatieve theorieën van politieke moraliteit gaan er vanuit dat de verantwoordelijke actoren in een moreel geladen praktijk in voldoende mate in staat zijn in overeenstemming met de

theorie te denken en handelen. Hun cognitieve vermogens moeten in ieder geval de kwaliteiten van de theoretische rede bezitten: abstractie, algemeenheid, onpartijdigheid en consistentie. Weinig verrassend, zijn zij idealiter allemaal een specifiek soort filosoof. Indien een samenleving eenmaal volkomen voldoet aan de eisen van een normatieve liberale theorie van politieke moraliteit, dan kunnen redelijke burgers volledig worden verzoend met de politieke orde waarin zij leven, met inbegrip van de ambivalentie, de onzekerheid en het ongemak waarmee die orde bezien vanuit hun individuele perspectief gepaard gaat. De problematische fenomenologie van die politieke orde kan dan ontmanteld worden als een irrationeel bijverschijnsel van een moreel nastrevenswaardig ideaal, een bijverschijnsel dat vanuit het oogpunt van politieke moraliteit niet ter zake doet.

Normatieve theorieën van politieke moraliteit impliceren een rationalistische opvatting van rechtspraak: rechtspraak is volgens deze theorieën een vorm van institutioneel toegepaste theorie en rechters zijn de ‘rechter-filosofen’ die in staat zijn om uit de ‘modder’ van het alledaagse recht een systeem te (re)construeren welks toepassing uiteindelijk leidt tot een moreel juridische beslissing.

Op basis van de typologie van normatieve theorieën van politieke moraliteit komt duidelijk naar voren waarom deze theorieën zo van belang zijn voor de houdbaarheid van een stabiliserende opvatting van rechtspraak: de beginselen hebben de status van een commensurans. Zij hebben, althans zo is de bewering, voldoende normatieve en kritische kracht en zij voldoen zodanig aan de eis van ‘representatieve adequaatheid’ dat hun toepassing tot politiek-moreel restloze uitkomsten leidt. Vanwege deze aan hen toegedichte eigenschappen, zijn de normatieve beginselen van politieke moraliteit cruciaal voor de rechtvaardiging van juridische commensurabiliteit en de daarmee samenhangende stabiliserende interpretatie van de problematische verschijningsvorm of fenomenologie van rechtspraak.

Hoofdstuk 4 is het eerste van vier hoofdstukken die nader ingaan op twee specifieke theorieën van rechtvaardigheid. Beide hebben op het eerste gezicht een grote verklarende en rechtvaardigende kracht voor de werking van de belangrijkste instituties in een Westerse constitutionele democratie. Dit zijn de theorieën van John Rawls’ and Martha Nussbaum. Hun theorieën bieden de soort van beginselen van rechtvaardigheid die sterke kandidaten zijn om in de praktijk van rechtspraak te dienen als finale commensurans.

In Rawls’ theorie is de gelijke waardigheid van burgers de hoogste en finale waarde die een samenleving moet dienen en dat kan volgens hem indien de belangrijkste instituties de beginselen van rechtvaardigheid als finale maatstaf adequaat en categorisch toepassen.

Rawls' theorie is Kantiaans met Aristotelische elementen. Het Kantiaanse karakter is gelegen in het Kantiaans mensbeeld dat hij in zijn theorie tot uitgangspunt neemt voor de bepaling van de rechten en plichten van burgers. Deze rechten en plichten zijn afgeleid van de fundamentele belangen van burgers, opgevat als vrije, autonome en afhankelijke wezens. Tegelijk en zoals past in een Aristotelische benadering van politieke moraliteit beoogt Rawls - weliswaar in beperkte mate- tegemoet te komen aan de behoeften van burgers opgevat als behoeftige en afhankelijke wezen. Een samenleving moet volgens hem wel degelijk in enkele van die behoeften voorzien om burgers een voldoende gelijke kans te bieden op een leven in overeenstemming met hun waardigheid.

Op basis van deze Kantiaanse en Aristotelische overwegingen komt Rawls tot twee abstracte en algemene beginselen van rechtvaardigheid. Deze beginselen schrijven een eerlijke verdeling van hulpgoederen voor, van basisvrijheden, kansen, inkomen en vermogen. Rawls vergelijkt deze beginselen met Kant's categorische imperatief: ze bieden het finale, uitputtende en absolute gezichtspunt ter vaststelling van de aanspraken van burgers. Voldoet een samenleving aan deze beginselen dan hebben burgers vanuit moreel oogpunt een uitputtende verklaring en rechtvaardiging voor de positie waarin zij als burgers verkeren. Daarmee is dan ook aan het liberale principe van politieke legitimiteit voldaan: burgers hebben met de beginselen van rechtvaardigheid een voor hen rationele reden om ook de lasten die zij moeten dragen in een politieke orde te aanvaarden, zo is de idee.

Rechtspraak heeft in Rawls' theorie een belangrijke taak. Het is een van de instituties die rechtvaardigheid vaststelt en realiseert. Zoals het een aanhanger van een normatieve theorie van politieke moraliteit past, huldigt Rawls een rationalistische of stabiliserende opvatting van rechtspraak. Hij ziet inderdaad rechtspraak als een institutionele toepassing van normatieve theorie.

In tegenstelling tot de aanspraken van Rawls' theorie, betoogt **hoofdstuk 5** dat in een samenleving die Rawls' beginselen van rechtvaardigheid volledig realiseert, anders dan bij wijze van incident de waarde van gelijke waardigheid van burgers wel degelijk kan worden geschonden, arbitraire vormen van machtsuitoefening daarbij inbegrepen. Dit komt door respectievelijk de conflicten van rechtvaardigheid die kunnen ontstaan, door de conceptuele armoede van rechtvaardigheid en door de onderbepaaldheid daarvan. Door deze kenmerken leidt de toepassing van Rawls' normatieve beginselen tot wat wordt aangeduid met 'residuen van rechtvaardigheid', situaties waarbij de gelijke waardigheid van burgers wordt gecompromitteerd.

Deze kenmerken hebben vanwege de hieruit voortvloeiende ‘residuen van rechtvaardigheid’ invloed op het morele karakter van rechtspraak. Rawls’ beginselen van rechtvaardigheid kunnen als normatieve achtergrondtheorie van recht en rechtspraak in ieder geval niet functioneren als finale commensurans. Zij rechtvaardigen dus geen vertrouwen op juridische commensurabiliteit en bieden geen steun voor een stabiliserende benadering van rechtspraak, noch voor de met die benadering samenhangende duiding van haar problematische fenomenologie. Rawlsiaanse beginselen van rechtvaardigheid kunnen niet worden gebruikt om de problematische fenomenologie van rechtspraak te voorkomen of te ontmantelen als irrationele verschijningsvorm.

Hoofdstuk 6 introduceert Nussbaums Capabilities-benadering. Deze theorie van rechtvaardigheid moet worden begrepen als spiegelbeeld van Rawls’ theorie: haar theorie is primair Aristotelisch met een vleug Kantianisme. Nussbaums Capabilities-benadering heeft de potentie om enkele van de Rawlsiaanse ‘residuen van rechtvaardigheid’ te voorkomen. Haar theorie is vanwege de voorgestelde beginselen van rechtvaardigheid, te weten de lijst met Centrale Menselijke Vermogens, beter geschikt om de waarde van gelijke waardigheid daadwerkelijk te realiseren in de praktijk.

De achterliggende reden hiervoor is dat het persoonsbegrip dat Nussbaum hanteert in grote mate empirisch geladen is. De Capabilities-benadering gaat uit van burgers als afhankelijke, behoeftige en capabele wezens en stelt met het oog op het garanderen van gelijke waardigheid de vraag naar wat deze burgers daadwerkelijk kunnen doen en zijn. Vanwege dit meer empirisch geladen persoonsbegrip bieden de beginselen van rechtvaardigheid van Nussbaum vergeleken met die van Rawls niet slechts een conceptueel rijker, maar ook een ‘dikker’, meer substantieel gezichtspunt, dat hierdoor meer sturende kracht heeft voor de praktijk.

De potentie om enkele Rawlsiaanse ‘residuen van rechtvaardigheid’ te voorkomen heeft ook haar uitwerking op de morele kwaliteit van rechtspraak. Nussbaums theorie van rechtvaardigheid biedt als achtergrondtheorie voor recht en rechtspraak een sterkere ondersteuning voor een stabiliserende benadering van rechtspraak dan de theorie van Rawls. De lijst met Centrale Menselijke Vermogens voldoet meer dan de beginselen van Rawls aan de beschrijving van een finale commensurans. Zo beschouwd lost Nussbaums Capabilities-benadering niet alleen sommige Rawlsiaanse ‘residuen van rechtvaardigheid’ op, haar benadering biedt ook meer epistemische en morele stabiliteit aan de praktijk van rechtspraak.

Hoofdstuk 7 laat allereerst zien dat Nussbaums filosofie over het geheel genomen een hoge gevoeligheid toont voor het inherent tragische karakter van het menselijk bestaan. Om die reden zouden we ook kunnen betwijfelen of Nussbaum wel een normatieve theorie verdedigt.

Echter, waar het de politieke moraliteit betreft ziet Nussbaum juist een uitsluitend *constructieve* rol voor tragiek als durende opmaat voor een uiteindelijk moreel harmonieuze politieke orde. Zij claimt dat in een volkomen rechtvaardige samenleving waarin alle Centrale Menselijke Vermogens voor alle burgers boven een zekere drempelwaarde zijn gerealiseerd, burgers geen daadwerkelijk tragisch verlies hoeven te dragen -uitzonderingen daargelaten. Mede om deze reden is haar theorie goed te begrijpen als een typische variant van een normatieve theorie van politieke moraliteit.

In tegenstelling tot Nussbaums aanspraken betoogt dit hoofdstuk echter dat ook haar Capabilities-benadering ‘residuen van rechtvaardigheid’ toelaat: situaties waarin anders dan bij wijze van incident de gelijke waardigheid van burgers wordt gecompromitteerd, mede door willekeurige machtoefening. Deze residuen ontstaan door conflicten van rechtvaardigheid, door de onderbepaaldheid van rechtvaardigheid en door Nussbaums poging om via de beginselen van rechtvaardigheid politieke legitimiteit te garanderen.

Nussbaums ‘residuen van rechtvaardigheid’ werken door in het morele karakter van rechtspraak. De rechterlijke beslissingen die door de Capabilities-benadering als achtergrondtheorie van recht en rechtspraak worden gerechtvaardigd zijn minder transparant, moreel probleemloos en gevrijwaard van willekeur dan de aanspraken van haar theorie doen vermoeden. In ieder geval kunnen Nussbaums beginselen van rechtvaardigheid niet dienen als een commensurans. Rechtvaardigheid biedt dus ook in Nussbaums theorie niet de epistemische en morele geruststelling die juridische commensurabiliteit en dus een stabiliserende benadering van rechtspraak veronderstelt. Ook in een volkomen rechtvaardige samenleving zoals Nussbaum die voorstaat, heeft rechtspraak vanuit moreel oogpunt een rommelig, ontransparant en moreel pijnlijk karakter.

Hoofdstuk 8 is het sluitstuk van het eerste deel van dit boek. Het biedt ondersteuning aan de uitkomst van de bespreking van Rawls’ en Nussbaums theorie van rechtvaardigheid: dat deze theorieën hun aanspraken niet waar maken en geen rechtvaardiging bieden voor een stabiliserende benadering van rechtspraak en de hieruit voortvloeiende interpretatie van haar problematische fenomenologie.

Dit hoofdstuk bespreekt een fundamentele antitheoretische kritiek die stelt dat iedere poging om via normatieve theorie de morele kwaliteit van een praktijk te garanderen per definitie inefficiënt is, morele schade kan toebrengen en een foutief beeld schetst van de eigenlijke morele aard van een praktijk. In deze kritiek is normatieve morele theorie eenvoudig niet het gepaste instrument om morele kwaliteit te realiseren. Op basis van een geconstrueerde dialoog kwamen we tot de conclusie dat een overtuigend antwoord op deze kritiek vooralsnog

ontbreekt. Derhalve hebben we reden om deze kritiek serieus te nemen en in ieder geval om in het bestek van dit onderzoek niet meer te trachten de morele kwaliteit van rechtspraak te begrijpen aan de hand van een normatieve theorie.

De afwijzing van normatieve morele theorie leidt niet noodzakelijk tot het opgeven van morele aspiraties: we zijn niet overgeleverd aan nihilisme of scepticisme. Dit hoofdstuk fungeert tevens als een constructieve opmaat voor het tweede deel van dit boek. Het hoofdstuk biedt een quasi-fenomenologische opvatting van rechtvaardigheid die rechtvaardigheid begrijpt op basis van inherente en contingente kenmerken en eigenschappen van een specifieke praktijk. Deze benadering legt de nadruk op de morele capaciteiten van de deelnemers aan een praktijk en hiermee samenhangend op de beschikbaarheid van voldoende ‘dikke ethische concepten’. Hoe de morele kwaliteit van een praktijk precies moet worden begrepen, is in deze benadering afhankelijk van de desbetreffende ‘sfeer van rechtvaardigheid’, dat wil zeggen van de specifieke kenmerken van de desbetreffende institutie. Deze kwaliteit kan immers niet worden afgeleid uit een overkoepelende theorie en haar normatieve beginselen. Hoewel een quasi-fenomenologische benadering geen gebruik maakt van zo’n algemene overkoepelende theorie en zich ‘bottum up’ baseert op lokaal gesitueerde noties, biedt zij toch de mogelijkheid voor morele kritiek en morele vooruitgang in een praktijk.

In het tweede deel van dit boek, de ‘instabiliteit van het juiste’, wordt deze quasi-fenomenologische benadering uitgewerkt voor de institutie van rechtspraak, opgevat als een specifieke ‘sfeer van rechtvaardigheid’ met specifieke contingente en constituerende kenmerken.

In **hoofdstuk 9** staat een postmoderne visie op de morele kwaliteit van rechtspraak centraal. Deze visie doet geen beroep op de rechtvaardigende en verklarende kracht van morele theorie. Zij is gebaseerd op een uitgesproken kritiek op iedere vorm van het ‘identiteitsdenken’ waarvan normatieve theorie een duidelijke exponent is.

De postmoderne visie lokaliseert de moraliteit van rechtspraak primair in het relationele, meer specifiek in de kwaliteit van de ontmoeting tussen de rechter en de ‘Ander’, dat wil zeggen de concrete, unieke, niet reduceerbare burger die partij is. Het simpele gegeven van de verschijning van de Ander voor de rechter opent als het ware het morele veld: deze ontmoeting maakt de rechter oneindig verantwoordelijk jegens die Ander.

Aan deze verantwoordelijkheid kan de rechter niet ontsnappen door middel van juridische argumentatie. In een postmoderne visie van morele kwaliteit gaat de verantwoordelijkheid van de rechter jegens de Ander aan iedere cognitie vooraf.

De morele kwaliteit van rechtspraak is in deze visie afhankelijk van de vraag of de rechter voldoende respect betoont aan de Ander. Echter, een rechter kan hierin nooit slagen vanwege het inherent ‘verterende’ perspectief dat hij ondanks zichzelf aan de Ander oplegt. Een rechter kan slechts zorgen dat de schade beperkt blijft door in ieder geval op het moment van de beslissing het geldende recht een moment op te schorten. Door dit ‘passieve’ moment schept hij de voorwaarden waaronder de constellatie van concepten kan ‘opdoemen’ die nodig is om deze Ander op enigerlei wijze te kunnen adresseren.

Omdat de rechter de Ander onontkoombaar tekort doet, is in een postmoderne visie moreel hoogwaardige rechtspraak een *contradictio in terminis*. Verantwoordelijke rechtspraak gaat altijd gepaard met ethisch ongemak, met een vorm van ‘rouw’ om de Ander die niet ten volle recht werd gedaan.

In dit hoofdstuk wordt betoogd dat de postmoderne opvatting niet geschikt is als integrale benadering van de morele kwaliteit van rechtspraak. Zij biedt te weinig conceptuele helderheid over wat een rechterlijke beslissing nu precies tot een juridische en een moreel juiste beslissing maakt.

Bovendien brengt deze visie het gevaar van inertie en van sentimentalisering in rechtspraak mee. Ten slotte lijkt deze visie in tegenspraak met zichzelf: door als het ware een bepaalde ervaring aan de rechter voor te schrijven, zoals ethisch ongemak en rouw, en door de preoccupatie met de ervaringen die de rechter zou moeten hebben, wordt de Ander mogelijk juist tekort gedaan.

Desondanks zijn een aantal inzichten van de postmodernisten de moeite waard. Van waarde is bijvoorbeeld het inzicht dat er een morele dimensie zit aan het relationele aspect van rechtspraak, aan de ontmoeting tussen de concrete rechter en de concrete burger die partij is in een proces. Ook de postmoderne gevoeligheid voor de mogelijke immoraliteit van ‘identiteitsdenken’ is waardevol in het onderzoek naar de morele kwaliteit van rechtspraak.

Hoofdstuk 10 introduceert het eerste element van de *breekbaarheid van rechtspraak*: een deugdethische opvatting van rechterlijke oordeelsvorming. Indien we het primaat geven aan de praktijk, dan is de morele kwaliteit van rechtspraak in ieder geval afhankelijk van het morele vermogen van rechters om adequaat te reageren op het particuliere geval dat zich aan hen voordoet. Hierbij speelt de kwaliteit van hun waarneming -een karakterafhankelijke eigenschap- een cruciale rol. Maar, dit waarnemingsvermogen volstaat vanzelfsprekend niet. Het verklaart nog niet het *juridische* karakter van een rechterlijke beslissing en er zijn ook andere karaktereigenschappen nodig om wat de rechter als passende reactie ziet, daadwerkelijk te effectueren in de praktijk.

Mede op basis van de gestolde inzichten in sociale praktijken en de rechtspraak kunnen we concluderen dat naast de professionele deugd van het rechterlijk waarnemingsvermogen ook de volgende deugden als excellente professionele karaktereigenschappen noodzakelijk zijn voor de morele kwaliteit van rechtspraak: rechterlijke moed, rechterlijke gematigdheid, rechterlijke rechtvaardigheid, rechterlijke onafhankelijkheid en rechterlijke onpartijdigheid. Morele kwaliteit van rechtspraak vereist tenminste dat rechters deze deugden boven een zekere drempelwaarde bezitten. Ze zijn in ieder geval noodzakelijke voorwaarden voor de morele juistheid van rechterlijke beslissingen.

In een deugdethische benadering van rechterlijke oordeelsvorming komt rechtspreken neer op een afweging op basis van alle overwegingen die vanwege zijn moreel professionele gevoeligheid een appèl op hem doen. Behalve expliciete rechtsregels, beginselen en precedentes, spelen hierbij ook 'dikke ethische concepten' een belangrijke rol die zich op meer directe wijze 'voordoen' in confrontatie met de feiten van het geval.

Omdat het criterium voor de beslissing is gelegen in de rechter zelf, laat een deugdethische benadering toe dat tegengestelde beslissingen in gelijksoortige gevallen tegelijkertijd juist kunnen zijn. Dit is niet in strijd met juridische rationaliteit. Rechterlijke beslissingen zijn immers niet te herleiden tot een coherent systeem, maar hun finale grond is de rechter zelf. Uiteindelijk kan de rechter slechts zeggen: 'dit is zoals ik het zie'. Moreel hoogstaande rechtspraak heeft hierdoor een inherent rommelig karakter en is slechts beperkt transparant en expliciteerbaar.

Een belangrijke implicatie van deze deugdethische benadering is verder dat het relevante domein voor de morele evaluatie van rechtspraak niet beperkt blijft tot rechterlijke uitspraken. Het bestrijkt ook andere data die aanwijzingen kunnen geven over de kwaliteit van het professionele karakter van de rechter, de gedragingen van de rechter zowel binnen als buiten de rechtszaal daaronder begrepen. Indien een rechter bijvoorbeeld telkens weer discriminatoire grappen maakt op feestjes, zou dat een reden kunnen zijn om te twifelen aan zijn professionele karakter. Rechtspraak is vanuit moreel oogpunt meer dan een verzameling van rechterlijke uitspraken.

Het belang van rechterlijke deugden voor het realiseren van morele kwaliteit in rechtspraak brengt mee dat een samenleving moet waarborgen dat sociale praktijken en instituties van voldoende kwaliteit beschikbaar zijn, opdat rechterlijke deugden kunnen worden ontwikkeld. Een deugdethische benadering van rechterlijke oordeelsvorming ziet daarom een belangrijke taak weggelegd voor sociale morele epistemologie, een discipline die zich bezighoudt met de

voorwaarden waaronder in sociale praktijken morele kennis en daarmee samenhangende professionele deugden kunnen ontstaan en behouden blijven.

Deze kennis is van bijzonder belang voor het juridisch onderwijs en de rechterlijke macht. Idealiter waken deze instituties tegen 'deugdbedreigende' tendensen en dragen zij bij aan de ontwikkeling en instandhouding van rechterlijke deugden. Dit betekent onder meer dat de nadruk moet liggen op de ontwikkeling van het vermogen om de relevante feiten vast te stellen en te kwalificeren. Omwille van de training van het 'rechterlijk oog' moet in het juridisch onderwijs het geldende recht worden gedoceerd in nauwe samenhang met de sociale realiteit waarin dit recht een rol speelt.

Ondanks de nadruk op de rechterlijke deugden, ruimt een deugdethische benadering van rechterlijke oordeelsvorming ook een belangrijke plaats in voor expliciete rechtsregels, beginselen en precedentes. Een deugdzame rechter zal deze bronnen vooral vanwege de deugd rechtvaardigheid op adequate wijze effectueren in confrontatie met een concreet geval. In geval van onzekerheid dienen expliciete regels, beginselen en precedentes als vuistregels voor beginnende rechters. Zij zijn tevens bruikbaar ter controle in casus waarin cognitieve valkuilen op de loer liggen. Verder is het geldende recht een bron van discursief materiaal op basis waarvan rechters hun beslissingen kunnen motiveren, al fungeert deze bron niet als finale rechtvaardiging.

Ten slotte constateerde dit hoofdstuk dat een deugdethische opvatting van rechterlijke oordeelsvorming niet volstaat om rekenschap te geven van de morele kwaliteit van rechtspraak, althans niet als we daaronder ook de liberale eis van politieke legitimiteit begrijpen. In een liberale samenleving volstaat de verwijzing naar de deugdzaamheid van de rechter in ieder geval niet als grondslag voor rechtspraak, ook al niet, omdat verschillende rechters in soortgelijke zaken tot een tegengestelde beslissing kunnen komen. Een verliezende burger moet als uitdrukking van zijn gelijke waardigheid een reden hebben om de beslissing te aanvaarden, een reden die op enigerlei wijze samenhangt met zijn eigen perspectief.

Om in deze leemte te voorzien introduceert **hoofdstuk 11** het concept van *burgervriendschap*, het tweede constitutieve element van de *breekbaarheid van rechtspraak*. De morele kwaliteit van rechtspraak is niet slechts gelegen in de deugdzaamheid van rechters, maar ook in het feit dat de rechter recht spreekt als een gekwalificeerde burgervriend. Dit betekent dat de rechter in de ontmoeting met de in het proces betrokken partijen mede uitdrukking geeft aan zijn respect voor de afzonderlijke burger en hiermee ook aan de gelijkwaardige relatie zoals die in een liberale samenleving tussen burgers behoort te bestaan. Hij adresseert het 'goede' zoals dat voor de concrete burger op het spel staat op welwillende

en sympathiserende wijze en overweegt het in zijn beslissing. Ook hierbij spelen ‘dikke’ ethische concepten een belangrijke rol: in confrontatie met de concrete rechtszoekende werpen deze concepten als vanzelf evaluatieve overwegingen op.

Doordat het concrete ‘goede’ van de betrokken burger een plaats heeft in het proces en in de uitkomst, kan deze burger erop vertrouwen dat zijn belangen door de rechter niet worden opgeofferd aan het algemeen belang of aan de belangen van andere burgers. De burger heeft door de welwillendheid van de rechter een reden -al is die weliswaar niet uitputtend of volledig expliciteerbaar- om een voor hem nadelige rechterlijke beslissing te accepteren, ook al weet hij dat een andere rechter mogelijk anders zou hebben beslist.

Het concept van burgervriendschap heeft niet slechts (een zekere indirecte) rechtvaardigende, maar ook verklarende kracht voor rechtspraak. In rechterlijke uitspraken komen niet zelden overwegingen voor die niet te herleiden zijn tot het geldende recht, maar die voortkomen uit de betekenis die een mogelijk welwillende rechter toeschrijft aan de in het geding zijnde belangen van de concrete burger, zoals *obiter dicta*. Deze overwegingen zouden we kunnen begrijpen als uitdrukkingen van gekwalificeerde burgervriendschap die rechterlijke beslissingen hun politieke legitimiteit verschaffen en uitdrukking geven aan het relationele aspect van rechtspraak. Deze niet direct tot het geldende recht te herleiden, maar toch juridische overwegingen verdienen dan ook meer aandacht (ook in onderzoek) als uitdrukkingen van de morele gevoeligheid van rechters. In ieder geval zijn het geen verwaarloosbare verschijnselen of louter subjectieve ontboezemingen.

Hoofdstuk 12 introduceert het concept van *tragische juridische keuze* als derde en laatste constitutief element van de *breekbaarheid van rechtspraak*. Dit concept brengt tot uitdrukking dat er grenzen zijn aan de morele kwaliteit van rechtspraak. Tragische juridische keuzes worden in dit hoofdstuk gepresenteerd als een inherent onderdeel van moreel hoogstaande rechtspraak. Ze zijn niet de irrationele of prereflectieve fenomenen waar (meer) rationalistische benaderingen van rechtspraak ze voor houden.

Mede op basis van inzichten ontleend aan de ‘tragische traditie’ in de praktische filosofie worden de belangrijkste kenmerken van een tragische juridische keuze beschreven. Daarbij is voorzichtigheid geboden: als ervaringsconcept bij uitstek laat het tragische zich niet op conceptueel niveau of op analytische wijze begrijpen. De bespreking is daarom per definitie tentatief, algemeen, niet uitputtend en onlosmakelijk verbonden met de tragische ervaring die een rechter, een getroffen burger of een sympathiserende toeschouwer kan hebben. Mede om deze reden worden in dit hoofdstuk relatief veel casus besproken om het tragische karakter van rechtspraak voelbaar te maken.

Een eerste kenmerk van een tragische juridische keuze is dat er sprake is van een *daadwerkelijk* (in plaats van ogenschijnlijk) conflict tussen de eisen die de voorliggende zaak aan de rechter stelt. Deze conflicten ontstaan door een toevallig constellatie van feiten die voor een deugdzame rechter die tevens beslist als burgervriend rechterlijke bindingen met zich meebrengt die niet met elkaar te verenigen zijn. We kunnen denken aan vier categorieën van conflicten die kunnen uitmonden in een tragische rechterlijke keuze. Dit zijn conflicten tussen fundamentele rechten waaraan de rechter is gebonden, conflicten tussen zijn gebondenheid aan het geldende recht en zijn gebondenheid aan de achtergrondwaarden van politieke moraliteit, conflicten tussen zijn gebondenheid aan het geldende recht en aan de eis van respect voor de Ander of de afzonderlijke burger die betrokken is in een proces en ten slotte conflicten die ontstaan vanwege ernstige epistemische onzekerheid ten tijde van de rechterlijke beslissing. Die laatste zijn conflicten tussen de gebondenheid van de rechter aan de plicht te beslissen en zijn gebondenheid aan de norm van juistheid. Het (al dan niet) tragische karakter wordt in het bijzonder bij dit type conflict pas na de keuze duidelijk. Een tragische rechterlijke keuze is hier het meest duidelijk een kwestie van moreel geluk. De morele kwaliteit van de rechterlijke beslissing hangt immers af van factoren die zich niet alleen aan de greep, maar ook aan het zicht van de rechter onttrekken.

Een tragische juridische keuze is niet eenvoudig een keuze in een situatie van conflict. Kenmerkend voor een tragische juridische keuze is dat deze uitmondt in een tragisch verlies, dat wil zeggen in een moreel verontrustend verlies. Dergelijk verlies is dus niet het gevolg van een verkeerde beslissing van de rechter, maar van de (contingenties in de) ‘wereld’, het recht daarbij inbegrepen.

Een tragische juridische keuze kan dus, alles in ogenschouw genomen, gerechtvaardigd zijn, maar desondanks onrecht in zich dragen. Een tragische juridische keuze heeft altijd een moreel verontrustend karakter, vanwege het tragische verlies. Met een tragische keuze raakt de toga van de rechter moreel bevuild en verliest mogelijk op zichzelf moreel hoogstaande rechtspraak haar morele ‘onschuld’.

Omdat van een tragisch verlies een geheel eigen appèl uitgaat dat niet gestild kan worden door de redenen voor de specifieke keuze die is gemaakt, volgt op een tragische juridische keuze veelal een ‘tragisch responsieve reactie’. ‘Tragisch responsieve reactie’ is een verzamelnaam voor een verscheidenheid van manieren om uitdrukking te geven aan het tragische verlies. We kunnen denken aan het bieden van compensatie aan de ‘verliezer’, pogingen om soortgelijke conflicten in de toekomst te voorkomen en emotionele ervaringen bij de rechter, zoals moreel ongemak of spijt en de erkenning van het tragische verlies,

bijvoorbeeld in de motivering van de beslissing. Hierbij spelen dan de retorische kwaliteiten van de rechter een belangrijke rol.

De ‘nasleep’ of dat wat strikt beschouwd ‘na’ de rechterlijke keuze komt, maakt in het geval van een tragische juridische keuze een cruciaal onderdeel uit van de morele kwaliteit van rechtspraak. In plaats van het restverlies te negeren of te ontmantelen als uitdrukking van een prereflectief of irrationeel, in elk geval ‘onwetend’ gezichtspunt, maakt de poging om recht te doen aan dit verlies onderdeel uit van juridische rationaliteit.

De conceptuele verankering van tragische juridische keuze in de praktijk van rechtspraak heeft mogelijk het voordeel dat eerder respect wordt betoond aan de verliezende burger in het geval van een tragisch verlies. Ook kan de erkenning van dit tragisch verlies vanwege het moreel verontrustende karakter bijdragen aan de morele vooruitgang van een rechtsorde. Het biedt mogelijk een motief voor het heroverwegen van het geldende recht.

We hoeven in ieder geval niet bang te zijn dat deze verankering leidt tot sentimentalisering, inertie of subjectivisme in de praktijk van rechtspraak. De rechterlijke deugden bieden hiertegen een voldoende waarborg. Evenals het concept van burgervriendschap heeft het concept van tragische juridische keuze zowel (indirecte) rechtvaardigende als ook verklarende kracht voor de rechtspraak. Een reeks van elementen in de huidige praktijk van rechtspraak kan worden verklaard aan de hand van het concept van tragische juridische keuze.

Op basis van de uiteenzetting van de drie elementen van de *breekbaarheid van rechtspraak*, te weten de deugdethische opvatting van rechterlijke besluitvorming, het concept van burgervriendschap en het concept van tragische rechterlijke keuze, kunnen we nu begrijpen waarom deze benadering getypeerd kan worden als een destabiliserende benadering van rechtspraak.

Zij is destabiliserend voor de rechter, omdat deze benadering geen epistemisch of moreel houvast biedt in vooraf gegeven, externe normatieve bronnen. Deze benadering brengt hierdoor de persoon van de rechter vol in beeld: in het realiseren van morele kwaliteit is de rechter primair op zichzelf aangewezen. Ook heeft hij vanwege het belang van zijn karakter de morele juistheid van zijn beslissingen niet zonder meer zelf in de hand. Men kan het eigen karakter immers niet bepalen, doch slechts (indirect) beïnvloeden. Verder is een rechter voor de morele kwaliteit van zijn beslissingen in grote mate afhankelijk van de kwaliteit van de praktijken waarin hij wordt gevormd en getraind. Indien die kwaliteit niet volstaat, zal hij niet of moeilijk op moreel hoogwaardige wijze recht kunnen spreken. Bovendien zal een rechter volgens deze benadering soms worden geconfronteerd met tragische keuzen en verlies en in die gevallen worden gedwongen vuile handen te maken. Door dergelijke tragische keuzes en

de hiermee samengaande reactie, maar ook vanwege zijn hoedanigheid als burgervriend vergt morele kwaliteit van rechtspraak veel van de persoon van de rechter. Zij vergt in ieder geval emotionele betrokkenheid en dit alles maakt het rechterschap tot een ook in existentiële zin veeleisend beroep.

De *breekbaarheid van rechtspraak* is destabiliserend voor de burger omdat rechtspraak niet voorspelbaar is: de beslissing hangt immers af van de persoon van de rechter. Ook de burger heeft zodoende weinig houvast. Voor de verliezende burger is deze benadering in het bijzonder destabiliserend, omdat hij geen uitputtende discursieve redenen krijgt waarom hij de negatieve lasten van een beslissing moet aanvaarden. In het geval van een tragische juridische keuze weegt dat extra zwaar, omdat de burger dan wordt geconfronteerd met een tragisch verlies dat hij eigenlijk niet zou moeten dragen. Van die burger als de daadwerkelijke ‘verliezer’ wordt dan toch gevraagd de beslissing te aanvaarden.

Deze benadering is destabiliserend voor een rechtsorde als geheel, omdat zij morele kwaliteit niet kan garanderen via de verwijzing naar een abstract en algemeen moreel ideaal. Zij is voor deze morele kwaliteit bovenal afhankelijk van de kwaliteit van het professionele karakter van afzonderlijke rechters. Omdat zij in de vorm van tragische juridische keuzes een vorm van onrecht in zich draagt waaraan niet te ontkomen valt, biedt deze benadering ook geen moreel geruststellende interpretatie van de rechtsorde.

De *breekbaarheid van rechtspraak* is tenslotte niet zonder meer in overeenstemming met de eisen die voortvloeien uit gangbare interpretaties van de ‘rechtstaat’, althans niet als hiermee ook wordt gedoeld op de eis van de voorspelbaarheid van politieke machtoefening. Dit is echter nauwelijks een bezwaar tegen de *breekbaarheid van rechtspraak*, aangezien ook rationalistische benaderingen van rechtspraak zoals een stabiliserende benadering niet in staat zijn om aan deze eis te voldoen. In dat licht en op grond van de besproken argumenten verdient de breekbaarheid van rechtspraak de voorkeur boven een rationalistische, stabiliserende benadering.

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⁹⁶⁰ Yet, I do think that a period of silence can be a fitting expression of one's respect for the quality of the tradition in which one participates. Unfortunately, the 'out-put' criteria that are presently in force in academia do hardly allow one to be hesitant about contributing.

into the ‘tragic tradition’ in philosophy.

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