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An Unstated Assumption

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Abstract

Both the defenders and critics of judicial review assume tacitly that there is a special moral capacity needed for a correct articulation of constitutional (explicit or implied) rights, and they only disagree about who is likely to possess this moral capacity to a higher degree. In this working paper I challenge this unstated assumption. It is not the case that the reasoning oriented towards rights articulation is *more* moral than many non-rights-oriented authoritative public decisions in the society. Further, I suggest that rights-related reasoning cannot be shown to be *differently* moral in a way which would support the idea that this relevant difference may justify why some political agents (such as judges) may be more suited to performing this particular type of moral reasoning than others (such as legislators). The best argument for such a distinction refers to the opportunity for and habit of conducting "moral thought experiments" which is what, as part of their professional duties, judges normally do, and which they can therefore instinctively do also when they engage in a "concrete" judicial review of a statute. But there is no good moral reason to believe that "moral thought experiments" triggered by specific fact-situations should be privileged as a method of moral reasoning, compared to an unashamedly abstract, principle-based moral reasoning. If anything, a good case may be made (referring to the need to openly acknowledge moral conflict, secure impartiality, equality and legitimacy) for deliberately abstracting from specific cases and focusing on the abstract and general level, only modifying it later, if one is compelled to such modifications by considering evidence from specific instances. Not even one half (the bottom-up half) of the Rawlsian famous "reflective equilibrium" apparatus can be of help in this regard.

Keywords

Judges – judicial reasoning – moral reasoning – reflective equilibrium – Jeremy Waldron – John Rawls

Rights and Moral Reasoning: An Unstated Assumption

Wojciech Sadurski*

In a number of books and articles, Jeremy Waldron has launched a wide-ranging and influential theoretical assault upon the idea and practice of entrusting the judges with the power of authoritative and final review of legislative acts, especially under constitutional bills of rights.[1]. Much of his argument can be read as addressed against those very arguments which had informed the emergence and maintenance of strong, politically powerful constitutional courts in post-communist political systems where they are often seen as the most efficient defenders of constitutionally entrenched human rights – perhaps, the instance of last recourse in the fight against latent authoritarianism in these countries.

Waldron's arguments have been widely discussed and subjected to a rich critical scrutiny, and he in turn has responded to his critics. Perhaps the most significant recent statement of Waldron's on this theme is his long essay in the *Yale Law* Journal "The Core of the Case Against Judicial Review"[2] in which he both takes stock of his own positions so far, and by responding to a number of critics pushes the argument further. His argument follows two main tracks, already familiar to the readers of his earlier work: the track of efficiency of human rights protection (claiming that there is no evidence that judges protect rights better than legislators do), and the track of democratic legitimacy (restating a classical argument that judicial review of legislative acts, at least provided certain conditions of democracy are met, is politically illegitimate).

In his most recent take on the issue of desirability of judicial review, Waldron focuses on the capacity and competence of judges to conduct the sort of moral reasoning needed to reach final decisions about rights. In an unpublished article "Judges as Moral

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[1] The list is too long, and probably too familiar to most readers, to warrant a bibliographical footnote here. To those who need these references, the best advice is to consult the literature referred to in the footnotes to Jeremy Waldron, "The Core of the Case Against Judicial Review", *Yale Law Journal* 115 (2006): 1346-1406, especially 1351 n. 14, 1352 n. 19, 1359 n. 42, 1361 n. 46 and 47, and 1379 n. 89 (henceforth referred to as "Core Case").

[2] Jeremy Waldron, "The Core of the Case Against Judicial Review", *Yale Law Journal* 115 (2006): 1346-1406.

Reasoners"[3] he attacks, with his usual lucidity and meticulousness, the idea that courts are better at moral reasoning than legislatures are. I was invited to act as a commentator on Waldron's paper which is to appear, alongside with comments and Waldron's subsequent response, as a symposium in the *International Journal of Constitutional Law* (I.CON).

I fully agree with Jeremy Waldron's conclusions, and also with much, if not all, of his reasoning. As such, I am a singularly inappropriate person to be a commentator on his article: "Me too" does not sound like an interesting comment. And I do not feel embarrassed to present myself here as a yes-man (even if there *was* something embarrassing about agreeing unconditionally with Waldron!) because, in my own modest way, I had reached somewhat similar conclusions to his, which I had expressed some time ago.[4] So, rather than trying to think of any other way of justifying my participation in this discussion, I will suggest a perspective for looking at the general structure of Waldron's philippic against the "Judges as Moral Reasoners" (JMR) thesis, and identify a somewhat neglected part of it.

The way I see it, a stylized and necessarily simplified (perhaps: grotesquely simplified) way of describing Waldron's strategy is by presenting it as attacking the following syllogism: (1) Rights articulation requires a particularly thorough moral argument; (2) Judges, compared to other political actors involved in the legal process, are especially good at moral reasoning; hence: (3) Judges should be entrusted with special responsibility for (including having the last word on) authoritative rights articulation in the society.

Much, if not all, of Waldron's fire is directed against premise (2): this is certainly true of his article in this issue of I.CON, but this is probably also true about much of Waldron's by now voluminous contribution to the theoretical debate about the legitimacy of judicial review. What remains, however, relatively underdeveloped is discussion of the premise (1) in the above syllogism. I cannot hope to develop the argument against (1) at any length here, but what I can try to do, and this will be my only contribution to the discussion triggered by Waldron's paper, is to suggest some ways in which the discussion around, and argument against, premise (1) can be carried on.

1.

Before reflecting on the meaning, the rationales, and a possible critique of the premise (1), three preliminary clarifications are in order. First, which is well explained by Waldron but which needs to be reaffirmed here because of its special relevance to my argument, is that in the context of this discussion we are always dealing with *comparative* judgments. Just as, in the case of Waldron's attack on premise (2) his argument cannot be seen as claiming that legislators are good and judges are bad at moral reasoning but only that legislators are (often enough, to upset the force of premise

[3] To appear in the *International Journal of Constitutional Law* (I.CON).

[4] Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights", *Oxford Journal of Legal Studies* 22 (2002): 275-99; see also Wojciech Sadurski, *Rights Before Courts* (Springer: Dordrecht 2005), chap. 2.

(2)) *better* in that respect than judges are, so also in the case of premise (1) it can be sensibly read only as stating that an act of rights articulation requires *more* meticulous moral reasoning than many other public decisions taken by authoritative actors in the society. Accordingly, a sufficient *challenge* to premise (1) may consist of showing that rights articulation does not call for any more thorough moral reasoning that many other, non-rights related authoritative decisions, require. Hence the critic of premise (1) should not be expected to show that rights-related decisions are not based on moral reasoning (which would be nonsense) but it will be sufficient for him/her to show that there is no necessary moral surplus in the arguments related to rights, compared to many other authoritative public decisions. If there is (as a critic of (1) may show) no qualitative difference in that way, the premise (1) is undermined and the whole JMR thesis is shown to be question-begging.

The second and third preliminary remarks concern the meaning of the notion "rights articulation". To begin with, "*rights* articulation" implies that we can draw a line between those decisions which crucially apply to rights and all those other decisions which are also public and authoritative (public, in the sense that they concern a collective issue emerging at the scale of a given polity, and authoritative, in the sense that their implementation can be eventually backed by the legitimate use of force) and yet are not, centrally, about rights. As this wording itself suggest, the distinction is one of degree rather than yes-or-no (as it is hard to think of a public and authoritative decision which does not implicate rights at a certain point), and all that matters now is to realize that some such distinction necessarily underlies the whole discussion about JMR. *Where* the line is to be drawn is a difficult and largely context-sensitive issue which cannot be discussed here but, in lieu of a general principle, we can try to think of some examples of paradigmatic decisions on both sides of the dividing line to realize that the distinction is meaningful. On the side of rights-related decisions we can think of allowing legally permitted abortion, permitting crucifixes in public schools, or punishing for racially vilifying speeches, and on the non-rights related side we can think of a decision to join a supranational economic alliance, setting up a system of professional-only army as opposed to a compulsory draft, or privatizing a hitherto state-owned industry. (And it is important to note that the distinction cannot be based on the idea that one category of decisions has a character of general norms, that is abstract and general directives which will apply in future to an indefinite number of instances, until the decision is revoked, while the other category contains only one-off decisions; both rights-related and non-rights related decisions can have varying degrees of generality, abstractness, and repetitive application in the future). But the most important caveat that should be kept in mind when talking about rights-related decisions, in the context of the JMR thesis, is that we should be careful not to define the area of those decisions in a way which is parasitic upon our knowledge of what judges actually are deciding about; in short, that we do not define rights-related decisions as those which are normally taken by judges. For if we incorporate our knowledge of judicial practices into our characterization of the rights-related field then the JMR thesis will be rendered circular, and the discussion about it meaningless. Because whether judges *should* have the last word on a particular set of issues (the issues of rights) is precisely what is at stake in this whole discussion – so it cannot serve as evidence for determining what *is* rights-related.

The notion of "rights *articulation"*, as used for the purposes of this Working Paper, assumes that there is, in a given society, a canonical catalogue of constitutional rights

(whether in a documentary bill of rights, or recognized in an implied but widely accepted way) as to which, at the level of an abstract formulation, there is a good measure of consensus but at the same time there is a strong disagreement, among people reasoning with good will, as to what they mean when applied to concrete circumstances when an authoritative decision is called for. So, for instance, everyone agrees as to the right against discrimination but there is actual disagreement (very much in a Waldronian fashion) as to whether it mandates or prohibits affirmative action in university admissions, etc. The argument which concretizes the abstract constitutional right to such a specific situation I will call an articulation of a right, and it is authoritative when the articulation carries the authority of law: when it has to be complied with by others. My main point is that such an articulation is not so much an act of making a vague concept simply more precise but rather that (when fundamentally divergent interpretations are available, under the accepted canons of interpretation)[5] it is an act of endowing a concept with moral value, which is the only reason we endorse this concept in the first place. For the rights are meaningful to us – morally significant – only insofar as they represent a moral value, but if a given proposed "right" cannot be understood in a way which is morally valuable to us, we have no reason to endorse that right in the first place. I think that it is a different way of saying what Joseph Raz meant when he had suggested that "rights" are "intermediary steps" or "intermediary conclusions in arguments from ultimate values to duties"; they are, Raz added "points in the argument where many considerations intersect and where the results of their conflicts are summarized …".[6]

This is an important point as far as our discussion here is concerned – not least because it dispels any attempts to minimize the political significance of rights articulation. It is much more than merely making a more general concept more specific – a job which can properly be seen as capable of being entrusted to judges, that is officials without strong democratic legitimacy etc. It is, rather, an act of actually making a fundamental choice for the society which (when a given constitutional right is capable of widely different interpretation) had *not* been prefigured by a constitutional choice. Now it may well be than not every constitutional right – not every right written into any constitutional document in the world – is of such a nature: in some cases, future decisions by political actors as to the articulation of a given right *have* been largely preempted at the act of constitution-making (such as with regard to a constitutional right against extradition from one's own state, for instance, even though some leeway of choice as to the meaning of "extradition" is still left to the future rights-articulators). But at least some of the most important constitutional rights are of such a nature that it is only in the process of articulating them that we can endow them with the value which supports our endorsement of that right in the first place – and it is around these rights that the whole debate about JMR centers.

So why would an act of articulation of such rights call for more thorough, painstaking, in-depth moral reasoning than many other authoritative public decisions? Why, in other words, should we accept premise (1) in the syllogism identified at the outset of this Working Paper?

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[5] It resonates with Waldron's recognition that "disagreements about rights are often about central applications, not just marginal applications", "Core Case" at 1367.

[6] Joseph Raz, *The Morality of Freedom* (Clarendon Press: Oxford 1986) at 181.

2.

One conventional argument for premise (1) is superficially attractive, but only superficially, and can be discarded at the outset. The argument goes that non-rights-related decisions are usually taken on utilitarian, policy-oriented, consequentialist and pragmatic grounds which mainly require engagement with complex calculation of benefits and costs while rights articulations are fundamentally moral in the sense that they call for a careful consideration of justifications of a philosophical nature, about the character and mutual relationships between such values as human dignity, self-respect, autonomy, self-fulfillment, etc. It is enough to articulate this argument to see how implausible it is. One way of rebutting it is by pointing out that, even if this distinction is accepted for the sake of argument, utilitarianism is just another *moral* theory about the grounds of rightness or wrongness of an action – so if the non-rights-related decisions are governed by utilitarian principles then they are just as moral as rights-related ones. But suppose someone who makes the argument described above uses "utilitarianism" in a conventional rather than a philosophical sense: not as about one moral theory among a number of controversial moral theories but rather as about a set of rationales for a decision which are not moral at all, which do not involve a judgment of moral rightness or wrongness but rather appeal to some other than moral criteria for deciding about what public authoritative decision to take. But this would be completely implausible because those non-rights-related decisions very much rely, for their rightness, on some criteria which are moral through and through.

Recall the examples of paradigmatic rights-related and non-rights related public decisions which I catalogued above, in Section 1 of this Working Paper: (A) the examples of rights-related decisions would be the rules about the availability of abortion, permitting crucifixes in public schools, or punishing for racially vilifying speeches, while the examples of non-rights related decisions are (B) a country joining a supranational economic alliance, replacing compulsory military draft with a professional army, and privatization of an industry. One can of course think of a number of other paradigmatic cases falling on the two sides of the divide: I tried to provide examples which seem to me to be truly non-controversial cases, in most people's eyes. But in what way can the cases belonging to category (B) be thought to warrant a less in-depth, thorough moral consideration than the cases in category (A)? In what way do cases in category (B) fail to trigger some pretty fundamental moral dilemmas, to which the only proper answers can also be moral? Consider joining a supranational alliance: a thick set of issues related to the feelings of patriotism, to the individual sense of citizenship, to the range of duties of solidarity and aid, to the possible trade-offs between the industries which are likely to gain and those which are likely to lose as a result of the step, and the costs of compensation to those who will lose – these are all *par excellence* moral issues even if they are intermeshed with various consequentialist calculi (which eventually, for their meaningfulness, also collapse into moral standards). In fact, similar consequentialist calculi are implicated by the paradigmatic cases belonging to category (A) as well: choosing the right regime of legal availability of abortion, deciding about allowing religious symbols in public spaces, tolerating racist hate speech – all these decisions and their counter-decisions have clear costs and benefits, raise questions about future outcomes, and implicate consequences for social harmony and peace, stability, etc.

Perhaps something depends in this argument on where we draw the line between a moral and non-moral argument. *This* would make it almost hopeless to prove (and also to disprove) that rights-related argument is moral while non-rights-related argument is non-moral: the boundary of morality is notoriously difficult to draw and uphold. One may try, though. One may accept the idea of Joseph Raz that what he calls "narrow morality" is only about "all those principles which restrict the individual's pursuit of his personal goals and his advancement of his self-interest".[7] The sphere outside such morality in a narrow sense is, for Raz, constituted by "'the art of life', i.e. the precepts instructing people how to live and what makes for a successful, meaningful, and worthwhile life".[8] This corresponds, it seems, to the distinction between the right and the good, or between the principles of justice and the conceptions of good life, the latter including also the ingredients normally not considered as "moral" such as prudence, convenience, personal satisfaction (which may be sparked by non- moral causes), etc. In the context in which Raz makes this distinction, the question is whether we can consider morality as being essentially rights-based, and his answer is that "right-based moralities can only be moralities in the narrow sense".[9] Raz's conclusion is that it is impossible to distinguish, at a fundamental level, the principles of morality in the narrow sense from those other principles, concerned as they are with "one's own personal goals".[10] This applies also, I believe, to a distinction between rights-based and non-rights based considerations at a societal level: it is impossible to understand the special value we attach to individual rights in isolation from the values and goals in society which we, conventionally, do not ascertain as rights-related. How can we identify what rights people have if we are ignorant as to the goals and values which make a polity a good society? Conversely, it would be a mistake to think that we can understand those societal values and goals while remaining ignorant as to the rights people have.[11] So the delineation of morality as a sphere (and consequently, a method of reasoning) which divides rights-related versus non-rights related issues is quite unconvincing.

But ultimately, I agree with Waldron that it does not matter what we *call* moral and non-moral; what matters is whether a given issue – as Waldron says – is one for which moral reasoning of the sort that moral philosophers idealize is appropriate. This determination cannot be done by carving the topic – the subject-matters – into the moral and the non-moral. The property of morality – whatever it may mean – is bestowed upon a given subject by virtue of the type of reasoning we conduct when considering it. So it would be to put the cart before the horse to claim that some issues (say, human-rights related) lend themselves to moral argument while others do not. The sort of reasoning "that moral philosophers idealize" may be applied to, or withdrawn from, any issue in the society when a decision – especially a public authoritative decision – is being called for.

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[7] Id. at 213.

[8] Id. at 213

[9] Id. at 213.

[10] Id. at 214.

[11] The last two sentences deliberately paraphrase Raz's: "The mistake is to think that one can identify, say, the rights of others, while being completely ignorant of what values make a life meaningful and satisfying and what personal goals one has in life. Conversely, it is also a mistake to think that one can understand the values which can give a meaning to life and have personal goals and ideals while remaining ignorant of one's duties to others", id. at 214.

So the difference between categories (A) and (B) of public decisions – between those that are and those that are not rights-related – cannot be that the decisions belonging to the first category raise moral dilemmas and those belonging to the second do not; and also it cannot be that there is a *higher intensity* of moral considerations in the first category, whatever it might mean and however it might be measured. Premise (1) in the syllogism attributed to the JMR thesis at the outset of this Working Paper cannot rely upon *this* distinction. To save it, the defenders of premise (1) of the JMR thesis must rely on a modified and much more subtle distinction: they must claim that, while both types of decisions raise moral issues, those decisions which are rights-related, and in particular rights-articulating decisions, raise *different* moral issues than those which are non-rights related. And then, it will have to be maintained, under the premise (2) of the syllogism, that judges are much better suited than other political actors to handle *those particular* moral issues which are implicated by rights articulation. But as announced, we stay, in this Working Paper, only at the stage of premise (1).

3.

What types of rights-related moral dilemmas may be thought of to be so relevantly different from the moral dilemmas triggered by non-rights-related decisions? Here we need to call a witness: a theorist who claims that the sort of moral dilemmas which are implicated by rights articulations are better handled by judges. As one can see, this evidence would encroach upon premise (2) in the original syllogism, but this is inevitable: in theories of judicial review the premises (1) and (2) are inevitably mixed up with one another (because the arguments about the specificity of rights-related moral argument quite understandably appear as a part of defending the judicial responsibility for rights articulation, in the context of a broader JMR package). I cannot think of a better witness for such a position than Michael S. Moore:

> "[J]udges are better positioned for this kind of moral insight [related to the rights persons possess] than are legislatures because judges have moral thought experiments presented to them everyday with the kind of detail and concrete personal involvement needed for moral insight. … One might well think that moral insight is best generated at the level of particular cases, giving judicial beliefs greater epistemic authority than that possessed by legislative beliefs on the same subjects".[12]

Here we have an outline of precisely the sort of moral theory needed to support the special competence of judges to provide authoritative rights-articulation (premise (2)): the type of moral questions they have to address when inquiring into the meaning, significance and limits of rights persons possess should be best handled by an appeal to "moral thought experiments" which judges, naturally enough, conduct as part of their everyday professional work. Those "thought experiments" pick up the experiences of real people in real contexts and circumstances; there is a thick description provided with the "kind of detail and personal involvement" that only individual cases can supply; and when all this remains "at the level of particular cases" rather than at some lofty abstract level (where legislatures normally reside), the decision-makers acquire the necessary "epistemic authority" to handle the cases well.

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[12] Michael S. Moore, "Law as a Functional Kind", in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford University Press: Oxford 1992): 188-242 at 230.

What is one to make of this theory? One immediate thing to note is that it has its clear limits: it may be used (if correct) to justify only so-called *concrete* judicial review (exercised in the process of considering particular "cases" and "controversies")[13] but not abstract judicial review, exercised by most European constitutional courts, which is addressed towards legislative statutes *in abstracto*, not in the context of their application to concrete cases (often very shortly after their enactment, and in some cases even *ex ante*).[14] In fact, even in the United States which is seen to be a paradigmatic example of a home for "concrete" judicial review, the Supreme Court often conducts its review of legislative acts which is virtually undistinguishable from an "abstract" review, and from which the arguments related to "the kind of detail and concrete personal involvement needed for moral insight" celebrated by Moore and triggered by a consideration of a particular case simply are absent.[15] Clearly, to all those instances the argument launched by Moore pointing at "moral thought experiments" allegedly naturally conducted by judges does not apply.

So we need to consider carefully the argument in its own proper field of relevance, that is when applied to those rights-articulating decisions which are undoubtedly taken in the process of adjudicating about a particular case, occasioned by a particular, non-anonymous individual wronged (as she claims) by the law which (in her view) violates her constitutional right. Why would reasoning by an adjudicator taking place in such circumstances be necessarily and significantly more conducive to a proper articulation of a general and vague constitutional right than when conducted *in abstracto*, without a particular instance of a particular person in mind?

This, I suggest, is the central question to be raised in the context of consideration of premise (1). And let me state straight away my response: I do not know. I cannot think of any convincing, persuasive response to this question which would support the superiority of a particular "thought experiment" over abstract reasoning, when articulating general rights. But I suggest the question is meaningful, and that if they fail to provide a convincing answer to this question, the proponents of the JMR thesis cannot get their reasoning off the ground. So even if they convincingly support premise (2) – which, as Waldron claims, they are unable to do – if they fail to answer the question which I have just raised at the end of the previous paragraph, they have not discharged the burden of convincing us about the major premise, that is, premise (1).

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[13] U.S. Constitution, Art. III.

[14] See Sadurski, *Rights Before Courts*, at 65-74 (discussing various implications of the distinction between abstract and concrete review) and id. at 74-79 (comparing ex-ante and ex-post judicial review. Note that for Waldron, ex-ante review is not really judicial review but rather "[s]omething that amounts in effect to a final stage in a multicameral legislative process, with the court operating like a traditional senate", Waldron, "Core Case", at 1359. But when the ex-ante review is exercised towards acts already passed by the parliament, but not yet promulgated, as is the case with the *Conseil Constitutionnel* in France (and, as one among a number of possible procedures of constitutional review, in Poland), the review that the court exercises is virtually indistinguishable from an ex-post abstract review of a recently adopted statute. The operative distinction is therefore that between abstract and concrete, rather than between an ex-ante and ex-post, review.

[15] See Alec Stone Sweet & Martin Shapiro, "Abstract and Concrete Review in the United States", in Martin Shapiro & Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press: Oxford 2002): 347-375; see also Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter", *Michigan Law Review* 101 (2003): 2744-80.

But we may at least try to *imagine* the best possible response to the question about why a particular "thought experiment" should be privileged over abstract reasoning in the argument about rights. There is, admittedly, always a danger of being disingenuous in such an exercise (in trying to imagine "the best possible" argument behind a position one disagrees with) but I am not sure what else can be done to debate meaningfully the strength of premise (1). So here is how such an argument might go: "In considering moral dilemmas, we should always privilege the perspective of the person whom the resolution of the dilemma will affect. This is because in morality, the effect on a person is what ultimately matters, and the way to recognize this importance is to try to imagine the position of a stakeholder in a given decision. This is particularly important when individual rights are concerned: rights are about individualized interests of persons and so the moral argument about the meaning of a right should emphasize and privilege the grassroots rather than a general level".

Let us take this argument seriously and try to make the best of it. It builds on one fundamental question-begging assumption which, for the sake of argument, we may take as correct. This assumption is that rights-related moral arguments are indeed more person-oriented than those which are non-rights-related. This assumption may be supported by definitional fiat: by a definition of rights as being *individuated* legitimate aims, interests and goods, in the sense that a right describes an aspect of individual well-being or interest which connects with the good for *this* individual, and no further justification that this good is a fit means to an ulterior end is required – so that a denial of this good to a person would be wrong regardless of the ulterior advantages to anyone else.[16] There is, of course, a huge debate going on concerning what such individuation of rights may mean, and in what sense other morally significant goods are not individuated.[17] But let us bracket, for the purposes of this discussion, all this controversy and accept, again just for the sake of argument, that rights are significantly individuated standards in a way many other morally significant goods, interests and values are not.

What does it imply for the structure of moral reasoning about rights (as individuated goods… etc), and why would they lend themselves better to the sort of "moral thought experiments" that Moore had in mind than other important moral dilemmas which arise in the society and also call for an authoritative decision? An obvious observation is that, from the recognition that rights-related arguments are about individuated moral goods *it does not follow* that the best moral perspective to adopt is the "grassroots perspective", that is, the sort of moral thought experiment which takes, as its point of departure, a particular individual case and works upwards, so to speak, moving on from the concrete to the general. It is a *non sequitur* to claim that the individuated *subject-matter* of moral reasoning demands per se a "particularized" ("grassroots", "bottom up", etc) moral *method* of reasoning: the one described earlier in the quotation from Moore. One needs to provide some additional arguments about why the "particularized" method is the best

[16] See Neil MacCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press 1982), at 159-60; see also Raz, *Morality*, at 166, 180; Jeremy Waldron, "Introduction", in Jeremy Waldron, ed., *Theories of Rights* (Oxford University Press: Oxford 1984): 1-20 at 13-14. This definition does not necessarily exclude group (or collective) rights but only implies that in "group rights" a group which is a holder of a right asserts these rights against some larger entity so is modeled on a position of an individual asserting his/her rights against a group to which s/he belongs.

[17] See, in particular, Ronald Dworkin, *Taking Rights Seriously* (Duckworth: London 1977) at 90-94.

type of moral reasoning suited to sort our dilemmas about "individualized" moral goods, such as rights.

At this stage, we need to go beyond some very vague descriptors such as "particularized" moral methods, or vague metaphors about "grassroots" or "bottom up" to describe the sort of moral reasoning that Moore (and other proponents of premise (1) in JMR) may have in mind. We need to be a little more precise about what such a structure or method of moral reasoning may consist of, in order to see whether it resonates well with the subject-matter of rights-related moral reasoning. To do so, we may be helped by an influential description of "reflective equilibrium" (RE) by John Rawls, as an expository device for the model of moral reasoning recommended by the author of *A Theory of Justice*.[18] The model is so well-known, and so widely used (including in the new paper by Waldron, only to be discarded as an unsuccessful candidate for a model of legal reasoning), that there is no point in summarizing it here in any detail. The "equilibrium" describes a coherentist model of moral reasoning, aimed at making sure that judgments at all levels of generality are in line with each other, on due reflection. This can be achieved by "going back and forth",[19] between the level of the "considered convictions" (which is Rawls's term for very specific judgments, about particular cases; Rawls sometimes refers to them as "our everyday judgments")[20] and the level of "principles" (which denote judgments of a high level of generality) until "principles … match our considered judgments duly pruned and adjusted".[21]

How can Rawls's model help us understand and elucidate Moore's point about "moral thought experiments"? An obvious way would be by saying that Moore's method corresponds to the "from convictions to principles" part of the reflective equilibrium model. Assume that this is the case (I will review this assumption below, in Part 5). Now at times Rawls indeed writes in such a way as to suggest that the "from convictions to principles" movement (call it, in old-fashioned language, an inductive method) was conceptually and chronologically prior to the "from principles to the convictions" step (call it, a deductive method of moral reasoning). But this would be a misreading, and there is no privileging whatsoever of the "inductive" over the "deductive" step, or vice versa. In *A Theory of Justice* the idea of the symmetry, or equal weight of both steps is clear: "we work from both ends",[22] Rawls emphasizes, and then crucially explains two, equally legitimate options available to us when the discrepancies between the different levels of generality (between "convictions" and "principles") persist: "We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of contractual circumstances, at others withdrawing our judgments and conforming

[18] A fundamental point to mention is that reflective equilibrium is not employed by Rawls as a way of supporting the principles of justice directly but only as a way of arriving at a satisfactory description of the original position, see *Theory of Justice* 19-21. But this is not significant for our discussion here, and I will be using reflective equilibrium as if it could be used to argue about moral principles directly.

[19] John Rawls, *A Theory of Justice* (Oxford University Press: Oxford 1971) at 20.

[20] Id at 46.

[21] Id at 20.

[22] Id at 20.

them to principle"[23] we shall be able to reach an equilibrium, Rawls suggests. But an even more explicit emphasis on moral symmetry is in *Political Liberalism* where Rawls gave his ex post interpretation of an initial description of RE: "One feature of reflective equilibrium is that it includes our considered convictions at all levels of generality; no one level, say that of abstract principles or that of particular judgments in particular cases, is viewed as foundational".[24]

And, I suggest, Rawls's symmetry model is eminently persuasive, including when applied to the arguments about rights articulation. It is true that at times, when reflecting upon moral dilemmas when a right articulation is called for, we begin from a reflection upon a particular case which instantiates, in our mind, the problem at issue. For example, when inquiring upon the scope of the legal availability of abortion, we may "begin" by thinking of a particular woman whom we know and who faced a moral dilemma about her unwanted pregnancy, or at least we may try to visualize such a woman even if we do not know one, and then let our empathy generated by this picture do moral work for us, some of the way at least, up to the point when we may start visualizing, and empathizing with, the feelings of people who are upset by the notion of termination of unborn children's lives… etc. A similar "moral thought experiment" can be conducted in the other paradigmatic cases used here as typical examples of rights-related dilemmas: we can try to enter the shoes of children in a public school and imagine how a religious symbol which is foreign (sometimes, hostile) to them affects their sense of identity and well-being, and we may also (in the case of hate speech) begin our moral reasoning by trying to put ourselves in the position of a member of publicly vilified group. And for each of these cases, we may also try to put ourselves in the shoes of those who oppose the claims: we may try to imagine how a refusal to allow a religious symbol affects the sensibilities of a member of a majoritarian religion, or how a racist speaker feels about not being allowed to make a racial generalization s/he believes correct and important.

We can try to collect those various imagined feelings, test our responses to those imaginary (or, of we judge a particular case) real dilemmas, and then try to make sense of our empathy to move up the level in the direction of generality. This is perhaps what Richard Rorty described as the "sentimentality" (without any pejorative sense of the word; indeed, just the contrary) underlying our moral emotions: the reliance upon the suggestions of our sentiments triggered by real-life stories rather than by the commands of reasons.[25] And only once we collect these resources – these direct experiences or these stories – can we try to organize them into a broader scheme of principles figuring at a higher level of generality.

This seems to be a plausible account of one possible process in moral psychology. But it is not clear at all why it should be a privileged process (quite apart from the fact that the main concern for Rorty, in the context of his article on sentimentality and human rights, was that of a moral educator, not a moral reasoner; the aim was to make people behave better to each other rather than articulate the best principles of justice and right; or to put

[23] Id at 20.

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

[25] Richard Rorty, "Human Rights, Rationality, and Sentimentality", in Stephen Shute & Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures* (Basic Books: New York 1993): 111-34.

it differently, Rorty was concerned by motivation, not justification).[26] Consider a counter-account to each of our paradigm cases. Abortion: we begin with a principled articulation of the value of human life, or of the weighing and balancing between the value of life (which we can see as changing in the process of the development of a fetus) and the dignity of a woman, connected with her control of her reproductive functions. We may try to coordinate these principles with the idea of equality of sexes, and how unwanted pregnancies affect women and men differently, and only once we organize these basic conceptions in our mind can we look at a specific case before us, and try to register whether it presents some particular, morally relevant properties which would compel us to modify the configuration of general principles already in place. Or with school crucifixes: we may begin by thinking about what the separation of state and religion means to us, and how it figures in our broader notion of a liberal democratic state, and how it attempts to reconcile the principles of non-establishment of religion and of free exercise of religion, when they clash, and only then may we try to see how, in the light of the general conception of the place of religion in a liberal polity, the presence of religious symbols in public institutions, including schools, can be supported or rejected. The case is similar with our third paradigm case: hate speech.

I do not claim at this point that the latter account is morally more attractive than the former, but I do not see how it can be shown to be evidently *less* attractive, which is the argument that a defender of premise (1) in the JMR syllogism would have to sustain. To say it boldly, I do not think that "moral insight is best generated at the level of particular cases", which is Moore's claim, and which is the claim needed to support the premise (1). Both John Rawls's model of RE, and my own sketchy outline of the two rival accounts of moral reasoning, suggest that the "deductive" (second) model is *at least as* attractive as the "inductive" (former) one. And if this is correct, then it is all that is needed to cast a fatal doubt upon the force of premise (1).

4.

But come to think of it, my view is that the "deductive" ("top down") model is *more* attractive, and that there is good moral sense in "beginning" at a fairly general and abstract level of moral principles, and only then start descending towards particular instances, with the insights gained from reflection on the particular cases serving as a modifier of the antecedently established principles governing a given "individuated good", that is, a constitutional right. That is, there is a good prima facie reason to privilege moral reasoning about rights centered around general, abstract conceptions, and giving it moral primacy vis-à-vis the sort of moral intuitions which we normally experience when conducting "moral thought experiments" of the sort that are celebrated by Moore.

Consider our cases of paradigmatic rights-related dilemmas. In the case of abortion, how much mileage can we get from empathizing with a woman's emotions in order to weigh and balance serious conflicting principles which point in different directions and yet which we must configure within a relatively coherent whole if we want to propose a rule which makes moral sense not just to this one individual woman but also to the

[26] See similarly, Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity: Cambridge 2002) at 56.

society as a whole? For there are many stakeholders with "stakes" of differing levels of intensity: women with unwanted pregnancies, fathers of their unborn children, unborn children themselves (at least from the perspective of those who believe that these already are human beings endowed with their own legitimate interests), and virtually everyone around who has a view on the issue and who has a claim to live in a society governed by just rules of conduct. Or take the question of school crucifixes: shall we really gain a thorough insight into (or even only a good starting point for the consideration of) this dilemma if we lock ourselves into the perspectives of schoolchildren: those who may be upset by constantly facing a hostile (to them) religious symbol, or those who are told by their parents that their preferred religious symbol should accompany them in all the significant places in their school, and yet there are none? Aren't we likely to think about the matter in a better way if we begin by acknowledging that the matter is one where some major principles on religion vis-à-vis the state are intersecting, and where a number of conflicting, but all prima facie legitimate, interests need to be mutually reconciled and readjusted? And the same applies to the hate speech example: are we really helped in our moral insight by telling ourselves stories about individuals reacting in one way or another to public vilifications rather than stating openly that this is an arena of potential conflict between two major principles: free speech and individual dignity, and that each has some significant reasons in support of it, and so the best way to particular specific rights in question is to begin by asking oneself, in a dispassionate way, what general reasons can be invoked to support the conflicting interests in this case, and how these reasons can be weighed and balanced against each other in that instance?

This model of moral reasoning has much to claim in its support, quite apart from the fact that it may simply appear much more intuitively natural, as a matter of moral psychology, to many of us. Its appeal may lie, first, in its *capacity to capture the conflicts* between different moral principles which may not be detectable at the level of a particular personal experience (informed, as it may often be, by a pressure from one powerful value or principle) but which appear with all their complexity only at an interpersonal level, when we attempt to collect all salient values at stake. This dimension of conflict of principles is invisible at the level of Moore's "moral thought experiments" occasioned by particular cases rich with "the kind of detail and concrete personal involvement" resulting from empathy but myopic towards competing considerations. The privileging of "bottom-up" moral reasoning involves the risk that a "broader picture" will disappear – and, in the case of rights in particular, the broader picture is all that matters. For if there is something truly specific about rights-related dilemmas is that they implicate conflicts, sometimes tragic conflicts of values, each of which is independently justified, and yet some of which have to give way to others in the particular instance. So if anything, rights-related dilemmas call for more rather than less emphasis on the abstract rather than a particular moral reasoning, because it is only the abstract level which is capable of encompassing as many values, which exert their gravitational pressure upon the case, as possible.

The inclination towards the general as contrasted to the particular, in the context of moral reasoning, is also supported by the quest for *impartiality*. "Impartiality" is probably an insignificant, perhaps absurd, perspective to take as far as personal morality is concerned but it is of central importance when reflecting upon the principles of justice – upon the principles which are to govern the interactions between individuals all

espousing often different personal moralities. "Moral thought experiments" aimed at tracking an impartial position on a given controversial issue (for instance, the experiments such as a reasoning in an original position, from behind the veil of ignorance;[27] or within the constraints of neutral dialogue,[28] or from an imagined perspective of an impartial or an ideal observer,[29] etc) may help us make sure that we do not tailor the proposed moral principles of justice to our particular interests (or the interests of those who affect us emotionally in a particularly intense way) but that we take on board as many interests as possible. This is what Rawls had in mind when he said that, "lacking knowledge of their natural assets or social situation, [the parties in the original position] are forced to view their arrangements in a general way".[30] There is a long and persuasive (to me, in any event) tradition in moral thinking about justice that there is a strong link between impartiality (at the level of method) and justice (at the level of substance) – and surely impartiality is fatally endangered if we allow ourselves to become prisoners to our intuitive responses to particular case studies presented to us, with all the bias and prejudice which may likely contaminate our intuitive judgments thus formed.

Third, a sufficiently high level of abstractness of moral discourse is necessary in order to ensure a degree of *equality of treatment* of the addressees of various rights. It is only when we consider an individual as a member of a broader category, as "a generic person, not as the warm and colorful individual you are",[31] that we shall be able to establish the criteria of relevance of particular properties of an individual for the purpose of equal treatment. Each person is different in some respects and similar (or identical) in others; in order to treat people equally we need to establish which individual properties are relevant, but this is simply impossible if we narrow our concern to that one person alone. The abstractness of a right's articulation is a prerequisite of its universality: of its being applied to all the relevant cases. "This universality of liberal rights is … based upon an ethical commitment to the equal treatment of persons" – observed Stephen Holmes, and he remarked: "It remains obscure how various critics [of abstract rights] can jettison all abstractions and nonetheless embrace egalitarianism…".[32] This concern about equality necessitates a degree of detachment from a particular case: an equality-respecting rights articulation must provide an interpretation of a right which must be extended to all (all in a relevantly similar position, that is, but what is a relevantly similar position is something tested by a conception of justice, and any exclusivist, discriminatory criteria are easily detectable at that level). And the focus on a single case renders this equality-oriented concern chimerical.

Finally, the move towards the general and abstract dimension, as opposed to the particular "moral thought experiments", can be supported by the need to secure proper

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[27] Rawls, *A Theory of Justice*.

[28] Bruce A. Ackerman, *Social Justice in a Liberal State* (Yale University Press: New Haven 1980).

[29] See Rawls discussion of this concept in *A Theory of Justice* at 184-90, and the literature he cites at 184 n. 34.

[30] Id. at 187.

[31] Stephen Holmes, *The Anatomy of Antiliberalism* (Harvard University Press: Cambridge Mass. 1993) at 229.

[32] Holmes at 230.

legitimacy to authoritative rights articulations. The liberal principle of legitimacy postulates that only laws that are based upon arguments and reasons to which no members of the society have a rational reason to object can boast political legitimacy, and as such be applied coercively even to those who actually disagree with them. A contemporary *locus classicus* of this principle is Rawls's *Political Liberalism*: 'Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason'.[33] Rawls further elaborates upon this conception in his discussion of the concept of 'public reason', that is, publicly recognizable standards of right and wrong. Another way of expressing the same thought is the "endorseability by all" thesis, which can be found in Habermas's suggestion about how individual interests may appear in public deliberations: "Only *generalizable* value-orientations, which all participants (and all those affected) can accept with good reasons as appropriate for regulating the subject matter at hand … pass this threshold".[34] The implication is clear: some arguments, even if actually present in the minds of legislators or policy-makers, are not qualified to figure in the public defence of a law; the law must be defensible in terms that belong to a forum of principle rather than an arena of political bargains and plays of naked interest.

But how can one hope to attain a "generalizable value orientation" if one's eyes are firmly focused on the particular case: a court case, or an imaginary case study, *à la* Moore? Only at a broader, more abstract level, when we try to distil the arguments presented to us from their embeddedness in one particular type of moral experience, or one ethical tradition, or one religious dogma, can we hope to reach for the arguments which can be, reasonably, endorsed by others, even if those "others" will not necessarily accept the specific conclusions of the argument. Hence, only when locating our reasoning at a fairly abstract level can we hope to attain the conditions for legitimacy of an act of rights articulation.

These four types of moral concern: visibility of moral conflicts, impartiality, equality, and legitimacy – argue for the "deductive" as opposed to an "inductive" moral method, when the dilemmas about a proper rights articulation present themselves to us. They call for an "abstract" rather than a specific perspective; for the privileging of a "from general principles to particular judgments" rather than a *vice versa* movement in the reflective equilibrium exercise.

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[33] Rawls, *Political Liberalism*, at p.137. A broader wording of 'the ideal expressed by the principle of legitimacy' is: 'to live politically with others in the light of reasons all might reasonably be expected to endorse', ibid at 243. For yet another statement of the liberal principle of legitimacy see Rawls, *Political Liberalism*, at p.217.

[34] Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, Mass: MIT Press, 1998) at p.81, emphasis in original. The same point has been expressed well by Waldron: 'If there is some individual to whom a justification cannot be given, then so far as *he* is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to *his* allegiance', Jeremy Waldron, *Liberal Rights* (New York: Cambridge University Press, 1993) at 44, both emphases in the original.

5.

As an aside, let me add a word on how the framework of reflective equilibrium, in the Rawlsian version (which has become canonical), fits the scheme of argument suggested here. So far I have been using it as if one of the two, equally legitimate steps of bringing about an equilibrium, namely the "bottom up" step (from considered judgments to general principles) corresponded to Moore's "moral thought experiment" or to Rorty's empathy-based moral sentiments. And my strategy of rebutting the primacy of that approach (which, I suggested, is the best support one can find for premise (1) in the JMR syllogism) is by showing that there is no reason, either in Rawls or in more intuitive thinking about rights, why we should privilege *this* step; that if anything, there is a good deal of sense in privileging the reverse movement, from principles to specific convictions. But I wish to bracket for a moment the assumption that Rawls's bottom-up move indeed corresponds to intuitive, empathy based responses to specific fact situations, and therefore, that at least one-half of Rawls's reflective equilibrium would be useful to the proponents of premise (1).

Rawls's descriptions and uses of RE, scattered throughout *Theory of Justice* and briefly restated in *Political Liberalism* (and also, in a much paler version and *sans le mot*, in *The Law of Peoples*,[35] are not paragons of clarity and lend themselves to diverse readings. It is true that, at times, Rawls can be read to imply that the "bottom up" step in RE corresponds roughly to what Moore might characterize as the sort of moral thought experiment which he applauds so much as the preferred mode of moral reasoning when rights are at stake. For instance, when he explains that the considered judgments of justice are subject to careful selection and examination by ourselves before they make it into the next step in RE, he implies that at least at the initial stage, we begin with intuitive and very specific, rough judgments: almost unreflective responses to specific fact situations, so that "we can discard those judgments made with hesitation, or in which we have little confidence", or those we make "when we are upset or frightened, or when we stand to gain one way or the other", etc.[36] A similar impression can be gained from Rawls's analogy between "everyday (moral) judgments", and the capacity, by native speakers of a language, "to recognize well-formed sentences" (here Rawls appeals to Chomsky's theory, and to "the sense of grammaticalness" that we have for the sentences of our native language).[37]

But his flagship examples of the bottom-up procedure in RE are distinctly different from Moore's moral thought experiments. In *A Theory of Justice* he gave the convictions "that religious intolerance and racial discrimination are unjust"[38] as examples of those "judgments … which we … make intuitively and in which we have the greatest confidence",[39] and which we may treat as "provisional fixed points which

[35] "The social contract conception of [the Law of Peoples], more than any other conception known to us, should tie together, into one coherent view, our considered political convictions and political (moral) judgments at all levels of generality", John Rawls, *The Law of Peoples* (Harvard University Press, Cambridge Mass. 1999) at 58.

[36] Rawls, *A Theory of Justice* at 47.

[37] Id. at 47.

[38] Id. at 19.

[39] Id. at 19.

we presume any conception of justice must fit".[40] They sound pretty abstract to me; they are not the sort of intuitive moral responses to a moral evil, when we see it, but rather reasonably generalized and abstract principles, perhaps at a middle level between specific moral responses and ultimate values. Similar was his language in *Political Liberalism* when he provided examples of currently "firmly held convictions" which can be "collect[ed]" in order to discern broader principles which underlie them: "the belief in religious toleration" and "the rejection of slavery".[41]

My point here is not to conduct exegesis of Rawls, but rather to show that even this part of Rawls's RE – a conceptual device widely used in moral philosophy – which consists in the bottom-up movement can hardly be of much use to those who profess that a morally attractive procedure in making moral sense of rights is to register first our immediate, intuitive responses to specific fact situations, and then work these "moral thought experiments" into a more articulate, more coherent scheme. At least for Rawls, this was *not* the meaning of his bottom-up procedure; the rejection of slavery, the belief in religious toleration, the condemnation of racial discrimination – these are not instances of a "moral insight … best generated at the level of particular cases" (to use Moore's language), or "sentimental" responses to specific instances of suffering (in Rorty's approach) but rather mid-level moral conceptions, the intelligibility of which can be perfectly well stated in an abstract fashion. It may well be that, for some people, as a matter of their individual moral psychology, they were motivated by facing specific cases of intolerance or discrimination, but this is by no means obvious for everyone, and it does not figure as a part of Rawls's description of the bottom-up track of RE.

6.

To summarize: much of the theoretical criticism (including the paper of Waldron under discussion) is addressed against the privileging of judges as compared to legislators in conducting thorough, sophisticated, unbiased moral reasoning necessary for the proper articulation of constitutional rights: legislators, the critics of judicial review say, can do it no worse, and perhaps better. But what is the "*it*" in the last sentence remains often unexplored.

Both the defenders and critics of judicial review assume tacitly that there is a special moral capacity needed for a correct articulation of constitutional (explicit or implied) rights, and they only disagree about who is likely to possess this moral capacity to a higher degree. But in this Working Paper I challenge this unstated assumption. I tried to show (after having explained the central terms of the debate, in Part 1 of this Working Paper) that it is not the case that the reasoning oriented towards rights articulation is *more* moral than many non-rights-oriented authoritative public decisions in the society (Part 2); I further suggested that rights-related reasoning cannot be shown to be *differently* moral in a way which would support the idea that this relevant difference may justify why some political agents (such as judges) may be more suited to performing this particular type of moral reasoning than others (such as legislators). The best argument for such a distinction to be found in the literature refers to the opportunity for and habit of conducting "moral thought experiments" which is what, as part of their

[40] Id. at 20.

[41] Rawls, *Political Liberalism* at 8.

professional duties, judges normally do, and which they can therefore instinctively do also when they engage in a "concrete" judicial review of a statute. But there is no good moral reason to believe that "moral thought experiments" triggered by specific fact-situations should be privileged as a method of moral reasoning, compared to an unashamedly abstract, principle-based moral reasoning (Part 3). If anything, a good case may be made (referring to the need to openly acknowledge moral conflict, secure impartiality, equality and legitimacy) for deliberately abstracting from specific cases and focusing on the abstract and general level, only modifying it later, if one is compelled to such modifications by considering evidence from specific instances (Part 4). Not even one half (the bottom-up half) of the Rawlsian famous "reflective equilibrium" apparatus can be of help in this regard (Part 5).

This argument puts to one side, as one can see, the question of whether judges naturally focus, in their moral psychology, on specific cases,[42] while legislators, in contrast, think primarily in abstract and general terms, uncontaminated by their knowledge of particular instances. This question belongs to the set of issues discussed by Waldron: comparing respective competencies, skills and styles of moral reasoning normally conducted by judges and by legislators. In "Judges as Moral Reasoners" he gives us some good reasons to believe that the type of public argument about rights which should figure in the forefront of authoritative rights articulations is better handled by legislators, unburdened by the responsibility to dress their argument in a legal costume and by the conventions of legal (including) textual interpretation which often blur rather than clarify the real moral issues at stakes. His main strategy in the paper under discussion is that it is the mixing of the legal with the moral which renders judges inferior as authoritative articulators of rights. But before we engage in the scrutiny of his own argument, it is useful, as a preliminary matter, to question the unstated assumptions about what type of moral reasoning is involved in the argument on rights – the assumptions which he, at times, seems to share with his opponents in this debate.[43]

[42] Waldron, for one, argues that it is not the case, especially as far as appellate courts are concerned; "Core Case" at 1379-80.

[43] To be sure, no such unstated assumption can be read into the paper under discussion though he does not rebut it either; it has been, however, made in his "Core Case" where he argued both that it is not the case that appellate courts typically consider "flesh and blood individual situations", id. at 1379, and that legislators often do consider individual cases when initiation or processing legislative proposals, id. at 1380.