Death and Consensus Liberalism

Williams, Jeremy

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Jeremy Williams

University of Birmingham

1. Introduction

Theories of public reason propose moral constraints on political action. They have, then, an inherently practical focus. Each such theory articulates a test or standard of public justification which is purported to show, roughly speaking, when political institutions, laws, or policies have been legitimately established, and when they ought to be abolished, repealed, or reformed. Depending on the details of the test which a given theory proposes, the upheavals it requires to political practice could be extremely radical—and not necessarily welcome. The full evaluation of any theory of public reason must therefore depend on whether the results of applying it are sufficiently plausible or palatable. Rawls acknowledged this point explicitly. After developing his seminal idea and ideal of public reason in *Political Liberalism*, he concluded that 'whether this or some other understanding of public reason is acceptable can be decided only by examining the answers it leads to over a wide range of the more likely cases.'[1]

Despite Rawls's counsel, however, philosophical investigation into the implications of public reasoning for concrete political questions remains surprisingly rare. Most discussion of public reason is pitched at a fairly high level of abstraction, consisting of reflection on whether, in general outline, particular accounts are coherent or compelling, and of analysis of the best ways to specify their various theoretical components (such as the conception of a reasonable person or that of a justificatory reason). To the extent that proponents of public reason consider in depth what their theories portend for the resolution of particular policy problems, their approach tends to be to handpick issues as illustrative case studies, on which their theory is taken to provide clear, attractive guidance. In this paper, my aim is to contribute to remedying this general omission of the literature. I do so by drawing out some hitherto unexplored practical implications of public reason under the Rawlsian conception, which remains, in spite of fierce competition, the dominant brand of public reason liberalism on the market.

1. Rawls 2005: 254.

The Rawlsian conception provides the archetype of the so-called *consensus* model of public reason. Consensus theories are distinguished by their restriction of the reasons that may be invoked in justifying exercises of political power to those that can be recognised as in some sense good or acceptable grounds for political action by all qualified members of the community. On the Rawlsian version of the consensus model, political decisions must be justified, more specifically, with reference to the moral reasons given by only the limited set of political values and concepts that all citizens will share if they are (by Rawlsian lights) reasonable. This is not to say that the Rawlsian view altogether disallows appeal to controversial reasons. For it permits justification on the basis of competing views about the interpretation, applicability, and relative importance of citizens' shared values, as adduced from within their reasonable 'political conceptions of justice'.[2] The theory does, however, significantly constrain political disagreement by specifying that reasons drawn from reasonable citizens' religions, metaphysics, conceptions of the good, and other aspects of their 'comprehensive doctrines' cannot count as justificatory. And it imposes upon all individuals who share in the exercise of the state's coercive power, including ordinary voters, a moral 'duty of civility' to advocate and lend support to only political initiatives that are publicly justified according to the foregoing standards.[3]

2. A political conception of justice is, roughly, one that takes account of only those moral values that constitute shared political values, and that tries to specify and order these in a sufficiently precise way to provide determinate answers to political questions. See Rawls 2005 at, e.g., 386.

3. See Rawls 2005 at, e.g., 217ff. On the so-called 'wide view' of public reason, which Rawls came to endorse in his final works on the subject, the duty of civility is somewhat relaxed: citizens are permitted to invoke their comprehensive doctrines in public argument, subject to the 'proviso' that a case in public reason can be produced 'in due course' that leads to the same conclusion they seek to defend (Rawls 2005: 462). The wide view is somewhat controversial among Rawlsians (for a rejection of it, see Hartley and Watson 2009). But because it does not give decision-makers any latitude to depart from the policy prescriptions that would be issued by public reason alone, it will make no difference to the argument of this paper whether or not it is assumed to be in force.

Any proposal that important decisions be taken on the basis of an artificially restricted set of reasons is likely to invite concern that the ability of political agents to reason and choose well will be unduly inhibited. Accordingly, one crucial test for Rawlsian public reason is whether it is, as Rawls himself puts it, *complete*. Rawls defined completeness as a matter of whether the content of public reason — that is, the total set of ideas, arguments, and principles from which public justifications are to be composed — is sufficient to generate 'a reasonable answer to all, or nearly all' the political questions for which the use of public reason is required.[4] He hypothesised that his conception of public reason is indeed complete in this sense, though he did not attempt to *show* it, and his defenders have not, I believe, met that challenge either.[5] The reasons for this are perhaps understandable.

4. See Rawls 2005 at, e.g., 244ff or 454. Rawls further advises (at 246) that whether an answer counts as reasonable for purposes of evaluating the completeness of public reason is to be 'judged by public reason alone'. In other words, public reason is not to be understood as incomplete just because it generates answers to which we object from our comprehensive or all-things-considered moral outlook. Rather, completeness is undermined only by cases in which the public reasons available for addressing a political question are so sparse that either no answer can be reached, or we can produce only answers that are disqualified as incompatible with relevant political values or principles of public reason itself. Interestingly, meanwhile, in *The Law of Peoples*, one of Rawls's comments might be taken to suggest, differently, that a model of public reason should be accounted incomplete not merely in the event that it fails to orient political decision-making, but also in the event that we cannot reconcile ourselves to its guidance in reflective equilibrium. For discussion, see Williams 2016: 3–4. At certain points below I will have occasion to discuss the possibility of public reasoning's leading us to policy conclusions that are defective in the latter sense. But to forestall confusion, I shall throughout use the term 'completeness' in only the first sense given above (the sense also standardly attributed to it in the secondary literature), on which it concerns, narrowly, whether public reason enables deliberators to argue their way to any resolution to the political problems put before them at all.

5. To be sure, there exist defences of the completeness of Rawlsian public reason. But their general strategy is to argue (a) that the (hitherto unmet) burden of proof lies with those who dispute public reason's completeness to make their case, and (b) that insofar as public reason fails to provide a basis for decision-making, there are nonetheless ways for citizens to select between the policy options before them that do not involve resorting to non-public

Demonstrating that a conception of public reason is complete seems a highly daunting — if not Sisyphean — task, involving delving into the minutiae of a vast number of political problems, to establish, in each case, what answers can be justified by public reasons alone. Showing that a conception of public reason is *in*complete, on the other hand, may be a more manageable undertaking. If a sufficient number of examples can be found in which public reason proves inimical to forming at least one reasonable conclusion, then the charge of incompleteness is substantiated without the need to exhaustively catalogue the outcomes of public reasoning for other questions. Yet, while doubts about the incompleteness of Rawlsian public reason have been often voiced, critics have thus far carried out relatively little of the necessary philosophical spadework.[6] The question of the completeness of Rawlsian public reason therefore remains crucially unsettled.

In speculating about the political issues that would be most likely to make revealing test cases for the incompleteness objection, commentators have typically alighted on the field of *bioethics*. For it contains many questions that appear to turn on precisely the sort of deep, longstanding philosophical debates that public reason requires citizens to put to one side. The question most commonly identified in the literature as raising the spectre of incompleteness is that of abortion. Having considered the implications of Rawlsian public reason for that controversy elsewhere,[7] however, in this paper I address an important — and thus far widely overlooked — bioethical problem that arises at the other end of human life. This is the problem of how to define and diagnose the death of a person, or determine at what point the clinical and legal practices conventionally associated with death, such as the removal of vital organs, may take place. My thesis will be that this is a matter on which public reason does indeed have a grave incompleteness problem. Public reason is indeterminate, I aim to demonstrate, between a broad range of legal definitions of death (at least bracketing the socially contingent effects which candidate policies might have on third parties).[8] I also aim to go beyond existing articulations of the incompleteness objection, moreover, by examining what the Rawlsian view implies about how decision-makers ought to respond to indeterminacies in public reason. Insofar as the route to a reasoned choice between competing criteria of death is indeed foreclosed, I shall contend, public reason requires that selection among policy options proceed in an unacceptably arbitrary fashion.

Before I begin, three clarifications about the scope of my argument and conclusions. First, to reiterate, my target is the Rawlsian view (and hence, in what follows, the terms 'public reason' and 'consensus liberalism' always refer to the Rawlsian versions thereof, unless otherwise specified). But who, for present purposes, counts as a Rawlsian? I take my critique to apply to consensus theorists who believe that public justification must proceed on the basis of the reasons given by political values and concepts shared by reasonable citizens, and who follow Rawls in identifying who the reasonable are. As I understand their respective positions, Jonathan Quong and Andrew Lister both fall into this category, for instance, despite their various innovations on Rawls's original theory.[9]

reasoning. See especially Williams 2000 and Schwartzman 2004. I examine claim (b) in section 8, below.

6. The most detailed attempt in the earlier literature to advance the incompleteness objection through sustained analysis of particular political controversies appears in Greenawalt 1988: chs. 6–8. Greenawalt's principal examples of alleged incompleteness are the problems of abortion and animal welfare. His argument predates *Political Liberalism*, and thus does not respond to the mature version of Rawlsian public reason, as developed there and in subsequent essays (though for a new argument to comparable effect, also focusing on abortion, and published only after the present article was completed, see Kramer 2017: ch. 3. I comment on Kramer's argument further in n. 47 and n. 76, below.) I have argued previously, moreover, that in the case of the problems Greenawalt cites, the charge to which Rawlsian public reason is vulnerable is not incompleteness but something else. See Williams 2015. Especially if I was right, the incompleteness objection still stands in need of substantiation of the kind I aim to provide here.

7. In Williams 2015.

8. Note that 'indeterminate' is a term of art within the public reason literature, on the precise meaning of which see the text around n. 26, below.

9. See Quong 2011 and Lister 2013.

Second, the case I make here against the Rawlsian view, thus defined, is admittedly pro tanto. I believe that the results of applying the model to the problem of death are sufficiently unwelcome that one would be warranted in abandoning it on the basis of my argument here alone. But I shall not attempt to convince the committed Rawlsian who believes that the difficulties identified do not outweigh the various merits of their theory. This is, then, a contribution to a wider critique of consensus liberalism's consequences for political practice. I reflect further on the implications of my findings for the future of consensus liberalism in the paper's conclusion.

Third and finally, the argument of this paper, if sound, might be taken to provide indirect support not only to the various strands of comprehensive or ethical liberalism (which is where, for what it's worth, my own loyalties lie), but also to consensus liberalism's emerging competitor within the public reason fold: the innovative recent *convergence* liberal view.[10] On convergence liberalism, few restrictions are imposed on the reasons by reference to which citizens may evaluate the case for political action (beyond, principally, the requirement that those reasons be *intelligible*). But the view holds, demandingly, that a law or policy is only publicly justified, and permissibly imposed, if there are from each reasonable perspective sufficient grounds to endorse it, or not to veto it.[11] Whether convergence liberalism does indeed derive comparative advantage from my argument will depend, I think, on whether it too runs afoul of objections that target its problematic implications in practice. I suspect that it does. But this is a matter for another day.

2. Determining death: the political problem

It will help to preface my argument with some background regarding how the conceptualisation and clinical determination of death arose as a matter of political concern.[12] Prior to around the mid-twentieth century, the limitations of medical science were such that the irreversible loss of heart and lung function was inevitably swiftly followed by complete loss of neurological functioning, and vice versa. Thus, there was no apparent reason for dissatisfaction with the traditional *cardiopulmonary* criterion of death, under which, if the patient's heartbeat and breathing ceased and could not be restarted, (s)he was declared dead. The advent of modern respirators and other medical technologies from the 1950s onwards, however, made it possible to indefinitely sustain the cardiopulmonary functioning of patients whose heart and lungs did not work independently, even in the face of permanent loss of consciousness or of brain activity generally. The practice of continuing treatment to patients under such conditions seemed, in the eyes of many observers, to involve an objectionable squandering of scarce resources and facilities, including not only medicines, hospital beds, and machinery, but organs which, given new transplantation techniques, could provide others with immense benefits — especially if taken from a heart-beating donor. Debate thus ensued, within and beyond the medical community, over whether the medico-legal understanding of death might be amended so as to facilitate more timely organ procurement, withdrawal of life support, and so forth, while protecting physicians from accusations of misconduct, or indeed murder.

The result of that debate was a widespread legal shift around the world from the 1960s, away from exclusive reliance on the cardiopulmonary criterion, and towards recognition of the idea of *brain death*. Brain death is standardly defined as the irretrievable cessation of functioning of the brain as a whole, including both the 'higher brain', in which consciousness is generated, and the 'lower brain', or brainstem, which is responsible, inter alia, for controlling autonomic bodily functions and reflexes such as respiration, heartbeat, blood pressure, and vomiting. While a large number of states have enshrined brain death in law, however, it remains controversial. Opposition comes primarily

10. I am grateful to an anonymous referee for suggesting that I acknowledge this possibility.

11. The chief architects of the convergence view are, of course, Gerald Gaus and Kevin Vallier. See especially Gaus 2011 and Vallier 2014.

12. For a longer, informative account, see DeGrazia 2005: 115–24.

from two sources: from those who, for various moral, philosophical, and religious reasons, support a return to the cardiopulmonary standard, and from those who favour adoption of a more radical *higher brain death* criterion. On the latter, death occurs upon the permanent loss of function of those regions of the brain in which the capacity for consciousness is realised, even if, because the brainstem survives, the patient's somatic functions continue spontaneously, without the need for medical assistance beyond basic intravenous hydration and nutrition.

The continued controversy over the correct understanding of death has resulted in legal clashes, on both sides of the Atlantic, in which — for instance — parents have resisted attempts to disconnect their brain-dead children from ventilators, or remove their bodies to the mortuary, on grounds of their (typically religious) conviction that they were still alive.[13] The practical significance of the choice between criteria of death is not, moreover, confined to the medical sphere. For in addition to deciding when physicians ought to be permitted to remove life support or organs from their patients, and when a human body may be autopsied and disposed of, we also need to know, say, under what conditions the crime of murder or manslaughter has taken place, when individuals and corporations may be sued for wrongful death, when the posthumous confiscation or reallocation of a person's property may take place, and when to change a surviving spouse's marital status to widowed.

These are *political* matters, for which the decisions reached will be backed up by the state's coercive power. Indeed, most, if not all, are *fundamental* political matters, in the Rawlsian sense that they represent, or are inextricably bound up with, so-called 'constitutional essentials' and 'questions of basic justice'. The latter fact is significant, because it means that even if — as Rawls himself proposed — the use of public reason is mandatory only when fundamental matters are at stake, public reason will inevitably be called upon to resolve the problem of how death is to be legally construed.[14] Our question is whether it has the resources to do so.

13. For a description of two recent such cases, see Brierley 2015.

3. Death and personal identity

We have immediate grounds to suspect that it does not. For what our death consists in, and the conditions under which it occurs, appears to be a *metaphysical* question. At first sight, the statement that someone has died seems equivalent to the statement that she has ceased to exist. For the dead are, as we say, no more. (Let us accept this claim for now; I return to it in section 5.) To know when someone ceases to exist, we need to know what is involved in her — and our — *continuing* to exist over time. And that in turn depends on our fundamental nature, or what kind of entities or substances we essentially are. The truth about our fundamental nature and persistence conditions is what theories of *personal identity* seek to establish. There is, however, no such theory that is or could stably remain non-contentious among Rawlsian reasonable citizens.

For illustrative purposes, consider just three of the most prominent (secular) families of views about personal identity in contemporary metaphysics.[15] First, on so-called *biological* or *animalist* accounts, each of us is essentially a human animal or organism, whose persistence over time consists in the continued functioning of the body as an integrated unit (or perhaps in its performing certain specified critical functions). Second, under *mind essentialism*, we are instead fundamentally minds, or beings with the capacity for consciousness, who are distinct from our bodies or organisms (albeit closely related to and dependent upon them), and whose existence over time consists in the continued

14. For Rawls's view that the duty to employ public reason applies only when addressing fundamental political questions, see Rawls 2005 at, e.g., 214–15. For the view that the duty applies in political justification generally, see, e.g., Quong 2011: ch. 9.

15. The literature on personal identity — even as restricted to the three canvassed views — is too vast to survey here. For three of the most influential proponents of these particular approaches, however, see, respectively, Olson 1997, McMahan 2002: ch. 1, and Parfit 1987: part III.

functioning of those regions of the brain responsible for generating conscious mental states. Third, on *psychological* approaches, our essential nature is not that of a merely conscious subject but of a more complex psychological being, whose existence over time requires a certain minimum degree of continuity in the contents of our mental lives, such as our memories, beliefs, intentions, and so forth. There are no obvious grounds for thinking that a reasonable citizen could not endorse any of these positions.[16] For reasonableness on the consensus liberal understanding is, in a nutshell, a matter of subscribing to the set of core normative beliefs which Rawlsians take to constitute the foundational commitments of a democratic society. These are the belief that one's fellow citizens are free and equal in their moral standing, that society should be organised as a fair scheme of cooperation among them, and — most controversially — that, owing to the existence of the so-called 'burdens of judgement', and consequent 'fact of reasonable pluralism', all should practice reciprocal restraint in public justification.[17] Each of the foregoing metaphysical views seems fully compatible with these political commitments. And, crucially, those views imply — or can be developed in ways that imply — strikingly different conclusions about the conditions under which we die.

Animalism, for instance, has been variously interpreted as compatible with the idea of brain death, and as ruling it out and requiring a return to the traditional cardiopulmonary criterion.[18] What is at stake in this debate is whether, absent the survival of the brain, the residual somatic functioning of which a human organism on artificial life support can be capable is sufficient for it to be considered alive.[19]

16. I explore in the next section whether there are any other less obvious reasons why they could not do so, arising out of the minutiae of the political conception of the person which the reasonable must endorse.

17. See Rawls 2005: 48–66.

18. Or some variant thereof. For an 'updated' cardiopulmonary standard, see DeGrazia 2005: 147–49.

19. For differing perspectives, see, e.g., DeGrazia 2005: 142–49, Bernat 2006, and President's Council on Bioethics 2008: ch. 4.

Animalist proponents of brain death typically claim that an organism whose brain is destroyed cannot function as a sufficiently integrated unit to be deemed alive, or that it is incapable of functions that are conceptually basic to biological life. For opponents of neurological criteria, however, it is absurd to claim that an organism that remains capable — as some brain-dead patients are — of such complex, coordinated activities as growth, sexual maturation, fighting infection, or gestating a fetus, is dead.

Although many animalists have thought that we can die by suffering complete brain failure, few if any would say that the irreversible loss of the capacity for consciousness alone is sufficient for death. Rather, on the standard animalist account, an individual whose higher brain is destroyed, but whose brainstem continues to mediate the autonomic functions of the body, remains alive, but enters a *persistent vegetative state*. Mind essentialists, by contrast, claim that such a person *is* dead, and hence endorse the higher brain criterion of death. On their view, the circumstances of one's death might be such that one leaves behind an organism that continues to function in various ways, with or without mechanical assistance. But since we are not fundamentally organisms, they contend, but minds that exist in some form of association *with* our organisms, we should think of the nonconscious animal that persists after higher brain death merely as a person's discarded vehicle, or living corpse.[20]

Finally, consider the psychological approach. Some of its proponents have argued that, like mind essentialism, it supports the higher-brain-death criterion.[21] But, as others have argued, some versions of this approach appear to yield a still more radical — if not rather unsettling — understanding of death, whereby one of us might cease to exist even *prior to* the permanent cessation of consciousness.[22] This is possible because the psychological approach holds that we cease to exist

20. See especially McMahan 2002: 423–55.

21. See, most famously, Green and Wikler 1980.

22. See, e.g., McMahan 2002: 43–55, and DeGrazia 2005: 127 et circa.

when the level of psychological continuity required for diachronic personal identity has broken down, for which loss of consciousness, though sufficient, is not strictly necessary. The psychological account implies, for instance, that in a science fiction scenario in which our memories and other psychological features are completely erased by some machine, we cease to exist, even if a conscious subject persists throughout the process. And outside the realm of science fiction, some psychological theories might imply that certain forms of dementia, whether brought on abruptly by injury, or progressively by disease, involve sufficiently dramatic erosion of our psychological capacities and characteristics as to be incompatible with our survival.

The precise implications of a psychological theory regarding when we cease to be depend upon its details. If a sufficiently weak degree of psychological connectedness is held to be enough for identity — or any degree at all — then the theory's implications for the point at which we cease to exist may be indistinguishable in all real-world cases from those of mind essentialism. Many psychological theories, however, hold that the psychological connectedness required for identity over time is of a more demanding level, of which only a *person* — in the Lockean sense of a self-conscious, thinking being — is capable. These theories hold, by implication, that our fundamental nature is that of a person in the foregoing sense. Those who endorse this view might be thought to be constrained to accept that death for us occurs immediately upon the loss of the higher cognitive endowments that make us Lockean persons. Yet, this is not necessarily so. For such a psychological theorist might think that, if our cognitive capacities are diminished below the level required for Lockean personhood, and we correspondingly dip below the threshold of psychological connectedness needed for identity, we do not cease to exist all at once, but fade out of existence gradually, as the remaining vestiges of our mental lives are extinguished — a process that only terminates at or around the final cessation of consciousness.[23] Nonetheless, if a psychological account holds that our existence cannot be a matter of degree, and depends on a level of psychological continuity which only Lockean persons can possess, then it does indeed seem committed to the conclusion that there is a chance of our ceasing to exist in a way that leaves a subject of basic consciousness behind for a non-negligible period of time. And while critics typically maintain that it is an embarrassment to the psychological approach insofar as it is thus committed, there still seems nothing unreasonable, given the understanding of 'reasonableness' advanced above, in a proponent of the psychological account's accepting or positively embracing this conclusion.

The foregoing discussion, while based on only a small sample of relevant metaphysical theories, indicates the existence of a striking degree of reasonable disagreement over the conditions under which we die, stemming in turn from reasonable pluralism over our fundamental nature and persistence conditions. To be sure, the scope of this disagreement is not unlimited. For all agree in particular (or so I shall assume) that, if a person suffers irreversible failure of cardiopulmonary function, causing the disintegration of his brain and body, death has occurred.[24] The question is whether we *must* await cardiopulmonary failure before pronouncing the patient dead, if some prior neurological standard has already been satisfied. For the state to require that we wait for the satisfaction of a later standard is for it to coercively restrain those who would perform the various death-related activities earlier, and who will in many cases think that delay is not merely a mark of suboptimal public policy, but a threefold betrayal: of the family, whose grief is pointlessly prolonged; of those in desperate need of the patient's organs or other resources; and of the memory, values, dignity in death, and so on, of the patient him or herself.[25] Conversely,

23. Cf. Parfit 1987: 323.

24. I discuss further limits on reasonable disagreement about death in the next section.

25. As an illustration of such sentiments, consider for instance the inscription on the grave of Nancy Cruzan, whose family engaged in a high-profile battle in the U.S. court system to have her life support discontinued after she fell into an irreversibly nonconscious state: 'DEPARTED JAN 11, 1983/AT PEACE DEC 26, 1990'. Cited in McMahan 2002: 423.

for the state to endorse an earlier standard requires restraint of those whose moral convictions still direct them to treat the patient as a living person, and for whom a premature declaration of death will be taken to evince, primarily, an abominable disregard for the latter's still-operative basic rights. Under consensus liberalism, what is crucial is that those who stand to be coerced in these ways can, no matter how vehemently they dissent from the law on death, nonetheless be said to have received a proper public justification for it.

Such justification will not be possible, however, if, in order to reason one's way to a conclusion about how death should be legally defined, one has no choice but to take sides, explicitly or implicitly, between reasonably rejectable understandings of our essence and identity. Instead, insofar as the required deliberative route to a policy conclusion is blocked by the Rawlsian requirement of neutrality between reasonable metaphysical doctrines, the determination of death will be a question on which the rules of public reasoning produce *indeterminacy*. I use the term 'indeterminacy' here in a technical sense attributable to Gerald Gaus.[26] Public reason is indeterminate in this sense when the considerations to which it permits appeal fail to provide deliberators with sufficient warrant to choose one way or another between the options on the table. Indeterminacy so defined is to be distinguished from what Gaus calls *inconclusiveness*, which occurs when the admissible reasons enable decision-makers to reach multiple competing conclusions, but no further public reasons can be adduced that would facilitate agreement over which is best or most reasonable. Put in further Gausian terms, inconclusiveness occurs when two or more options have public justifications that are neither *defeated* (that is, refuted by some publicly eligible reason) nor *victorious* (proven beyond reasonable doubt).[27] In cases of indeterminacy, by contrast, we cannot even get *that* far: whatever political conclusions our full, comprehensive perspective might have enabled us to draw, the *public* reasons on hand do not add up to 'the minimum degree of proof required for either justified acceptance or rejection' of any relevant policy alternative.[28]

Consensus liberals have sometimes argued that inconclusive justification is an endemic feature of political life, which a polity can accommodate without abandoning the ideal of public reason.[29] Insofar as public reason is found to be indeterminate, however, I believe consensus liberalism faces a more serious challenge. This is because, as we shall see in more detail later, in cases of inconclusiveness it is consistent with Rawlsian values for us to select between policy options via the familiar devices of democratic politics, such as majority voting. But should public reason prove indeterminate, the deadlock will be breakable only by resort to rather more unusual and unappealing procedural mechanisms. Before considering, however, how damaging it would be to public reason should it prove indeterminate on the matter of defining death, our more immediate task is to confirm whether the appearance of indeterminacy observed so far is confirmed on further inspection. We need to confirm, in other words, whether there is any viable, non-metaphysical form of reasoning about death that is generally available to Rawlsian deliberators. Over the next four sections, I will argue that there is not. The terms of citizens' duty of civility, we shall see, prohibit them from publicly invoking, or factoring into their decision-making, precisely the considerations needed if they are to reliably reach even inconclusively justified verdicts in this complex and morally fraught policy area.

4. Death and the political conception of the person

The natural place to begin our inquiry is by asking whether a conclusion about the determination of death could be derived from the Rawlsian 'political conception of the person' (hereinafter 'PCP'). For the purpose of the PCP is precisely to fulfil the role in democratic deliberation

26. See Gaus 1996: 151–58. For informative further discussion of the distinction, see Schwartzman 2004: 193–98.

27. Gaus 1996 at, e.g., 151.

28. Gaus 1996: 153.

29. See especially Schwartzman 2004.

that comprehensive conceptions of the person typically perform in ordinary moral reasoning.

Let us first take stock of the PCP's main features. Like the other political concepts and values on which public reasoning depends, Rawls presents the PCP as one of the 'fundamental ideas' that characterise the tradition of democratic thought, and are latent within the 'public political culture' of a democratic society.[30] It represents, he thinks, the distinctive way in which democratic citizens view themselves and their peers. Indeed, the PCP understands a person *in terms of* citizenship: as an individual who can take part in public life in virtue of her possession, to a sufficient degree, of certain cognitive capacities and moral sensibilities — namely, the 'moral powers' of rationality and reasonableness.

Rawls sometimes formulates the PCP in such a way as to imply that, unless an individual possesses the relevant endowments at a given time, she is not a person at that time. For instance, he writes that 'we think of persons as rational and reasonable, as free and equal citizens, with the two moral powers and having, at any given moment, a determinate conception of the good, which may change over time.'[31] When the PCP is understood in this way, many human beings, such as children, or those who were once cooperators, but whose mental capacities are now too diminished, do not qualify. And a requirement that public reasoning be informed by this version of the PCP would accordingly seem at serious risk of generating a raft of unpalatable conclusions concerning the rights and permissible treatment of those excluded. On other occasions, however, Rawls observes a more capacious understanding of the person at work within the democratic tradition. On the latter, 'we say that a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.'[32] In allowing that a person need only fulfil the role of citizen over the course of a complete life, this formulation of the PCP draws in members of society who do not yet possess the requisite capacities but will, and those who no longer possess them but did.[33] Call this the inclusive PCP, in contrast to the exclusionary variant identified at the top of this paragraph.

As I understand it, it is the inclusive PCP that consensus liberalism accepts, and requires reasonable citizens to endorse. Were this not so, Rawls could not coherently claim, for instance, as he does, that children are equal beneficiaries of justice from any reasonable perspective.[34] Moreover, Rawls does not merely stipulate that the more inclusive formulation applies — he justifies consensus liberalism's adoption of it on the ground that it is needed to 'go with' the democratic conception of society.[35] On the latter, society is understood as a collective enterprise of a certain scope. It is not a mere 'association' of the kind that one is free to join or leave at will once one reaches 'the age of reason', thereby acquiring or divesting oneself of its package of rights and obligations.[36] Rather, a democratic society is 'a more or less complete and self-sufficient scheme of cooperation, making room within itself for all the necessities and activities of life, from birth until death.'[37] 'We add the phrase "over a complete life"' when specifying the extent to which persons must be able to participate in public life, Rawls tells

30. Rawls 2005: 14 and 29–35.

31. Rawls 2005: 481–82 (emphasis added, footnote deleted).

32. Rawls 2005: 18 (emphasis added).

33. To be sure, it continues to exclude those permanently incapable of participation in social life. Yet while I believe this is a matter of concern, it falls outside the aims of this paper to consider the consequences of that residual exclusion for public reasoning here.

34. Rawls 2005: 474.

35. Rawls 2005: 18.

36. Rawls 2005: 41 et circa.

37. Rawls 2005: 18. In addition to being a 'complete' social system in the foregoing sense, Rawls suggests here and elsewhere that, for the purpose of developing a political conception of justice, it is appropriate to model a democratic society as 'closed' — that is, without inward or outward migration — such that entry and exit are by birth and death *only*. But the stipulation of closedness, he stresses (at p. 12), can only be a temporary theoretical convenience (unlike, assumedly, the characterisation of a democratic society as complete).

us, to reflect this fact about the bounds of the societal relationship.[38] Rawls's view, thus, appears to be that the inclusive PCP is the more faithful rendering of the conception of ourselves presupposed by the distinctive democratic mode of societal organisation.

Accordingly, in what follows my argument will be predicated, unless otherwise indicated, on the assumption that it is the inclusive PCP that is found among reasonable people's stipulated shared commitments, and hence lies within the content of public reason. I shall, however, consider in the paper's concluding section the possibility of amending the PCP to the exclusionary formulation as a means of combatting the indeterminacy problem I am in process of outlining. Suffice it to say for now that, given the implications of adopting the exclusionary PCP, the assumption that consensus liberalism subscribes instead to its inclusive sibling is not unfavourable to the theory.

Because it includes the idea of a citizen's leading a complete life, without specifying a point of terminus, it would seem correct to say — if it does indeed turn out to be the case that public reason is indeterminate on what death consists in — that the location of that indeterminacy is the PCP itself. There is, however, one part of Rawls's discussion of the PCP that might be taken to suggest, if obliquely, that this piece of theoretical machinery contains further features that can facilitate a resolution of the problem of legally defining death.

I have in mind Rawls's seldom-discussed suggestion that the PCP incorporates the idea of a citizen's 'public, or institutional, identity, or their identity as a matter of basic law'.[39] His brief remarks about public identity reveal that he conceives of it as having synchronic and diachronic dimensions.[40] That is, it provides a standard for the identification of citizens by the state *at a time*, and for their re-identification *over time*, for such purposes as determining their legal rights and share of resources. As with the PCP generally, Rawls suggests that the conception of public identity relevant to public reason is distinctively democratic; other kinds of society, he says, may employ different understandings of when their members continue or cease to be persons, or the same persons, under law. Unfortunately, however, Rawls does not say what he thinks the democratic criterion of public identity might be. Instead, he only illustrates it with an example: under the relevant criterion, he says, someone undergoing religious conversion does not become a different person, or cease to be a person, and conversion is accordingly irrelevant to our legal rights. But while Rawls demurs on the question of what the democratic criterion of public identity consists in, it would be natural to anticipate that, if it exists, it could be used to yield a corresponding public criterion of a person's death or final exit from social relations. This would presumably be uncovered, as is done with metaphysical accounts of personal identity, by following the identity relation forward in time to the point at which it ceases to hold between the person in question and anyone in the future.

This suggestion, while intriguing, faces an obvious problem. For the PCP is expressly designed to stand apart from longstanding philosophical controversies over the nature of our identity and existence, not to provide a basis for wading into and resolving them. Rawls says that the problem of personal identity

> raises profound questions on which past and current philosophical views widely differ and surely will continue to differ. For this reason it is important to develop a political conception of justice that avoids this problem as far as possible.[41]

He claims on behalf of the PCP that

> [i]f metaphysical suppositions are involved, perhaps they are so general that they would not distinguish between the metaphysical views … with which philosophy has

38. Rawls 2005: 18.

39. Rawls 2005: 30.

40. See Rawls 2005: 30–32.

41. Rawls 2005: 32 n. 34.

> traditionally been concerned. In that case they would not appear to be relevant … one way or the other.[42]

And he implies that the idea of public identity in particular is general enough to be acceptable to citizens with a broad range of metaphysical commitments, saying 'all agree, I assume, that for purposes of public life, Saul of Tarsus and St. Paul the Apostle are the same person. Conversion is irrelevant to our public, or institutional, identity.'[43] This would all be an extraordinarily misleading way of presenting the PCP, if the truth were that it came with determinate and contentious commitments regarding when a person should be taken by the state to have ceased to be.

It might be replied that in the foregoing quotations Rawls somewhat overstates the degree of metaphysical equidistance required in the specification of the PCP. What is needed is not, as Rawls seems to suggest, general acceptability to those who hold one of the competing views in the philosophical debate, but neutrality among those views that are *reasonable*. As I noted above, reasonableness, on the Rawlsian understanding, is a matter of acceptance of certain central holdings of the democratic tradition: as Rawls himself puts it, public reason 'does not trespass on citizens' comprehensive doctrines so long as those doctrines are consistent with a democratic polity.'[44] If, then, it could be confirmed that particular commitments regarding our identity, persistence conditions, and death are latent within the basic moral framework of such a society, then the fact that certain philosophical perspectives are incompatible with these commitments would be no obstacle to incorporating them into the PCP. The question, then, becomes one of whether there are indeed any such commitments identifiable within the tradition of democratic thought.

There is some initial cause for optimism here. For the democratic tradition, as glossed by Rawls, does indeed appear incompatible with

42. Rawls 2005: 29 n. 31.

43. Rawls 2005: 32 n. 34.

44. Rawls 2005: 490.

at least some understandings of personal identity and their practical implications that individuals might conceivably hold. Suppose, for instance, that on one view whenever we fall asleep we cease to exist, and the individual who wakes up is a different person. Proponents of this view might take it to have a range of unusual implications — for instance, that it is wrong to hold a person, Y, morally responsible for what his physically and psychologically continuous predecessor, X, did the previous day, or that it is wrong to burden X for the sake of benefits to Y.[45] This seems a paradigmatically unreasonable position, insofar as it conflicts with the idea of personal responsibility, and of the pursuit and refinement of a conception of the good over a prolonged period of time, that Rawls identifies as part of the democratic view of what it means to be free.

It is not enough, however, for the PCP to provide guidance at the margins of the debate by ruling out certain idiosyncratic outlying views. If the PCP is to be the source of a solution to public reason's apparent indeterminacy on death, it must also provide grounds for choosing among the criteria on which the public and philosophical debates have centred, such as those described earlier in this paper. Yet, try as I might, I cannot see how it could do so. For to the extent that it is possible to discern an understanding of a person's public or institutional identity within democratic public culture at all, it is too loose or inchoate to do the necessary work. The best way to confirm this seems to be to attempt to evaluate the accounts of identity, existence, and death described in section 3 on the basis of their liberal or democratic credentials. If one does this one sees that, whatever one might make of their respective philosophical merits, there is none among them that it would be remotely plausible to impugn on the basis that they are insufficiently in keeping with a democratic polity. These views are, as I have suggested, objects of *reasonable* disagreement.[46]

45. For discussion of the ethical implications of a view of this sort, see Olson 2010.

46. Matthew Kramer, I anticipate, would object to this statement. In new work (Kramer 2017: ch. 3), he offers a critique of Rawlsian public reason that has, if I understand it aright, strong affinities with the incompleteness objection,

It should not, then, be a surprise that Rawls failed to identify what the conception of citizens' institutional identity found in democratic public culture consists in: insofar as it exists, it is too coarse-grained to articulate with any precision. It is, then, too coarse-grained to settle the question of whether, for example, the loss of the capacity for consciousness, or self-consciousness, or psychological continuity, is compatible with a person's survival. Liberal democracy, as a system of ideas, is simply not, so to speak, *complete* or *comprehensive* in the required respect.

5. Death as a biological concept

The PCP, I have argued, is of scant help in enabling public reasoners to reach a determinate conclusion about the definition of death. It may seem to some Rawlsians, however, that I have been looking for an answer to our question in the wrong place. Death, it might be said, it not something that happens only to persons, but to all life. It is therefore a *biological* concept. Thus, the appropriate way for a democracy governed by public reason to arrive at a legal criterion of death is for it to treat the question as a scientific rather than a philosophical one, to be resolved in accordance with the evidence and conclusions put forward by the relevant experts.

If death is a scientific concept, it is a heavily disputed one. There exists no consensus, either among members of the public or the scientific community, over how our death is best defined in theory, or which criterion of death should be adopted in practice. This, however, poses a serious difficulty for the suggestion that the political problem of death should be resolved by appeal to science. For while it is indeed permissible under the rules of public reason to draw on scientific evidence and expertise, there are significant caveats.

Rawls addresses the place of science in public reason while setting out what he refers to as the 'guidelines of inquiry'.[47] The purpose of these guidelines is to further regulate the way in which citizens evaluate the applicability and implications of their abstract political values and principles in the concrete circumstances they face, and especially their use of empirical evidence and predictions in so doing. In essence, the guidelines of inquiry impose a general constraint, over and above consensus liberalism's headline requirement of non-reliance on reasonably rejectable comprehensive doctrines, on political appeals to arcane or specialist academic ideas that are opaque to, or contentious among, ordinary citizens. 'As far as possible', Rawls says when describing the guidelines, 'the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on plain truths now widely accepted, or available, to citizens generally.'[48] Thus, citizens may not invoke 'elaborate economic theories of general equilibrium, say, when these are in dispute.'[49] And they may likewise appeal to the 'methods and conclusions of science' only when 'not controversial'.[50] Indeed, in a striking passage, Rawls suggests that the reasoning of

and which he articulates primarily with reference to abortion. Perhaps Kramer's central claim (for which see especially pp. 110, 115, and 144–46) is that, where the PCP fails to specify whether certain beings fall within its scope, we cannot say of those involved in the dispute over the moral or metaphysical status of those beings whether their perspectives are reasonable. We can pronounce on their reasonableness, he thinks, only when we have resolved the philosophical debate between them. For only then will we know whether the beings at issue are 'in fact moral persons' (Kramer 2017: 115), and hence which of the disputants envisage treating them consistently with the values of interpersonal freedom and equality. *Pace* Kramer, however, further moral and metaphysical argument of the ordinary kind cannot retroactively transform the content of the reasonable. For reasonableness is just what consensus liberalism stipulates it to be. The perspectives on death described in section 3 are properly accounted reasonable, I contend, in that they are compatible with all those commitments about persons and their relations that Rawlsian reasonable citizens, *qua* liberal democrats, are definitionally required to accept. Their disagreement is on a question which the PCP, as one element of those commitments, fails to settle.

47. Rawls 2005: 223–26.

48. Rawls 2005: 225.

49. Rawls 2005: 225.

50. Rawls 2005: 224.

scientific experts regarding the risk to the population from a nuclear accident is non-public in the same way as the reasoning of a religious group concerning some article of faith.[51] These restrictions rule out selecting a legal definition of death on the basis of scientific testimony, just as surely as they rule out doing so on the basis of clerical authority.

Rawls's suggestion that complex and controversial scientific advice cannot be relied upon in public justification is made repeatedly, and is thus not a mere slip. But it might be argued that it is not a well-considered aspect of his view, which consensus liberals can safely jettison. Catriona McKinnon, for example, has proposed to amend the ideal of public reason to permit appeal to controversial scientific evidence and conclusions, within limits of reasonable disagreement to be determined by the community of relevant experts itself.[52] Her particular concern is that, absent such modification, public reason would not be fit for purpose in formulating policy on climate change. The importance of evidence-based policy-making does not in itself, however, show that we should amend rather than abandon consensus liberalism. To decide *that*, we need to know whether admitting controversial scientific submissions into democratic deliberation can be reconciled with the moral values animating the theory, and hence whether doing so would be more than an ad hoc amendment. Insofar as the relevant values condemn the oppressiveness of coercing people on the basis of claims to deference in judgement by supposed authorities whom they reasonably do not recognise, it is not obvious why scientific authority should not be, as Rawls suggests, regarded as of a piece with ecclesiastical and philosophical authority from the point of view of public reason.[53]

51. Rawls 2005: 220.

52. See McKinnon 2012: 21–30.

53. Some public-reason theorists may embrace this conclusion. Gaus, for instance (who is admittedly not a consensus liberal), has argued (2011: 251–53) that justificatory reliance on expert testimony is permissible only if the coerced have sufficient grounds, at the bar of their own evaluative standards, to accept that those offering it are indeed experts.

The role of science within public reason is an ongoing problem, which deserves attention that I cannot give it here. Fortunately, however, doing so is not required. For even if the best interpretation of the ideal of public reason permits appeal to disputed scientific expertise, the question of when we die is not, I believe, one that science can resolve under its own steam without the addition of controversial metaphysical premises.

This follows most clearly if, as we accepted provisionally in section 3, for someone to die is for her to cease to exist. While science specifies various candidate criteria of death (cardiopulmonary, whole-brain, neocortical, and so on), and is able to identify clinical investigations to confirm whether they have been met and assess the reliability of those investigations, it cannot tell us which criterion marks our ceasing to exist. For it cannot tell us our essential kind or persistence conditions.

This, however, is not the end of the matter. For while the view that death equals our ceasing to exist — sometimes referred to as the *termination thesis* — is plausible and widely held, it is controversial. Critics of the thesis contend that there is a conceptual wedge to be driven between death and nonexistence. It has been argued, for instance, that we ought to accept that a being can be first alive, and then cease to exist, without dying. The amoeba that ceases to exist by dividing, or the embryo in the womb that ceases to exist by fusing with its sibling, are alleged examples. Conversely, some people also think that a thing that is now living could die and yet continue to exist. This is not only a commitment of religious believers in an afterlife. For on some views it is also true to say that an animal or person that dies, rather than ceasing to exist, continues to exist as a dead animal or person.[54] Insofar as there is indeed a conceptual divide between death and nonexistence, such that to specify the conditions of our ceasing to exist is not straightforwardly, or pari passu, to specify the conditions of our death, this fact might be taken to throw into doubt the relevance of personal identity theory for the medico-legal criterion of death. Indeed, David

54. This view is associated in particular with Fred Feldman. See, e.g., Feldman 2000.

Shoemaker has suggested that the existence of such a divide *refutes* the relevance of personal identity to this public policy question. He says that it would be 'bizarre' to say that the amoeba that divides thereby dies, and that it is at least an 'open question' whether one would have died if one 'magically popped out of existence'.[55] And he concludes on that basis that '[c]easing to exist doesn't entail dying, and unless that's the case it seems that what's relevant for the definition of death remains independent of considerations of personal identity.'[56] It would be tempting to suppose that Shoemaker's argument must be helpful to the consensus liberal cause. One might reason that if, as Shoemaker avers, determining the conditions of our death is not a task for personal identity theory, then it must instead be a task for biological science. And if *that* is right, one might then naturally conclude, it suffices to show that the justification of laws or public policies relating to death can remain freestanding of controversial metaphysics, as public reason requires. I believe, however, that to reason in this way would be a mistake.

For a start, the mere fact (if it is a fact) that death and ceasing to exist are not equivalent ideas is insufficient to justify the conclusion that the definition of death 'remains independent of considerations of personal identity'. For it is possible that personal identity theory has an indispensable role to play in identifying the conditions under which we die *even if* the termination thesis is false. To determine whether this is indeed so, we need to know not only that the concepts of death and ceasing to exist diverge, but precisely *how*. Shoemaker does not provide an account of the necessary and sufficient conditions for a thing to be properly regarded as having died. Yet suppose that, in deference to people's intuitions about amoebas and embryos, say, we propose that death be understood as ceasing to exist by means other than fission or fusion. This would be to reject the termination thesis while retaining the relevance of personal identity to the definition of death.

55. See Shoemaker 2010 at, respectively, 487 and 488.

56. Shoemaker 2010: 488.

To be sure, it resolves Shoemaker's 'open question' of whether magically popping out of existence equals death in favour of the view that it does; but this point is at least arguable.[57] I emphasise that it is not my aim to defend the foregoing understanding of the death/nonexistence distinction, or any other.[58] Instead, the relevant point, given our concerns, is that to take a stand on the termination thesis — or, more broadly, to provide an account of the relationship between life, death, existence, and nonexistence — is itself to engage in metaphysical argument. To claim that the conditions of our death are to be obtained from biological science, on the ground that the question is freestanding of personal identity, given the nonequivalence of dying and ceasing to exist, is to rely on a metaphysical thesis that some citizens will reasonably deny. To coerce the latter on those grounds, therefore, would still be a violation of the terms of public reason.

In short, the claim that the conditions for our death can be identified without appeal to personal identity is not to be confused with the claim that this can be done without appeal to metaphysics. Indeed, to underscore the inescapability of metaphysics in this area, suppose that one were to publicly affirm (contrary, as I have argued, to the limits

57. It has been said in support of the termination thesis that, if someone ceases to exist, she must no longer be alive, from which it follows that she must have died. See, e.g., Luper 2016. Shoemaker (2010: 488) questions this, suggesting that it is plausible to think, of a person who magically ceases to exist, that she is now neither alive nor dead. Yet suppose we focus on the concept of *survival* rather than that of being alive. If someone ceases to exist, she fails to survive; but to say that someone did not survive seems equivalent to saying that she died.

58. For an account of what it means for something (whether a person or any other living thing) to die that is in some respects similar to — though considerably more nuanced than — the proposal mooted in the text, see Gilmore 2012. Gilmore argues that to die is to lose the capacity to live without undergoing certain kinds of fission, fusion, or metamorphosis. If I understand him aright, he thinks that his account does not rule out a continued role for personal identity theory in specifying the conditions of death for a person, since the candidate theories can vie for the status of the best explanation of what it means for someone to have the capacity to live. And even if I have misinterpreted him on that point, this is clearly a view that someone could reasonably hold.

of public reason) that it is not as minds, or psychological continuants, but as organisms that we die, and that death is not to be understood as the failure of preservation of numerical identity, but rather as the cessation of the somatic functionings required for an organism to be alive.[59] Even given these hefty assumptions, science cannot provide us with a definition of death unaided. For the question of what level and kinds of somatic functionings are required in an organism if one is to say that it is living is itself metaphysical: it remains outstanding even when one knows all the facts about the processes taking place within its body.[60] Just as science does not, for instance, independently settle the question of whether a fissioning amoeba dies or undergoes deathless annihilation, so it does not settle the question of whether or how far a living human organism is to be defined with reference to continued neurological functioning.

I conclude, then, that public reasoners cannot rely on science to explain how our death is to be conceived, or which criterion of death ought to be adopted in medical practice and policy. Scientists clearly have views about these matters. But they are not acting only in their capacity as scientists when they expound them.

6. Patient interests

Rawlsian deliberators, we have seen, cannot reason their way to a legal criterion of death either by consulting their shared democratic conception of the person, or by referring the matter to biological science. A third alternative, however, may seem more promising. A political community's concerns, a consensus liberal might next emphasise, do not lie in the conceptual analysis of death for its own sake. Rather, as citizens and lawmakers, our interest in death is practical: we need to determine under what conditions the law should allow us to *treat* a person as having died. And what is centrally relevant to this moral question, the Rawlsian might add, is not whether the patients whom we propose to treat as dead are *truly* so, but rather whether we would thereby cause them *harm*. Accordingly, this new proposal goes, we should reframe the debate over death as a question of what is required by respect for the interests or wellbeing of patients whose metaphysical status is in dispute. Call this 'the moralised approach' to reasoning about death. In adopting it, it may seem that we would shift the focus from a philosophical problem that public reason has no authority to consider, onto matters of justice that fall squarely within its competence.

The moralised approach is a familiar perspective in the bioethical debate on death.[61] Some advocate it in part because they think that, until the heart and lungs stop working, and the body begins to disintegrate, there is no fact of the matter about whether a person has died. All of its proponents emphasise that even if someone is alive, it does not follow that they have a stake in their life being continued, or that their wellbeing can be affected by anything we might do to them.[62] The latter point is generally illustrated with reference to organ donation. Current social attitudes and medico-legal practice both endorse the so-called 'dead donor rule', whereby vital organs may be removed from a patient only once dead. And it is standardly assumed that, to determine whether the dead donor rule is satisfied, what matters is whether someone is *truly* dead. For proponents of the moralised approach, however, this is a mistake. Instead, as James Rachels puts it, the relevant question is: 'At what point does the donor no longer have

59. Or, as Gilmore would have it (see the previous note), for it to have the capacity to live.

60. This was recognised, for instance, by the President's Council on Bioethics (2008: 49).

61. See, e.g., Rachels 1986: 42–43 or Veatch 1993.

62. The moralised approach also derives support from Derek Parfit's famous thesis (in Parfit 1987: chs. 12 and 13) that personal identity, or the truth about our survival, is not 'what matters' for the purpose of determining when it would be rational to show prudential concern about what will happen in the future. I do not discuss the Parfitian idea of 'what matters' in the text. I take it for granted that, if public reason must maintain neutrality on personal identity, and if (as I go on to argue in this section) it also cannot resolve the question of when life ceases to be worth living, then it cannot speak to the question of the conditions under which prudential or first-personal concern about the future is justified either.

any use for the organs?'[63] Parallel questions are to be asked with respect to other death-related conduct, such as disconnection from life support, redistribution of the person's estate, and so on.

Most proponents of the moralised approach appear to believe the law should continue to identify a criterion of death, and withhold legal permission to engage in activities such as burial and organ removal until after it is satisfied. Their suggestion is that our judgements about when these activities are ethically acceptable should determine the criterion of death, rather than the other way around. It is, however, worth highlighting the possibility that, if citizens were to engage in moral reasoning about the permissibility of these acts on a case-by-case basis, they could be drawn to a more radical conclusion: that death ought to be effectively abolished as a legal concept. For there is no guarantee that citizens' reasoning would lead them to think that there must be a single point in the decline of the functioning of a human brain and body to which all hitherto death-related activities need be tied.[64] Thus, deliberators might regard the search for a legal criterion of death to have been entirely superseded by a series of discrete questions about when, given the requirements of respect for patients' interests, organ retrieval and so on are to take place. For convenience, in what follows I will continue to speak as though the political question for which public reason requires an answer is: 'When should the law say that a person is to be pronounced dead?' Readers can, however, mentally add the caveat that the relevant question could instead be rendered as something like: 'When should the law allow us to carry out the set of activities which current conventions link to the occurrence of death?' The assessment I will give of public reason's ability to answer the former question also applies, mutatis mutandis, to its ability to answer the latter.

The view that the law on determining death should be formulated on the basis of patient interests has been criticised by those who believe that the metaphysics of death has at least some moral significance in its own right.[65] For present purposes, this debate is irrelevant: what matters is whether the moralised approach is open to Rawlsian deliberators, and would enable them to reach determinate policy conclusions. For two key reasons, the answer is 'no'.

The first reason is that, peculiarly enough, owing to certain complexities in the structure and content of public reason, the moralised approach does not enable citizens to successfully bypass the prohibited question of the metaphysics of death as intended. The explanation for this lies in the fact that, as I have argued in greater detail elsewhere, the moral considerations that count as eligible grounds in Rawlsian public reason for the imposition of a law pertain exclusively to the moral status, entitlements, and interests of *persons*, as defined under the PCP.[66] This creates a problem in the present context, because the question of whether the beings whose interests are centrally at issue when we are trying to decide whether some death-related activity is to be legally permitted ought still to be accounted political persons turns on their personal identity.

These claims require some unpacking. Consider first the claim that, when engaging in public reason, the moral considerations that may be factored into the justification of the use of state power relate only to what is due to political persons. This follows from the requirement that public justifications rest only on political values that reasonable citizens share. As we have seen, the values which reasonable citizens share are limited to freedom, equality, fair cooperation, and public justification (plus, we might add, their various necessary entailments). All of these values, however, on their Rawlsian characterisations, concern *interpersonal* rights and relations. That is, they identify, according to Rawls, forms of treatment that are appropriate to individuals in virtue of their possession (at least during the appropriate periods of

63. Rachels 1986: 42.

64. For an argument to that effect, see Halevy and Brody 1993.

65. See, e.g., DeGrazia 2005: 139–42. For a nuanced perspective, see McMahan 2002: 443–50.

66. See Williams 2015, especially at 30–33.

normal development) of the cognitive capacities required for citizenship.[67] That the shared moral horizons of the reasonable are limited in this way is a consequence of 'reasonableness' having been defined in terms of acceptance of the basic holdings of the democratic tradition. For democracy is (as Rawls himself construes it) simply an approach to conducting the political relationship — that is, the relationship of persons within the basic structure, whereby they exercise power over one another.[68] It does not, then, involve any characteristic stance on our ethical obligations to the planet, or to living beings in general — not even to human beings in general. Thus, to offer a moral justification for political action that is acceptable to all reasonable citizens is to defend that action in wholly person-affecting terms.

Now consider the claim that, for public reasoners to determine whether the individuals whose interests are primarily at stake in the choice of a criterion of death should be understood as persons, they must invoke considerations of personal identity. As we saw in section 4, according to the (inclusive) PCP, a person is not necessarily someone who *now* has the cognitive powers needed for citizenship, but someone who has them over the course of a complete life. Of course, none of the moral patients who might be declared dead under the reasonable conceptions of death canvassed in this paper still possess such powers. This means, however, that to assert that they are persons, whose interests count in public reason, one must identify them as late stages of individuals who earlier possessed those powers — that is, as numerically identical with such earlier individuals (as opposed to, say, beings that previously existed in association with persons and outlasted them, or beings that came into existence only when those persons died). If this is correct, then the moralised approach does not offer an alternative, for Rawlsian citizens, to reasoning about death in metaphysical terms. For to isolate the pool of interests that, from the shared public perspective, are relevant to political decision-making, they must settle the question of personal identity *first*.

Suppose, however, that one rejects my claim that political personhood is a necessary condition for a being's interests to be eligible to be tallied into the public justification of a political decision. Suppose, rather, that one takes the view that a being's interest in continued biological life would, whether they are a person or not, be recognised as a legitimate basis for imposing a law, at the bar of reasonable citizens' shared political values. There is still a second problem. Under the moralised approach, Rawlsian deliberators need to come to a judgement about whether further life would indeed be in patients' interests — a judgement, that is, about whether the future still holds any good in prospect for them. Yet, to distinguish between understandings of the conditions under which life remains worthwhile, or to affirm any one of them as the rationale for choosing between legal criteria of death, would be a paradigmatic violation of neutrality between reasonable conceptions of the good. So the moralised approach merely directs decision-makers to swap one prohibited philosophical controversy for another.

To elaborate: bioethicists who defend the moralised approach typically contend that the point at which life ceases to hold prudential value, and death-related activities may safely be carried out, is the point at which the capacity for consciousness is lost. But while the view that life without the possibility of interaction with the world is of no further benefit is clearly reasonable and widely shared, so too is its denial: many reasonable people believe, on religious or non-religious grounds, that life in a non-conscious state, though sadly diminished, remains a precious gift until one breathes one's last. Moreover, reasonable disagreement over what makes human life worth continuing is not confined to the question whether life beyond consciousness remains a good: it also ranges over the issue of whether and under what conditions life may cease to be a benefit for *conscious* beings. Many individuals, for instance, have come to the conclusion, when contemplating a future in a severely demented condition, that there

67. For the claim that these values apply to persons due to their possession of these capacities, see Rawls 2005 at, e.g., 29–35, 79, 16, and 213.

68. See Rawls 2005 at, e.g., 216–17.

would be no point in going on after the unravelling of the faculties of rationality and self-awareness that make them (in the Lockean rather than Rawlsian sense) persons. Some think, indeed, that it would be intrinsically demeaning to go on in this way. And some may take these claims to be true not only of themselves, but of everyone. That these perspectives on the good are reasonable can once again be confirmed from the fact that none violates the basic political commitments which define the constituency of public justification. To abandon neutrality with respect to them, then, would be to transgress the limits of public reason. Yet this is precisely what the moralised approach requires.

This latest impediment to determinacy arises, note, because of what is unavoidably involved in our making judgements about the limits of the interest in continued life. Public reason requires that citizens appeal only to those aspects of the good that any of their reasonable peers can recognise as such, and that they abstain, conversely, from affirming any position that is prejudicial to the latter's complete understandings of the features or determinants of a life worth living. It is impossible, however, to advance a perspective on whether and to what extent the life of an individual retains prudential value while upholding that kind of neutrality. For to pronounce on that question is necessarily to engage in an accounting of the sources and varieties of goodness that will be available or foreclosed to the patient if her life is indeed extended. It is, then, necessarily to take a stand on whether the things which rival conceptions of the good variously identify as contributors to a worthwhile existence are indeed so.

The latter point bears emphasising, because it helps to show that the way is barred to what might otherwise seem a natural Rawlsian response to the problem currently at hand.[69] This response begins by acknowledging the existence of reasonable disagreement over the conditions under which extending biological life can constitute a benefit. But instead of concluding that Rawlsian deliberators are accordingly powerless to specify those conditions, it instead proposes that, from the perspective of public reason, the point at which it is appropriate, ceteris paribus, to treat a human being as dead is the point at which it becomes possible for reasonable people to diverge on the question of whether further life is capable of serving that being's interests. To identify when this stage is reached, we must consult the beliefs that reasonable people are stipulated to share on the subject of the good. And in essence, the relevant beliefs are that persons have three basic or 'higher-order' interests: one interest in developing and exercising each of their two moral powers to the degrees required by liberal citizenship, and a third in rationally pursuing their determinate conceptions of the good.[70] These beliefs imply that, for at least as long as the possibility of realising these interests exists, our futures hold the possibility of further good. But, the anticipated Rawlsian response now suggests, once an individual's capacities for moral and rational agency have been irreversibly lost, the higher-order interests are no longer engaged by the decision whether to extend her life, and reasonableness therefore does not require citizens to accept that doing so would be worthwhile. Thus, the point at which life can no longer be publicly acknowledged as prudentially valuable is the point at which one no longer possesses the native endowments required for satisfaction of the higher-order interests. Insofar as this understanding of the benefits of existence is derived from the content of the reasonable, the response concludes, we can appropriately think of it as a *political conception of a worthwhile life*.

Although this understanding of the scope of the interest in continued life is clothed in Rawlsian language, I believe that it does not respect the limits of public reason. Before arguing for this claim, however, it is worth noting that the attractions of the envisaged solution to public reason's indeterminacy problem are likely to evaporate for most Rawlsians once we clarify what more precisely it implies. For it commits us not merely to the view that the irretrievably comatose

69. I am indebted to an anonymous reviewer who suggested this response, along with its idea of a 'political conception of a worthwhile existence', to which I turn momentarily.

70. See Rawls 2005 at, e.g., 74.

have no publicly recognisable interest in continuing to live, but also to the view that those who remain conscious (or indeed self-conscious), though in a state of dementia or cognitive impairment sufficiently severe to preclude active citizenship and rational project pursuit, can likewise be subsumed into the category of the dead (at least other things being equal). Yet, while it would be reasonable, in the specialist Rawlsian sense, for one to think that this is so, it is difficult to overstate just how radical — as well as, for all but a few, how deeply unpalatable — this conclusion is. And accordingly, if this conclusion is indeed one that citizens must acquiesce in when adopting the perspective of public reason, then while consensus liberalism will have evaded the incompleteness objection, it will instead be significantly damaged by the fact of its conspicuous breach with prevailing considered moral judgements.

To be sure, a defender of the proposal under examination may want to insist that judgements that conflict with the determinations of public reason — whether reached by the citizens of a consensus liberal polity or by political philosophers — are simply to be disregarded. But this will not do. It is true, of course, that citizens who prove willing to use their political power to resist the policy positions yielded by public reason thereby render themselves unreasonable. But insofar as consensus liberalism seeks to explain how a liberal constitutional regime can achieve 'stability for the right reasons' — stability, that is, based on willing endorsement of the primacy of public reason, as opposed to a mere balance of political forces — it cannot remain indifferent to whether otherwise reasonable citizens find, in significant number, that the implications of public reason, when teased out, are intolerable enough for them to have cause to abandon their duties of civility. On the contrary, as Rawls himself writes, consensus liberalism must 'hope' that the answers to political questions reached by public reason turn out to be within the 'leeway' that reasonable citizens' convictions allow them to accept, 'even if reluctantly'.[71] Moreover, even consensus liberals who would sever their theory's connections with the notion of stability for the right reasons must be sensitive to whether *you and I, here and now*, as Rawls would put it, find that the practical implications of public reason fall foul of our considered judgements in reflective equilibrium.[72] For if consensus liberalism fails this philosophical test, there is no higher court of appeal, as it were, at which it can be vindicated.

In any event, I also believe, to reiterate, that what was earlier referred to as the political conception of a worthwhile life cannot be put forward within the strictures of public reason. Indeed, the phrase 'political conception of a worthwhile life' is, it seems to me, a contradiction in terms. The fundamental problem with the proposal that public reasoners take up this conception is, I submit, as follows. To say that, as far as the public point of view is concerned, there are no grounds for prolonging life after the loss of the moral powers is to say, by implication, that, from that same point of view, hedonic pleasure, for example, or the satisfaction of whatever preferences individuals without moral and rational agency may still be capable of forming, are not intrinsic contributors to a worthwhile existence — contributors, that is, independently of the fact of having been chosen by a person as an end. It is therefore to say, by further implication, that citizens who follow reasonable conceptions of the good that do regard pleasure, or preference satisfaction (or what have you) as intrinsic goods, and direct that they be promoted accordingly (within the limits of justice), are wasting their time. These claims will seem implausible to many of us. But more pertinently, there would be nothing meaningful left of neutrality over the good if consensus liberalism were to permit them to be made.

71. Rawls 2005: 246.

72. This second consideration remains relevant, then, to, e.g., Jonathan Quong. For while Quong defends an 'internal conception' of consensus liberalism, whereby political arrangements need be acceptable only to a hypothetical constituency of reasonable citizens whose commitment to upholding the outcomes of public reasoning never wavers, he nonetheless accepts, if I understand him correctly, that consensus liberalism must be justified *to us*, from the perspective of the philosopher, in reflective equilibrium. See Quong 2011: chs. 5–6 (on the internal conception), and 155–56 (on the role of reflective equilibrium in justifying consensus liberalism).

Indeed, it is precisely on these grounds, I take it, that Rawls specifically cautions us that public reason must abjure evaluations of people's overall quality of life or level of wellbeing.[73] He argues that, for political purposes, assessments of how well-off people are (or would or will be) should be conducted instead in terms of their shares of primary social goods — despite the fact that 'primary goods are clearly not anyone's idea of the basic values of human life and must not be so understood'.[74] Rawls seems not to have anticipated, then, that, for resolving certain political questions, quality-of-life assessments may be indispensable, and the metric of primary goods not an acceptable substitute. In what is, as far as I can tell, his sole explicit reference to the interest in continued life, and its relevance to political decision-making, Rawls says only that 'any workable political conception of justice that is to serve as a public basis of justification … must count human life … as in general good'.[75] The words 'in general' here mask public reason's difficulties (as, for that matter, does the word 'human').

I conclude, then, that the moralised approach is a dead end for public reason. I have argued that the political values shared by Rawlsian citizens enjoin respect only for the interests of political persons, and that public reason is therefore hamstrung by its inability to confirm, without recourse to metaphysics, whether human beings at the end of life, whose cognitive endowments have decayed, remain persons in the relevant sense. If I am wrong about that, however, and a being's interests are to be factored into the public justification of political arrangements irrespective of whether they belong to persons, public reason will still be unable to identify a point at which a patient's interest in further life runs out without violating neutrality over the good. (Finally, if I am wrong about *that too*, and what public reason instead requires is that citizens acquiesce in the conclusion that there are no grounds for extending life once the three publicly recognised higher-order interests of persons are no longer engaged, then we have also seen that consensus liberalism will still not be saved, but rather exposed to new objections which seem at least as grave as the original incompleteness objection.)

There is a certain irony to these findings. Ethics has recently witnessed considerable movement towards the view that the metaphysical truth about our identity and survival is of much less practical significance, prudentially and morally, than has conventionally been assumed.[76] It appears, however, that consensus liberalism, under which public justification must be, in Rawls's famous slogan, 'political, not metaphysical', cannot derive the expected benefit from these developments.

7. Third-party interests

I have now argued that public reasoners cannot decide between reasonable criteria for determining when a person has died by (a) metaphysical reasoning; (b) reasoning about the implications of their shared conception of the person; (c) consulting the resources of biological science; or (d) reasoning about the way in which the relevant policy options would impact upon patients' interests. Since these options seem to exhaust the viable possibilities, I submit that we are justified in concluding at this point that public reason does indeed have an indeterminacy problem with respect to the political question of death.[77]

73. See Rawls 2005: 188.

74. Rawls 2005: 188.

75. Rawls 2005: 177.

76. A powerful recent articulation of that position appears in the work of David Shoemaker. See, e.g., Shoemaker 2016.

77. If an earlier argument of mine was correct, this conclusion contrasts interestingly with the way public reason handles the primary moral problem arising at the *beginning* of life: abortion. While public reason is unable to specify, I have here maintained, whether a range of patients with eroded psychological, neurological, and physiological functioning remain living persons under the PCP or have (publicly recognisable) interests that tell against treating them as dead, we can be certain — or so I have contended elsewhere — that fetuses are *not* political persons at any stage of pregnancy, and hence are at no point eligible for the protection that that status confers. For even under the inclusive PCP, the political relation between persons within the basic structure is taken to extend only between birth and death. By that token, while public reason

This verdict comes with a caveat. In asking what conclusions Rawlsian deliberators would be warranted in drawing about death, I have implicitly assumed that, to make a decision, they require access to reasons pertaining to the intrinsic properties of the patients who stand to be pronounced dead under the various criteria at issue. Someone might think, however, that even if reasons of the latter sort are unavailable, citizens may nonetheless be able to make headway by reasoning instead about the effects that implementing the candidate criteria may have on the publicly relevant interests of third parties, or society at large. I accept that appeal to third-party-focused reasons might *in some societal contexts* enable public reasoners at least to narrow the field of public policy options — conceivably even to the point of resolving the policy question altogether. Yet, it would be a mistake to think that the availability of these reasons adequately alleviates the indeterminacy problem that I have developed thus far.

Any attempt by citizens to reason their way to conclusions about when patients should be declared dead on grounds of considerations of the foregoing sort would, I take it, have to proceed in a particular way. One would have to say that, while public reason cannot offer any answer to the question of whether those patients are living persons who retain lives of value, the interests of third parties are sufficient to carry the day no matter what the answer might be assumed arguendo to be. To be sure, it seems that nobody could reasonably argue, in that vein, that whether or not a patient, P, is assumed to be a person with a life worth living at time t1, we should nonetheless go ahead and treat him as dead at t1, as a means of securing the benefits that would thereby accrue to, say, people on organ waiting lists. For so to argue would express a readiness to engage in the instrumentalisation of persons that is incompatible with the special priority of basic rights over the general welfare — a priority which, according to Rawls, any sufficiently liberal understanding of justice will endorse.[78] It does, however, seem possible for citizens to argue that, even if P really were dead and beyond harm at t1, he still ought not to be declared so, on grounds that adopting the relevant criterion of death would cause too much third-party harm. Citizens might be able to make a compelling case, for instance, that given prevailing social attitudes, pronouncing patients dead at that stage would attract too much public hostility, or unduly damage trust in doctors or state officials.

It seems to me that it would be implausible to try to defend consensus liberalism's handling of the problem of death on grounds that, although it prevents citizens from asking morally pertinent questions about patients themselves, it at least allows them to whittle down their policy options with reference to their third-party effects. For it would be far more natural to conclude that, if public reason forces this degree of reliance on third-party interests, its rules are unduly burdensome. Irrespective of its surface plausibility, however, reasons pertaining to third-party effects are too contingent on variable social circumstances

fails to deliver a verdict regarding when we are to be considered dead, its verdict regarding abortion seems both determinate and radically permissive (indeed disturbingly so, as most would think). See Williams 2015.

Matthew Kramer has newly disputed my earlier position. While he is likewise a critic of public reason's management of the abortion controversy, he believes that 'the Rawlsian conception of persons does not *in abstracto* entail or exclude the personhood of foetuses' (2017: 152–55). This view requires that Kramer discount various statements by Rawls to contrary effect — as when, e.g., Rawls claims (2005: 41) that, before entering society by birth, 'we have no prior identity'. Yet while I think Kramer's understanding of the PCP does not square with the Rawlsian account, I cannot make that case here. Notice, however, that even if his interpretation of the PCP were right, it would not follow, as he contends, that resolving the problem of abortion via public reasoning is 'impossible' (Kramer 2017: 92). Kramer assumes too readily, in particular, that appeals to women's prerogatives to prioritise themselves over their fetuses (irrespective of the latter's moral status) can justify abortion under only rare circumstances, when it seems at least reasonable for a citizen to argue that, given the burdens of pregnancy and childbirth, such appeals justify abortion frequently, or indeed always. Nor does Kramer anticipate that, where public reasoning runs out, consensus liberalism might call for a procedural resolution to the problem at hand. And *that* means, I believe, that like others he misses the ultimate practical and moral significance of indeterminacy in public reason, as I develop it below.

78. See Rawls 2005 at, e.g., 450.

for the envisaged defence of public reason to be relied upon as generally applicable. Although such reasons *might* be an aid to deliberators, given a particular confluence of social attitudes, institutions, practices, and so on, we cannot be expected to grant that they will always come to the rescue. It is appropriate that public reason be judged in part on the basis of its consequences for cases in which, given the social facts, there happens to be no reasonable criterion of death of which citizens could claim, with appropriate warrant, that it would cause significant third-party harm, or in which it is clear that any such harms would be more than compensated by benefits.

On these grounds, in what follows I propose to set third-party-focused reasons aside as the source of a potential solution to the indeterminacy problem I have identified. We can simply stipulate, without extravagance, that we are considering public reason's performance under societal conditions in which these reasons would not provide a catalyst to decision-making.

What would follow from this fact? Proponents of the incompleteness objection have generally assumed that, where public reason proves unable to answer some question for which its use is mandated under the duty of civility, this suffices to show the permissibility of appealing to non-public reasons, and hence the falsity of the claim that doing so, within the relevant class of political decisions, is morally wrong. As Andrew Williams and Micah Schwartzman have argued, however, that conclusion does not follow.[79] For selection of a legislative course of action by non-public reason may not be the only remaining alternative. And if it is indeed objectionably sectarian to govern free and equal persons in accordance with non-public reasons, as consensus liberalism claims, then these other possibilities must first be explored.

79. See Williams 2000: 209–11 and Schwartzman 2004: 209–14.

8. Coping with indeterminacy: five unsuccessful strategies

Schwartzman has identified no less than five distinct strategies that citizens might employ to cope with incompleteness in public reason without reaching for their comprehensive doctrines.[80] They are: (1) 'intrapersonal delegation', or deferral of a decision until later, when further public reasons may have come to light; (2) deference to others who claim to have succeeded where one has failed to answer the relevant question by public reason alone; (3) moral accommodation between opposing perspectives; (4) calling time on deliberation, and proceeding to a majority vote; (5) random adjudication, by a procedure such as a coin flip. The efficacy and moral appropriateness of these strategies has so far not received much attention, and our investigation provides a good opportunity to do so. In this penultimate section I argue that, in the case of indeterminacy over the definition of death, the ideal of public reason requires (5), and that, insofar as it does so, the ideal is objectionable.[81]

It is not entirely clear how many of Schwartzman's strategies he takes to be applicable to cases of indeterminacy in public reason, as opposed to the different problem of inconclusiveness. The only approach which he rules out explicitly — calling it 'useless in the face of indeterminacy' — is (4).[82] It is worth pausing to clarify why. Recall from earlier that public reason is indeterminate when it provides, as in the present case, insufficient reasons to justify one's venturing to choose in any way from among the relevant policy options, and inconclusive when citizens find that they have sufficient reasons to adopt their various competing policy preferences, but public reason cannot bring them into agreement regarding which is best justified by vindicating any option beyond reasonable doubt. Democratic selection

80. Schwartzman 2004: 209–14.

81. Some parts of this argument refine and expand upon parallel claims which I have defended elsewhere about the utility of Schwartzman's proposals in the different context of *global* public reason. See Williams 2016: 18ff.

82. Schwartzman 2004: 211. Quong (2013), on the other hand, appears to believe that at least (1), (3), and (5) are relevant to indeterminacy.

of an inconclusively justified policy appears fully compatible with the ideal of public reason. For the policy imposed is indeed justified, so those who propose it can sincerely attest, by a reasonable balance of public reasons, even if many do not consider it optimal, or most reasonable. That claim cannot be made, however, where public reason is indeterminate. If no policy is supported or ruled out by public reason, then citizens who are nonetheless able to reach a judgement must have done so on the strength of their comprehensive doctrines. And enforcement of those judgements by a democratic majority would be a straightforward violation of the Rawlsian ideal.

With (4) eliminated, then, let us consider Schwartzman's other proposals. I assume that (1) and (2) are also irrelevant here. For if it is correct that public reason supplies insufficient grounds to make a decision about the definition of death because it prohibits appeal to the necessary philosophical considerations, then deferring the decision until later, or looking to someone else, will not help.

At first sight, proposal (3), for moral accommodation, might seem no more promising. The only form of accommodation that Schwartzman mentions explicitly is compromise-brokering. And it may be difficult to imagine what compromise between proponents of opposing definitions of death would even look like, let alone to envisage the prospects for obtaining one being any more than extremely remote. After all, compromise on this issue would generally mean, for one side, acceding to some people's lives being ended prematurely, and for the other agreeing to the pointless squandering of organs and other scarce resources. Depending on the factions involved, however, and their particular concerns, compromise may sometimes be conceivable. But even if it were, it is ruled out in cases of indeterminacy, for reasons that run parallel to those ruling out resolution by democratic voting. Suppose that public reason is indeterminate between policies P_1, P_2, and P_3, and that the public is split between advocates of P_1 and P_3. As before, since no policy is supported by public reason, if citizens are nonetheless able to reason their way into a preference, it must be by reference to their non-public doctrines. Compromise on P_2, in this context, means agreeing to govern by striking a balance between those doctrines. And that approach to political decision-making is condemned by the Rawlsian view as 'political in the wrong way'.[83]

This conclusion also applies to another, somewhat different potential strategy for reaching moral accommodation between differing perspectives on death.[84] Here we select a criterion of death on the basis that all reasonable perspectives can at least agree that its satisfaction is sufficient for the death of a person. Assuming a society in which all reasonable views are represented, this would presumably yield a criterion of death as the irreversible breakdown of biological functioning to the point where both the cardiopulmonary and whole-brain standards are met. Moral accommodation in this form is not naturally described as compromise, because, while it aims at a policy that is in one respect acceptable to all parties (it ensures that nobody will think that the law declares people dead prematurely), it is not an attempt to split the difference between existing policy proposals, or to find a settlement that the opposing camps themselves deem equally satisfactory. Indeed, under current technological constraints, the policy obtained under this approach aligns almost exactly with the cardiopulmonary criterion, at the heavy expense of all neurological standards, since absent head transplants irreversible cardiopulmonary failure makes total brain death unavoidable, thereby satisfying the joint criterion, while psychological disintegration and brain death are compatible, as we have seen, with long-term maintenance of cardiopulmonary function. In common with compromise-brokering, however, this proposal is 'political in the wrong way'. For in the absence of a public justification of any particular criterion of death, it again views the political task at hand as one of seeking an accord between citizens, addressed in their capacities as holders of rival comprehensive doctrines.

There is, however, yet a further form of moral accommodation remaining that might fare better. This is what we might call the strategy

83. Rawls 2005 at, e.g., xlv.

84. I am grateful to Paul Billingham and Jeff McMahan for suggesting that I consider this possibility.

of *privatisation* — that is, of ceding a political matter to individuals to resolve in their own cases, rather than insisting on a unitary, community-wide response for all.[85] In the current context, privatisation means allowing persons to decide what criterion of death will be applied to them. This possibility is of particular interest for two reasons. First, some jurisdictions already grant their citizens a degree of this sort of discretion. Japan and the American state of New Jersey, for instance, have both legislated to allow individuals to exempt themselves from neurological criteria of death, out of a concern to accommodate religious beliefs to the effect that (earthly) death occurs only once the traditional cardiopulmonary standard is met. Second, some bioethicists who are sympathetic to Rawlsian liberalism have advocated privatising the decision over the definition of death, precisely as a means of accommodating reasonable pluralism over human survival and the value of life.[86] As a solution to indeterminacy, however, the strategy of privatisation fails.

One reason for this is that it can at most obviate the need for the enforcement of a collectively made decision in cases where the wishes of a previously competent person are known. Many cases, however, will obviously not be like this. And we cannot avoid this problem just by requiring that everyone records a prior personal decision, or by implementing a system of presumed consent, whereby the state communicates that it will infer that everyone accepts some default criterion of death if they do not opt out. For that still leaves the issue of what to do with individuals who, like children, lack the mental capacity to make their own medical decisions. It does not appear that the community would be justified in granting family members, as the designated legal agents of incompetent patients, the power to decide when the latter should be declared dead. Rawls stresses that any reasonable political conception of justice will perforce accept that citizens lack untrammelled authority over their children or other dependent persons in their care, and that the state is entitled to intervene in the home to prevent abuse and neglect.[87] Yet, unless public reasoners can determine how the options placed before a fiduciary agent stand to affect the interests of the patient on whose behalf she purports to act, they will be unable to judge whether the amount of discretion granted falls within reasonable bounds, or constitutes a license to engage in mistreatment. And in any case, for at least some incapacitated persons, who lack loved ones, or sufficiently responsible loved ones, the appointed agent will be a state official.

Even when it comes to persons whose prior wishes are known, however, there is a further obstacle. This is that a policy of deferring to these wishes cannot itself be justified except by ruling on precisely the sort of contentious philosophical issues that privatisation aims to sidestep. To fix ideas, suppose that a hospital patient signs, in an appropriately voluntary fashion, an advance medical directive requiring that, in his case, the point at which death should be treated as having occurred is the point at which the cardiopulmonary standard is fulfilled. Later, he suffers a serious medical complication that results in total brain failure, though cardiopulmonary functioning is artificially sustained. Is the directive authoritative? That depends on whether the patient remains, at the point at which the choice arises whether or not to fulfil its terms, a source of valid claims against us, as Rawlsians would put it. But public reason is powerless to answer that question.

The grounds for the latter claim can likely by now be at least partly anticipated. First, public reason cannot take a stand on whether the individual who signed the directive still survives as a person under the PCP, to whose treatment the political values apply. And nor, second, can it take a stand on whether it matters in any way to the dead, or those whose capacity for a mental life has been annihilated, that their earlier wishes be carried out. To say that they retain an interest that we so

85. While Schwartzman does not discuss privatisation, it is at the heart of Gaus's approach to overcoming the (somewhat different) problem of indeterminacy that he regards as a danger for his version of convergence liberalism. See Gaus 2011: ch. VI.

86. See Zeiler 2009 and DeGrazia 2005: 138.

87. See Rawls 2005: 466–74.

act would be to violate neutrality between reasonable conceptions of the good, by contradicting the controversial *experience requirement*, on which an individual's interests are affected only by things that make a difference to her experience. But to say that we ought to respect the determinations of a person's autonomous will irrespective of whether our doing so would benefit her would likewise be to venture beyond public reason's remit. For the public justification of political arrangements, according to Rawls, must not rely on any reasonably rejectable understanding of the ethical significance of autonomy.[88] Rawls cites the doctrines of Kant and Mill in this regard. And I take it that, in giving the examples of those particular thinkers, he meant to suggest that it is verboten to appeal to unshared conceptions not only of the ways in which respecting people's autonomous choices may contribute to their good, but also of the ways in which doing so may serve values independent of their good — as derived, say, from a philosophical account of the nature and demands of human dignity, or of the intrinsic or impersonal value of states of the world. Certainly, the rules of public reason would seem utterly arbitrary if these species of view were not treated even-handedly. Yet, while reasonable citizens necessarily accept that persons have autonomy rights grounded in the higher-order interests, there is nothing unreasonable in their taking the view that our reasons to respect people's choices are exhausted once their good is (as those citizens see it) no longer at stake.[89]

So much, then, for moral accommodation. At this point, the only one of Schwartzman's coping strategies left standing is (5) — random adjudication. None of the other proposals, as we have seen, enables decision-makers to select a policy without reliance on non-public reasons. Random adjudication does so — though admittedly only at the cost of abandoning the ambition of justifying laws on the basis of a positive balance of public reasons. Yet, insofar as the ideal of public reason not only directs citizens to aim at public justification, but also requires them to abstain from foisting their non-public doctrines on others, it appears, as Schwartzman and Williams claim, that they should avoid doing the latter even when they are unable to achieve the former.[90] If this is right, then given that random adjudication is the only available way to proceed while maintaining independence from comprehensive justification, this is what consensus liberalism requires.

Schwartzman acknowledges that the suggestion that we resolve important political problems randomly when public reason proves indeterminate, rather than by inquiring after the best available non-public reasons, is likely to strike us as 'highly implausible, if not altogether absurd'.[91] In defence of random adjudication, however, he provides an example in which it seems like the right thing to do. This is the case of a hospital board charged with deciding which of two patients should receive an organ. As Schwartzman constructs the example, both individuals are equally suitable from the point of view of public reason: the board are able to confirm that they are in equal need, would derive an equal benefit from the organ, have spent the same length of time on waiting lists, are equally non-responsible for their plight, and so forth. Schwartzman then asks whether, given that public reason does not identify a preferred candidate, it would be appropriate for board members to break the tie by discriminating on the basis of religious affiliation or sinfulness. He concludes — and I assume everyone would agree — that deciding the matter on that particular basis would be wrong, and that random adjudication is morally required.

Schwartzman's example, however, is not entirely apposite to a defence of public reason. For the selection of organ beneficiaries on the basis of religious devotion or purity does not only fall foul of the

88. Rawls 2005 at, e.g., 78 or 400.

89. Notice that these considerations suggest that public reason has a problem justifying legal recognition not only of advance medical directives, but also of people's wills. To be sure, it is commonly accepted in liberal societies that wills ought to be upheld, precisely on grounds of respect for the autonomy of the dead. But it is by no means a requirement of reasonableness that one should accept this, and many philosophers of course do not.

90. See Schwartzman 2004: 213 and Williams 2000: 210.

91. Schwartzman 2004: 212.

ideal of public reason — it also constitutes a violation of church-state separation, and of basic religious freedom, to a degree that would be condemned by public reason liberals and their critics alike.[92] Given the details of Schwartzman's case, it is not only public reasons, but reasons of justice generally, that have been exhausted in the comparison between the two patients. So comprehensive or ethical liberals can agree that a coin toss, say, is the appropriate solution. The question here is not whether random adjudication is ever called for, but whether public reason forces citizens to rely on it excessively. To test *that*, we need to concentrate on political questions for which Rawlsians would have to turn to randomisation before ordinary moral deliberation has run its course.

If the argument of this paper is correct, the legal determination of death is (in at least some societal circumstances) just such a question. This example does not work to the advantage of consensus liberalism, since the claim that a political community should randomly decide the provisions of its laws in this area is intuitively and reflectively unacceptable. To resolve this particular problem arbitrarily would mean abstaining from asking whether the policy adopted will prematurely end lives that are worth continuing, or, conversely, extend biological life past the point of ethical justification, to the detriment of (for instance) the supply of life-saving organs. This is to play Russian Roulette with people's lives and wellbeing. And the stakes are all the higher given that the range of reasonable understandings of when death should be taken to have occurred seems rather broad. As we have seen, reasonable answers to the question of when there is no longer any patient-centred objection to pronouncing that death has occurred range from the final stages of dementia, when one's distinctive psychological attributes, or the higher cognitive powers associated with personhood, have been lost, through higher and whole brain failure, to the point at which the heart and lungs finally stop working. This suggests that the menu of policy options between which random adjudication might be called for will (except insofar as contingent third-party-focused reasons intervene) in turn be wide. This conclusion is at least damaging to consensus liberalism. It would be far from implausible, I think, to regard it as a reductio of it.

92. For an ethical liberal defence of church-state separation, see Arneson 2014.

9. Conclusion

Rawlsian consensus liberalism requires that the justification of coercive laws (or at least the most fundamental laws) be formulated without reliance on reasonably rejectable claims about the basic nature and value of human survival. I have argued, as critics of consensus liberalism have often suspected, that fundamental political problems are not always susceptible to resolution by public deliberation conducted within these constraints. The determination of death provides an example of a political dispute which does not merely depend upon but essentially *is* a dispute about the nature and value of life. One conclusion to be drawn from our investigation, then, is that to forbid democratic engagement between rival comprehensive doctrines is in some cases equivalent to forbidding citizens to resolve fundamental problems of justice — at least through the use of reason.

Another conclusion to be drawn is that the procedural mechanisms which Rawlsians have proposed for coping with incompleteness in public reason are not only of insufficient help, but in at least some cases exacerbate public reason's difficulties. The claim that indeterminacy should be resolved by random adjudication takes on the objection that public reason is sometimes unable to decide what to say about a policy problem, and transforms it into an objection that seems more dramatic: that public reason can require picking political arrangements in an intolerably arbitrary way. This finding alters the cast of the incompleteness objection, by closing the gap between it and what I have elsewhere called the *ethical objection* — the objection, that

is, that public reasoning can in some cases generate (or be at undue risk of generating) determinate but morally unacceptable decisions.[93]

If my assessment of the implications of public reason for the determination of death is correct, Rawlsians face a difficult choice how to respond. It would be tempting to suppose that problems of incompleteness like this one can be satisfactorily addressed with a bit of theoretical tinkering — and more specifically by amending the content of public reason to allow extra reasons in and facilitate better decision-making. But this would seem at odds with the fundamental commitments of consensus liberalism. Under the consensus model, the justificatory reasons that citizens may invoke depend on the reasons their peers can accept. Thus, additions to the content of public reason require corresponding amendments to the *constituency* of public reason. The sine qua non of the Rawlsian view, however, is, as we have seen, that the constituency of public reason should be open to all who subscribe to (the Rawlsian interpretation of) the basic insights of the democratic tradition. To discriminate further among persons who are fully reasonable by this standard, then, seems an abandonment of this Rawlsian commitment.

Indeed, doing so would appear to produce a slide from the idea of public justification to the so-called *correctness-based* standard of justification to which ethical liberals typically subscribe, under which political decisions are permissibly implemented when justified by *valid* — as opposed to public — reasons.[94] The proposal we are now considering for restriction of the justificatory constituency is designed to meet an objection to the effect that, in its current form, public reason resolves the political question of death in a morally unacceptable (because arbitrary) fashion. Given that motivation, however, the discrimination called for among the reasonable would presumably have to be on the basis that particular beliefs about life and death are needed to facilitate morally better outcomes. Yet, once the principle is conceded that it is appropriate to discriminate among the reasonable for that purpose, it is doubtful that there could be any principled objection to doing so again for other political questions. The circle of justification would then quickly close to those with morally sound beliefs on every issue. And, as Lister has noted, the view that political justification need only be acceptable to those with sound beliefs is equivalent, precisely, to the view that justification should be correctness-based.[95]

It might be replied that there is one way in which the content of public reason could be revised to circumvent the incompleteness objection while maintaining the required distance between consensus and ethical liberalism. This would be to abandon public reason's use of what I earlier called the inclusive PCP, in favour of the PCP's exclusionary reading. You will recall from section 4 that, whereas the inclusive PCP counts us as persons for the duration of our complete lives in society, without specifying when that life ends, we remain persons under the exclusive PCP only for as long as we possess the moral powers needed for citizenship. Substituting the inclusive for the exclusive PCP, a proponent of this move might argue, achieves determinacy without importing alien philosophical content from the realm of comprehensive doctrines into the political domain. But it is unclear to me, nonetheless, that doing so would be any more consistent with consensus liberalism's founding values. For *if* Rawls is correct that it is the inclusive rather than exclusionary PCP that is presupposed by the democratic tradition, then the proposal at hand still discriminates against paid-up democrats whom we had previously been told are entitled to be counted among the constituency of public justification. It is dubious that the fact that the presence of these citizens within the relevant constituency is an obstacle to determinacy on some political questions would be a good enough reason, by consensus liberal lights, for casting them out.

Leaving aside the question of whether it would be *coherent* for consensus liberals to endorse adoption of the exclusionary PCP, however,

93. See, e.g., Williams 2015: 49.

94. The term 'correctness-based justification' comes from Wall 2002: 386.

95. Lister 2013: 40.

I believe that it would not be *prudent* for them to do so. As with the suggestion we encountered in section 6, to the effect that public reason should identify the irretrievable loss of the moral powers as the point beyond which further life can no longer be considered in someone's interests, making the mooted change would only succeed in exchanging a problem of indeterminacy for a problem of public reason's yielding conclusions that are dramatically out of step with mainstream moral judgements. As I have argued, public reason recognises only the rights and interests of persons as legitimate grounds for political action. Thus, for public reason to withhold the status of person from someone is, as Rawls himself puts it in the context of slavery, for it to deem them 'socially dead'.[96] To pronounce us socially dead, if not literally so, immediately upon the loss of the moral powers needed for citizenship would certainly avoid the incompleteness objection as I have developed it. But since, as we have seen, the absence of these powers is consistent with the presence of (self-)consciousness — and may thus allow for various forms of enjoyment, recognition of and affection towards others, and so forth — adoption of the exclusionary PCP would not only not help consensus liberals: it would make things considerably worse for them, in two respects. First, it multiplies the fronts on which they are exposed, by generating a range of additional implausible implications about the status and permissible treatment of individuals who have yet to develop the moral powers, in addition to those who have lost them.[97] And second, even where the end of life alone is at issue, it seems at least somewhat less bad for consensus liberalism to require random selection from among the various reasonable criteria of death available, as it does when public reason is indeterminate, than for it to directly dictate adoption of a policy that, while reasonable, the vast majority of us would consider the most repugnant of the options on offer.[98]

If, on the foregoing grounds, consensus liberals cannot respond to the problem posed in this paper by altering the terms in which public justifications must be offered, their only alternative seems to be to bite the bullet, and accept that public policy on the determination of death should (absent a fortuitous balance of third-party-centred reasons) be determined randomly. The sustainability of the bullet-biting response depends, however, on how many other important political questions the Rawlsian model may fail to resolve satisfactorily. I have argued elsewhere that there are indeed other such questions, and I believe that there are yet more to be discovered. If so, it will become increasingly implausible to suggest that the sort of counter-intuitive consequences I have here described are a bearable cost to be priced in when adopting the consensus liberal view.

96. Rawls 2005: 33.

97. A consensus liberal might counter that to say that a being is not a person is not to say that they may be treated in any way we like. It is merely to say that their treatment is not a constitutional essential or matter of basic justice. And since this means, on some Rawlsian views, that it is a question that can be resolved in accordance with non-public reason, withholding the status of person can be compatible, the interjection goes, with granting an individual stringent legal protections. Two points in response. First, this defence is obviously not available to those who think that public justifications must be offered for fundamental and non-fundamental political decisions alike. And second, even if the use of public reason is required only in tackling fundamental questions, the treatment of non-persons will still count as such a question insofar as the basic interests and rights of persons are simultaneously at stake. Yet it appears that this will frequently, if not always, be so. I take it, for instance, that insofar as organs are analogous to other scarce resources, it is a question of basic justice how we harvest and distribute them. By that token, however, when the exclusionary PCP is in place there will be no meaningful room to consider the ethical treatment of humans who have lost the moral powers outside the confines of public reason, even if it is assumed that public justifications must be produced only when fundamental questions are at issue.

98. I am grateful to an anonymous reviewer for prompting me to consider the option of amending the PCP in the name of achieving determinacy. Technically, I should add, the reviewer's proposal was for a halfway house between the inclusive and exclusionary PCPs, whereby members of society count as persons prior to developing the moral powers, but not after losing them. With the exception of the penultimate sentence of the paragraph to which this note is appended, I believe that the considerations adduced in the text against adoption of the exclusionary PCP also carry over to this suggestion.

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