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## RESPONSE AND COLLOQUY

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY HUGH BAXTER<sup>1</sup>

AND BY LINDA MCCLAIN & JAMES FLEMING<sup>2</sup>

**MICHAEL SANDEL:** I first want to thank Jim, Linda, and Hugh for these very interesting challenges and questions. I also want to say a word of thanks to Jim for having convened us in his characteristic way. He's more than an intellectual impresario. He's really a marvelously fair-minded and thoughtful person; everything he does is an open invitation to an intellectual community to gather itself and to engage in discussion of hard and interesting questions. I want to thank him for his role in convening this event.

Where to begin? Maybe I'll start with Hugh's questions and work back to Linda and Jim's. I think that both Rawls' revised proviso concerning public reason and Habermas' view are too restrictive. I would favor no restraints on public reason as such. I would favor an open public reason and democratic discourse, one that invites and encourages citizens to make their best arguments, to respond to one another, and to see what happens. There are two reasons I oppose any prior restraints on public reason: one to do with philosophy, the other with democracy.

The reason to do with philosophy is that I don't think we can know in advance what kinds of reasons or arguments or convictions will carry weight with our fellow citizens. I don't think that reasons and convictions and arguments come pre-labeled in the way that would be required to rule some in and some out in advance, before we see how persuasive they can be. This is, I suppose, another way of saying that I don't think the distinction between the right and the good can or should constrain public discourse in a democratic society. That's the philosophical reason for favoring a democratic, argumentative free-for-all that does not rule out certain kinds of reasons in advance.

The political reason is that I think a democracy goes better that way, if we don't prejudge or pre-label the kinds of reasons that citizens may bring to public life. I think it's been a weakness, a defect of democratic life and public discourse in our society – and in many democratic societies in the last few decades – that certain kinds of reasons have been ruled out in advance. I don't think that constraining public reason generates a public life based on mutual respect among free and equal citizens. I believe, to the contrary, that the

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<sup>1</sup> Hugh Baxter, *Sandel on Religion in the Public Square*, 91 B.U. L. REV 1339 (2011).

<sup>2</sup> Linda McClain & James Fleming, *Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights*, 91 B.U. L. REV 1311 (2011).

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attempt to do so generates resentment and backlash among those whose comprehensive moral or religious convictions are delegitimated in advance, before the democratic deliberation gets going. So I would reject any constraints on public reason of the kind that Rawls and Habermas offer, and favor instead a deliberative, argumentative free-for-all. I think we can't know until we try what arguments will prove persuasive or acceptable to other people.

There is a further difficulty: the case for constraints on public reason arising from Rawls' political liberalism – even the revised version of it – rests on the claim that in democratic societies, there is a reasonable pluralism about the good, or about comprehensive moral conceptions, but that there is not a parallel reasonable pluralism about justice. I think that's mistaken. I agree with Rawls, that there's a reasonable pluralism about the good and about comprehensive moral doctrines. But if you're to get anything like the priority of the right over the good, or the constraints of liberal public reason, then you have to maintain that there is not a reasonable pluralism about justice.

But surely, the disagreements we have in our society between libertarians and egalitarians about income redistribution and the difference principle, are reasonable disagreements. We have pluralism about a question, which on Rawls's own account is a question of distributive justice, the difference principle. And yet, is there reason to think that this disagreement – this pluralism about whether the difference principle is or isn't a principle of justice – is unreasonable in a way that conflicting views about same sex marriage are not? I don't think so.

Hugh's commentary addresses the difference between officials and citizens. I would not say there is a greater obligation of officials regarding public reason. The reason to reject this distinction is one that Rawls recognizes in his book, *Political Liberalism*.<sup>3</sup> The reason I don't believe that officials and candidates have a special obligation to speak in a secular language that does not apply to voters generally is this: in a democratic society, the reasons that voters give, and the reasons on which they base their votes, are the basis of coercive law. So if you come to the conclusion that public officials and candidates may not legitimately base policy or law on comprehensive conceptions of the good, then it seems to me arbitrary to say that voters in a democracy, whose votes determine coercive law, may rely on comprehensive moral doctrines.

It seems to me that, in a democracy, it stands or falls together. If it is illegitimate for public officials to base their decisions on comprehensive moral doctrines, then it is also illegitimate for voters to do so. I myself think it's legitimate for public officials and for citizens generally to bring comprehensive moral views to bear on public questions. But on the narrower question, I agree with Rawls that it stands or falls together, for reasons he gives in *Political Liberalism*.

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<sup>3</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

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I would sum up by saying there is a difference between the separation of church and state and the separation of religion and politics. The separation of church and state is a good thing. The separation of religion and politics is a different, and not necessarily desirable, thing.

Now, I want to respond to the question Linda raised at the end of her talk. She cited the federal court decision in the case striking down Proposition 8 in California, saying that Judge Walker held that only private, moral, and religious convictions could possibly justify the restrictions embodied in Proposition 8. For their part, the proponents of Proposition 8 said that moral views have often been the basis of law. So what do I think about that? Well, I think as a general matter of political philosophy, the proponents of Proposition 8 were right and Judge Walker was wrong. I mean wrong insofar as he thought that because the restrictions could only be justified by certain moral and religious convictions, those restrictions were unjustified. Whether they were unjustified has nothing to do with whether they rest on moral and religious convictions, or comprehensive moral views.

I think it's a confusion to say that they're private convictions. That disparages them, because it implies that private moral views are not open, even in principle, to public discussion or argument or defense or refutation. So to say that they rest on a private moral view is a piece of polemics.

If the question is whether resting on a particular moral and religious conviction disqualifies a law as such, I would say no, it doesn't. So at that level of principle, I would say that, if that's his view, Walker is wrong and the proponents of Proposition 8 are right. But it's a further question of whether the moral and religious convictions are defensible or not.

Let me say one more thing about Linda's formulation. Linda refers to Judge Walker's idea that the ability to perform the offices of marriage should be decisive and that the principle of equal worth can be resolved by empirical evidence. Do I have that right, Linda? Yes?

I don't think this is something that can be decided by empirical evidence rather than substantive moral argument. I don't think the ability to perform the offices of marriage is something we can determine without deciding what those offices are, what those responsibilities entail. This, in a way, touches on Jim's point. If the opponents of same sex marriage are right in their claim that procreation is the proper end of marriage, then a principle of equal respect and concern would support distinguishing in access to marriage between those who can perform the function of the office of marriage and those who can't. And everyone who can perform the office of marriage should be admitted to it, and everyone who can't perform that office should not be admitted to it. The principle of equal respect and concern would be satisfied by applying that principle.

Which is why I think that principle alone, of equal respect and concern, or free and equal citizenship for all – this goes to Jim's formulation – can't get you all the way to same sex marriage unless you just assume that the view that procreation is the proper end of marriage is false. Because if it's true, then

treating citizens equally means determining access to marriage equally with respect to that purpose. The ability to perform that purpose, or that office, as Linda was saying. Isn't that right? Am I missing something, Linda?

**LINDA MCCLAIN:** Judge Walker heard extensive testimony about the purposes of marriage. David Blankenhorn for the Proposition 8 folks talked extensively about this argument we've already heard: marriage is to channel sexuality, it's to deal with the risk of unintended pregnancy. The other side had Nancy Cott and other people testify that the purposes of marriage are multiple. And he found the opponents to Proposition 8 more credible on marriage's purpose or purposes. So what I would have said, if I had a little more time, is, given the definition that he accepted of the purposes of marriage and the state's interest in marriage, and given all the testimony about the capacity of same sex couples with respect to these purposes, they're equal for all the relevant purposes. And the only thing that could explain Proposition 8's line drawing was something else. And he found that to be certain religious and moral views about inferiority and God-given rules about what marriage is. That's the longer version.

**MICHAEL SANDEL:** But the reason that sounds implausible to me, the wrong way of going about it, is that it's not as if asking various people to testify about the purpose of marriage is an empirical, evidentiary matter. That's what I would dispute. Are they testifying qua sociologists, qua historians, qua theologians, qua moral analysts? These are normative, not merely empirical questions: what is the purpose of marriage? So you can have all the testimony you want, but you can't as a judge rule that the evidence offered in the testimony decides the question of the purpose of marriage as if you were making that ruling without normatively assessing the arguments that the various people who testified offered. It's not an empirical question.

**LINDA MCCLAIN:** Empirical evidence was brought to show the capacity of same sex couples to carry out the offices of marriage with this broader conception of marriage's purposes.

**MICHAEL SANDEL:** But then everything hangs on the moral analysis Judge Walker made about what the purpose of marriage in the state of California is. Packed into that decision are implicitly all of the arguments about what I've been calling *telos* and honorific considerations, precisely the normative views that I claim are unavoidable. So by your account of it, that was the moment when he made a moral judgment about the purpose of marriage, properly understood. And sure, then you can say all sorts of things followed from that. But that moment of choice wasn't dictated by some empirical evidentiary hearing. That judgment was in large part a moral judgment. He was assessing the arguments that were presented to him about what the purpose of marriage properly understood consists in. Do we disagree about that, Jim and Linda?

**JAMES FLEMING:** I think that's exactly right. I think that there could be some empirical dimensions to the question about how well same sex couples rearing children are doing. If we look at things like how well the kids are doing in school, how well adjusted they are, et cetera. So sometimes there are empirical dimensions to these moral questions.

**MICHAEL SANDEL:** I agree.

**JAMES FLEMING:** And I think in the trial, there was consideration of those kinds of empirical issues.

**MICHAEL SANDEL:** Sure, fair enough. I'm not saying that empirical considerations are irrelevant, only that the kind of judgment Judge Walker came to is at least in important part a moral judgment that includes, implicitly or explicitly, the considerations that I was suggesting are part of a comprehensive moral doctrine.

**DAVID ROOCHNIK:** I was a bit puzzled in your conversation with Linda. As I understood it, you were drawing a rather sharp line between empirical discourse or analysis and normative or moral discourse or analysis. That's very puzzling to me from someone who is trying to resuscitate a teleological view. It seems the heart and soul of at least Aristotle's teleological reasoning is exactly to get rid of that line. What something is tells us what something is for; I think you made that very point about the essence of golf. Presumably, that's something like an empirical question, but it generates norms. So I just was puzzled by that distinction.

**MICHAEL SANDEL:** I do want to blur the line between the two for just the reasons that you say. So my point to Linda, really to Linda's example of Judge Walker, was to say that it could not have been a merely empirical evidentiary hearing that led him to conclude that the purpose of marriage was this rather than that. So, I think that the kind of hearing that she described, and the conclusion Judge Walker drew from it, was not only empirical. True, it had empirical aspects; what historians and sociologists and others have to say is relevant. But it also has an unavoidably moral dimension. The judgment that he made about the purpose of marriage was not merely empirical, but also partly moral. But yes, for just the reasons you say, I don't want to draw such a sharp distinction. But this example, adjudicating among competing conceptions of the purpose of marriage, seems to me a good illustration of why it's a mistake to think the moral and the empirical in this kind of domain could be separated.

**ERIC BLUMENSON:** The question I have has to do with the place of bracketing. It does seem to me that to the degree that people have different

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comprehensive views and different judgments about the purpose of marriage, to the degree that they are not mutually exclusive, it's best not to create winners and losers, but to have an overlapping judgment that can incorporate as many of these as possible.

Most negotiators would say bracketing is essential in order to get agreement and also to prevent winners and losers if you can. It seems to me that if you bracket those purposes in that case, you come out with a more defensible, civic judgment that doesn't divide people.

**MICHAEL SANDEL:** Sometimes yes, sometimes no. It depends what moral judgments you're bracketing. In the 1830s, there were evangelical Christian abolitionists who argued that slavery should be abolished because it's a sin. They brought religion directly into public discourse. Now, you could have said then, "Well, some believe it's sin. Others believe it's morally defensible. Others disagree with slavery on non-religious grounds." So would you have favored bracketing in that case? Would you say that the evangelical Christian abolitionists' views should be bracketed? And what would that mean exactly? That they shouldn't be brought to bear in public discourse about whether slavery should be permitted?

Now, there are other cases where bracketing is perfectly sensible. It's a prudential matter to keep people from one another's throats, especially if the moral stakes are not particularly high. So as a prudential matter, sure, bracketing is often a sensible thing to do. My quarrel is with those who argue it's a philosophical matter, that bracketing in principle is the right way to conceive public reason as such, and democratic deliberation as such, and moral reasoning as such. And those who typically argue this are those who assert the priority of the right over the good, and so on. My quarrel is with that wholesale bracketing, not with the use of bracketing from time to time as prudence may suggest.

**ALON HAREL:** What I find attractive about rights based theories is the fact that even had the practice of marriage been based on reproduction or something like this, then I could come and say, "No, I challenge this on the ground of my right, blah, blah, blah." I admit that changing the practice in the way that I demand is detrimental to the purposes of the practice. And yet, I want to be part of it. This is a very powerful intuition, which I think is not captured in the analysis that you're suggesting with your theories in general.

**MICHAEL SANDEL:** My answer to your question about rights theory – Don't we need rights theory in order to be able to criticize or to change a practice? – is that I don't think we do. It may be that there is a perfectly well integrated, coherent practice of marriage somewhere, not in our society, but somewhere, whose only real purpose is procreation. It's an important fact about our social institution, marriage, that it's not fully captured by that purpose. But there could be one, and we might want to change it. We might

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want to broaden it. We might want to improve it. So I'm not arguing for conventionalism. But the question is, in the name of what? Now, I would say, taking the example you gave, that we would want to broaden the understanding and the practice of marriage as a social institution in the name of realizing another range of human goods having to do with a mutual lifelong commitment, an expression of love embodied and recognized by the community, and so on.

That's an argument that could very well be brought to bear to criticize a narrowly construed practice. And yet, it would be possible to argue for that change in the practice, in its meaning and its purpose and in the access people have to it, in the language of the good. You can use the language of the good to criticize existing institutions and conventions without necessarily invoking rights. Now, there will be a theory of rights connected to any view of the good of a social practice or institution. And the principle of access will differ, depending on how one conceives the purpose of the practice.

Since we've talked a lot about the same sex marriage case, I want to go back to one other aspect of the bracketing question: although I'm against wholesale bracketing, I'm in favor of retail bracketing if prudence suggests. I want to bring out one of the great moral and political costs we pay if we try to bracket the question of the underlying good and the moral question about gay and lesbian relations – whether they're worthy of appreciation and recognition and honor. The cost of bracketing that contentious moral and partly religious question is this: by insisting that the substantive moral argument not be made when you're trying to decide the legal case, you deprive the democracy of the civic education that goes with open argument about the moral claims that everybody knows really are at stake in the same sex marriage case.

So bracketing, while serving important and legitimate prudential considerations in various cases – in business deals, in political disagreement – it's a mistake to elevate bracketing to the level of a principle, a wholesale principle, and insist upon it in all cases. Sometimes bracketing the underlying moral question can delay the day when, in this case, gays and lesbians are accorded full recognition by the community, precisely because the underlying moral view has not been challenged as part of the public discourse. So there can be a real moral cost to bracketing questions of honor and recognition.

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY GARY LAWSON<sup>4</sup> AND ANNA DI ROBILANT<sup>5</sup>

**MICHAEL SANDEL:** Thanks so much for these papers. Jim, you found two disparate kinds of papers and perspectives for this panel. First, Gary Lawson. Gary says that for the libertarianism that he favors, the claim to ownership is not based on moral desert, it's not based on self-ownership, it's grounded simply on a right to first possession. Well, it's hard to know what to

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<sup>4</sup> Gary Lawson, *Truth, Justice, and the Libertarian Way(s)*, 91 B.U. L. REV 1347 (2011).

<sup>5</sup> Anna di Robilant, *The Virtues of Common Ownership*, 91 B.U. L. REV 1359 (2011).

do with that except to ask, “Well, why first possession? Why not third or seventh or ninth possession?” If Gary began to work out a reply to that question, I suspect that he might wind up leaning on something like the idea of self ownership, maybe some Lockean idea about mixing something one owns with something unowned. Maybe he would lean on some ideas about effort; maybe he would lean on something that, lo and behold, had something to do with moral desert. But otherwise, it’s just hard to know what to do with the idea that first possession is somehow privileged. Why is it privileged? So that, in short, would be my question to Gary.

For Anna di Robilant, the common ownership theme is very intriguing to me, and sympathetic. I would like to learn more, Anna, about the kinds of examples you have in mind that might dramatize the tension between systems of property that prize autonomy and those that prize other goods to do with solidarity or deliberation. You mentioned at the end very briefly the affordable housing scenario. In the paper you mention the fisheries and the open field system in England and the Japanese Iriachi system. And I suppose intellectual property would be a domain of law where there might be some live questions about common ownership versus appropriation. So all of it seems to me very intriguing, sympathetic, and suggestive. My response takes the curious form of asking whether you could take one or another of these examples and show how the tension between autonomy, on the one hand, and other goods, deliberative or solidaristic goods, plays out.

**GARY LAWSON:** I went first, so there we go. I have first possession of the microphone. Let me be clear that what I say is not speaking for libertarians as a whole, because there are some libertarians, some very prominent ones, who do make the Lockean move quite explicitly. There are some libertarians who at least talk as though effort or moral desert is relevant for property allocation. I don’t think they actually mean it when the time comes to formulate a theory. And can I speak for first possession theorists? Well, the answer is no because there are lots and lots of first possession theorists.

**MICHAEL SANDEL:** Well, never mind them. What about you? Why do you think first possession is privileged?

**GARY LAWSON:** I’m just giving you the qualification that what I say should not be attributed to anyone else. The reason why I’m hemming and hawing is the same reason why for twenty years I’ve managed not to talk about moral or political theory. Because I don’t think that you can spell out a theory of ownership without having a more general theory of rights on which it is based. I don’t think you can have a general theory of rights without having a more general theory of morality on which it is based. I don’t think you can have a theory of morality without having a theory of epistemology, how we would know anything, moral propositions or otherwise, on which it is based. And I don’t think you can have a theory of epistemology without having a

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metaphysical theory of the nature of reality on which the epistemology is based. And finally, with metaphysics, we come to first philosophy, and we're done.

So the reason why I have never written an article spelling out what I think is my theory of first possession is because I'm too busy teaching law classes. This is not my distinctive excellence as a human being. The best I can do, by way of a short form answer, is to say that the theory of ethics that I think comes out of a metaphysics and epistemology that I cannot spell out, is something resembling the eudaimonism of the classical Greek thinkers. Then the next question is how does one extend the obligation of developing your own distinctive excellence as a human being into a social setting where there are other equally autonomous moral agents with the same objectives? That's where the *telos* of rights comes in. Rights are a device for coordinating those actions among those autonomous individuals.

The nature of that coordination function dictates that any specific principles that are derived from that conception of rights have to have certain characteristics. They have to be knowable; they have to serve, in fact, a coordination function. They have to be identifiable with some relative degree of specificity and certainty, in particular circumstances. And since the fundamental principle of natural law that emerges from this ethic is, don't hurt other people unless it's a rectificatory action: once somebody's got something, you have to be able to justify grabbing it away from them in rectificatory terms. I think that moral principle, combined with what I guess is best described as an economic or epistemological principle about the knowability of principles, coalesce to support the first possession norm. I mean, that's the short form of the argument that I would give here. The long form is the one that, as I said, I've been silent on moral and political theory for twenty years in the academy. Savor this moment because there are twenty more years of silence to come. It's a perfectly fair, wonderful question. That's the best I can do by way of response.

**ANNA DI ROBILANT:** Let me go back to the example about affordable housing, which is the area I'm working on right now. In response to your comments, I want to do two things. First, I want to spell out what is exactly the dramatic conflict between autonomy and greater equality. I also want to bring some analytical clarity to this tension and see exactly whose equality, whose autonomy, and what are autonomy, equality, and community in this conflict.

So let's go back to exit rules in the limited equity case. What is the conflict here? The conflict here is, on the one hand, what is the interest of the current owner who wants to exit that is sacrificed? Is the interest in the equity, in the full market price of the share? And this in more abstract terms means what? Means autonomy in the sense of what we could call positive freedom, of the freedom to actually materially pursue one's life plans and ends.

What is the interest on the other side, that of the prospective buyer? It is twofold. First, the interest in, again, positive freedom, freedom to materially pursue one's life plans. And, also, another type of freedom, freedom of self-determination, freedom of feeling secure enough to form and revise one's values and life plans.

Now, in the first case, the current owner who wants to exit is in a better off position than the prospective low-income buyer. So here, what we are doing is sacrificing the autonomy of some who are already better off to increase the autonomy of others who are worse off.

**JAMES FLEMING:** I want to put a question to Gary. I've never heard anyone who needs more to read John Rawls' *The Independence of Moral Theory*<sup>6</sup> than you, based on what you just said. Rawls, in *The Independence of Moral Theory*, basically says, 'We political philosophers are all the time greeted by all of these epistemologists and metaphysicians and all these other folks who say we can't get on with our work until we first resolve all these prior epistemological questions, metaphysical questions, and the like. And that can be quite debilitating.' Rawls argued that the content of our arguments has nothing to do with any of these important, perennial epistemological, metaphysical and other disputes. 'We can get on with our work without resolving all of these prior disputes.'<sup>7</sup>

Gary, the way you presented it dramatically just now really does make it sound as if the inability to bracket those disputes and get on with the work of moral and political theory has silenced you for twenty years. I think you do quite well getting on with your own moral and political theoretical arguments without resolving all these prior debates.

Second, Gary, it seems to me that you owe Michael more of a response than you've given him about whether the grounding of your libertarian view ultimately has to be something like self-ownership. Now, maybe there could be varieties of libertarianism that don't conceive themselves as grounding libertarianism on self-ownership. Maybe it's liberty. Maybe it's autonomy. But it's got to be something like this, it seems. It can't be just something like first possession. So I'm amplifying, I think, Michael's challenge.

**GARY LAWSON:** Well, let me answer the second question first. I think it can be that you are the first possessor of yourself. You don't have to have a Lockean notion, which is essentially a theological notion of self-ownership, underlying that and libertarians are split as to whether or not they think there is an underlying notion of self-ownership. I happen not to, not because I think I'm owned by somebody else, but because I think I'm just not owned in that sense.

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<sup>6</sup> JOHN RAWLS, *The Independence of Moral Theory*, in COLLECTED PAPERS 286 (Samuel Freeman ed., 1999).

<sup>7</sup> *Id.* at 287-88.

The more interesting one is the first question. Yes, I think there are lots of people who get on with moral and political theory. The question is what is it that they are getting on with? What is it that they are doing, and what is the epistemological status of the conclusions that they draw? If what you view political theory as doing is coming up with a model that yields a set of conclusions that you already have – we can call them considered judgments if we wish – yes you can do it.

Just speaking as a personal matter, I don't find that all that substantive. One can spin out lots of models that yield sets of conclusions that one has. Now, there are perfectly good arguments that that's all there is, that there simply isn't anything more to it. That's the argument that I alluded to at the beginning about whether or not there is such a thing as foundationalism, whether there is any grounding for moral or political theory beyond simply reflecting on the thoughts that some person or group of people happen to have at a given moment in time. So yes, you can do all sorts of things. The question is what are the things that one is doing?

**MICHAEL SANDEL:** In your opening remarks, you put some value on making recourse to what ordinary people thought about morality and justice, as opposed to what rarified academics think. Here, I think you're getting caught up in a version of this yourself. You're getting caught up in how all the various libertarian theorists disagree. But think about what the ordinary person, the ordinary libertarian, the freshman in college, or the people all across America, think. Don't they have a basic moral intuition that they own themselves and that's what drives their libertarianism?

**GARY LAWSON:** Even if you might well be right, they could be completely wrong. I await an argument that is cognitively reliable. That intuitions actually conform to a mind-independent reality. If someone can convince me that they do, I will give weight to intuitions.

**MICHAEL SANDEL:** I don't think that there's a general answer or procedure that can resolve all questions and disparate views. That, in a way, goes back to what I was saying before in the exchange in response to Hugh's paper. I think the attempt to set up constraints on public reason or the attempt to pick out in advance certain features of reasons as legitimate or illegitimate contributions is a mistake. So it's certainly true that the free-for-all, as I've called it, of open public discourse, unconstrained by procedures or principles that we could identify in advance – I agree that such discourse is open to a wide range of disparate views, some off the wall.

But I think that's also true of debates we have about justice. This goes back to the point in the first panel about whether the fact of reasonable pluralism about the good doesn't also apply to disagreements about justice. I think one can get off the wall, disparate answers, certainly deep disagreement, whether we're talking about justice or whether we're talking about the good life. I

think in neither case is there a general answer that takes the form of a procedure or a principle to adjudicate. I think the only general thing that can be said is to ask more about the view, to see whether it's simply a crazy person you're dealing with, or whether there is some rationale that didn't appear at first that may actually be plausible or interesting or wrong-headed in an interesting but explicable way, and see what we can do.

In that respect, I think public discourse, democratic discourse, is not unlike the discussions we have all the time about normative questions, whether at the dinner table or in private life, or with our friends or in faculty meetings. There are often surprising and disparate, sometimes wild-eyed, conceptions. I don't think there's a general procedure that can solve that problem. In fact, I'm not sure it's a problem. It's the starting point for public deliberation about hard questions.

**DAVID ROOCHNIK:** Those comments just now seem to commit you to something like skepticism, broadly speaking.

**MICHAEL SANDEL:** I don't think so. Why is that?

**DAVID ROOCHNIK:** Well, you just said there's no answer.

**MICHAEL SANDEL:** To reject proceduralism is not to embrace skepticism. It's to say that we have to attend to the competing conceptions of the good that underlie the views that our interlocutors offer in public discourse. That doesn't commit one to skepticism at all.

**DAVID ROOCHNIK:** But in principle can those debates be resolved? You seemed to just say now they can't be resolved.

**MICHAEL SANDEL:** I'm not saying they can't be resolved. I'm saying they can't be resolved in advance by applying a decision procedure. But that's not to say they can't be resolved. Whether they can be resolved, we can't know until we try.

**DAVID ROOCHNIK:** After we try, we can know? I mean, if we did have that open discussion and we determined that we now know the answer, wouldn't it be reasonable then to shut off the debate?

**MICHAEL SANDEL:** Well, take the analogy of disputes about the meaning of the Constitution on a given question. Is the right to bear arms an individual right, or is it a right attached to being a member of a militia? Or does the freedom of speech guaranteed by the First Amendment cover commercial speech as well as political speech? Now, you could very well say that there's no single decision procedure that can resolve those questions, and still take the view that some interpretations are better than others and some are right. So, I

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don't think that one is committed to skepticism in moral argument any more than one would be committed to a skepticism about the meaning of the Constitution simply by saying there is no decision procedure that will resolve contested claims, morally or constitutionally.

The picture of moral reasoning that I have in mind – reasoning about the good, in an open-ended way, not governed in advance by a certain decision procedure – is a kind of dialectic or hermeneutical approach to moral reasoning that is very closely analogous to interpretive approaches to getting at the meaning of the text. And there might be rival meanings embodied in a given text with regard to freedom of speech, for example. There may be close calls, and yet some readings may be better than others and it may be possible to converge on a single right answer. But I don't think we can know that in advance until we try, whether we're interpreting the Constitution or whether we're engaging in moral argument generally.

I don't think there's a single trumping value that applies to all public arguments or moral arguments or constitutional arguments. But let me see if I can give an example that goes to some of the discussions that we've had in both panels and earlier today, because actually more of the discussion than I anticipated involves people wanting to know how moral reasoning can proceed at all. A lot of the questions have been about that. It's also related to the discussion about whether religious convictions have a legitimate place in moral discourse, and whether they simply lead to dogmatic impasse if they're admitted.

A few years ago, I found myself on the President's Council on Bioethics. This was during the Bush Administration. Many of the members were very conservative. And we were debating the question of stem cell research and the moral status of the embryo. Now, the moral status of the embryo, if anything, is a fraught question and one that is very often informed by religious convictions. And we were debating the question whether embryonic stem cell research should be legally permitted and whether the government should fund it.

Now, the view that religious reason should play no part in deliberations of that kind is often supported by the thought that people just have a view – either the embryo is a person or it isn't – that's a religious matter and no further discussion is possible. But even on this morally contentious question, we are able to have sustained and illuminating discussions.

Let me give you just one example. There were some who had a strong religious conviction that human life in the relevant moral sense begins at conception. And therefore, embryonic stem cell research, which destroys, say, a six-day blastocyst, is morally impermissible. There were others who thought those reasons made no sense at all, were merely religious convictions that should not be allowed to interfere with the possible medical benefits of stem cell research.

Then there were those of us in the middle who really hadn't thought through a position on the question of embryonic stem cell research. I hadn't, simply

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because I wasn't familiar with the issue before I took on this assignment. One of the members, who did hold the strong view that life begins at conception and insisted on this view of the embryo, was informed by his Catholic faith, although he was advancing other reasons for it. And I asked him whether it was a consequence of his view that destroying a blastocyst for the sake of stem cell research was morally as abhorrent as yanking organs out of a five-year-old child in order to save lives or to promote life-sustaining research.

He said yes. He gave a principled answer, playing out the moral implications of his view. And we had other, similar exchanges about other hypotheticals. Now, that exchange did not resolve once and for all the question about the moral status of the early embryo. But for those who were in the middle, who hadn't decided, there was an audible gasp when he said yes. It was, I think, a moment of great intellectual integrity on his part, because the people who were trying to make up their mind what they thought at that moment, I think, decided they didn't believe that the early embryo was a person in that full sense.

The people who already had strong convictions on the other side weren't swayed. Some thought this is a principled statement of the implications of the view. Others thought this confirms what they always thought, that it's crazy and can't be right. But the people in the middle were swayed. This is just one in a series of exchanges. So I think moral argument can proceed in that way; not that a single such example or exchange can be decisive, but taken over a range of such exchanges it's possible to explore and to test and to challenge and to argue with views that may seem at first glance as merely religious dogmas, in order to explore their logical implications.

Or if you favor banning embryonic stem cell research because it destroys embryos, should you also shut down all forms of in vitro fertilization, fertility treatments that create and discard excess embryos? Many people who held the first view didn't hold the second view. So it's possible to ask, "Well, what is the relevant difference between those cases?"

This is an example of what might be called dialectical, or hermeneutic moral reasoning. Now, you could say at any moment, "Yeah, but how do you know that even if people come to some convergence they aren't all wrong?" Well, it's always a possibility, there's never a guarantee. But moral reasoning is that way. There's not, I think, ever a guarantee that any point of convergence, even within oneself, is right. Tomorrow, or in the next moment, there might arise a counter example or new consideration that dislodges it. That's always a possibility. But that doesn't mean that simply because there are strong views, including views that may be religiously informed, that there's no way of arguing with them or engaging with them or attending to them.

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY JUDITH SWANSON<sup>8</sup>  
AND DAVID ROOCHNIK<sup>9</sup>

**MICHAEL SANDEL:** These are two very different political visions flowing from Aristotle that we've just heard. One of them wants me to be more ambitious, and the other less. So let me take each of them in turn.

First, Judith emphasizes the view, and it's a view I've heard articulated before, that a good person in a bad regime should edit himself in public to avoid danger to himself and to avoid wasting his breath; that one doesn't tell the whole truth, especially in matters of morals and politics, before just any old crowd. And so candid moral speech should be restricted to schools and universities and intellectual venues rather than displayed in public, generally, where it could lead to trouble not only to the speaker, but also presumably it could get people excited or destabilize the regime and lead to things like the execution of Socrates or to other forms of instability that would be undesirable for people who aren't ready, able or willing to hear the truth.

Now, this is a familiar view. I'm not sure it's entirely Aristotle's view. It's a view that Leo Strauss and others have emphasized with regard to a great many thinkers. Some have drawn it from Spinoza. But I do think it stands in a certain tension with a teaching of Aristotle that David emphasized when he said that, for Aristotle, experience counts, narratives count, public opinion counts, all because they tell us something truthful about the world. David made this observation in the context of saying that I need to say more directly whether I accept the background theory. And this, he said, was part of Aristotle's background theory, about why attend to things like ordinary opinion, intuitions, convictions, that may be found generally in the public.

I find this strand in Aristotle quite powerful. And it connects with the idea of moral reasoning that we were discussing earlier. I think it's different simply from the appeal to intuitions that is often made in contemporary moral and political philosophy. For Aristotle, philosophy had to address itself to the life of the city, to the opinion that was out there, ill-formed though it be. Why? Well, I think there was a certain kind of democratic impulse in that insistence. He believes that opinion, ordinary experience, tells us something real, truthful, about the world. And this is partly his disagreement with Plato, the idea that the philosopher ideally should escape from the cave and return only under duress.

Whereas for Aristotle, and this appeals to me, the claims of the cave must be given their due, even to do proper political philosophy. So it's not as if the philosopher could do his or her work, arrive at a true conception of the good or of the just or of the beautiful, and then decide whether or to what degree to share it with the benighted people who still inhabit the cave, the people in the

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<sup>8</sup> Judith Swanson, *Michael J. Sandel's Justice: What's the Right Thing to Do? A Response of Moral Reasoning in Kind, With Analysis of Aristotle and Examples*, 91 B.U. L. REV 1375 (2011).

<sup>9</sup> David Roochnik, *Michael Sandel's Neo-Aristotelianism*, 91 B.U. L. REV 1405 (2011).

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grip of opinion and prejudice and confusion, and so on. Because for Aristotle, even to get at what the truth really is about these questions of justice and the good requires mixing it up with the life of the city. That's why an important ingredient, even starting point, for the philosopher's activity, qua philosopher, is to walk the streets of this city, or to listen to talk radio, or to watch cable television, even those outrageous talk shows. Not because what they're spewing forth, very often venomously, is true or is an adequate idea of justice or a true rendering of the good life, but because something through a glass darkly can be glimpsed, passions and convictions, of which some account has to be given.

And the only way to really understand what kind of account is being given is to engage with those people who are screaming on talk radio or spewing vitriol on cable television, and so on, to take the most extreme examples.

So here, I agree with Aristotle, as emphasized by David, that these experiences, these narratives, the views of the person in the street, count as grist for doing political philosophy – figuring out what the good and the just really are. Not because one is ultimately beholden to those views, but because they're a starting point from which you build an account. That is another way of describing the account I was trying to give earlier of what I take moral reasoning and deliberation to consist in: an engagement with even the confused, misunderstood opinions that our fellow citizens (and we ourselves) bring to public life. Some of them more or less articulate, others more or less dogmatic, some more or less confused. But one can engage with those views and opinions in a kind of dialectic, a form of deliberation, and try to work out a more adequate understanding from that.

One of the tests of whether it's really a more adequate understanding is then to see if the participants can be presented with that higher version, Judith, and whether they see at least something of themselves in it. And that's also how civic education works. So this is one of the features of Aristotle's account that I find very helpful and that's in a certain tension with the other part – I see it, really, more as a Platonic than an Aristotelian view – about telling noble lies, censoring speech, editing one's speech, and recalling that there are certain things one doesn't say in front of the children.

A good man, Judith says, in a bad regime should edit himself in public. Maybe so, up to a point. But to listen to this rather dark account of our culture, it would seem that good men and women in most societies we're familiar with would have to carry on in the same way. There was the litany of obstacles to a politics of moral engagement: the language, technology, interest, violence, and so on. But to heed those obstacles too fully, too completely, misses out, deprives us, cuts us off, I think, from the deliberative or dialectical kind of engagement that I think on Aristotle's own account is necessary to realize the good life. That's one response to Judith's very interesting paper.

And now in response to David. I think he gives a litany of ways in which I draw on Aristotelian arguments or engage in Aristotelian forms of reasoning in my bioethics book, in this book, and in an earlier book. In his paper, there's

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even a longer litany of such examples, all of which I accept. Then he asks, but do I embrace the background theory? Do I embrace Aristotelian physics and biology and cosmology? To which my short answer is, well David, can't you be a little bit grateful for small things? And then I suppose the question is just how small that small thing is?

David wants an account of nature in what he calls the robust, big sense. Well, I think there are two possible ways of conceiving nature in the robust, big sense that might be relevant to moral and political philosophy. One is the big robust sense to do with cosmology – to embrace all of Aristotle's physics, biology and cosmology which includes, for example, the teleological explanation of why fire rises: because it's aiming to reach the sun, its natural home. And a teleological explanation of why a stone will fall if you drop it: because it's aiming at the earth, where it belongs.

So is David really saying that I need to embrace this Aristotelian physics and biology and for that matter cosmology, in order to vindicate the moral and political claims? Well, it's an intriguing question. I would be inclined to say there's a second way of conceiving Aristotle's account of nature in the big, robust sense – maybe not quite so robust and big as this cosmology, physics, biology package – which is his account of human nature. As David mentioned, Aristotle reasons about the purpose, the *telos* of political association by pointing out that human beings are by nature political beings. By which he means something analogous to his claim about why fire rises, when he says it rises to reach the sun, its natural home. It's analogous to that idea, but I don't think it depends on anything like that idea.

The reason that political association is for realizing the good life is that we are, by nature, political beings. This means that we can't fully realize or unfold our nature, our full human faculties, except by deliberating with equals, as equals, about the common good; without sharing in rule, without ruling and being ruled in turn. Now, this does appeal to a certain idea of human nature. It says that participation in politics, of a certain kind, is necessary to unfolding the full range of our human faculties. We could think hypothetically in the privacy of our studies about the common good. We could think vicariously as we watch politicians, decide whether they're making the right decisions, whether we would make other ones. But we don't fully develop our human faculties unless we ourselves participate in deliberation about the common good with the full weight of responsibility, knowing that our voice will matter in the shaping of the collective destiny.

Now, that involves a certain theory of human nature, according to which we are only complete if we develop our faculties through this kind of practice, aiming at the common good, ruling and being ruled in turn. I find this view of human nature powerfully attractive. So in that sense, I suppose, David, I share Aristotle's account of nature, of human nature, in a robust, big sense, underpinning this civic conception.

But in order to hold this view must I also embrace Aristotle's physics and biology and cosmology – including the idea that fire rises because it aims to

reach the sun? Well, I'm not so sure. It's conceivable that there could be some connections. It's possible that teleological explanations in physics, and teleological modes of reasoning in morals and politics, stand or fall together. Aristotle thought they did, and he had views about both. But I'm not sure in retrospect that they must stand or fall together.

So I'm open on the question of whether teleological explanations of physics and biology are still plausible or conceivable. I don't rule them out, but neither would I say that an account of human nature or of political association and its purposes must necessarily stand or fall with Aristotle's physics and biology. Why should I?