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# *Deep Disagreement and Political Legitimacy: The Case for Modus Vivendi*

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## *FRONTIERE LIBERALI*

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Introduction:  
Focus on *modus vivendi*  
**Roberta Sala**

This collection of essays emerges from a workshop on theories of *modus vivendi* held at the Centro di Ricerca e Documentazione Luigi Einaudi in Turin in November 2017. To introduce the topics, let me recall that *modus vivendi* is generally defined as a set of arrangements that are accepted as basis for conducting affairs by those who are party to them, although they are not the arrangements that any party would most prefer. Establishing a *modus vivendi* involves trying to reduce the potentially destructive effects that disagreement would otherwise produce. Recently *modus vivendi* has been defended also as a realist approach to politics against the so-called ideal or moralistic accounts of it. The claim is that political theories – specifically: the liberal accounts of politics – tell us little about how the real world works and even how it should work.

The targets of most critics are both Rawlsian political liberalism and its negative assessment of *modus vivendi*. In fact, Rawls sees *modus vivendi* as nothing but the Hobbesian contingent balance of powers: *modus vivendi* is understood as a precarious equilibrium that depends on “circumstances remaining such as not to upset the fortunate convergence of interests”.<sup>1</sup> This means that according to Rawls *modus vivendi* is not the best political arrangement in order to live and coexist peacefully with one’s own fellows.

To Rawls, *modus vivendi* may be only the way for the so-called unreasonable people to live within a liberal society since they do not share its moral fundamentals – such as tolerance and mutual respect. Although Rawls

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<sup>1</sup> Rawls 2005, 147.

is critical of grounding society in a *modus vivendi*, he admits that a *modus vivendi* may develop over time into a moral overlapping consensus. Having experienced the goods of living according to those fundamentals, unreasonable people may turn to comply with liberal institutions convincingly. Rawls concludes this argument by saying that there is no guarantee for such an occurrence. Views that would suppress the basic rights and liberties of persons, the ones that tolerance and mutual respect are supposed to protect, may indeed survive in society. He thinks that in a sufficiently fair society such views would not be strong enough to undermine those fundamentals, but “that is the hope; there can be no guarantee”.<sup>2</sup>

As anticipated above, Rawls’s idea of *modus vivendi* has been widely criticized. In light of a more realistic approach to political theorizing, various authors offered more ‘optimistic’ accounts of *modus vivendi*. Indeed, although it is not the ideal pattern of political cohabitation grounded in shared moral values, *modus vivendi* seems to be the best alternative to a utopian consensus-based society. So, all of the criticism that have been levelled against *modus vivendi*, be it optimistic or not, started by outlining the standoffs of the Rawlsian theory of overlapping consensus. Some of them end by offering a fruitful view of *modus vivendi* as a legitimate settlement, albeit of a specific kind of legitimacy. The idea is that a society relying on *modus vivendi* may be still legitimate, whereas legitimacy is not dependent on a sharable moral content.

The papers of this collection follow this line of criticism. They all start by recalling the shortcomings of Rawlsian criticism against *modus vivendi*. They are also similarly committed to valuing *modus vivendi* as a way to contribute to social stability in a realistic political framework. They all address the question of the legitimacy of *modus vivendi*, hence the concern about the reasons people may have to adhere to a *modus vivendi* arrangement. These reasons are not necessarily moral reasons: indeed, *modus vivendi* is not something like a moral consensus. Many different reasons may move people to it.

At the same time, all authors agree on recognizing the ‘side-effect’ of admitting different reasons: *modus vivendi* is somehow less demanding than consensus but it also guarantees less stability. All authors wonder whether *modus vivendi* may be stable or not and conclude that *modus vivendi* may be reached at some cost in terms of instability. When people do not consent on a

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<sup>2</sup> *Ibidem*, 172.

sort of common morality, what they may agree on is a contingent settlement obtained through negotiation and compromise.

Having recalled some general elements of all of the following contributions, I would like to spend now two words about each one. Alessandro Ferrara authored the one: “How to accommodate *modus vivendi* within a normative political theory”. He defends an idea of a ‘fruitful’ *modus vivendi* to be more pluralist than a moral consensus but still legitimate. To argue for that, Ferrara conceives of a “normativity of the reasonable” (p. 20): this means that any political justification should be addressed to “us”, not to an external third person who does not exist. Thus, a fair society should be justified to “us”, without making us betray our own comprehensive view while abiding by its injunctions. In order to include more people among “us”, Ferrara advocates a *modus vivendi* as a further way of political inclusion. The idea is that one and the same political arrangement could be endorsed by some citizens on *principled* grounds (that is, subscribing to the same moral values and reaching an overlapping consensus on them) and by other citizens on *prudential* grounds (that is, by entering a *modus vivendi*). Legitimacy is still preserved: authorities are legitimate still remaining true to their mandate of protecting all citizens, be they wholeheartedly compliant with them or only obedient to them for a number of different reasons, moral and non-moral.

In his paper “Political legitimacy and *modus vivendi*”, John Horton aims at understanding how *modus vivendi* can play a role in theorizing political legitimacy in a manner that is both cogent and realistic. That means that Horton is seeking to engage with a more ordinary conception of politics, directed towards ‘understanding and interpretation’ rather than prescribing any rule or moral principle. He recalls the definition of *modus vivendi* he put forth in an earlier paper that is still well-suited to account for it:<sup>3</sup> *modus vivendi* is a practical accommodation that could be accepted for a variety of reasons by those who are parties to it, except for reasons of violence or fear. If violence and fear cannot be conceived of as plausible reasons to adhere to a *modus vivendi*, given that they cause dependence and subjection, *modus vivendi* cannot be interpreted as a consensual settlement. Horton claims that: “we need to be less explicitly voluntarist in conceptualizing the conditions of a *modus vivendi*” (p. 57). The idea is that there is a further perspective of acceptance

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<sup>3</sup> Horton 2010, 431-448.

of a political regime: not only a subjective one, as it is shown by what people say or claim; but, also an objective one, as it may be inferred from how people behave, from what they do in fact. Horton's concern is about actions as *evidence* of being party to an ongoing *modus vivendi*, that is, of acceptance of political authority through people's behaviour. Horton's alternative account of political legitimacy is grounded on an ongoing *modus vivendi*: political legitimacy resides in the acknowledgement of political institutions and practices, and these may change over time.

Political legitimacy is at the core of the paper by Valentina Gentile, "*Modus vivendi* liberalism, practice-dependence and political legitimacy". Her point is to analyse David McCabe's theory of liberal *modus vivendi*<sup>4</sup> in comparison with Rawls's *Political Liberalism*. She is specifically interested in showing how both theories are similarly practice-dependent although from two different perspectives. In spite of McCabe's willing to close the loopholes of Rawlsian political liberalism through the adoption of a liberal *modus vivendi*, his proposal does not reach his goal. Gentile starts by elucidating the two accounts of practice-dependency. In Rawls's *Political Liberalism* practice-dependency entails a sort of common morality: "sharing a liberal institutional context shapes the framework of reasons for endorsing a conception of political authority that better represents certain moral premises concerning citizens understood as socially and politically equal" (p. 35). Differently, McCabe sees practice-dependency as "actual citizens' acceptance of the liberal terms which reflect society members' actual equality of status" (p. 35). According to McCabe, *modus vivendi* liberalism may be recast as a practice-dependent model of political legitimacy that can be realized when citizens' reasons converge in endorsing an institutional arrangement, not necessarily when these reasons are the object of a consensus. Convergence seems to better respond to actual pluralism according to McCabe. In spite of its expectation, *modus vivendi* liberalism does not work: Gentile charges McCabe of not clarifying why those who are not committed to liberalism should endorse liberal institutions. Indeed, he assumes a minimal universalism consisting in a shared presupposition that the interests of all persons matter equally. He trusts that this presupposition is universally accepted by any person, be she liberal or non-liberal. But this presupposition "seems to trump practice-de-

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<sup>4</sup> McCabe 2010.

pendency” (p. 38) and turns to be scarcely realistic. Conceived so, *modus vivendi* liberalism is at odds with its main goal to provide an anti-utopian defence of liberalism. Furthermore, any context-dependent (contingent) justification of a political order is weak as it disconnects the idea of legitimacy from a conception of liberal political morality.

The relationship between realism, public justification, and legitimacy is also the focus of Federico Zuolo’s paper “Is *modus vivendi* the best realist alternative to public justification liberalism?”. By public justification liberalism Zuolo means any approach committed both to the foundation of a just liberal order and to the liberal principle of legitimacy. In light of public justification liberalism, a just order is the one that is acceptable by those who are subject to it for a few shared moral reasons. The question now arises of what happens when people do not share those reasons. In fact, realistically some people do not consent on the same set of reasons: in light of their disagreement different reasons should be invoked to support just order. Zuolo wonders whether *modus vivendi* may be the solution: in fact, a *modus vivendi* may be reached through negotiation and compromise, not necessarily through a consensus on moral reasons. Unfortunately, *modus vivendi* does not work. Any account of it betrays both the expectations of realism: descriptive adequacy on the one hand, and the ambition of prescriptive capacity on the other hand. In order to illustrate his thesis, Zuolo refers to the ongoing dispute about the treatment of animals. This dispute sees animalists and anti-animalists engaging in a dramatic reasons-exchange and in mutual efforts of persuasion. If *modus vivendi* should be justified by a sense for peace and security, it is pretty clear that peace and security are not what people look for and demand of each other. Perhaps *modus vivendi* is – says Zuolo – “the unintended result of parties fighting, negotiating, campaigning for something else, namely for the realization of their favoured goal which, though, cannot be achieved” (p. 85). In a realistic perspective, then, *modus vivendi* is what people have, not what they prefer. Zuolo stresses the ambiguity of *modus vivendi*: on the one hand, *modus vivendi* is probably all that people may reach in a pluralistic society; any consensus-based arrangement is too idealistic. On the other hand, when hinged on order and security, *modus vivendi* is a too restrictive arrangement: there are many more demands and they all require a more robust concern for prescription. Zuolo concludes by admitting that *modus vivendi* is not an alternative to political justification liberalism. Nonetheless, it works as a complementary perspective within it, as it may describe certain states of affairs and legitimize them appropriately.



In sum, these contributions in this collection suggest several future directions for *modus vivendi* to be revised. They all emphasize some weakness of the traditional framework of liberal political legitimacy supposedly based on shared values. Their common target is Rawlsian political liberalism: they all criticize the idealistic presupposition of reasonable pluralism and the idea of a moral overlapping consensus. Similarly stimulated by the so-called realistic turn in political theory, all authors recognize the normative dimension of realism. Their lesson is an invitation to revise the notion of *modus vivendi* in line with the idea that it may represent the most promising way to live in a 'differently legitimate' society in spite of a truly deep disagreement.

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Alessandro Ferrara

**How to accommodate  
*modus vivendi* within  
normative political theory**

In this paper my aim is to rethink the role that the notion of *modus vivendi* can play within a normative political theory inspired by Rawls' 'political liberalism'. For that purpose, in the first section I criticize an alternative concept of *modus vivendi* articulated within an influential 'minimalist' (if not downright political-realist) approach to liberalism, championed by John Gray, Bernard Williams, and others.<sup>1</sup> In spite of the diversity of nuances, philosophical agendas and theoretical propensities, these defenders of a "liberalism of fear" incur similar difficulties. Although motivated by skepticism about consent for "reasons of principle", nowhere to be found, advocates of political legitimacy via *modus vivendi* shy away from the extreme conclusion that stability trumps justice under all conditions. At some point in their construction, they re-introduce normative assumptions and values – usually in the guise of make-shift bottom-line limits to admissible patterns of stability – that lack all specific justification and contradict the pretended overcoming of the distinction of justice and prudence. *Modus-vivendi* liberalism thus is affected by internal inconsistency. Furthermore, *modus vivendi* theorists are keen on presenting their approach as more respectful of pluralism than consent-based, 'moralistic', normative liberalism. It is hard to see, however, in what sense their views of *modus vivendi* – premised on rationality as the sole factor of orientation – would be more pluralism-affirming than the *dual*

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<sup>1</sup> Representative of this trend are Williams 2005, Gray 2000, Geuss 2008. In certain respects I would include also Bellamy 2007. For illuminating reviews and critical commentaries, see Galston 2010, Scheuerman 2013, Floyd and Stears 2011.

normative core of political liberalism, premised on the irreducible distinction of the rational and the reasonable.

These two problematic features of *modus vivendi* liberalism should not be misconstrued. They speak against the ultimate coherence of making *modus vivendi* the one and only frame of reference for liberal political theory, not against the fruitfulness of the notion of *modus vivendi* as such. In the second section, I argue that *modus vivendi* retains its full fruitfulness if integrated within a *normative* political-liberal view of legitimacy, as the notion through which the oppression-free political coexistence of liberal and non-liberal constituencies, domestically and transnationally, is best understood. More specifically, I will discuss how my notion of *modus vivendi* differs from the standard conception of *modus vivendi* expounded in *Political Liberalism*.

## I. *MODUS VIVENDI* LIBERALISM: GRAY AND WILLIAMS

In a plurality of vocabularies Williams, Geuss, Gray and other authors have been advocating a ‘realist’ or, more precisely, a ‘minimalist’ version of a legitimate liberal political order. In the eloquent and concise version offered by Gray,

Liberalism has always had two faces. From one side, toleration is the pursuit of an ideal form of life. From the other, it is the search for terms of peace among different ways of life. In the former view, liberal institutions are seen as applications of universal principles. In the latter, they are means to peaceful coexistence. In the first, liberalism is a prescription for a universal regime. In the second, it is a project for coexistence that can be pursued in many regimes (Gray 2000, 2).

Normative philosophers – Locke, Rousseau, Kant, Rawls – in his opinion epitomize the first face, philosophers who embrace a more skeptical or realist view – Hobbes, Hume, Berlin – epitomize the second face.

In a Chapter of *Two Faces of Liberalism* entitled *Modus Vivendi*, Gray highlights two ‘philosophies’ that struggle for the soul of liberalism:

In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of

diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in its turning its face away from the ideal of rational consensus and looking instead to *modus vivendi* (Gray 2000, 105).

The *modus vivendi* liberalism propounded by Gray reaches back to Hobbes. Freeing ourselves from the letter and the details of his argument, we must take inspiration from Hobbes and reformulate the gist of his teaching in pluralist terms:

The end of politics is not the mere absence of war, but a *modus vivendi* among goods and evils... Amended in this way, Hobbes's thought implies that the most important feature of any regime is not how it succeeds in promoting any particular value. It is how well it enables conflicts among values to be negotiated. The test of legitimacy for any regime is its success in mediating conflicts of values – including rival ideals of justice (Gray 2000, 133).

Gray's neo-Hobbesian rethinking of liberalism carries two methodological consequences. First, "the trundling distinction between *de facto* and *de jure* authority", the pivot on which any and every normative view hinges, is now called "less than helpful". Second, "the demarcation of reasons of principle from reasons of prudence" is declared untenable. According to Gray, it derives from the illusion that morality overrides all other considerations and that its demands are "normally self-evident to reasonable people" (Gray 2000, 133).

It would be tempting to reject these formulations, especially the one concerning toleration as helping us cope with diverse ways of life destined to eventually fade into an undivided rational consensus, as gross misunderstandings of political liberalism. Countless times Rawls underscored that nothing, not even public reason, can miraculously cause the burdens of judgment to vanish and that the zeal to bring into politics the entire truth as we see it is incompatible with democracy. But Gray does duly acknowledge that both his project and 'political liberalism' reject the perfectionist idea that the legitimacy of a regime rests on its responsiveness to some 'supreme virtue'. Whereas Rawls, however, stops halfway and still nurtures the illusory belief in an overlapping consensus on a political conception of justice, Gray suggests that also justice is not immune from the conflicts of values arising from societal pluralism. Furthermore, both he and political liberalism acknowledge that some

‘primary goods’ are indispensable preconditions for any worthwhile human life. Whereas Rawls, however, embraces the natural law optimistic view that “primary goods do not conflict with one another”, Gray’s neo-Hobbesian liberalism embeds the realistic view that these goods, including rights, do not form a “consistent, harmonious system” but are often at war with one another.

In spite of his acknowledging these points of convergence, Gray still misinterprets Rawls. Rawls’s “overlapping consensus” on a political conception of justice is meant as an ideal-theory end-state to be striven after or to be used a yardstick for assessing given polities, but by no means as an account of the *current predicament* of democratic societies. Such predicament is best described as a “constitutional consensus” (Rawls 2005, 164-168) on a number of rights and constitutional essentials but *not on their implications*. For example, citizens in all walks of life, including justices, agree on ‘equal protection of the laws’ or ‘free speech’, but may disagree on what this implies. Such disagreement obviously extends to the way the different primary goods ought to be balanced and if necessary prioritized.

In the next section, Gray highlights the points of divergence between his liberalism of *modus vivendi* and political liberalism. Rawls is attributed the intent “to formulate principles of justice which any reasonable person is bound to accept, or at any rate cannot reject, regardless of her conception of the good. The result is a liberal philosophy of right in which justice is meant to have priority over all other goods” (Gray 2000, 135). Again, this interpretation is inaccurate: as of 1980, the normative credentials of ‘justice as fairness’ do not rest for Rawls on its being “being true to an order antecedent to and given to us”, as Gray would have it, but simply on its being the political conception of justice “most reasonable for us”, given “its congruence with our deeper understanding of ourselves” (Rawls 1980, 519; 2005, 28).

In the constructive, positive part of Gray’s *modus vivendi* liberalism, difficulties are even more manifest and visible. His approach, based on the assumption that “all or nearly all ways of life have interests that make peaceful coexistence worth pursuing” (Gray 2000, 135), aims at judging “regimes in terms of their capacity to mediate compromises among rival views of the good” (Gray 2000, 135). This Hobbesian priority of peace over justice, fully embraced by Gray, leads to three counterintuitive consequences.

First, in the absence of any screening of the ‘ways of life’ or ‘conceptions of the good’ susceptible of being party to a *modus vivendi*, any context could be the setting of a *modus vivendi*. Even in Syria a *modus vivendi* could be achieved among the Assad regime, Isis and the Al-Qaeda-derived Al-Nusra and such *modus vivendi* would not basically differ from the one that regulates the coexistence of different conceptions of the good in France or UK. Of course it would be different – in the obvious sense that no two *modus vivendi* are identical – but not so different as to require that we come up with a different term. That is to me deeply questionable.

Second, the idea that all human groupings have an interest in peaceful coexistence is an empty claim that contributes little to explaining why human groupings that have wildly disproportionate stakes in the making, implementation and stability of a scheme for transnational governance (say, the US and the Republic of San Marino) should equally abide by its terms. In the end, the explanation of stability comes to rely on the classical political-realist notion of balance of power: only when two parties to an agreement have roughly equal power and stakes, the agreement has a chance for stability.

Third, his questioning the distinction of reasons of principle and of prudence leads Gray’s liberalism to rest on a dubious moral phenomenology. The sense of justice plays no role distinct from the rational pursuit of one’s advantage, as though no difference existed between the point of view of what is to my or our advantage and what is fair to all the parties concerned.

Were these not, in and of themselves, formidable difficulties, Gray’s project of a liberalism of *modus vivendi* is affected by an internal tension between on the one hand its underlying intent, and the means through which such intent is carried out on the other. *Modus vivendi* is the affirmation of the primacy of peace, of peaceful coexistence over all other political values: *primum vivere*. The ballast that puts *modus vivendi* at risk of sinking way to the bottom of philosophical worth is the suspicion that the priority of peace is a road leading to the acceptance of the most horrible forms on injustice, the suspicion that anything can be sacrificed for the sake of stability. Aware of this risk, Gray, hastens to add that “modus vivendi is far from the idea that anything goes... There are limits to modus vivendi” (Gray 2000, 20). These limits, as it somewhat surprisingly turns out, are set by ‘universal human values’. These putatively universal values, a few lines above denounced as incapable of generating a view of justice (Gray 2000,

19), nonetheless are now invoked in order to “set ethical limits on the pursuit of *modus vivendi*” (Gray 2000, 20).<sup>2</sup>

Furthermore, we accept the limit-setting cogency of these values not because it is prudent and expedient to do so, but because we recognize their intrinsic worth, their being ‘just’. Thus Gray’s ‘comprehensive’ *modus-vivendi liberalism*, in order to avoid turning into a caricature-like idea of ‘might makes right’ or ‘anything goes’, in the end comes back full circle to presupposing non-prudential, actually even ‘universally’ cogent, values that set limits on legitimate forms of *modus vivendi*. It also surreptitiously reinstates the distinction between prudential and principled motivations. The ‘universal values’ that mark the red line between an acceptable *modus vivendi* and an unacceptable one evidently cannot be endorsed for prudential reasons: so Gray needs *malgré lui* to presuppose that at least some normative contents are endorsed for reason of principle only, because they are just. *Modus vivendi*, the concept that should have emancipated us from the spell of universal normativity – to which Rawlsian liberalism falls prey hook, line and sinker – now appears to presuppose ‘universal values’. Was it worthwhile to run through the whole anti-normative argument, if this is Gray’s conclusion?

To sum up, Gray’s idea of *modus vivendi* as the one and only model for the liberal polity suffers from the same weakness than affects pacifism as a philosophical position on war. Pacifism only makes sense as a radical, intransigent outlook that rules out any exception, including self-defense. The moment pacifists allow for any exception – e.g., taking arms in self-defense – they turn into theorists of ‘just war’. Their position becomes indistinguishable from a very demanding and narrow theory of just war, which admits only ‘war in self defense’, but a theory of just war nonetheless.<sup>3</sup> A similar flaw affects the program of neo-Hobbesian liberalism. *Modus-vivendi liberalism* is consistent and coherent only as an extreme position, prepared to claim that any agreement whatsoever, capable

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<sup>2</sup> The vagueness of Gray’s formulation stands out in contrast with Margalit’s detailed analysis of the line dividing compromises and what he calls “rotten compromises” (Margalit 2010).

<sup>3</sup> For an expanded version of this argument, see Salvatore 2016, 65–68. See also Salvatore 2010.

of securing any peace, even a Hitlerian peace, is better than conflict. The moment one reintroduces principled, value-based, normative limits to the kind of admissible *modus vivendi* then, at that moment, one falls back into a kind of normative theory and a very poor one at that – ‘universal values’ are invoked coming from nowhere, that command allegiance based on no principle whatsoever. So pure *modus vivendi* approaches end up in inconsistency and in a questionable admixture of political-realist and normative elements.

Many of the criticisms leveled by Gray against normative liberalism also apply to Bernard Williams’ sophisticated political realism, articulated in his posthumous volume *In the Beginning Was the Deed* (2005). Ground-breaking is Williams’ suggestion that political realism need not eschew the (normative) question of what authority *deserves* to be considered legitimate. Differently than theorists who, in the footsteps of Weber and Schumpeter, have enervated the critical dimension of legitimacy by equating it with the mere fact of belief in legitimacy, Williams must be credited with challenging what he calls ‘moralism’ – the subordination of politics to a standard of legitimacy couched in moral principles or in a moral reading of the Constitution – by giving us a competing realist account of what can count as a *justified belief in the legitimacy of authority*.

Williams identifies the ‘first political question’, the foundational stone on which the edifice of political philosophy rests, along Hobbesian lines, “as the securing of order, protection, safety, trust, and the conditions of cooperation. It is ‘first’ because solving it is the condition of solving, indeed posing, any others” (Williams 2005, 3). While crude forms of realism in the past failed to adequately distinguish between legitimate authority and arbitrary power, Williams vindicates realism for the 21<sup>st</sup> century by building into it the normative assumption, rejected instead by Gray, that such distinction makes sense. Rejecting the ‘moralist’ move of harnessing legitimate authority to some kind of principle, Williams revives the traditional battle-cry of political realism: namely, the autonomy of politics. The ‘first question’ should be answered without reference to moral principles, but such answer is only the first step towards meeting the ‘basic legitimation demand’. It goes to Williams’ merit to have developed the political-realist stance up to the point of closest possible convergence with normativism compatible with still retaining the distinction: for a state to *meet the basic legitimation demand* (and thus for its authori-



ties to be *legitimate*) means to provide an ‘acceptable’ solution to the first political problem – as opposed to its providing a solution that is merely de facto accepted by the subjects of that state.<sup>4</sup> One is left wondering why this position should be considered a realist one.

The reason is the following. Although all forms of political authority must answer the ‘first question’ in order to be legitimate, not all need to meet the ‘basic legitimation demand’ *in the same way*. In some parts of the world, people may find it reasonable to place *additional* requisites on authority, over and beyond answering the first question: for example, that authority also meet certain liberal-democratic standards. This is the element of realism that survives in Williams. Nothing can be said for liberal-democracy, other than the fact that in some parts of the world – for the time being, one should add – liberal-democratic credentials are taken as requisites for the legitimacy of authorities.

Two consequences follow. First, both democratic and non-democratic forms of authority may be legitimate, as also Gray emphasizes. Second, those who once posed additional liberal-democratic constraints on authority (in the guise of a bill of rights, or the presumption that political justification must be *equally acceptable* to *everyone* subject to the authority being justified), in a changed historical constellation *may cease to pose them*. Now, if it is only with modernity that legitimate authority has to satisfy liberal standards, we have “no ground for saying that all non-liberal states in the past were illegitimate, and it would be a silly thing to say” (Williams 2005, 14). For a structure of authority to claim legitimacy within its own parameters means that “it makes sense to us as such a structure” (Williams 2005, 14), where ‘making sense’ means something more than just the factual operation of a certain

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<sup>4</sup> Another passage where Williams comes close to a normative account is the following: “The situation of one lot of people terrorizing another lot of people is not per se a political situation: it is, rather, the situation which the existence of the political is in the first place supposed to alleviate (replace). If the power of one lot of people over another is to represent a solution to the first political question, and not itself be part of the problem, *something* has to be said to explain (to the less empowered, to concerned bystanders, to children being educated in this structure, etc.) what the difference is between the solution and the problem, and that cannot simply be an account of successful domination. It has to be something in the mode of justifying explanation or legitimation: hence the Basic Legitimation Demand” (Williams 2005, 8).

power structure. To make sense is understood by Williams as a descriptive notion when applied to the understanding of a political situation other than our own, but as one that “becomes normative” when applied to our case, in that we then think that the structure of authority confronting us is one that “we should accept” (Williams 2005, 11). What does that ‘should’ mean from a political-realist point of view?

Criticizing those who, like Rawls and Dworkin, aspire to anchor such ‘ought’ in unsituated principles or in the moral significance of the Constitution, Williams advocates a Weberian ethics of responsibility and a rethinking of ‘the political’. Concerning societies other than our own, Williams claims that we can consider legitimate certain contemporary non-liberal States. The notion of legitimacy, in this case, is *normative* insofar as these non-liberal societies ‘co-exist’ and enter relations with ours and thus “cannot be separated from us by the relativism of distance” (Williams 2005, 14). “In the beginning was the deed” means that discussions about legitimate authority must proceed from realistic assumptions about the chances of these societies to achieve stability: in particular “If the current legitimation is fairly stable, the society will not anyway satisfy the other familiar conditions on revolt” (Williams 2005, 14).

Williams’ position incurs three difficulties. First, his adoption of a Hobbesian question as the fundamental one of political reflection cannot go unquestioned. Although trust and the conditions of cooperation are mentioned, a residue of the old-type realism survives in Hobbes’ “priority of stability over justice”. For a different view, let us recall Locke’s point that unjust political arrangements may result in a *worse* predicament than the lack of order and that therefore the test of political legitimacy needs to be more demanding than the mere ensuring of order and the protection of life. The purpose of the Lockean commonwealth is to *avoid oppression*, where oppression certainly includes the deprivation of life, but also includes being forced to live according to principles one cannot endorse. A just commonwealth is one in which rights are respected, authorities are subject to the law, and the principles of government are endorsed by the citizens: together these features define an alternative “first question of politics” premised on “the priority of justice over stability”, a priority that reaches all the way to authorizing rebellion against established authority. Williams’ selection of a Hobbesian version of the first political question, posited as self-evident, biases the basic legitimation demand in a minimalist direction: “Have you protected my

life? Have you ensured order?” are the benchmark questions for testing authority’s legitimacy. A Lockean version of the first political question would generate a different benchmark question, which does not reject but *expands* the Hobbesian one: “Have you safeguarded me from oppression?”. Williams’ selection of a Hobbesian ‘first question’ leads his realism to question-begging. His anti-normative argument depends on his having already presupposed a realist understanding of how the question of legitimate authority must be approached.

The second difficulty is that while Williams acknowledges that a number of competing assessments of the legitimacy of authority – some critical, others apologetic – will vie for public acceptance in the public forum, given the absence of a normative standpoint he appears unable to distinguish a structure of authority ‘making sense to us’, in the sense that we should accept it, and one merely prevailing on the ground. In spite of his claim that in our own society this ‘making sense’ of authority is normative, it remains totally unclear on what basis the factually prevailing assessment could ever be challenged.

The third difficulty concerns the polemical target. Williams’ picture of ‘political moralism’ is flawed. Like Gray, Williams downplays the significance of Rawls’s turn from the framework of *A Theory of Justice* to that of *Political Liberalism*, based on which it is inaccurate to sum up Rawls’s view of legitimacy as connected with a moral principle. The gist of *Political Liberalism* is precisely to harness the standard of legitimacy to a *political* conception of justice endorsed by citizens who embrace *diverse* moral comprehensive conceptions. Not incidentally, Rawls’s declared goal is to investigate the conditions that enable a *stable and just* society to last over time despite the broad reasonable disagreement among its citizens. This modified understanding of legitimacy is partially acknowledged by Williams in his review of *Political Liberalism*, which contains important insights, but overlooked in his Chapter *Realism and Moralism in Political Theory*. The Rawlsian principle of legitimacy – the most promising starting point for addressing the legitimacy of authority from a normative point of view – is simply ignored.<sup>5</sup>

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<sup>5</sup> In fact, the framework of *Political Liberalism* completes the autonomization of politics *beyond* the autonomization from morality and extending it to include the autonomization of politics from theory (Ferrara 2014, 27-30).

To sum up, while Williams' realist approach offers an inconclusive answer to the question when authority should be considered legitimate, nonetheless its invaluable merit is to point to three challenges that any normative account should address.

First, a normative liberal theory should account for why its view of legitimate authority could and should be convincing also for *non-liberal* publics present in complex societies.

Second, a normative theory should embed differentiated accounts for what the legitimacy of authority means for modern and non-modern structures of authority. Only on the basis of a dubious philosophy of history human populations could be imagined to have lived in the throes of arbitrary power for millennia before liberal constitutionalism arrived on the scene. From a synchronic perspective, a proper normative theory of legitimacy should also account for what *in our times* makes authority legitimate within a liberal-democratic polity and in other kinds of polities. Only on the basis of an ideological fundamentalization of liberalism, in fact, could the sectarian idea be conceived that only in the 85 democracies counted by Freedom House in 2016 is legitimate authority to be found, whereas the rest of the 193 states of the world are ruled by illegitimate structures of arbitrary local power.

Third, a normative liberal theory ought not to renounce articulating a sense of what is attractive in the liberal-democratic idea of legitimate authority, without at the same time denigrating the forms of political association embraced by those who hesitate to embrace liberalism. In so doing it should justify why we may legitimately want to consolidate and protect from deterioration right-respecting structures of authority that have come into being out of historical contingency.

## 2. MAKING (BETTER) SENSE OF *MODUS VIVENDI* FROM A NORMATIVE PERSPECTIVE

Underneath the inconclusive theory of *modus vivendi* put forward by the proponents of a neo-Hobbesian liberalism of fear – who posit value pluralism as the reason why we should convert from consensus models towards *modus vivendi* models of the political order, only to then reintroduce universal values in order to prevent *modus vivendi* from slipping into the proverbial cabinet of horrors – lies the inability to grasp the difference between two

kinds of normativity: a normativity of principles and one which for lack of a better term I call the exemplary normativity of the reasonable. Either disregarding, or paying lip service to, the major paradigm shift that separates *A Theory of Justice* from *Political Liberalism*,<sup>6</sup> the realist neo-Hobbesian proponents of *modus vivendi* fail to notice that the normative ground of justice as fairness as “the most reasonable doctrine for us” has shifted away from what they call “moralism” and brings together normativity and plurality in a groundbreaking way.

No transcendent, context-independent standard of justice is posited within political liberalism, but the cogency of what is reasonable – and especially of what is ‘most reasonable’, a one-place predicate – remains rooted in the situatedness of ‘us’, the political subject to whom political justification is owed. If we want to spell out what ‘most-reasonableness’ means, we find an intuition close to the one underlying *modus vivendi* – namely, most reasonable for us is the ‘political conception of justice’ which a) best comports with the concrete historical plurality of reasonable comprehensive conceptions found in our context and thus b) makes it optimally possible for everyone to abide by such normativity without betraying her own comprehensive intuitions. What makes a political conception of justice most reasonable is not responsiveness to something beyond us, but its superior ability – relative to its competitors – for allowing each of us to remain in alignment or in resonance with oneself while abiding by its intimations.

What a normative political philosopher does is not to posit transcendent standards, but to hermeneutically bridge a gap between seemingly divergent positions whose supporters are unaware of how much common ground they share. The philosopher’s task is to unravel that common ground, to show how broader than suspected it is and how it can support institutional implementation. In Rawls’s words, one of the four tasks of a normative political philosophy is

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<sup>6</sup> See fn 7 of Chapter 2 of *Political Liberalism*. Rawls corrects a passage of *A Theory of Justice* “where it is said that the theory of justice is a part of the theory of rational decision [...] This is simply incorrect. [...] This theory is itself part of a political conception of justice, one that tries to give an account of reasonable principles of justice. There is no thought of deriving those principles from the concept of rationality as the sole normative concept” (Rawls 2005, 53).

to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered, or differences can at least be narrowed so that social cooperation on a footing of mutual respect among citizens can still be maintained (Rawls 2007, 10).

This normative understanding of a ‘stable *and* just’ society that enables “social cooperation on a footing of mutual respect among citizens” to take place shares with the *modus vivendi* propounded by Gray and the realism advocated by Williams a total independence from context-transcendent values. Rawls does not have to inconsistently invoke unsituated standards from ‘out of the Cave’ when it comes to blocking locally degenerated patterns of coexistence, because these pacts are suboptimal – namely, *less than ‘most reasonable’* – in their forcing some of the parties to suffer misalignment relative to their own moral intuitions and comprehensive conceptions.<sup>7</sup> At the same time as it shares this feature of Gray’s and Williams’ *modus vivendi*, Rawls’s notion of a legitimate political union does not undermine the two distinctions – integral to all normative perspective – between arbitrary influence or power and legitimate authority, and between principled and prudential motivations.

My point, however, is not simply that the later Rawls’s view of a just and stable society of free and equal citizens endorsing a political conception of justice ‘most reasonable for them’ does a better, more coherent and consistent, job than Gray’s and Williams’ neo-Hobbesian views at capturing how a pluralistic arrangement is possible. That would just amount to a plain defense of Rawls. Much more needs to be done. My point is rather that Rawls’s view can be brought – if appropriately expanded – to respond to two challenges that these authors raise.

Williams and to some extent Gray as well raise two important critical points. First, can normative liberal theories account for how their views of legitimacy could possibly convince the non-liberal publics present in com-

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<sup>7</sup> The normativity of the ‘most reasonable’, differently than the normativity of the ‘most rational’, has a dimension of exemplarity connected with it and cannot be reduced to the dynamic of subsumptive determinant judgment, to use Kant’s terminology. It is bound up with the exemplarity-tracking capacity of reflective judgment. On this point, see Ferrara 2008, 72-79.

plex societies? Second, liberal theories should embed differentiated accounts of legitimacy for modern and non-modern, democratic and non-democratic structures of authority. Only on the basis of a dubious philosophy of history we could imagine that human populations have lived in the throes of arbitrary power for millennia before liberalism arrived on the scene. Normative theories that wish not to turn into liberal fundamentalism should then account for what makes authority normatively legitimate in non-liberal polities.

How can the partially reasonable, who endorse comprehensive conceptions not fully compatible with the burdens of judgment, be included in the circle of those to whom political justification makes sense? To address this challenge I have suggested to expand the framework of political liberalism at four specific junctures (Ferrara 2014). I will only discuss two amendments to the paradigm, more directly related to *modus vivendi*. *Pace* those who would opt for restricting the circle of the addressees of political justification to reasonable citizens only (Quong 2011, 5), thereby paving the way to ‘liberal oppression’, political liberalism has the resources for meeting the challenge of making the partially reasonable citizens fully reasonable. This result can be achieved by complementing the role of public reason with *conjectural arguments* (envisaged also by Rawls, but confined to a peripheral role) that engage citizens endorsing partially reasonable comprehensive conceptions and offer them (hopefully convincing) *internal reasons* for recognizing the burdens of judgment and for subscribing to the liberal constitutional essentials. This ‘conjectural turn’ within political liberalism would generate a sort of *reflexive pluralism*, in which citizens reasoning from different comprehensive conceptions would embrace pluralism for diverse reasons. A whole stream of Rawlsian literature has produced examples of this way of proceeding (Ferrara 2014, 81-86).

However, there is no guarantee that conjectural arguments, given their hermeneutic nature, will deliver the desired result. What then? What to do when not *all* the citizens endorse the constitutional essentials “in the light of principles and ideals acceptable to their common human reason” as required by the liberal principle of legitimacy (Rawls 2005, 137)? This is the juncture at which we can improve Rawls’s standard view of *modus vivendi* qua “social consensus founded on self- or group interests, or on the outcome of political bargaining”, a form of political union which is “only apparent, as its stability is contingent on circumstances remaining such as not to upset the fortunate convergence of interests” (Rawls 2005, 147) which set it in place.

The distinctive feature, and Achilles' heel, of *modus vivendi* is the exclusively prudential nature of the motivation of the parties. When the matrix of mutual advantage is upset by contingencies and one party's benefits in breaking out exceed the costs involved in the collapse of the agreement, motivation to abide by the terms of agreement fades away.

My argument is that in order to meet the challenge of including non-liberal citizens in the circle of political justification, political liberalism could be amended by questioning the assumption, hitherto accepted by all interpreters of Rawls, that the polity moves all of a piece, holistically, through the stages of political conflict, *modus vivendi*, constitutional consensus and finally overlapping consensus. There is no need to hypostatize a purely analytic distinction between two ways of partaking of a political agreement into two historically exclusive forms of political compact: one and the same political arrangement could be endorsed by *some* citizens on *principled* grounds and by *other* citizens on *prudential* grounds. Even a cursory look at *The Law of Peoples* shows that Rawls envisaged the possibility, in the case of 'the world' *qua* political entity, of a multivariate political entity based on a mix of principled and prudential, justice-oriented and balance oriented, considerations endorsed by different groups of actors. One larger component of 'the world' includes peoples that relate via principles of justice to one another in the context of a 'Society of Peoples', and then jointly relate to other types of peoples (peoples ruled through 'benevolent absolutism', 'burdened societies' and 'outlaw states') on a mix of considerations of justice and prudence.

Thus, even when hyperpluralism proves intractable both for public reason and for conjectural arguments, political liberalism, if renewed along the lines detailed in *The Democratic Horizon*, can still offer the remedy of a *multivariate polity*, where some of the citizens embrace *all* the constitutional essentials in the light of principles (as in the standard version), while other citizens or groups of citizens embrace *some* of the constitutional essentials in the light of principles and *other* constitutional essentials out of prudential reasons, and a third group of citizens embraces *all* of the constitutional essentials out of prudential reasons. The legitimation of authority could then follow a differentiated pattern, avoiding liberal oppression but still remaining true to the mandate of protecting *all* citizens not just from life-threatening violence, but more broadly from oppression as per the liberal principle of legitimacy.

The second critical point raised by *modus-vivendi* and realist liberals concerns legitimate but non-democratic authority. Are the citizens of the states



not counted among the 86 democracies credentialed by Freedom House in its 2016 report in the throes of arbitrary power? How to distinguish those who indeed are in such predicament and those who instead are ruled by *legitimate yet non-democratic* authorities? Can we draw that distinction without conflating legitimacy and belief in legitimacy?

We need to go back, once again, to Rawls's liberal principle of legitimacy – “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (Rawls 2005, 137) – and rethink it as *a special principle* of legitimacy, applicable only to contemporary liberal societies. For all other societies, I suggest to amend it at three junctures. First, the central notion of a constitution can be understood as referring to the central institutional complex (Plato's and Aristotle's “*politeia*”) and its underlying principles, customary or codified.

Second, the requirement that ‘all’ citizens as ‘free and equal’ should be ‘reasonably expected’ to endorse the essentials of the *politeia* must be modified when considering non-liberal polities. The legitimacy of authority need not be an all-or-none concept, but may admit of degrees. Citizens of a non-democratic polity may accept various kinds of inequalities connected with religious faith, gender, race, ethnicity, sexual orientation out of reasons of principle rooted in their comprehensive conceptions. This predicament makes the authorities that operate within that constitution *non-democratic*, but not *illegitimate*. On what basis? On the basis of their exercising power in accordance with principles, embedded in the constitution, which reflect a more or less ‘non-egalitarian’ conception of justice ‘most reasonable’ not *for us*, but for all those included (as rulers or subjects) within the authority system. This view of legitimate non-democratic authority embeds a situated, non-perfectionist understanding of normativity: we liberal-democrats do not share the idea of justice, largely comprehensive and not political, that underlies their institutions but acknowledge, based on their accounts, that it is *pro tempore* the idea of justice ‘most reasonable *for them*’, not just ‘what they believe to be reasonable’, and that structures of authority responding to it are legitimate not just in a *de facto* sense.

We can freely voice our dissent, point to the discrepancy of such conceptions and the rights included in the Universal Declaration signed by many of these non-democratic polities, we can even use our political and economic leverage to create incentives for change, we can actively support the sectors of

their citizenry who advocate democracy, but we cannot regard their structure of authority as on a par with a band of usurpers exercising arbitrary power. This is how normative liberalism can meet the challenge of the liberalism of fear.

Third, the basis for endorsing the essentials of the country's constitution-as-politeia can be expanded from 'principled motivations alone' to a mix of principled and prudential motivations. This modification of Rawls's principle allows then for a range of *degrees of legitimacy* attributable to existent authority, without falling into the realist view (the view of justice reconstructed must still be 'most reasonable for them', not just believed to be reasonable) or into a liberal normativism that, as Gray and Williams correctly point out, amounts to a kind of liberal fundamentalism. The limit-case of constitutional essentials entirely endorsed by everyone solely on prudential grounds marks the extreme hypothetical case when authority borders on arbitrary power and is not fully legitimate.

### 3. CONCLUSION

To conclude, the challenge of distinguishing arbitrary power and legitimate *non-democratic* authority can be met by making the liberal principle of legitimacy *a special case*. *Non-democratic* political authority is legitimate when it operates in accordance with the principles that shape the polity's central institutions and derive from the conception of justice most reasonable for all the participants in the system of authority. *Alignment with such normative backdrop* distinguishes legitimate authority and arbitrary power in contexts historically or geopolitically other than our own. Political liberalism so revisited can effectively counterattack 'political realist' conceptions. By presupposing a Hobbesian priority of stability, *modus vivendi* and realist liberals foreground the alignment of the authorities' conduct with the moral views of the powerful, more influential or majority sectors of the population. Instead, political liberalism offers a notion of legitimacy premised on the alignment of authority's conduct with the views not just of the more powerful, influential or numerous sectors but of *each and every member of the society*. Not in tracking transcendent principles, but in providing a non-ethnocentric critical edge and in its *greater capacity for inclusion* resides the appeal exerted by liberal-democracy on so many of those who don't live under democratic authority.

Going back to *modus vivendi*, the conception presented in Section 2 has shown how, differently than in the standard Rawlsian view, this notion can

still play a relevant role within a normative political-liberal approach to legitimacy. Far from being relegated to a remnant of past stages of political integration, *modus vivendi* and the prudential dispositions sustaining it highlight a possible path to the political coexistence of liberal and non-liberal constituencies within a rule of law, domestic or transnational, free of oppression.

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Valentina Gentile

***Modus vivendi* liberalism,  
practice-dependence and  
political legitimacy<sup>1</sup>**

Contemporary political theory is characterised by a realistic critique of liberalism, in which the political realm is more clearly distinguished from the moral. In the literature, two lines of argument are invoked to support realist considerations in politics: first, political realism is seen as an antidote to a somehow idealized and unfeasible version of liberalism; and second, realist theorizing is said to provide the proper *contingent* response to the deep pluralism that characterises contemporary democracies (Horton 2010, Galston 2010). In the first case, political realism is strictly defined as an anti-utopian and feasible theory, while in the second, realist theorizing is seen as avoiding foundational disagreements about justice mutating into second-order disputes concerning the justifiability of legitimate political institutions. In this second sense, the realist critique challenges a key aspect of Rawls' liberal project – that is, its justificatory constituency.

David McCabe (2010, 6) presents an interesting example of realist critique of Rawls' justificatory project. McCabe argues that Rawls' *Political Liberalism*, which relies on a substantive consensus view, asks citizens to commit

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<sup>1</sup> Earlier drafts of this paper were presented at the panel on “Modus Vivendi and the Problem of Inequalities of Power”, Ipsa world congress 2016 (Poznan) and at the workshop on “Modus Vivendi Theory” at Mancept Workshops in Political Theory 2016 (Manchester). For their stimulating comments I am grateful above all to Fabian Wendt, Fabian Wenner and Manon Westphal. Special thanks are owed to John Horton for his extensive comments and precious suggestions on the last version of this article. Finally, I am thankful to Elisabetta Galeotti for inviting me to take part of this editorial project and Federica Liveriero and Beatrice Magni for their editorial work for this special issue.

to a demanding version of the justificatory requirement “that expresses political values that others as free and equal also might reasonably be expected to endorse” (Rawls 1996, 1). Yet this goal is practically unfeasible and normatively inadequate if the aim of liberal theory is to take the fact of moral diversity seriously. In conditions of deep pluralism, the justificatory requirement should be recast so to include those, illiberal or sceptical, who are in fact excluded by Rawls’ justificatory constituency. Following Scanlon, McCabe believes that the argument for liberalism should be one the critic of liberalism cannot reasonably reject (2010, 7).

This paper contributes to this discussion by confronting the *modus vivendi* justificatory project as presented by McCabe with Rawls’ liberal project. It suggests that both *Modus Vivendi Liberalism* (hereafter MVL) and *Political Liberalism* (hereafter PL) seem to endorse a practice-dependent account of political justice in which “politics is prior to morality”; yet the ways in which reasons are endorsed to justify the shared conception of political authority are significantly different in these two schemes. McCabe presents a distinctive kind of *contingent* practice-dependent liberalism that might be distinguished from Rawls’ *institutional* model. Following Sangiovanni (2008), I recover the notion of ‘practice-dependence’ to reveal the differences underlying these two liberal projects and the implications that a *contingent* practice-dependent model might have on what McCabe calls the central feature of the liberal project, that is its Justificatory Requirement (JR) (McCabe 2010, 5).

The paper is structured as follows. Starting from Rawls’ notion of consensus-based toleration, Section 1 provides a brief reconstruction of the recent literature on *modus vivendi*. A common feature in this body of work is to consider *modus vivendi* as a realist and strictly political response to Rawls’ highly moralised conception of political authority. Section 2 focuses on a specific version of *modus vivendi* political theorizing, as suggested by McCabe (2010). McCabe’s MVL is here presented as an alternative liberal justificatory project: it insists on a notion of political legitimacy that is crucially linked to the inclusion of a plurality of voices in the justificatory constituency of liberal democratic societies. Section 3 reconsiders both Rawls’ and McCabe’s versions of justificatory liberalism in the light of Sangiovanni’s notion of practice-dependence. It distinguishes two practice-dependent justificatory views: Rawls’ *institutional* model and McCabe’s *contingent* one. Section 4 focuses on the ideal of political legitimacy implicit in such a *contingent* model, which is guaranteed by what I call the ‘Inclusiveness Requirement’ (IR). Section 5

shows that this version of political legitimacy seems to rely on an idea of public justification based on convergence of reasons. This is opposed to Rawls' *institutional* model, which insists on the conditions of shareability and accessibility of reasons as a basis for public justification. This section clarifies the differences between these two models and their implications for such issues as stability and autonomy. Lastly, Section 6 considers McCabe's proposal as a case of practice-independent justificatory liberalism. In this second reading, however, MVL seems to be inconsistent with its realist premises.

#### I. FROM *POLITICAL LIBERALISM* TO *MODUS VIVENDI* THEORIZING

The tension between moral pluralism and the stability of liberal institutions is central to contemporary liberal thought. In PL, Rawls famously asks, "How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?" (Rawls 1996, xxv) For Rawls, institutions and, especially, the constitution of a democratic society provide the proper framework of reasons for reaching an 'overlapping consensus' and thus supporting liberal democratic arrangements over time. In this way, he argues, a "stability for the right reasons" is realized (xxxix). This account importantly links the issue of the stability of liberal institutions in plural societies to the principle of liberal legitimacy so that the view of toleration introduces a conception of political authority which is justified to everyone in terms that cannot reasonably be rejected.

Here, Rawls draws an important distinction between two different models of toleration: a view of liberal toleration based on an 'overlapping consensus', and another, more traditional view that he calls '*modus vivendi*' (Rawls 1996, 181). A *modus vivendi* sees people in divided societies endorsing liberal institutions as a matter of balancing opposing forces. In such circumstances, citizens view society as a compromise between what they consider to be the best possible arrangement (namely, a state based solely on their own comprehensive doctrine) and the worst (namely, a state based solely on a comprehensive doctrine opposed to their own). Yet, within a *modus vivendi*, each citizen sees the liberal state as, at most, a second-best political order, and accordingly the relationship between state and citizen is inherently unstable. Rawls clarifies this point using the example of Catholicism and Protestantism in the sixteenth century:

Both faiths held that it was the duty of the ruler to uphold the true religion and to repress the spread of heresy and false doctrine. In such a case, the acceptance of the principle of toleration would indeed be a mere *modus vivendi*, because if either faith becomes dominant, the principle of toleration would no longer be followed. Stability with respect to the distribution of power is lacking (Rawls 1996, 148).

Recently, the notion of *modus vivendi* has revived. It has increasingly attracted the interest of scholars who criticize the implicit moralism and strict legalism of Rawls' project. First, John Gray has proposed an idea of *modus vivendi* as an antidote to Rawls' "anti-political legalism" (Gray 2000, 16). Gray distinguishes between two incompatible views of liberal toleration: one aimed at establishing universally justified principles that are based on rational consensus, the other instead focusing on the more modest claim of balancing different values and ways of life. He insists on the need to dismiss a liberal universalist project in favour of a view of liberal toleration that is compatible with the historical fact of pluralism (6). According to Gray, Rawls' justificatory framework, reflecting values that are firmly grounded on an 'overlapping consensus', is in fact unable to accommodate the demands of moral pluralism. This approach displaces all fundamental issues, such as basic liberties and social distribution, from the realm of politics (16). Yet, Gray reminds us, disagreement does not cover only the good, but also the right (7). A *modus vivendi*, which does not rely on problematic notions such as truth or right, should inform a feasible political project of liberal toleration. This is based on the idea of compromise and bargain among competing communities who hold different sets of values. Under a *modus vivendi*, toleration is presented as a condition for peace which embraces diversity instead of suppressing it.

Gray's defence of *modus vivendi* liberalism has inspired a vast body of literature focused on the possibilities of reconciling an account of toleration with what Waldron (1999) has called the 'circumstances of politics'. Different views regarding not only the concept of the good but also the content and the application of the principles of justice inevitably must confront the issue of political authority and the ways in which it should be constructed in order to be legitimate (Gentile 2017). Matters of justice therefore cannot be isolated from matters of politics, nor, more precisely, from those democratic procedures and practices that can be widely recognised as legitimate. In this literature, it is possible to broadly distinguish two distinct approaches: the

first insists on an account of comprehensive pluralism (Galston 2002), while the second seeks to recast the problem of political legitimacy in contexts of deep pluralism in less moralised terms (see for instance Horton 2010, 2012; McCabe 2010). To recall Williams (2005, 1-3), I shall call this approach ‘political realism’.

This paper focuses on the second version of *modus vivendi* theorizing. For political realism, a *modus vivendi* envisages a “broadly consensual” view of toleration that introduces a procedural interest of the parties in recognizing the legitimacy of a particular political arrangement (Horton 2010, 432). In contrast to Rawls’ principle of liberal legitimacy and its justificatory structure, this view invokes a narrower idea of legitimacy understood as a distinctive political concept (Galston 2010, 388). Thus, appropriate standards of evaluation of the legitimate institutional arrangement should arise within politics rather than from external moral standards (Galston 2010, 386).

## 2. *MODUS VIVENDI*, POLITICAL LEGITIMACY AND PUBLIC JUSTIFICATION

Within what I have labelled ‘political realism’ it is possible to distinguish at least two different ways in which political legitimacy has been linked to the notion of *modus vivendi*. For Horton (2012), the problem with Rawls’ principle of liberal legitimacy is that it depends on an account of justice that is implicit in its justificatory structure. Against this, Horton argues that political legitimacy should be located in relation to the criteria that are operative in particular social, cultural and conceptual contexts, and which inform people’s judgements about the legitimacy of their state (145). In this way, Horton hopes to resist the attitude of several liberal (neo-Kantian) scholars who provide a predetermined justification of the principle of liberal legitimacy irrespective of both contextual circumstances and people’s actual beliefs. The notion of political legitimacy related to *modus vivendi* ought not to be extrapolated from consent theory: people consent to a *modus vivendi* because they acknowledge its political legitimacy (Horton 2019, 141-142). A *modus vivendi* is, for Horton, less stable than an ‘overlapping consensus’, yet such an instability reflects the very political circumstances from which it arises (Horton 2010, 441). Thus, he suggests a *contingent* and relatively unstable idea of political legitimacy linked to actual political institutions and practices, which is aimed at ruling out the liberal commitment to public justification. This



account, however, can provide only scant resources for a normative defence of *modus vivendi* political legitimacy. By separating the notion of legitimacy from the justificatory requirement, Horton concedes that *modus vivendi* political legitimacy may not be distinctively liberal. He locates his idea of *modus vivendi* outside the realm of liberalism. Thus, the contingent account of political legitimacy could easily be satisfied in hierarchically ordered societies – say, a society whose conception of political authority is defined strictly in religious terms. For normative political theorizing, however, what counts is to provide an argument to explain a widely shared intuition regarding the fact that a liberal political order, in which basic freedoms and rights are protected, is preferable to one in which the principle of freedom of conscience is at risk.

One might argue that Rawls also recognizes the political legitimacy of some non-liberal hierarchical societies, which he calls decent hierarchical peoples (Rawls 1999, 62 ff).<sup>2</sup> Of course, Rawls' notion of 'decent peoples' has important implications for the idea of international toleration, because the kind of pluralism that characterizes international society will inevitably be reflected in a diversity of political forms, some of which may be non-liberal democracies but still satisfy the conditions that justify the recognition of them as "equal participating members in good standing of the Society of Peoples" (59). Yet, the account of 'institutional decency' represents a central normative constraint. Rawls does not provide a clear definition of decency, but suggests that it might be understood as a kind of weak reasonability (Rawls 67; Beitz 2000, 686). Rawls' notion of decency amplifies the anti-paternalism of the theory. In the international Society of Peoples, some non-liberal decent hierarchical peoples are recognized as members of an enlarged justificatory constituency, the original position of second level. This weak form of legitimacy is based on their capacity as peoples to select and support what Rawls considers to be "certain familiar and traditional principles of justice among free and democratic peoples" (1999, 37). Yet, two elements distinguish Rawls' international legitimacy from the kind of political legitimacy suggested by *modus vivendi* theorists. First, also this weak idea of international legitimacy is grounded on an 'overlapping consensus' among liberal and decent non-liberal peoples; second, the liberal notion of legitimacy, which is satisfied within liberal societies, and the legitimacy of decent non-liberal peoples, which is

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<sup>2</sup>I am grateful to John Horton for raising this point.

realized at the level of the Society of Peoples, importantly differ. I shall return to this point in Section 6.

However, some supporters of *modus vivendi* theorizing have taken the commitment to liberalism seriously in providing an account of political legitimacy linked to some form of public justification. McCabe (2010) offers an interesting case of a *modus vivendi* justificatory project. Here, a minimal account of political justice that is justified as a *modus vivendi* should be preferred to an idealized version of liberalism. MVL is nonetheless linked to a normative account of political legitimacy as far as it reflects citizens' reasons to consent to it. Thus, MVL provides a more plausible answer to what McCabe calls the liberal project's 'Justificatory Requirement'. In his view, JR is essential to any liberal theory insofar as it captures two main features of liberalism, namely the harm principle and anti-perfectionism. The task of MVL is to reconnect JR to the deep pluralism emerging in contemporary societies. In this model, the political legitimacy of a specific institutional setting must reflect a commitment to JR that is compatible with a fundamental condition of inclusiveness.

MVL is a 'particularist' form of liberalism rooted in two considerations: first, the recognition that many citizens might not endorse a liberal view of political association; and yet second, that these citizens might see the existence of the state either as an unchangeable fact of modern life or as something that is instrumental to the achievement of other important goods (McCabe 2010, 133). Under these conditions, an agreement on the liberal terms might emerge as a compromise among citizens who view the liberal state as a second-best solution (133). As a normative project, MVL asks citizens who accept the liberal terms on a *modus vivendi* basis to commit themselves to a weak proceduralism that is grounded in a presumption that the interests of all persons matter equally (140). Like other scholars who have emphasized the need to make the liberal justificatory constituency more inclusive (see especially Sala 2013; Kelly and McPherson 2001), McCabe believes that it is necessary to recast JR so as to include those citizens who, albeit illiberal, would nonetheless have reasons to accept the liberal state. Under a *modus vivendi*, liberal principles might be endorsed, for contingent reasons, also by those illiberal citizens who are excluded from Rawls' justificatory constituency. Although this sort of compromise might lead to lesser degrees of stability, "it does not fail to meet the ideal of justification", McCabe argues (2010, 156).

To test the implications of McCabe's justificatory project and whether it appropriately addresses the problem at the core of the realist critique of

Rawls' project, I shall explore Sangiovanni's (2008) definition of a practice-dependent model of political theorizing in the next section and consider Rawls' and McCabe's approaches in the light of it. I then go on to consider the implications that these two liberal justificatory projects have for the idea of legitimacy.

### 3. TWO VERSIONS OF PRACTICE-DEPENDENT LIBERALISM

Sangiovanni has distinguished a 'practice-dependent' model of political theorizing – in which “the content, scope and justification of justice depends on the structure and form of the practices that the conception is intended to govern” – from a more general practice-independent view of morality which holds that first principles of justice do not depend on practices or institutions (2008, 2). In general terms, practice-dependence is founded on a relational account of justice since it assumes that institutions and social practices “put people in a special relationship, and it is this special relationship that gives rise to first principles of justice” (4). Thus, a practice-dependent model of political justice relates a certain notion of equality to extant social institutions. In my view, both Rawls and McCabe could be seen to endorse a practice-dependent model of justice in which ‘politics is prior to morality’ (Sangiovanni 2008, 5). However, the ways in which the two normative approaches link their justificatory framework to principles and institutions varies significantly.

From Rawls' PL, we derive an *institutional* interpretation of practice-dependency. As I have shown elsewhere (Gentile 2017), Rawls' political constructivism is a procedure that enables the specification of the normative implications of certain moral premises concerning citizens' social and political equality for the political conception of political authority. This procedure assumes institutional conceptions of citizenship and society and a background condition of reasonableness, so that ‘rational agents, as representative of citizens and subject to reasonable conditions, select the public principles of justice to regulate the basic structure of society’ (Rawls 1996, 93). This account serves to demonstrate the practical aim of Rawls' conception of political authority – namely, justice as fairness: “it presents itself as a conception of justice that might be shared by citizens as a basis of reasoned, shared and informed and willing political agreement. It expresses their shared and public political reason” (9; on this point see also Klosko 1997). This view

of practice-dependence tells us that sharing a liberal *institutional* context (I) shapes the framework of reasons ( $R_i$ ) for endorsing a conception of political authority (P) that better represents certain moral premises concerning citizens understood as socially and politically equal ( $M_i$ ). The institutional/public morality ( $M_i$ ) expressed by the appeal to the shared framework of reasons ( $R_i$ ) reflects citizens' consensus regarding the liberal terms. For Rawls, the appeal to shared reasons ( $R_i$ ) is consistent with citizens' capacity to realize political autonomy (Rawls 1996, 77-78). I will come back to this notion of political autonomy in the next section.

McCabe seems to offer a different version of practice-dependence. The political legitimacy of JR based on a *modus vivendi* is to be drawn from actual citizens' acceptance of the liberal terms which reflect society members' actual equality of status, understood here as a 'presupposition of minimal universalism' (McCabe 2010, 140). This model seems to adhere to the practice-dependence desiderata since it assumes that institutions and practices put people in a special relationship and this gives rise to principles of political justice. In this case, however, the liberal order is justifiable by citizens who endorse a set of different reasons, e.g. instrumental, prudential, and so on (let us call them  $r_1, r_2, r_3, \dots$ ), all reflecting a contingent condition of actual social equality ( $C^*$ ) that is, in turn, implicit in that institutional setting ( $I_c$ ). McCabe distinguishes between JR understood as a moral ideal, namely Rawls'  $R_j$ , from the set of reasonings  $r_1, r_2, r_3, \dots$  that motivate the endorsement of a liberal institutional arrangement to which JR applies (159). Under a *modus vivendi*, citizens show their commitment to JR, albeit for different reasons, and this achieves morally acceptable outcomes. JR is therefore here understood as a procedural commitment which 'serves as a constraint on acceptable outcomes' (160) without entailing any specific one.

#### 4. POLITICAL LEGITIMACY, INCLUSIVISM AND PUBLIC JUSTIFICATION

In the previous section, I argued that McCabe's project can be seen as an attempt to recast an idea of practice-dependency in terms of a weak form of proceduralism that is genuinely political. According to the author, this rules out problematic notions such as reasonableness and reasonable pluralism in favour of a contingent understanding of compromise among competing sets of reasons. Under such a contingency, however, the liberal state is just one

possible outcome of the justificatory scheme. McCabe concedes that the case for *modus vivendi* liberalism depends upon conditions that are neither universal nor guaranteed (2010, 160).

Yet, what are the implications of this justificatory project for the notion of political legitimacy? While the *institutional* account importantly connects a notion of stability ‘for the right reasons’ to the principle of liberal legitimacy, MVL, understood as a practice-dependent model of political theorizing, entails a trade-off between the stability of the consensus and the notion of political legitimacy. In rejecting the idea of a shared framework of reasons, MVL appeals to a notion of political legitimacy that is grounded in an account of inclusiveness. Let us call it the Inclusiveness Requirement (IR). Given the deep pluralism of contemporary societies, the political legitimacy of liberal institutions can only be contingent: it is realized when citizens’ reasons converge in endorsing this institutional arrangement.

For Rawls, the converse is true. Acknowledging the fact of reasonable pluralism is precisely why an idea of stability ‘for the right reasons’ should be supported. As Weithman (2011; 2016, 98 ff) has shown, the reason behind Rawls’ political turn was his recognition that the idea of stability presented in *A Theory of Justice* was unrealistic. That book laid out how a liberal institutional setting would encourage members’ views of the good to ‘converge’ – that there would be a ‘congruence’ between the right and the good. But Rawls came to realize that this conclusion was not only improbable but also conflicted with the fact that liberal institutions encourage pluralism about the good. Now, the principle of liberal legitimacy that is expressed in JR is a guarantee of this new idea of stability. The appeal to  $R_i$ , which reflects the values expressed by liberal institutions, is not aimed at preventing moral disagreement; rather, it encourages reasonable pluralism by showing some degree of ‘compatibility’ between a private and public morality. The idea of compatibility between the good and the right, however, suggests that state laws or decisions should not necessarily have to be regarded as ‘good’ from the perspective of one citizen’s comprehensive doctrine in order to be seen as legitimate. The legitimacy refers rather to the justificatory process that reflects such a compatibility. Quong’s (2005) distinction between foundational and justificatory disagreement might be useful here to grasp the sense in which liberal legitimacy is linked to Rawls’ JR. As Quong rightly points out, Rawls’ standard for liberal legitimacy asserts that the state should not act on grounds that citizens cannot “reasonably expect to endorse” (2005, 316).

Yet, McCabe believes that Rawls' notion of liberal legitimacy is problematic precisely because it assumes a background condition of reasonable pluralism. In contrast, MVL suggests a justification for liberalism that cannot be rejected by those who are unreasonable. Some gradations of instability are the price to be paid to ensure such a broader justificatory constituency: the inclusiveness of reasons, in turn, seems here to be the crucial factor to realize political legitimacy. Thus, while Rawls' principle of liberal legitimacy derives from a symmetry between the framework of reasons ( $R_i$ ) for endorsing a particular liberal institutional setting and certain moral premises regarding the normative ideal of citizens understood as free and equal ( $M_i$ ), MVL relies on an account of political legitimacy that is satisfied when different citizens, on grounds of their own different reasons ( $r_1, r_2, r_3, \dots$ ), actually and voluntarily support a *contingent* liberal arrangement (I).

It is precisely this nexus of political legitimacy, IR and JR that I find problematic in MVL, however. Under a *modus vivendi*, it might be the case that citizens endorsing different reasons, both liberal and illiberal, come voluntarily to support the same liberal institutional arrangement. Yet, as Rawls maintains, when liberal institutions are accepted as a *modus vivendi*, they will be easily abandoned when the balance of forces among citizens' competing views changes in favour of one specific doctrine. For McCabe, this possibility would not detract from what is appealing in MVL: that under a *modus vivendi* the liberal state could be endorsed and justified by all citizens on the basis of their own reasons. Such a congruence between the conception of political justice (the right) and citizens' varying comprehensive doctrine (the good) would be the guarantee for citizens' autonomy. Yet, even conceding that such a consensus is both *contingent* and *unstable*, it is not clear how those who are not committed to liberalism, and especially citizens who endorse illiberal doctrines, would nevertheless freely and voluntarily support the liberal state.

In responding to this objection, McCabe concedes that MVL needs to explain why liberal institutions are the best option not only for citizens who support liberalism, but also for those who see it as a second-best solution. He insists that citizens who endorse illiberal views will be still committed to an ideal of the equal moral status of all persons, so that liberal institutions are a suitable option not only for fully liberal citizens, but for all citizens who are committed to such a view of equality (2010, 159). This move is bizarre. Although McCabe asserts that the mere acceptance of the liberal terms might emerge as a compromise among competing forces, he also argues that under

a *modus vivendi*, citizens, either liberal or illiberal, endorse liberal institutions on the basis of their own reasons given their shared commitment to equality. A distinctive feature of MVL is therefore “its commitment to minimal moral universalism grounded in the presumption that the interests of all persons matter equally” (138). In other words, McCabe seems to share some of the Rawlsian concerns regarding the stability of liberal institutions precisely in connection with such a commitment to the IR.

If I understand McCabe’s argument correctly, however, it seems that from the theory we can derive two different interpretations of the notion of political morality that, in turn, entail two different views of the political legitimacy-IR-JR nexus. At some point in his argument, McCabe seems to derive an equality of moral status from the *contingent* liberal institutions (2010, 133). Yet, it seems that this view of equality, which is consistent with a *contingent* practice-dependent justificatory model, reflects a de facto situation of equality that is the product of the historical development of modernity. This model, however, can provide only a weak normative defence of the liberal state. In other sections of McCabe’s book, though, a thicker moral understanding of equality seems to transcend such a contingent institutional situation: McCabe relates “the presumption that the interests of all persons matter equally” to what he calls a “moral minimal universalism” (2010, 138). This notion of *thin* morality seems to trump practice-dependency: in this way, however, this proposal fails to meet the main realist desiderata of the theory, that is the “priority of politics to morality”.

In the next two sections, I consider McCabe’s project in light of the two interpretations suggested above. In the first case, MVL is presented as a distinctive practice-dependent model of justification, one that entails an idea of a convergence of reasons that ought to be introduced with the aim of public justification. This view contrasts with Rawls’ consensus view, which bases public deliberation on shared and accessible reasons. For Rawls, the appeal to a shared framework of reasons is crucial to support the ideal of political autonomy, which is linked in turn to the principle of liberal legitimacy. In the *contingent* model, instead, the appeal to different reasons is committed to an idea of *threshold* autonomy (McCabe 2010, 51-53) linked to political legitimacy. According to MVL, the liberal state is a legitimate one as long as all citizens, even illiberal ones, have reasons to accept and endorse that political order. Section 6 instead considers the case of MVL as a practice-independent model of public justification.

## 5. MVL AS A PRACTICE-DEPENDENT JUSTIFICATORY MODEL OF POLITICAL THEORIZING

How should the political legitimacy of liberal institutions be understood in the outlined practice-dependent interpretation of MVL? Crucial to practice-dependency is the priority of politics to morality. Rawls' *institutional* version of practice-dependency connects politics to morality in a specific way: it ensures that the conception of political authority, which is justifiable to all citizens, is committed to a view of institutional morality that sees citizens as free and equal. McCabe's *contingent* version of practice-dependency seems to reproduce a similar structure insofar as it suggests that, by sharing the same institutional settings in which they are recognized as equals, all citizens might endorse a liberal state S for their own reasons that, albeit different in nature (e.g. instrumental, prudential, self-interested and so on), all reflect a widely shared intuition regarding equality (M) which is implicit in that *contingent* liberal institutional setting. Let us call this set of private reasons  $r^m_1$ ,  $r^m_2$ ,  $r^m_3$ , etc. In this sense, the argument supported by contingent and institutional practice-dependent scholars is similar. The difference is rather related to the content of political morality: a notion of equality of moral status which is reflected in a plurality of private reasons is here opposed to an institutional understanding of political morality in which citizens are understood as free and equal.

However, if this is the case for *modus vivendi* JR, this model seems to provide a version of the convergence view of the kind defended by Stout (2009) and Gaus and Vallier (2009). The difference between convergence and consensus is specified by the variable R in JR. Following D'Agostino (1996), the distinction between consensus and convergence views can be described as follows:

If both A and B share a reason R that make the regime reasonable for them, then the justification of the regime is grounded on the consensus with respect to R. If A has a reason  $R_a$  that makes that regime reasonable for him and B has a reason  $R_b$  that makes that regime reasonable for her, then the justification of the regime is based on convergence on it from separate points of view (D'Agostino 1996, 30).

Thus, the dispute here is about the framework of reasons that serves the justificatory desiderata. For Vallier, the acknowledgement of the fact of rea-



sonable pluralism in the liberal JR should imply “that there is a presumption in favour of less restrictive conceptions of reasons” (2011, 4-5). Similarly, in McCabe’s view, a convergence of reasons reflects the possibility that illiberal citizens might nonetheless endorse liberal institutions as a second-best arrangement on the basis of their own reasons. Differently from Gaus and Vallier, however, McCabe’s idea of convergence is committed to a realist form of political theorizing: he hopes to rule out thick moral notions such as reasonability and reasonable pluralism that he finds problematic in the institutional model. While the *institutional* version of practice-dependence envisages a consensus in the model of public justification where the reason R must be either shared or at least accessible to all citizens – for it appeals to reasons we all expect to be endorsed (see on this also Boettcher 2015, 192) – the *contingent* version of practice-dependence suggests that a convergence of different sets of reasons would be sufficient to guarantee the realization of a weak version of autonomy, which McCabe calls *threshold* autonomy (2010, 51-3). In this way, McCabe hopes to show that as far as all citizens have reasons to endorse the liberal order, that order is legitimate to them. Thus, while the political legitimacy of liberal order is guaranteed by its commitment to the IR – based on the inclusion of citizens’ reasons – its political stability can only be weak. For McCabe, this is a necessary outcome if we take seriously the form of deep pluralism that characterizes contemporary democracies. Although MVL provides only a weak defence of the liberal order, this is one that could be accepted also by critics of liberalism.

The *contingent* model presents a justificatory defence of liberal institutions that is committed to a weak version of autonomy. Here, political legitimacy is linked to the absence of coercion. In his treatment of JR, McCabe distinguishes between in-practice and in-theory justifiability. A’s claim is justifiable *in practice* to B if, by acknowledging the fact of pluralism, it is supported by a line of reasoning that is seen by B as “warranted by good reasons” (McCabe 2010, 81). In contrast, A’s claim is justifiable *in theory* to B if “it is grounded on reasons that would persuade an appropriately competent interlocutor” (*ibidem*). McCabe argues that Rawls moves from the first, in-practice justifiability, to the second, in-theory justifiability (82). By committing the principle of liberal legitimacy to an idea of ‘stability for the right reasons’, Rawls’ justificatory model shifts foundational disagreements about justice to a dispute concerning the framework of reasons that reasonable citizens should be expected to endorse. This move, McCabe believes, is unfeasible: it restricts

the justificatory constituency only to those (reasonable citizens) who already endorse the moral premises implicit in that justificatory construction. It is also normatively inadequate: it is morally arbitrary and disregards the form of pluralism that characterizes contemporary liberal societies.

My impression, however, is that McCabe fails to acknowledge some important aspects of Rawls' institutional model. In his recent work, Weithman has argued that an important difference between convergence and consensus is related to the way in which different notions of political autonomy are connected to the idea of political legitimacy (2016, 168). Weithman's reasoning is extremely useful in illuminating the real difference between the contingent and institutional models. As noted above, both institutional views and contingent views are consistent with a practice-dependent model of political theorizing. In both cases, the form of justifiability is constrained by a certain notion of political morality. Both justificatory schemes are concerned with the realization of a certain notion of political autonomy distinct from a comprehensive view of autonomy. However, against Rawls' institutional understanding of political morality, McCabe proposes a 'weak' idea of equality of moral status which is reflected in a plurality of private reasons. While Rawls' idea of political autonomy is realized if a liberal state is justified in light of an *institutional* conception of political morality, in which citizens are understood free and equal, McCabe believes that a kind of *threshold* autonomy is realized when citizens voluntarily accept the liberal order on the basis of their own reasons.

This difference in the two theorists' understanding of political autonomy has important implications for their accounts of legitimacy. For McCabe, the liberal order is legitimate when its justificatory structure expresses its uncoercive character: we should not expect all citizens to assign the same value to or justify in the same way, say, the constitutional principle of freedom of conscience; it is sufficient to acknowledge that, given certain historical and contingent conditions, all citizens are *in-practice* ready to accept it. For Rawls, however, the uncoercive character of liberal institutions is not what counts in JR. The principle of liberal legitimacy asks that the justification for the coercion of liberal institutions should reflect an ideal of political autonomy in which citizens are understood as free and equal. Rawls in fact believes that it is not enough to acknowledge that certain historical or contingent conditions might bring about the same conclusions regarding the liberal regime S. The justifiability of S should rest on some moral premises that people share by

virtue of their status as citizens. Thus, given the fact of reasonable pluralism, the form of justifiability should be stable for the right reasons. The idea of stability ‘for the right reasons’, linked to the principle of liberal legitimacy, is not meant to rule out coercion; rather, it aims at providing a justification for coercion which reflects an institutional understanding of political morality while transcending the contingency of certain historical or particular facts of a given society (see on this also Weithman 2016). Therefore, citizens are expected to endorse the constitutional principle of freedom of conscience in terms that reflect not their comprehensive or contingent reasons, but their moral and political status as citizens.

Imagine that A supports a certain illiberal view  $x$  – say, the caste system. Imagine that  $x$  is also shared by the majority of citizens of the state  $S$  where A lives. Now, suppose that in  $S$  there is only a small minority that does not support  $x$ , but that these citizens have prudential or self-interested reasons to support  $x$  as a second-best solution (they believe that if they support a different view this would endanger their status, or they think that by supporting  $x$  they will be granted a special status within  $S$ ). In this situation, the caste regime of  $S$  would be uncoercive to both the majority that fully supports  $x$  and the minority that supports  $x$  as a second-best solution. However, this regime cannot be said to be legitimate from a liberal point of view. For liberal legitimacy, we need to justify why a specific form of coexistence, namely the liberal one, is something citizens should give value to, albeit disagreeing deeply in terms of their comprehensive views.

## 6. MVL AS A PRACTICE-INDEPENDENT MODEL OF POLITICAL THEORIZING

McCabe would probably be resistant to this conclusion. He would perhaps argue that such a case could not arise under modern conditions, simply because too many citizens would resist it. As already mentioned, McCabe maintains that his particularistic defence of liberalism rests on the conjunction of two facts: contemporary societies are characterized by a form of pluralism that is not necessarily reasonable, but these citizens do nonetheless regard liberal institutions either as an unchangeable fact of modern life or as something that is instrumental to the achievement of other ends (2010, 133). Even conceding that this case is too unrealistic to be taken seriously, a conceptual problem with this idea of political legitimacy remains: if this is

the right interpretation of MVL as a justificatory project, this model of theorizing hardly helps to provide an adequate justification for the liberal political order when a large majority of the population endorses an illiberal doctrine, such as the caste system.

However, McCabe could also respond that my reading of MVL's justificatory project as a practice-dependent model is in fact incorrect. If MVL does not provide a practice-dependent view of justice, the opposite should be true. Following Sangiovanni, a practice-independent view of morality holds that first principles of justice do not depend on practices or institutions (2008: 2). Accordingly, the justification for a *modus vivendi* should not be derived from extant institutions, but rather should be committed to a transcendent view of morality. Thus, the set of reasons ( $r_1, r_2, r_3 \dots$ ) that citizens can endorse to justify the liberal state, albeit different in nature, must all reflect a view of morality that McCabe calls 'minimal moral universalism'. Thus, MVL JR is committed to a view of moral universalism that is implicit in the international human rights standards (McCabe 2010, 138).

The caste-system-supporting state S would of course be ruled out as a possibility by this account of MVL JR. But not on the grounds of political legitimacy: this sort of regime would be impossible because the illiberal view x on which it stands is in opposition to such a 'minimal moral universalism'. According to this interpretation, however, it seems that a kind of constraint on the *permissible* set of reasons is necessary to realize the idea of threshold autonomy defended by McCabe. Thus, much of what was appealing in the MVL project seems to be lost in the practice-independent interpretation. By selectively intervening in the sets of citizens' private reasons, this view is inconsistent with its anti-perfectionist premises.

Thus, this second interpretation of the *modus vivendi* justificatory project is also unsatisfactory. By relying on a view of morality which is context-independent, the justificatory structure of MVL is at odds with the main goal of the theory, which is to provide a less idealized and somehow anti-utopian defence of the liberal state. It is neither anti-utopian, since it relies on an external view of morality that applies to JR, nor is it able to provide a defence of the liberal state that is strong, only one that is contingent and very limited.

McCabe might still object that MVL is not anti-utopian or committed to a radical realist rejection of moral or ideal theorizing, but should rather be understood as a model of ideal theorizing aimed at ensuring more inclusivity than Rawls' public reason liberalism. Yet, I wonder whether the appeal to a

moral minimum is enough to defend the liberal order. MVL ideal theorizing seems to provide a version of toleration similar to Rawls' international model. As mentioned above, Rawls' institutional decency is the requirement for the inclusion of some non-liberal societies in the Society of Peoples. A decent hierarchical society is presented as peaceful, respectful of basic human rights and supportive of some form of equality. Yet, the form of political autonomy required by the liberal principle of legitimacy is realized only within well-functioning liberal democratic regimes. It seems that MVL JR crucially disregards the discontinuities between these two accounts of legitimacy.

To understand this last point, it might be useful to consider the case of an existing state. Take for example the case of Venezuela, a constitutional republic committed to basic human rights and a certain degree of political pluralism.<sup>3</sup> Yet, this regime is founded on an illiberal doctrine of popular sovereignty over national resources that entails the weakening of property rights.<sup>4</sup> The restrictions on firms' and individuals' property rights is perhaps the most problematic aspect of *chavismo* from a liberal democratic perspective. Nonetheless, Venezuela's political regime – at least under Chávez – could fall within the category of a decent society and liberal peoples ought to tolerate it in the Society of Peoples (see on this point also Gentile 2018).

## CONCLUDING REMARKS

Contemporary normative theory is marked by a realist turn. In this paper I have linked a main realist concern, where the political is defined as being distinct from morality, to Sangiovanni's idea of a practice-dependence model of political theorizing. I have suggested that McCabe's defence of the liberal

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<sup>3</sup> In the elections of 2013, President Maduro defeated his more moderate opponent, Capriles, by a slim margin (only 1.5 per cent), a result that was deeply contested by the opposition and which has put into question the legitimacy of the whole process (see McCarthy and McCoy 2013). This stands in contrast with a pattern that, from 2006 to 2012, saw President Chávez build a system of cooperative relationships with his moderate opponents and demonstrate openness to political pluralism. This strengthened Chávez's political legitimacy and popular support.

<sup>4</sup> *Chavismo* is based on the idea that national resources belong to the population and the government has the right to revoke the ownership of private firms or individuals in the name of the Venezuelan people.

order on the grounds of a *modus vivendi* could be understood as a *contingent* model of practice-dependent political theorizing. This has been contrasted with Rawls' *institutional* model. The contingent practice-dependent version of JR suggests a weaker form of proceduralism that is genuinely political. This view is meant to rule out problematic notions such as reasonableness and reasonable pluralism in favour of a *contingent* understanding of compromise among competing sets of reasons.

A contingent justification of the liberal order is, however, a weak one. For McCabe, a loss in terms of stability is the price to be paid if we want to take seriously the fact of moral diversity that characterizes contemporary societies. MVL is meant to provide a justification of liberal institutions that the critics of liberalism cannot reject. Such an attempt to expand the justificatory constituency of JR is reflected in the account of political legitimacy, realized when citizens voluntarily accept the liberal arrangements. The idea of in-practice justifiability is therefore preferred to Rawls' in-theory model.

McCabe's model seems to miss a crucial point of Rawls' institutional practice-dependence and the idea of liberal legitimacy related to it. As I have shown in this paper, the most problematic aspect of the contingent model is that it disconnects the idea of legitimacy from a conception of liberal political morality: an idea of political legitimacy that reflects the uncoercive character of extant institutions seems to be sufficient to meet the MVL JR. Yet, from a normative point of view, this might be not enough. As the example of the caste system shows, and McCabe would perhaps agree, normative political theory need not show that the system is *in-practice* uncoercive; rather it needs to provide an argument that explains why a specific form of coexistence, namely the liberal one, is something citizens should give value to, albeit disagreeing deeply in terms of their comprehensive views.

In conclusion, I have considered McCabe's model as a version of 'practice-independent' moral theorizing. A transcendent view of threshold morality is meant to ensure certain acceptable outcomes in terms of rights and freedoms. This move, however, comes at the cost of sacrificing the theory's premises of anti-perfectionism and realism. Furthermore, the appeal to a threshold morality, implicit in the international human rights standards, seems to be inadequate to distinguish between the legitimacy of a liberal order, in which all democratic freedoms are secured, and that of a decent, yet not fully liberal, institutional order.

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## I. INTRODUCTION

My aim in this paper is to begin thinking about political legitimacy in terms of a viable conception of *modus vivendi*.<sup>2</sup> The latter idea remains underdeveloped, both here and in political theory more generally, and, at least in my view, its potential for thinking about politics in a variety of theoretical contexts has been underestimated.<sup>3</sup> This is no doubt partly explained by the fact that the initial impetus behind the renewed interest in the idea of *modus vivendi* in recent political theory derived primarily from the highly partisan and negative characterisation of it presented by John Rawls (Rawls 1993, 147-149). Here, I want

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<sup>1</sup> This paper is an edited and lightly revised version of J. Horton, “*Modus vivendi* and political legitimacy”, in J. Horton, M. Westphal and U. Willems (eds), *The Political Theory of Modus vivendi*, Heidelberg, Springer, 2018, pp. 131-148. In addition to the acknowledgements there I am very grateful for their helpful and acute comments to the participants in the Workshop on ‘*Modus vivendi*’ at the Centro Einaudi, Turin in November 2017.

<sup>2</sup> I have addressed questions about political legitimacy and *modus vivendi* largely independently of one another in a number of earlier articles. See Horton (2005; 2006; 2010a; 2010b; 2012; 2018).

<sup>3</sup> It should of course be acknowledged that there are a few theorists who have made serious attempts to develop a fuller account of *modus vivendi*, most importantly, perhaps, John Gray (2000) and David McCabe (2010). In a nutshell, I principally differ from both in not wanting to tie my account of *modus vivendi* to a theory of value-pluralism, and also from McCabe (and perhaps Gray) in not wanting to claim it to be necessarily liberal in any meaningful sense. I have however, learnt a good deal, although probably not enough, from them both. See also Horton *et al.* (2018).

to move beyond Rawls's view and try to take some no doubt faltering steps towards developing the idea of *modus vivendi* in a more positive way, through exploring its possible relationship to the notion of political legitimacy. In particular, I shall suggest that a suitable conception of *modus vivendi* can play an important role in at least one plausible interpretation of political legitimacy.<sup>4</sup>

It may be helpful to begin with a few brief preliminary remarks about where my discussion of *modus vivendi* should be located within the broader topography of contemporary political theory. First, I conceive of it as part of what has become known as the 'realist turn' in recent political theory (e.g. Rossi and Sleat 2014; Galston 2010; Geuss 2008; Williams 2005; Newey 2001). That is, it seeks to engage with a more quotidian and less idealised conception of politics than is typical of what is known as 'ideal theory'. So far, though, I think it would be widely agreed, even by sympathisers with a realist approach, that it has been more successful, or at least most commonly deployed, as a critique, rather than as offering a constructive alternative to the ideal theory it critiques. Developing the idea of *modus vivendi*, as I see it, is intended to offer one, but only one, possible way of taking forward the realist critique in a more creative direction. Secondly, my particular interest within the realist perspective is quite unusual in that it aspires to a style of political theory that is primarily directed towards *understanding* or *interpretation* rather than *prescribing*; political theory as more concerned with trying to make sense of fundamental political notions, rather than as a source of practical instruction or political guidance. In this regard my approach differs quite significantly from that of the many realists who want to harness their approach to the aim of providing practically useful political direction. Political theory in this more interpretative vein, by contrast, aims to be neither a form of *ersatz* political ideology nor a substitute for practical political thinking (Horton 2017; Freedman 2012). Thirdly, however, while being primarily interpretative in intent and seeking to avoid the overly moralistic bent of ideal theory, this approach remains to some extent unavoidably normative, if only weakly so. Thus, I fully accept that it is not possible to escape altogether some measure of normativity even in a style of political theory that aims to better reflect and be more sensitive to the complex and challenging 'realities' of political life. The very notion of political legitimacy is

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<sup>4</sup> To be clear, I conceive of *modus vivendi* and political legitimacy as separate and distinct ideas.

in some sense irreducibly normative and the conception of *modus vivendi*, as it is presented here, also contains within it some rather modest normative components. However, conceding that some measure of normativity is unavoidable does not mean that there is no significant difference between a political theory explicitly aiming at prescription or characterising an ideal political order, on the one hand, and one in which a modest measure of normativity is an ineliminable dimension and perhaps also a by-product of an essentially different kind of project, on the other.

One final preliminary point is that neither the conception of *modus vivendi* that I set out, nor the account of political legitimacy I endorse, are necessarily or specifically liberal.<sup>5</sup> On the other hand, nor are they necessarily incompatible with liberal political regimes, and are not, therefore, inherently anti- or illiberal. Liberal regimes are certainly one possible form of a *modus vivendi* and one that might indeed be especially salient under some circumstances: liberalism in most of its forms has much to be said for it as a basis for a *modus vivendi*. Where there is a parting of the ways with most liberals, though, is in rejecting the claim that *only* a certain kind of philosophically endorsed liberal regime could be politically legitimate. It is one of my motivations to defend the idea, which is surely borne out by history however ‘radical’ some liberal theorists seem to find the very idea, that there can be a wide variety of legitimate political structures and regimes, including some, although most definitely not all, non-liberal ones.<sup>6</sup>

## 2. *MODUS VIVENDI*

The intuitive idea behind the concept of a *modus vivendi* is not hard to understand, even if working out a fully satisfactory account of it is considerably

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<sup>5</sup> Much though I admire his work, I fear that Gray (2000) is partly responsible for some confusion in this area. Although his book supposedly supports the claim that there are two faces of *liberalism*, one of which he believes defensible and the other not, he often writes as if he is criticising the claims of liberalism *tout court*, a problem which is further exacerbated by his vagueness about the specifically liberal credentials of the *modus vivendi* form that he defends.

<sup>6</sup> Bernard Williams (2005) at least hints at the idea that *only* a liberal regime could be legitimate *under the conditions of modernity*. If that is indeed his view then I am deeply sceptical towards it (although much will depend upon exactly what is meant by conditions of modernity).

more difficult. The core idea is one of a set of arrangements that are, in some sense, accepted as basis for conducting affairs peaceably by those who are party to them; although they are not the arrangements that any of the parties would most prefer or believe to be 'right'. A *modus vivendi* is, then, from the point of view of its participants never better than second best, and often a lot worse than that. Establishing a *modus vivendi* involves trying to find a way of living together by reducing the potentially destructive effects to which serious disagreement and conflict would otherwise give rise.<sup>7</sup> Each party gives up something that they would like but also gets something of what they want out of it, too. The value of a *modus vivendi* is that it offers a way for those who are party to it to coexist together, if not entirely amicably then at least for the most part peaceably, notwithstanding continuing significant and, absent the *modus vivendi*, potentially destructive conflict and disagreement between them. On the other hand, on matters about which we all agree a *modus vivendi* will not be needed.

It should be noted that *modus vivendi* arrangements are not, of course, limited to the sphere of politics. Anyone who has ever been a member of any even minimally complex group or involved in any personal relationships of more than the shortest duration will have at least a passing acquaintance with the idea, whether or not they use the term '*modus vivendi*' to describe it.<sup>8</sup> However, my interest is in a political conception of *modus vivendi* and I therefore focus in what follows entirely on that. Furthermore, my interest is still more narrowly focused on the idea of *modus vivendi* as a way of characterising the conditions of workable basic or fundamental political institutions and practices, rather than with its role in helping to deal with particular polit-

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<sup>7</sup> *Modus vivendi* theorists, therefore, typically depart from agonistic theorists such as Chantal Mouffe (2005) in refusing to valorise political conflict. For *modus vivendi* theorists some measure of conflict is pretty much the order of the day in political life, but also always a potential source of threat to political order and security that therefore needs to be controlled rather than actively encouraged.

<sup>8</sup> I use this Latin tag partly because it already has some currency in the literature, but also to avoid possible misunderstanding. I would be perfectly happy with the more mundane 'compromise', but for the fact that some political theorists have wanted to make a sharp distinction between a compromise and a bargain. However exactly that distinction is made, though, the conception of *modus vivendi* with which I am concerned incorporates both.

ical disputes within them. This kind of *modus vivendi* is probably best understood as an ongoing commitment that is concretely embodied in institutions, procedures and practices, rather than as a short-term or one-off settlement of a specific dispute or conflict.<sup>9</sup> Constitutions, regimes, and basic political institutions and processes are typical subjects of a *modus vivendi* in this regard. If one is party to a *modus vivendi* about the broad set of institutions and practices that constitute a particular political regime then I claim that what this effectively means is that one is generally committed to accepting the outcome of those practices and processes as authoritative (where, of course, they have been properly enacted in accordance with the terms of *modus vivendi*), which is most importantly not the same as agreeing with them or believing them to be right. Although there is always the potential for it to be disrupted, undermined or challenged, the kind of political *modus vivendi* of concern here may be and often is long-standing and deeply embedded, while almost inevitably undergoing more or less substantial adjustments in response to changing circumstances.

I have elsewhere offered a fairly basic characterisation of how a *modus vivendi* is best understood in the following terms:

*A modus vivendi* is a practical accommodation that can be built around any number of factors and be accepted for a variety of reasons by those who are parties to it. Those reasons will often include a measure of self-interest, but may also include more general prudential considerations and whatever moral principles and other values can be effectively mobilised in support of a particular political settlement. This is not, it should be emphasised, to reintroduce liberal principles or an assumed moral consensus through the back door. Rather, it is only to recognise that typically people do share *some* moral commitments or principles, along with other values, and that this overlap can be quite extensive, if often vague and indeterminate. Also, even where people do not have the *same* reasons, they may have their own moral, or other, reasons for acting in ways conducive to a *modus vivendi* (Horton 2010, 440).

Although I largely stand by this brief sketch, at least in one respect it is insufficiently clear. Thus, although a wide variety of reasons can indeed properly ground support for a *modus vivendi*, it should be made clear that one

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<sup>9</sup>The line between the two can be vague and imprecise. It is not always clear what will count as a basic institution or practice.

kind of reason in particular is excluded: serious direct threats. Such threats are characterised by being fundamentally coercive in intent; and this makes them the basis for tyranny or oppression, not a *modus vivendi*. There are inevitably considerable grey areas around what counts as coercive, and one of the tasks of a fuller account of *modus vivendi* is to try to be clearer on this matter, but the intuitive basis of the distinction at work here and the reason why it is needed are, I believe, clear enough.

A *modus vivendi* in this context is, then, essentially a way of living peaceably together, which is ideal for no one but is an arrangement that the parties to it are prepared to live with. Beyond securing some measure of peace and security,<sup>10</sup> the core values that are integral to a *modus vivendi*, the substantive content of any actual *modus vivendi* (and usually there will be much more to it than just peace and security) is always specific to a particular arrangement: it is not something that can be determined through philosophical theorising or abstract reasoning. While the defining features of a *modus vivendi* can properly be specified in general terms, its content cannot, as any actual *modus vivendi* is a practical achievement and not a theoretical construct. Being party to a *modus vivendi*, accepting a set of institutions and practices as a viable *modus vivendi*, generally involves working within whatever are its parameters, even when the purpose of the activity is to effect changes to those very parameters. An effective *modus vivendi*, therefore, also sets limits to how changes in its terms should be pursued; in particular it represents an alternative to levels of ongoing violence and insecurity that seriously undermine one's ability to realise one's most important values or life projects. But it also by definition involves sacrifices of one sort or another; although some parties will likely have to give up more than others, as a *modus vivendi* neither implies nor requires there be an equality of sacrifice.

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<sup>10</sup>The use of the terms 'peace and security' is, it should be mentioned, far from unproblematic. First, their meaning is not precise, and they can to some extent be differently interpreted. Secondly, in respect of their being scalar, they are always a matter of a degree, and there will be differences between people about how much is 'sufficient' for political purposes. Thirdly, the focus on these values can lead one to think that these are the only values that matter; they are not. But they do have a kind of *political* primacy in that some measure of them is the pre-condition for the realisation of other political values. It does not follow, though, that more peace and security is always preferable to the realisation of other values.

The extent to which a *modus vivendi* is actually realisable in any given situation is *always* and *unavoidably* an open question, and cannot therefore be arrived at through *a priori* reasoning. General theoretical reflection and empirical inquiry may help in understanding the conditions under which a *modus vivendi* is more or less likely to be achieved and whether some kinds of institutions tend to be more conducive to a *modus vivendi* than others. However, politics is quintessentially a realm of contingency and there is, in short, nothing in the fabric of the universe which ensures either that a *modus vivendi* will be achievable or that it will not. The idea of a *modus vivendi* is not, therefore, a panacea to all the problems and challenges of political life. Contrary to one common objection, it is simply a mistake to claim that *modus vivendi* theory assumes that peace and security are some kind of super-good. It does not claim that people must be committed to pursuing peace at any price. In the absence of a willingness to live with those of a different persuasion, or where the scope for compromise or bargaining is too limited, a *modus vivendi* may prove unattainable. At best, one can say that there are strong motivational reasons in most circumstances, especially when the costs of a failure are very high, for at least making a significant effort to find a workable *modus vivendi* and to sustaining and preserving it where one already exists. But it is always a practical project subject to the vicissitudes of fortune and much else.

This characterisation of the notion of a political *modus vivendi* is, I hope, for all its imprecision, at least an adequate basis for the subsequent discussion. That discussion touches on two of many issues that need to be addressed in developing further a political theory of *modus vivendi*, and which also bear closely on the issue of political legitimacy. The first of these concerns how we should deal with the fact that in reality it is impossible that any political regime will be universally accepted, even as a *modus vivendi*, by all those who are subject to it. Clearly, where such rejection is deep and widespread, there is no question of there being anything that can properly be regarded as a *modus vivendi*: it is a condition of an arrangement's being a *modus vivendi* that it is in some sense accepted as such by those who are subject to it. As noted earlier, there has to be a distinction between peace and security sustained by a *modus vivendi* and circumstances where such conditions are maintained solely by the use of violence or the threat of it on the part of those with much greater power. One might here adapt a remark of Bernard Williams in saying that a situation of one lot of people terrorising another lot of people is not



a *modus vivendi*, even if it does result in a kind of peace, but is rather the kind of situation to which a *modus vivendi* is supposed to offer an alternative (Williams 2005, 5). However, one question that then arises with regard to a *modus vivendi* around political fundamentals is whether a weaker condition such as ‘widespread acceptance’ might be sufficient. Could one yet be party to a *modus vivendi* that one does not accept? Or, do we nonetheless require something like acceptance from each and every party for there to be a genuine *modus vivendi*?<sup>11</sup>

The question concerns what could be said to ‘dissenters’ from a *modus vivendi* – those who insist that they are not party to such an arrangement? It seems to me that there are two main lines of response that may have some initial plausibility. The first is simply to agree and grant that all those who are subject to an arrangement must explicitly accept it, if they are truly to be parties to the *modus vivendi*. If we do take this line, though, it would seem straightforwardly to follow that those who do not do so are not bound by it, or at least not bound by virtue of its being a *modus vivendi* to which they are party. On this view, those who reject a particular *modus vivendi* necessarily remain outside of it, and as such it has no valid claims on them. And, indeed, if they clearly and incontestably do reject it, then this would seem to be an unavoidable conclusion in the light of what a *modus vivendi* is. To be clear on this: I think that sometimes such an account will be an accurate description of the situation and it should be conceded that no *modus vivendi* exists with those who clearly refuse to be party to it. But is this all that can be said?

So, let me briefly mention the second approach to dealing with those who deny that they are party to a particular political *modus vivendi*. This response seeks to implicate within a *modus vivendi*, in suitably defined circumstances,

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<sup>11</sup> Enzo Rossi (2010) has some interesting things to say about this, but he is specifically concerned with the relationship between *modus vivendi* and liberalism, and in particular the liberal principle of political justification, according to which the basic political structure should be reasonably acceptable (not accepted) to all those who are subject to it. As I am not concerned to relate *modus vivendi* with liberalism in this way, I need not be at all worried by his conclusion that ‘the idea of *modus vivendi* does not offer a viable internal corrective for consensus-based accounts of the foundations of liberalism’ (Rossi 2010, 22). However, while I can happily welcome the decoupling of *modus vivendi* from liberalism, and in this regard view Rossi as a perhaps inadvertent ally, this does not mean that some of the points he raises are not pertinent to the enquiry I am engaged in, and to which I cannot claim to have done full justice here.

at least some of those who may nonetheless *claim* not to be party to it. Initially, this may appear to be a most unpromising option, and perhaps contrary to the whole spirit of the idea of a *modus vivendi*. Surely, if some arrangement is to count as a genuine *modus vivendi* then the parties to it must clearly accept it as such to make it one? This is a powerful objection and, as I have already acknowledged, it can be a decisive one; but is it always and necessarily so? I return to this question shortly but first I want to introduce a different issue that a theory of *modus vivendi* also needs to address.

This issue, which is clearly related to the first, concerns what exactly it is for a *modus vivendi* to be 'accepted' if one is to be party to it. What does one need to do to be party to a *modus vivendi*; what does the 'in some sense' with which I have regularly qualified acceptance amount to? Again, I suggest, we do not want to be driven in the direction of something like either an actual or a hypothetical social contract. An actual contract is unrealistically demanding, while a hypothetical contract risks pushing us too far in the direction of ideal theory. Instead, my suggestion is that we have to think of a *modus vivendi* at the level of constitutional settlements or basic political institutions and procedures somewhat differently. In particular, we need to be less explicitly voluntarist in conceptualising the conditions of a *modus vivendi*.

My suggestion is that there are two relatively distinct perspectives on 'acceptance' in the context of a political regime. One is subjective and is broadly similar to the kind of thing I have been talking about so far. Do people see themselves, if only reluctantly, as party to the particular way of doing things politically that prevails in their political community? Do they understand themselves to be members of this particular polity? More specifically, do they acknowledge the right of basic political institutions to make authoritatively binding decisions? Whether they do so, though, is not exhausted by this subjective perspective, as it is not only a matter of what people *say* or *claim*, even if they are not being dishonest or deceitful. It is also about how they *act* or what they *do*. The second perspective, therefore, is more objective and behavioural. It asks: do they behave in ways from which it can be reasonably inferred, whatever they may say, that they do in fact subscribe the ongoing *modus vivendi*? Do they, that is, give every appearance of accepting the authority of the political institutions and practices through which the *modus vivendi* is given expression? Do they engage with normal political processes? Do they take advantage of the benefits available to those who are party to it? Do they make recourse to the judicial system? This may superficially

sound like an appeal to the familiar idea of tacit consent, but that would not be quite right. For one thing, these kinds of actions are to be taken not as *expressions* of consent, but as *evidence* of being party to the ongoing *modus vivendi*; of acceptance of the political authority of the prevailing institutions, practices and procedures through their behaviour. Also, as I shall argue in the next section on political legitimacy, consent theory typically gets things the wrong way round.

Finally, we can now return to the first issue, noting how this approach relieves *some* of the pressure created by the inevitable absence of universal acceptance. Once we understand how being a part of a *modus vivendi* is less demanding in what it requires by way of *explicit* acceptance than might initially be thought, it also becomes easier to see how a much wider range of people may properly be understood to be party to it. If the kinds of attitudes and forms of engagement with the political system that I am now suggesting may be sufficient evidence of ‘acceptance’, it seems plausible to think that only those who actually behave in ways that explicitly dissociate themselves from the established political order effectively exclude themselves from the ongoing *modus vivendi*; a mere mental reservation is not sufficient to establish that one is not party to a *modus vivendi*.

### 3. POLITICAL LEGITIMACY

Before seeking specifically to relate the foregoing conception of *modus vivendi* to the idea of political legitimacy it may be worth saying briefly what hangs on the latter notion and how I think we should understand it. Basically, a legitimate political regime is one that has claims on the allegiance of those who are subject to it. In particular, this has implications for the standing of law and fundamental political institutions and how changes to them should be sought and effected. Here, I broadly agree with Philip Pettit when he writes that if a regime is legitimate

attempts to change unjust laws should be restricted to measures that are consistent with the regime’s remaining in place. It requires you to acknowledge the state as the appropriate arbiter and decider of legal issues [...] Legitimacy imposes a *pro tanto* moral obligation, then, if you oppose certain laws or measures – and given different conceptions of justice, everyone will be disposed to challenge some – to oppose them in ways allowed by the system: to stop short of revolution or rebellion (Pettit 2012, 137).

This does not mean that illegal acts are always necessarily incompatible with acknowledging the legitimacy of a regime. Ordinary criminality and civil disobedience, to take two very different examples, do not typically involve a denial of the legitimacy of the political structure or of law in general. But, nor does it offer *carte blanche* for a regime to act however it wants; not just anything will be compatible with what makes a particular regime legitimate. Political legitimacy, therefore, involves the recognition of a regime's right to rule, its political authority, within the context of the criteria and beliefs that effectively ground the legitimacy of that regime's institutions, practices and procedures.

To elaborate in a little more detail.<sup>12</sup> First, I believe that there has to be some connection, at least in a rough and ready way, between political legitimacy and the actual (rather than hypothetical) beliefs and attitudes of those subject to it; a view that has largely fallen into disrepute among political philosophers, at least partly as a result of dissatisfaction with the Weberian explanation of what this amounts to. The principal objection to (the standard interpretation of) the Weberian view, which I also endorse, "is that it misrepresents the relationship between legitimacy and people's beliefs", for a state "is not legitimate because people believe in its legitimacy, but because it can be *justified in terms of their beliefs*" (Beetham 1991, 11). Thus, secondly, I suggest that a much more prominent role should be afforded to the social, cultural, conceptual and normative context, the broader belief system, within which a people frame their thinking about the legitimacy of their governmental institutions. This is undoubtedly a controversial claim. But, on the view I advance, while it is the allegiance of its members, their acknowledgement of it, broadly understood, that sustains the claim of a state (or any form of political community) to political legitimacy, this is not, though, merely a matter of asking people their opinion or the aggregating of such opinions to arrive at an overall assessment: it is not a matter of popularity or even of agreement about the merits of its basic political institutions or principles. Fundamentally, political legitimacy concerns the acknowledgement of the state as having political authority – recognizing the right of the state to exercise state power by making laws, pursuing policies and enforcing them on its

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<sup>12</sup>This section is essentially a very slightly reformulated account of political legitimacy set out in Horton (2010).

citizens – in terms that have salience within the social and ideational context in which such authority is exercised and affirmed.<sup>13</sup>

While it may not be completely mistaken to say that something like consent plays *a* role, my argument is not a form of consent theory. This is because ‘consent’ is not the ground or justification of political legitimacy; legitimacy is not to be found in a voluntary act or decision, express or tacit, which supposedly creates it. Thus, while the acknowledgement of its authority by its citizens is a fundamental part of the story of what it means for basic political institutions or a governmental regime to be legitimate, it is not consent that *creates* its legitimacy. Simplifying greatly, according to classical consent theory, where it is given, our consent is the ground or reason that we have to acknowledge the authority of the state: I acknowledge its authority *because* I have of my own volition, either expressly or tacitly, granted it authority over me. And if I have not given my consent then the state does not have any justified claim to exercise authority over me. My contention, however, is that this misunderstands the role of consent: basically it gets things the wrong way around.

Thus, one consents to, or more accurately recognizes or acknowledges, the state as legitimate, because it meets the operative criteria of legitimacy. One does not acknowledge its legitimacy *because* one has consented to it. The acknowledgement of legitimacy matters, but that acknowledgement is grounded in something other than the act of acknowledgement itself. So, what then on this account explains my acknowledging political legitimacy? This can and does vary; and how it varies will depend in part upon the kinds of consideration that underpin the legitimacy of the basic institutions in the specific political community of which one is a member. Thus, in my own case, for instance, as a British citizen, it will be because, entirely mundanely, I recognize the political institutions and laws as having been properly constituted and enacted, and the current government as the properly elected government of Britain; and this is so notwithstanding my antipathy towards it in general and disapproval of much that it does in particular. However, in a culture and political structure within which, say, Islam is the dominant belief

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<sup>13</sup> While contestation about some of the criteria of legitimacy within a given political community is often ongoing, even such contestation takes place in a context of intelligible disputes about what is contested. That is, not just anything will count as a serious criterion for political legitimacy in any particular context.

system, for example, it will likely (and appropriately) play an important role in shaping the discourse of political legitimacy for that society. Islam will provide part of the context of beliefs in which claims about political authority are formulated, asserted and assessed. Although this does not of course mean that everyone in that society must be a Muslim, any more than everyone in a liberal society has to be a liberal, political legitimacy in such a society may be partly constituted through beliefs and discourses rooted in distinctively Islamic ways of thought. And the structure of political institutions can reasonably be expected in significant ways to reflect such differences of fundamental cultural and ideational differences.

In the course of his famous critique of social contract theories and reflecting on the relation of the people to their King in the England of his time, David Hume observed that: ‘they consent, because they apprehend him to be by birth their lawful sovereign’ (Hume 1987). Peter Winch’s comment on Hume’s remark captures very precisely the point that I want to make here:

Consent does indeed play a role in the relation between citizen and ruler in this case, but it is not the role described by social contract theorist. It is not the *source* of their sense of the ruler’s legitimacy; rather, their recognition of his legitimacy is expressed in the role played by the thought of his royal birth in the way they consent to his rule, and the importance they attach to this is of course rooted in the hereditary institutions which belong to their form of life (Winch 1991, 227).<sup>14</sup>

Contrary to the claims of some critics, this does not simply “dissolve legitimacy into belief and opinion”, and nor is it true that just because “a people holds a belief that existing institutions are ‘appropriate’ or ‘morally proper’, then these institutions are legitimate. That’s all there is to it” (Schaar 1969, 284). First, there is the possibility on this account that citizens can be mistaken, for example because they wrongly believe that their state meets the relevant criteria of legitimacy when in fact it does not. The key point here is that, on this view, people are making *judgements* about political legitimacy. They are deploying criteria and can offer reasons in making those judgements; not simply asserting that a state or ruler is legitimate merely because they say so. And to understand those judgements and how reasoning about political

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<sup>14</sup> I have discussed Winch’s views on political authority more fully in Horton (2005). My account is much indebted to his.

legitimacy functions, therefore, we have to situate such arguments within the specific context of the culture, political practices and intellectual and moral traditions that shape and give substance to them. Secondly, and equally importantly, however, people can also call into question those existing criteria, which are not immutable or unrevisable, and usually to some extent plural and open to varying interpretations. While the prevailing discourses of legitimacy will provide the starting point or initial context for such reflections it certainly need not be where those reflections end.

#### 4. *MODUS VIVENDI* AND POLITICAL LEGITIMACY

Having thus far set out my favoured conception of *modus vivendi* and explained how I understand political legitimacy, the question that now presents itself is: how should the relationship between them be understood? Can the idea of a *modus vivendi* be of service in helping to formulate a viable account of political legitimacy? In brief, my suggestion is that the kind of account of political legitimacy offered here is not only broadly congruent with the understanding of a *modus vivendi* presented earlier, but that a discourse of political legitimacy grounded in an ongoing *modus vivendi* can help to explain the authority of its political institutions and practices, as well as supplying a normative context within which they can be intelligibly criticised, challenged and renegotiated. A *modus vivendi*, therefore, can help to explain how political legitimacy is possible in a way that does justice to what I believe are two important desiderata that such an account should meet: that is, first, it admits of the many and diverse forms that legitimate political regimes can take and, secondly, it responds to the idea that political legitimacy should somehow be rooted in the beliefs of those who are subject to it.

The central idea is that the web of operative beliefs about political legitimacy in any given society both supports and is sustained by a *modus vivendi* instantiated in its basic political institutions and practices. In this way such a *modus vivendi* to considerable extent (although not necessarily exclusively or completely) comprises recognising the salience of the criteria in terms of which members make sense of and assess the way they do things (politically) ‘around here’. That is, political legitimacy in the broadest terms is focused around such general considerations as our political community being a ‘constitutional democracy’, ‘a monarchy’, ‘an Islamic state’ and so on, and

the way that these terms of political association are interpreted and enacted through concrete political institutions and practices. The discourse in which these broad ideas are elaborated, which includes the possibility of their being challenged, is the substance and context of fundamental political debate and contestation. To be clear, this does *not* mean that one has to be, respectively, a constitutional democrat, a Muslim or a monarchist. That is one important reason why such a political settlement is a *modus vivendi* and not a consensus of values or even an overlapping consensus.

Political legitimacy, therefore, resides in the acknowledgement of the authority of the practices and institutions that are politically operative in terms that are ideationally salient. As explained earlier, this does not mean that these practices and institutions cannot change or that they cannot be challenged or contested: that would be absurd. If, however, one is serious about co-existing with others in a shared, and usually pre-existing, political association then one has to at least engage with the prevailing discourse of political legitimacy that confers authority on current institutions and practices. A *modus vivendi*, too, requires us to do something to address, rather than simply ride roughshod over, the fundamental concerns of those with whom one wants or needs to live peaceably together. We have to at least aspire to political inclusiveness if legitimacy is to be grounded in a *modus vivendi*.<sup>15</sup>

Legitimate political institutions and practices in even a moderately complex and diverse society, where that is political power is something other than the mere exercise of force and coercion, will at least to some extent almost inevitably be constituted through a *modus vivendi*. They will be the outcome of an historical and ongoing conglomeration of ‘settlements’ reflecting shifting and conflicting values and interests, as well as relative balances of power, which have coagulated into an acknowledged but not necessarily uncontested way of doing things politically. Their legitimacy, however, is expressed not solely in the bare fact that they are the basis of a *modus vivendi*, but through such arrangements coming to articulate ways of thinking about how they are

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<sup>15</sup> I think that this offers perhaps the best interpretation of Bernard Williams’ “basic legitimation demand” (Hall 2015). The Basic Legitimation Demand arises when “A coerces B and claims that B would be wrong to fight back: resents it, forbids it, rallies others to oppose it as wrong”, because in so doing, “A claims that his actions transcend the conditions of warfare, and this gives rise to a demand of justification of what A does” (Williams 2005, 6).



to be interpreted and assessed that also have an at least partly independent life. The marriage of *modus vivendi* and political legitimacy in this way, therefore, seeks to reflect both the contingent and ‘negotiated’, and always in a sense ‘provisional’, character of basic political institutions and practices, and an understanding of political legitimacy that sees it as mediated through an emergent discourse of argument and judgement associated with them. Political legitimacy will be standardly affirmed through the ongoing reengagement with a discourse about how politics should be conducted, notwithstanding serious and sharp disagreements about many important substantive issues, which is constitutive of a genuine *modus vivendi*. Correspondingly, where this does not obtain and fundamental conflict about the terms of political association persists to an extent that a significant number of citizens do not accept the authority of basic political institutions and practices, political legitimacy will at best be problematic; where such disagreement is deep and widespread it may simply be absent. However, this is not a weakness of the theory: any such theory if it is to reflect our experience also needs to explain how claims to political legitimacy can fail or even be indeterminate.

## CONCLUSION

The aim of this paper has been no more (but also no less) than to sketch in a very general way an account of how a suitable conception of *modus vivendi*, broadly understood, can play an illuminating role in theorising political legitimacy in a manner that is both realistic and conceptually cogent. The core of that account has been to try to show how a *modus vivendi* constituted through the operative criteria or discourses can ground the terms in which the claims to legitimacy of a particular political regime are articulated, validated and contested. Such a *modus vivendi* is affirmed through an ongoing engagement with the basic institutions, practices and processes that constitute the fabric of a shared political life. In at least one sense this is an undeniably ambitious and highly controversial set of claims, and many political theorists will find the moral constraints on such an account of political legitimacy far too permissive and normatively undemanding. So, it may be worth emphasising one last time that on the account of a *modus vivendi* that I have presented, there has to be sufficient reason to motivate people to be party to a particular set of political arrangements. Furthermore, to reiterate the comments with which I began, it is

also quite modest in its claims in that what has been presented is intended as no more than a provisional and tentative sketch of how such an argument could be developed. My hope, therefore, is that this can be a contribution to, and certainly not the conclusion of, both a discussion about the meaning and possibilities of a political theory of *modus vivendi* in general, and what role it might have in articulating a viable conception of political legitimacy in particular.

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Federico Zuolo

**Is *modus vivendi* the best  
realistic alternative to public  
justification liberalism?**

I. INTRODUCTION: *MODUS VIVENDI* AND PUBLIC JUSTIFICATION LIBERALISM

The question within the title of this paper may sound strange. Why do I formulate the question in this way? Are *modus vivendi* (MV) approaches meant to replace public justification liberalism (PJL)? In a strict sense they are not, although MV approaches and PJL offer opposing approaches to the justification of a political order both in terms of their methodological assumptions (idealizing in the former, realism in the latter) and in terms of their normative content (more demanding in the former, more minimalistic in the latter). To better understand this opposition, we should clarify the two notions. In this paper, I will later define what I mean by MV. For now, however, let me clarify what I mean by PJL. In what follows I will include in PJL any kind of approach that is committed to both the foundation of a just liberal order and the liberal principle of legitimacy (Gaus 1996; Habermas 1990; Larmore 1990; Rawls 1993; Waldron 1987). In other words, PJL here includes all the theories that make the legitimacy of a just order dependent upon the acceptability of such an order to all those who are subject to it. Although there are various theories of public justification, for which a proper justification may demand specific kinds of reasons (public reasons, accessible reasons, shared reasons, and so on, depending on the author), they all share the idea that proper justification requires only certain kinds of reasons, namely good reasons on some moral or epistemic grounds. As we will see, this is one of the main differences between MV and PJL.

Many criticisms have been leveled against PJL. Let us focus here on two charges that typically come from the realist camp to which supporters of MV

usually subscribe. The first is that PJJ is too idealizing an approach. By reducing politics to public justification and by conceiving of political theory as applied ethics, it misrepresents political reality and human motivations. The second charge is that, notwithstanding PJJ being committed to providing an answer to the problem of diversity and claiming to justify order to diverse perspectives, in fact, it ends up being non-inclusive of many positions. By establishing that only reasonable people or doctrines should be part of the justification enterprise or by excluding religious views, PJJ, so the argument goes, fails by its own standard because it is not sufficiently inclusive of diversity.

In light of these considerations, the title of this paper asks whether an MV-based approach can supplement PJJ by providing an account of how a legitimate political order can arise out of diversity without falling prey to the problems of PJJ.<sup>1</sup> In a sense, both MV approaches and PJJ start out from a similar concern: justifying the order against the background of deep disagreements. But they differ as to the kind of grounds they require at the basis of this order. PJJ is demanding and establishes that only certain reasons can justify the order and only certain attitudes are appropriate responses to diversity, while an MV-based approach sets a lower bar regarding the reasons and forms of an order's legitimacy.

Returning to the question of the title, we must now better understand the other components of my starting point. In what follows I will ask what constitute the main features of MV-based approaches and how we should understand the realism criterion.

Famously, Rawls defined MV as an order stemming from an agreement that is reached thanks to the fortunate convergence of the interest of the parties (Rawls 1993, 146). In this sense, Rawls stresses the non-moral motivations of the parties, insofar as the parties are moved only by their self-interest. Here, MV is understood as a kind of social phenomenon, not as a theory. Hence, the question of the title of this paper should be rephrased as to whether the idea of MV as this kind of social phenomenon could be the basis of an entire political theory that recommends and uses MV as a solution to the most fundamental political problems.

In general, MV may be characterized as a kind of arrangement with the following main traits. First, an MV is a kind of social order that citizens

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<sup>1</sup>This point has been especially emphasized by McCabe 2010.

accept for diverse (prudential) reasons. This means that for there to be a MV, there need not be only one kind of reasons in support of it; instead, all reasons, be they moral, prudential or otherwise, are admissible.<sup>2</sup> In this sense, second, an MV is a kind of order that may be reached through different micro and macro forms of negotiation, compromise and diverse types of agreements that need not be only principled in nature.<sup>3</sup> Moreover, people may implicitly accept the order or not reject it, even if they have not explicitly consented to it. Third, an MV is a settlement that may be historically reached in diverse ways. It can be a necessity in ending serious conflicts or wars. But unlike other ideas of order, MV may be the result of any kind of path. Unlike settlements that stem from significant ruptures – such as a constitutional crisis or change – MV can be both the result of an explicit agreement aiming at an MV and the unintended consequence of diverse agreements and changes of attitude at the micro-level.

In practice, MV may be reached through pragmatic compromises or negotiations. Unlike principled compromises, pragmatic compromises and negotiations are obtained for the sake of pursuing an advantage for the individual or the group at stake. Principled compromises, instead, are pursued for the sake of promoting or respecting a certain value (e.g. respecting the agency of other parties, tolerating other perspectives or respecting other epistemic capacities).<sup>4</sup> For this reason it is unlikely to be the case that an MV may be formed by principled compromises because the latter are quite demanding in terms of reasons

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<sup>2</sup> “A *modus vivendi* is a practical accommodation that can be built around any number of factors and be accepted for a variety of reasons by those who are parties to it. Those reasons often will include some measure of self-interest, but may also include more general prudential considerations and whatever moral principles and other values can be effectively mobilized in support of a particular political settlement. This is not, it should be emphasized, to reintroduce liberal principles or an assumed substantive moral consensus through the back door. Rather, it is only to recognize that typically people do in fact share some moral commitments or principles, along with other values, and that this overlap can be quite extensive, if often vague and indeterminate” (Horton 2010, 440).

<sup>3</sup> “A framework for the exercise of political power is grounded in a *modus vivendi* when its main features can be hypothetically presented as designed and adjusted over time through a virtually unrestricted bargaining process between the competing individuals and groups that make up the society” (Rossi 2010, 21).

<sup>4</sup> For further discussion about the difference between principled compromise and pragmatic compromise, see Bistagnino (2018), May (2005), and Weinstock (2013).

for compromising. Although MV and pragmatic compromises are *de facto* often interwoven, insofar as MVs are likely to be formed by multiple pragmatic compromises by diverse parties, pragmatic compromises do not necessarily form or arise in an MV arrangement. Indeed, a compromise may arise in a situation characterized by the prevalence of a consensual form of agreement, namely a pragmatic agreement between a majority and a dissenting minority. For this reason, a non-realist perspective of politics may be open to pragmatic compromises, in lieu of a full consensus with certain parties, but remain reluctant to move towards MV as an overall and stable arrangement regarding the whole polity.

Now we may try to answer the question of what is meant by realism. This is not an otiose question because the term ‘realism’ is both a commonsensical notion and a concept that has been the subject of considerable debate in recent years. Even though it is a complex issue, it seems accurate to say that realism, in this context, entails the following requirements placed upon a theory. First, a realistic theory meets the principle of feasibility. Most realists, but probably not all (for an exception, see Rossi, mimeo), adhere to this connection between realism and feasibility. Certainly all realists are committed to upholding the idea that a political theory should have some significant practical import. This means that if it expresses a normative requirement and is not solely descriptive, a theory is realist if it is not utopian. This means not demanding the impossible and accepting the imperfections of this world as a structural feature of reality. Second, and related to this, both the assumptions and the content of a theory should be suitable to people as they are. This means, among other things, not assuming that people are fully rational or morally motivated, or that in a just state of affairs disorder and irrationality will be swept away. Moreover, it also entails that a theory should include and discuss really existing phenomena and agents (such as political parties, historical events, and so on), thus dropping non-existent elements that are present in idealistic theories (for instance, Rawlsian fictional entities such as Kazanistan, comprehensive reasonable doctrines, and so on). Third, a realist theory of politics rejects the standard idealist approaches according to which normative political theory can be thought of as a form of applied ethical theory. In this sense, politics is a specific domain of reality, which is not reducible to pure moral rules (Burelli 2016; Rossi 2010; Sleat forthcoming).

The connection between MV and realism needs a further clarification. Of course, as we have seen, MV is a kind of social order, while realism is a whole perspective on politics. Despite the obvious differences, I maintain that MV

and realism are closely connected to the extent that MV is used as the cornerstone of a political theory, which, in this case, is necessarily realist in kind. Realism can dispense with MV, but MV as a basis of a political theory cannot but lead to some form of realism. The connection between MV and realism rests on MV's commitment to being descriptively adequate, and in particular more adequate than moralistic approaches, and in putting forward sober (and often minimalistic) normative requirements.

At this point, we can appreciate the realistic strengths of MV with respect to the alleged weaknesses of PJJ. Supporters of an MV-based approach take MV to be more descriptively adequate and capable of practical guidance than PJJ. Descriptive adequacy means a faithful representation of the world as it is, and in particular of how politics actually works. Building on descriptive adequacy, practical capacity means that a theoretical framework provides recommendations that are more fitting to real politics and people, thus avoiding the risk of normative irrelevance. This means not only taking into account real motivations of people, but also considering actual social settings as the result of historical processes. Hence, MV is thought to be capable of making sense of and including phenomena that PJJ either neglects or normatively downgrades. This is particularly the case of unreasonable people. The relation between the reasonable and the unreasonable may be aptly accounted for in terms of MV (on this point, see Sala 2018).

Building on these preliminary considerations, which I take to be an uncontroversial reconstruction of the matter, I want to test whether MV-based approaches can meet their own standards, and in particular whether they are not open to the same critiques that MV approaches level against PJJ. In particular, I will focus on MV as a foundational notion that aims to substitute consensus in PJJ, so as to build an autonomous political theory at the center of which is MV (Horton 2010; McCabe 2010). In this sense, I will not question the very idea of MV, which may still be very important in a political theory that deals with diversity; rather, I will challenge the tenability of MV-based theories, namely those theories (most notably Horton's and McCabe's) in which MV is the cornerstone of an approach that should meet the realistic desiderata above.<sup>5</sup> I will argue that MV falls prey to a partial descriptive in-

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<sup>5</sup> Wendt (2018) has interestingly distinguished between three uses and understandings of MV in recent political thought. First, there is the negative account of MV where



adequacy, which has some implications for its practical applicability, namely the incapacity to indicate how a certain MV arrangement can be improved. Although MV-based approaches are right to highlight some realistic concerns against PJJ, similar worries may also be addressed to MV itself.

In what follows, I will use the treatment of animals as a test case to assess MV-based approaches with respect to the considerations outlined above. Although this case is rather specific, it is also a significant one because it points to new and possibly permanent challenges to order and legitimacy that do not involve the usual issues of ethnic and religious minorities.

## 2. A CASE IN POINT: DISPUTES ABOUT THE TREATMENT OF ANIMALS

In democratic and liberal countries, animals currently enjoy an unprecedented level of legal and social protection. Abuse of animals and their unjustified killing may be sanctioned. Moreover, the raising and treatment of animals on farms and in research laboratories are regulated by a number of rules regarding their welfare and appropriate use. Even the condition of pets in private houses is in many cases ruled by law. For these reasons we may safely surmise that it is likely that animals are better treated now than ever before. However, industrial farming and the massive consumption of animal products account for billions of animal deaths per year. Hence, despite the widespread and advanced concern for animal welfare, the current situation is denounced by animal rights activists as an unprecedented mass slaughter.

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MV is defined as the negative pole that is opposed to the cherished kind of order (Rawls, Vallier). Second, there is the political theory of MV outlined by Gray (2000) and Horton (2010) whereby MV is a notion of social order that is compatible with realist methodological principles. Third, there is McCabe's (2010) *modus vivendi* liberalism, in which MV is made compatible with the liberal principle of justification. Fourth, Wendt (forthcoming) defends an idea of *modus vivendi* as a sui generis phenomenon that identifies institutions that secure peace and order. In this paper, I mainly refer to the second category (Gray's and Horton's political theory of *modus vivendi*), but the same considerations I will put forward are also applicable to McCabe's theory. Despite being liberal and committed to some principle of justification, thus differing from wholehearted realist accounts, McCabe's theory retains some realistic desiderata and MV plays a grounding role as in political theories of MV.

This is a complex situation that may be analyzed from different perspectives and according to diverse criteria. But for our purposes we may only ask: Is there currently a form of social order regarding the treatment of animals? In some sense there is: we have many laws and the vast majority of people adhere to them. Many people also consider animals to be morally relevant from a moral point of view and show at least some concern for them, which may entail the safeguarding of their pets or the avoidance of some products (e.g. furs) or practices (hunting, corridas and the like). A relatively large minority (supporters of animal rights) considers the current situation unjust but may have reasons to appreciate a certain amount of progress in relation to the past (e.g. the obligation to stun animals before slaughtering them, bans on the use of primates in some countries, bans on animal testing for cosmetics, and so on). But a smaller minority within this minority (animal rights activists) challenges this order in a direct way.<sup>6</sup> They oppose current laws and actively challenge them in a range of ways, for instance, through protests, civil disobedience, acts of advocacy, attempts to convince other people to join the cause, acts of animal rescue, and on rare occasions through violent acts. These are vociferous and visible acts but their number compared to the vast majority of people who accept current practices is minimal. That there is broad acceptance can also be confirmed by the number of people who would prefer that animals not be used and/or eaten, but who nevertheless largely accept the situation because it is better than nothing.<sup>7</sup>

How should we describe this situation if we were to follow the categories of contemporary political theory?

Of course, this situation is characterized by a form of deep and seemingly irreconcilable pluralism, which goes beyond the standard Rawlsian characterization. Perhaps the best way to characterize it is by way of Alessandro Ferrara's notion of "hyperpluralism" (Ferrara 2014, 91). Hyperpluralism is

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<sup>6</sup> How many? We do not have the figures. Only some estimates of the numbers of vegetarians/vegans are available. In European countries, the number of vegetarians varies around 10%, and vegans are fewer. <https://www.statista.com/topics/3345/meat-consumption-and-vegetarianism-in-europe/> However, the groups of vegetarian/vegan are not the same as the categories we are discussing, because not all vegetarians/vegans are supporters of animal rights in the sense used here. But these figures may at least offer us an approximate idea.

<sup>7</sup> Horton 2018.

the idea that contemporary societies manifest multiple types of disagreement at different levels and are composed of both reasonable and non-reasonable parties. This means that there can be diverse types of agreement, negotiation or implicit assent by different groups of people. Some may share values on a consensual basis in a Rawlsian style, while others may accept the order out of strategic reasons, and others still may simply be unwilling to act upon their convictions and thereby merely acquiesce to the status quo. This is what Ferrara calls a “multivariate structure” (Ferrara 2014, 106).

One may object to this reconstruction by arguing that such notions have been outlined for the analysis of the whole structure of a polity, while here I am only considering the treatment of animals. Hence, these categories would not be applicable to our case. In response, it is true that the treatment of animals does not concern constitutional essentials and the institutional structure of the state. However, this is a justice-like situation: it affects every person although it does not regard persons; it pertains to an issue that cannot be solved merely through individuals’ private spheres; it demands a public ruling, and it is marred with protests, challenges and disagreement. As such, the standard notions revolving around the justice and/or legitimacy of a social order may be applicable to our case because practices in respect of animals, and the disagreement thereof, are in need of justification.

Can we describe this whole situation as characterized by MV? It is likely that we can because the current situation is the result of years of negotiations and compromises. Furthermore, the current situation is somewhat accepted for different reasons (both principled and pragmatic). It probably cannot be vindicated as the best possible solution by most people.<sup>8</sup> Animal righters completely reject the situation on the basis of principle; supporters of animal welfare would probably strengthen the rules around animal welfare; speciests are dissatisfied with the many hurdles that current rules pose to the treatment of animals, and so on. Perhaps only very moderate supporters of animal welfare – who think that animals are somewhat morally considerable but human interests always trump animal interests in the avoidance of suf-

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<sup>8</sup> It is an open question whether there is a (majority or minority) group that upholds this arrangement on a consensual basis as the best one. If it were sufficiently robust and widespread, then we would have a proper multivariate structure. However, it is difficult to assess this possible consensus because for many people animals are still not a matter of justice, even though many consider them to be morally relevant.

fering – could consider it the best arrangement. Moreover, there is an MV at least between the majority of people who accept the use of animals (typically as a source of food and in scientific laboratories) and the minority of those who are vegetarian/vegan and who would prefer that there be no animal exploitation but somewhat accept the current situation as better than nothing.<sup>9</sup>

Finally, to check whether this is an MV, we can ask whether this situation is a peaceful and secure one. The answer is mostly positive. Only very few animal rights activists (in particular the Animal Liberation Front (ALF) and The Justice Department) have challenged some practices in a violent manner. Only some ALF activists think that there is a war and that they are prosecuting a just war in the defense of animals.<sup>10</sup> And most of the visible actions are acts of sabotage, animal ‘rescue’ or hardline campaign. But we can hardly say that, despite disagreements and some instances of violence, we are at war.<sup>11</sup> The security of people has been threatened only in a few hardline campaigns (for instance, the Stop Huntingdon Animal Cruelty movement in the UK). Even the most radical activists (e.g. ALF) seem to have not committed any physical injury to people – although we should recall that they have perpetrated some acts of psychological intimidation.

Is this a satisfying condition? A preliminary and rather standard Rawlsian consideration could be that an MV does not grant sufficient stability insofar as the parties do not agree for the right reasons, which in turn might be detrimental to their support of the arrangement. This concern for stability in part seems sensible to the extent that there is a growing number of vegetarians and advocates for animals. Moreover, dietary habits are changing quickly, while rules are slower to adapt to such change. However, this focus on stability misses some key points, because we should not suppose that further variation in social attitudes towards animals will inevitably result in increasing disorder or conflict. We should not take for granted that the evolution of the status quo is to be more favorable to animal righters. An MV can be an evolving

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<sup>9</sup> Francione (1996) has famously claimed that the animal rights movement has lost its commitment to liberation in favor of a convinced or acquiescent concern for animals in a condition of exploitation.

<sup>10</sup> This claim has sometimes been put forward by ALF activists. But it has also had a more academic formulation (e.g. Bernstein 2004, 101-103).

<sup>11</sup> I do not discuss here whether these cases are cases of terrorism. See Hadley (2009).

and flexible order. And this speaks in MV's favor. Hence, the argument from stability does not represent a real challenge to the reconstruction thus far.

So what is the problem with this reconstruction based on the idea of MV? It seems that the categories employed so far provide a sufficiently faithful picture of reality. But I want to challenge this impression with two questions. First, is this a fully convincing picture of the current state of affairs? Second, should we be satisfied with the fact that there is an MV at the heart of the current disagreement regarding the treatment of animals? And should the parties be content with this? As the reader may recall, the first question reformulates the need for descriptive adequacy, while the second expresses the requirement of prescriptive capacity.

### 3. IS MV DESCRIPTIVELY ADEQUATE?

Let us focus on the issue of a framework's descriptive capacity. Realist approaches, including MV, claim that liberal moralism, as Horton calls it, which also includes PJL, fail to correctly represent reality because, among other things, in them there is "little real appreciation of how political processes and institutions work in practice" (Horton 2017, 490), there is a neglect of the power dimension of politics, and so on. In what follows I will argue that MV-based approaches also fall prey to a (partial) descriptive inadequacy and are not equipped to represent social reality in a satisfying manner.

To broach an answer to the question of descriptive adequacy, let me pose a straightforward question: Is an MV what people request and want? Since MV-based approaches seek to take people as they are and analyze real situations (not hypothetical ones), and actual social acceptance is what determines legitimacy, it is not out of place to ask such a question. On the one hand, we may doubt that an MV is what people want because most people would prefer an arrangement that is either more supportive of animals or less so. On the other hand, this is not a problem insofar as the specificity of MV approaches is to show the legitimacy of a situation that is structurally suboptimal or "second-best". People have reasons to accept it as a second-best because: (i) it might be an improvement with respect to other possible alternatives; (ii) people usually prefer order and peace to no order at all; or (iii) such a situation is the result of a compromise that at least realizes in part the preferred values and signals a middle ground between competing claims. This is probably the case in our situation.

Before concluding that this reconstruction is descriptively satisfying, let us unravel what descriptive adequacy may mean in a more specific manner. An approach is descriptively adequate at the *macro*-level if it can account for the macro phenomena, for instance, social classes, parties, nations, and so on; or it is adequate at the *micro*-level if it can make sense of the functioning of the basic components of a state of affairs (individual behavior, family relations, and so on). An approach is descriptively adequate from a *behavioral* point of view if it can trace the outer functioning of the social elements at stake (for instance, if it can make sense of the observable behavior of the elements of an order without taking into account the grounds for that functioning). An approach is descriptively adequate from a *motivational* point of view, by contrast, if it can make sense of the internal grounds for the behavior of the elements of a state of affairs.

These distinctions are far from conclusive, and merely aim at outlining a more fine-grained, yet incomplete, characterization of what descriptive adequacy might mean. If they hold true, we may try to better understand in what sense an MV-based approach is more descriptively adequate than PJJ. Theories based on MV take pride in MV's capacity to explain that a peaceful order has been reached, if at all, despite the fact that people may have diverse and conflicting reasons to accept the order. In this sense, an MV-based approach may be adequate from a macro and behavioral point of view. However, this does not necessarily grant that an MV approach is adequate from a micro and motivational point of view. This is so because an MV typically tracks the emergence of an order as a social phenomenon and is seldom interested in differentiating between different types of order. A supporter of MV may be suspicious of, if not baffled by, this claim: How can MV not be appropriate in this context if MV is precisely open to diverse motivations, types of relations and attitudes? Indeed, MV-based approaches do not restrict themselves to a specific source of acceptance so as to filter only good reasons and good types of attitudes that explain social order. In this sense, MV-based approaches are open to diverse motivational bases. But this openness and methodological richness seems, *de facto*, to be obscured by the recurrent insistence that what counts in the end is the dyad of peace and order. I am not claiming that in principle an MV-based theory should necessarily suffer from this problem, but as things are currently outlined, this seems to be the case.

To better illustrate my point, consider the following question. Would people think that the state of affairs regarding the treatment of animals is accept-

able because it is a peaceful order? As anticipated, most people, if possible, would opt for a different order, be it more pro-animals or more pro-humans. In this sense, MV is admittedly trying to make sense of the goodness of a second-best order. And some people may recognize their motivations as second-best motivations to abide by this order. But making peace and order the master values reveals an assumed but non-justified normative preference for them. Such a preference may seem to be necessary to meet the requirements of descriptive adequacy, but this is so only to the extent that we privilege outer behavior and macro level explanation, thus overlooking the motivational and *micro*-levels of explanation.

Besides peace and order, at the *micro*-level people usually want that their goals to be more fully realized. Hence, when faced with disagreement, people engage in political activities, campaign or just discuss and argue with their friends and families in an attempt to convince them otherwise. What happens in these situations is an exchange of reasons, namely people want to be right and recognized to be so, rather than merely accommodate their conflicts. In other words, in many daily interactions, people do not seem to be engaged in finding an MV, for they seem rather engaged in an (often imperfect) kind of reason-giving that aims at finding the truth or convincing others at a substantive level. Then, it frequently happens that people become disillusioned about the real possibilities of convincing others or finding the truth, and as a consequence they may accept that an MV securing peace is all that can be secured. However, even if an MV arrangement is likely to be a frequent result, what comes before reaching it – people's continuous activities and debating for a better order – can hardly be accounted for in terms of MV. Overlooking all the other activities of reason-giving that aim to justify a point neglects an important part of reality.

Of course, MV theorists do not deny that an order is reached thanks to a variety of debates and negotiations. On the contrary, as noted, an MV may be the open result of 'unrestricted' forms of negotiation and other forms of agreements. But MV theorists, when making this point, do not make sense of it because they are just interested in the ultimate end of a secure and peaceful order. In other words, I am unconvinced that an MV-based approach as a theoretical perspective can make sense of the social phenomenon of requesting that something be justified appropriately, and that people or states provide (good) reasons for their actions. Public justification is usually taken to be a rather idealized setting, but it may have a surprisingly realist, descrip-

tive counterpart in the fact that people frequently discuss matters to find an agreement and are sensitive to the kind of reasons that are provided. This does not mean, though, that PJJ is in any case more descriptively appropriate than MV-based approaches. It simply means that descriptive adequacy may demand of MV-based approaches more fine-tuned categories and an attention to what comes before (and after) the achievement of an order.

More broadly, MV-based approaches tend to drive a wedge between moralistic approaches and realistic ones, the latter being very minimal (too minimal) in their normative requests as to the kind of agreement that the parties reach in an MV. But people are more often than not quite demanding and not necessarily lenient with respect to the kind of agreement they want to achieve. Indeed, to take just a few examples without being exhaustive, in real negotiations people put forward a number of normative demands. For instance, they want to be treated fairly in the process independently of whether they achieve the desired result;<sup>12</sup> they want to receive good reasons, and if this does not occur they tend to feel (rightly) disrespected; people may be worried about unequal relations of power at the beginning of and during a negotiation, as well as the procedures that crystallize symbolically such inequality, even though they know that the result is doomed. In sum, normative demands are likely to emerge in many real-life negotiations that end up in MV-like arrangements. These normative demands typically concern the type of arguments that the parties ought to exchange, namely those requested to be put forward and those expected to receive; and they concern the relational structure of negotiation, in that the parties are unwilling to take part in negotiations that too harshly express differences in power. In brief, the values of exchanging good reasons and of having a real or symbolic fairness in negotiations are values that people tend to cherish in real negotiations – even those that do not necessarily aim at a full consensus and are more likely to end up in an MV-like arrangement. How can MV-based approaches account for these normative demands?

My sense is that MV-based approaches are only seemingly rich in descriptive terms because of their exclusive focus on order and security as either mas-

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<sup>12</sup> On the axiological dimension of procedures to handle value conflicts, see Ceva (2016). She correctly emphasizes the moral nature of the procedures, whose value is to be judged intrinsically, namely independently of the kind of result to which they lead.



ter values or interpretive lenses. Matt Sleat has put forward a similar point in more general and normative terms:

Put differently, we need a justification of the liberal state that goes beyond justifying its capacity for physical coercion through the creation of order because the power that now stands in need of justification is more permeating, ubiquitous, and imaginably insidious, and does not necessarily have much if anything to do with the maintenance of peace and stability (though the state might claim that it does). My worry, therefore, is that *modus vivendi* is asking a possibly outdated question regarding the legitimacy of coercive power when the political reality, and in particular the nature of the power in need of justification, has changed considerably. (Sleat mimeo, 11).

I would add that the restriction on order and security is not only limited with respect to what we should protect from a state's invasiveness. It is also somewhat limited and misguided with respect to the kinds of claims that people put forward. Consider our case of disagreement about the treatment of animals. Peace and order is what we more or less have. But is this what people want? And should we not track this if we want to be descriptively adequate?

McCabe seems to be aware of this worry when he poses the question as to whether a theory based on MV fails to do what we want from a political theory – namely a rationally vindicated and fully justified solution to dissent.<sup>13</sup> His answer is that this worry is misplaced because in fact people do without fully harmonious solutions. People live well in second-best settlements and theoretical coherence is not an important task (McCabe 2010, 239-240). But this seemingly realist remark – calling for a retraction from a utopian society where disagreement is overcome – misrepresents the point. Consider,

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<sup>13</sup> “It must be acknowledged that the *modus vivendi* liberalism I have outlined is not entirely satisfying. In two main areas it seems especially inadequate. The first concerns the worry that MVL [Modus Vivendi Liberalism] fails to provide precisely what we want from a political theory – viz., a rationally vindicated solution to the problem of moral conflict that all parties within a political community would wholeheartedly accept. MVL does not resolve the moral dissensus that is the context for liberal theory through a more complete and reflective account, it might be said, but instead acquiesces to such conflict and shows us only how to manage it. In thus failing to articulate a rational harmony among the competing parties of liberal society, it fails to reconcile us to our social world in the manner of philosophical reflection at its best.” (McCabe 2010, 237).

for instance, the case of treatment of animals: those interested in change are mostly motivated by a sense of injustice; they are not necessarily moved by the search for an ideal harmonious state. Irrespective of this, it does not solve our problem either. Indeed, what those who are most unsatisfied with the status quo want is a proper vindication of the order or a change of the order.

Let me explain further my sense of dissatisfaction with the supposed descriptive adequacy of MV approaches. At their core is a half-descriptive/half-normative claim that the basic needs of individuals and society are peace and security. But perhaps this is not what people most ardently want. And this is not necessarily what they may demand of each other. In sum, MV approaches seem either to conflate what people need, what people want, and what people may demand of each other, or to prioritize the needs over the wishes and demands. Of course, in some cases the three may coincide. However, they have diverse normative features. What people need is an objective feature, which can be ascribed from a third-person perspective regardless of what people think. What people want is structurally subjective and depends upon people's desires, projects, and preferences. What people can demand of each other is an intersubjective domain that is reducible neither to the objective components of individuals and society, nor to its subjective features, for it rather depends upon the content of justice. Failing to distinguish these three elements may result in an impoverished account of social reality.<sup>14</sup>

The major ground for MV's descriptive approach is its refusal of PjL's idealization and acceptance of a realist methodology. However, MV's insistence on rejecting idealizing approaches is somewhat misleading. Idealization may be suitable or unsuitable for the purposes it is meant to serve (Valentini 2017). But then idealism is to be assessed with respect to its normative capacity, not its descriptive one. MV's supporters may reply in turn that idealism's lack in descriptive capacity is reflected in its false assumptions at the basis of normative theorizing. Hence, the descriptive dimension also affects the normative one. To be true, MV-based approaches may have a point in this regard. But what I want to emphasize is that their rejection of idealization cannot be the only answer to PjL's problems in descriptive adequacy, because

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<sup>14</sup> Horton (2018, 55) recognizes that peace and security are not 'super-goods' or what people necessarily want. That is fair enough. However, in practice the realist use of MV has always been quite insistent and *de facto* reliant on this assumption.

idealization may be only one of the possible causes of the failure to meet the desideratum of descriptive adequacy. Another cause may be, as we have seen, the simplistic informational basis and the lack of nuanced categories that affect MV-based approaches.

In sum, I do not mean to say that MV approaches are descriptively wrong. Rather I claim that they provide only a partial descriptive account. But if so, one may rejoin that ultimately *any* approach is subject to this critique because it is realistically impossible to be descriptively complete. What counts, an MV supporter may claim, is that an approach is correct in describing the main features of a state of affairs and in assuming the realistically correct traits of the world. That is fair enough, but in what follows I contend that, from this descriptive partiality, a further flaw in MV's normative dimension follows.

#### 4. WHAT KIND OF NORMATIVE GUIDANCE?

In light of the considerations above, we may ask: What might an MV-based approach recommend in a situation of deep disagreement, such as the one on the treatment of animals and many others?<sup>15</sup>

First, we may suppose that we should consider an MV as a satisfying arrangement. Insofar as a situation can be described as an MV-status quo, on the view of MV-based approaches it is legitimate and hence satisfying. Therefore, no further action should be taken because an MV-arrangement guarantees peace and security and may comply with other cherished criteria (minimal respect for human rights or genuine consent). This view seems coherent with a binary account of MV, according to which either we have an MV-like kind of order or we do not have such an order (either because there is no order at all or because such an order is consensual). That means setting a threshold above which all kinds of order are acceptable and below which all orders are unacceptable. However, the recommendation of being satisfied with an MV

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<sup>15</sup> Horton abandons the idea that political theory has a proper prescriptive role, and rather claims that the best one can do is to provide a satisfying interpretation of reality (Horton 2017, 497). So far I have quoted Horton many times in virtue of his being both an MV theorist and a realist. However, the practical guidance requirement is usually thought to be an important requirement, particularly if it is usually considered a weakness that MV theorists identify in other approaches. Hence, my question is pertinent.

arrangement neglects the fact that many people may not be fully satisfied. But the supporters of MV could rejoin that the second-best is all what we can hope for. However, this pessimistic conclusion is not necessarily realistic. History is full of examples of certain arrangements that seemed “all things considered acceptable second-best”,<sup>16</sup> but which were later challenged by some stubborn, unsatisfied group of persons who would eventually change the situation. It is true that the ideal is usually unattainable, but how close/far the status quo is posited with respect to the ideal may make a lot of difference. Merely saying that a certain order is acceptable because it is better than nothing and most people accept or do not want to change it amounts to relinquishing the normative role of a theory. We need a further criterion to establish whether or not the second-best solution is, all things considered, satisfying. But my contention is that MV cannot provide it. (See the next point).

Second, supporters of MV may acknowledge that there is a sort of imperfect MV insofar as there are grounds for dissatisfaction, and may encourage the parties to pursue a better MV. This is, unlike the previous account, a scalar understanding of MV, according to which we can measure the goodness of an order, and hence also of an MV along a certain continuum. This view is preferable to the binary understanding above. If we are faithful to the realistic spirit of MV-based approaches, this should be preferred because a binary account exists and is detectable to the extent that one can establish and find a threshold that defines what is MV and what is not. But setting this threshold is somewhat arbitrary and neglectful of the fact that in practice everything occurs in degrees. For instance, what truly counts as a peaceful order? Should there be no violence at all or only a minimal amount of it? And if so, how much? Answering these questions requires sensitivity to degrees and nuances that are at odds with a binary account of MV. But, then, if we opt for a scalar account of MV, we are open to ameliorations of MV because nothing would prevent us from being unsatisfied with some level of MV. In this case, what is meant by a ‘better’ MV? It may mean two things.

First, pursuing a better MV may mean seeking to implement an order that more fully embeds the reasons for which an MV is acceptable, namely order

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<sup>16</sup> This is admittedly a strange and seemingly contradictory notion. What I mean is that a state of affairs may seem the second-best and yet still be fully acceptable and probably satisfying in virtue of the impossibility of reaching the ideal or because of disagreement about the ideal.

and peace. Can the pursuit of more order and peace be a convincing basis for disagreeing parties to find a better agreement? I doubt that it can. Consider our case of disagreement about the moral status of animals. Can we say to the disagreeing parties “look, we understand that this is not the ideal situation and that you might have grounds for dissatisfaction, but if you pursue further order and peace, in the end you will be happier”? I doubt it would be a convincing solution insofar as we are in a condition of almost complete order and security, and this answer proposes more status quo as a solution to those who criticize the status quo regarding animals.

The second way to interpret the idea of pursuing a better MV focuses on MV's being a second-best. Fabian Wendt (2016) has plausibly argued that MV arrangements may be assessed in terms of how close/far they are with respect to the ideal. Insofar as an MV arrangement is second-best, it is second-best with respect to an ideal (or more ideals, because people typically disagree about what constitutes the ideal). Notwithstanding the plausibility of this point, it is not a viable solution to our problem. To see this, consider the following. I take these three features to be necessary of an MV:

- 1) An MV arrangement is structurally second-best with respect to a more preferable arrangement or ideal;
- 2) Unlike PJJ, an MV-based approach is very inclusive towards the types of reasons and motivations that people can have for accepting it;
- 3) An MV is normatively minimalist: it is sufficient that there is order and security plus another criterion – e.g. respect of a minimal set of rights (McCabe), or a lack of forceful imposition of the order (Horton) – for the order to be legitimate.

Taking these three conditions together, it is difficult to see how we can pursue a better MV from within an MV-based approach. As Wendt says, we can rank different MV-arrangements in terms of the extent to which they are distant from or close to the ideal. But ranking an MV in virtue of its being second-best can only be done in the light of the ideal of which an MV is the second-best. Hence, from within MV's perspective, which is characterized by conflicting values and possible ideals, we cannot know how to pursue the ideal and improve the second-best that is possibly far from ideal. Indeed, we would need to return to the idealizing approach that an MV-based approach seeks to replace. Alternatively, we may relax either the second or the

third condition. That is to say, we may be less inclusive of the types of reasons and motivations that people may have to accept the MV. But if so, we would end up with a standard liberal public justification. As an alternative, we may make the third condition more demanding, but, in this case, we would lose the realistic and inclusive features of MV, thus getting closer to what Horton calls a 'moralistic liberalism'.

In sum, pursuing a better MV by seeking to approach the ideal can be done only at the cost of borrowing the normative criterion from other perspectives, thus including more robust and less minimal moral criteria, or by distinguishing between people's motivations, thus excluding some people. As second-best perspectives, MV-based approaches do not relinquish their normativity because they retain some claim to legitimize some social order. However, they lose either their action-guiding character or their theoretical autonomy because they need the help of other, more robust theories to establish what a better order would look like and what value should be further pursued.

There is a sort of short-circuit at play here. The realistic virtue of an MV-based approach is that of making a virtue of necessity, namely of arguing that second-best solutions are all that we can achieve because best solutions are unachievable or counterproductive in practice. But, where an MV already takes place, one cannot utilize MV to offer a better solution. MV can only offer an appropriate approach if the real problem is order and security. Otherwise, it can be the unintended result of parties fighting, negotiating, or campaigning for something else, namely for the realization of their favored goal, which cannot even be achieved. But from within a pure MV-based perspective, we do not have any guidance to improve an MV if MV is what we already have.

## 5. CONCLUSION

In conclusion, it is worth noting a further peculiarity of MV. If we interpret MV as any kind of order that is accepted by the parties for whatever reason and that is not imposed, we may say that nearly any kind of social arrangement could be characterized as a form of MV. With the exception of very rare cases of consensual just orders, on the one side, and orders achieved by force of despotic regimes, on the other, all more or less accepted social orders may

be described as MV.<sup>17</sup> This very ecumenical interpretation is far too inclusive, and risks losing the peculiarity of MV with respect to other notions.

Now, we can finally try to answer the question from the outset: How do MV-based approaches fare with respect to the requirements of realism? An MV-based approach is probably more realistic than PJJ. However, its narrow focus on order and security may be blind to further demands that require a more robust concern for normative reasons.

Supporters of MV have aptly challenged PJJ for its lack of realism. But I doubt that MV can be an autonomous perspective, at least in its current form. To be an autonomous perspective in political theory, it would need to include, indeed, more details and a more fine-grained structure to meet the desideratum of descriptive adequacy and a clearer normative commitment to discharge its action-guiding function.

To conclude, my aim in this paper was to test MV-based approaches against their own standards. My critical remarks addressed MV as a pure alternative to PJJ and as a foundational notion of a political theory that aims to be – as it were – ‘freestanding’. I did not want to challenge the very idea that MV may appropriately describe certain states of affairs, or that it could appropriately legitimize them. In fact, MV can work both descriptively and normatively as a complementary perspective within PJJ. Here I cannot discuss in any detail what this would mean. Suffice it to sketch a possible division of labor. To that end, MV could play the role of covering the faults of PJJ by including those parties that are typically left out of public justification, whether they are unreasonable or just alien to the kind of agreement that PJJ pursues. Who comprises these parties that are outside of public justification depends on the sort of PJJ at stake. Hence, the kind of MV complementing PJJ may vary accordingly. But it is a virtue of MV as a notion that it is sufficiently flexible to cover diverse possibilities in a functional division of labor.

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<sup>17</sup> Jones (2017, 454) is more skeptical of this and claims that in our societies in fact there may be more consensus, at least at the fundamental level of constitutional essentials, than supporters of MV may be willing to recognize. That is possible. However, as Jones aptly points out, even in quasi-consensual conditions, such accounts of MV as Horton’s would consider as a MV even some quasi-consensual situations in virtue of the fact that such a condition has been reached through many fortuitous circumstances and contingencies that cannot be defended as optimal.

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Il libro di Federica Liveriero, *Decisioni pubbliche e disaccordo. Giustificazioni e compromessi tra pari epistemici*<sup>1</sup>, tratta, con una prospettiva liberale rawlsiana e post-rawlsiana, la questione della *legittimità* delle istituzioni politiche democratiche e della *giustificazione* pubblica sia di una concezione della giustizia, sia delle decisioni politiche collettive, da adottarsi in contesti democratici. Liveriero si chiede quali standard e principi devono essere soddisfatti affinché la *coercizione* delle istituzioni politiche democratiche risulti giustificata a tutti gli agenti su cui la coercizione è esercitata, e, in seconda istanza, come, in questi stessi contesti democratici, si possono giustificare pubblicamente e in modo rispettoso tanto l'adesione a un framework liberale di sfondo, quanto le decisioni collettive maturate alla luce del disaccordo tra cittadini con visioni comprensive molto diverse tra loro – tra cui anche visioni *irragionevoli*. Tali domande non sono nuove per il pensiero liberale. Originale e robusto dal punto di teorico e normativo è però sia il modo di affrontarle, sia la risposta che viene fornita a entrambe le questioni.

In maggior dettaglio, Liveriero avvia le proprie riflessioni riscontrando un *dilemma giustificativo* inerente al modello di legittimità e giustificazione offerto dal pensiero liberale, e si propone di risolverlo. Tale dilemma è il seguente: da un lato, al pensiero liberale preme fornire un modello di legittimità la cui giustificazione è ancorata ad argomenti strettamente *normativo-filosofici*, la cui accettabilità è pensabile per agenti fortemente idealizzati, ma difficil-

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<sup>1</sup>Il volume recensito è *Decisioni pubbliche e disaccordo. Giustificazioni e compromessi tra pari epistemici*, Roma, Luiss University Press, 2017, 259 pp., di Federica Liveriero.

mente per agenti in carne e ossa; da un altro lato, però, il versante «volontaristico» della tradizione liberale spinge a ricercare un modello di legittimità accettabile anche da cittadini reali, ossia che può essere sostenuto effettivamente e stabilmente dalla motivazione di agenti reali. Questi due desiderata sono in tensione tra loro: se si propende per la prima alternativa, si avrà un modello di legittimità solido e “carico” dal punto di vista normativo, ma verosimilmente non capace di fare presa sulle motivazioni di agenti in carne e ossa; se, invece, si imbocca la seconda via, il modello di legittimità avanzato sarà stabile e efficace dal punto di vista motivazionale, ma potrebbe portare a ritenere legittime decisioni che, in un'ottica strettamente normativa, non risultano pienamente giustificabili (pp. 16-18).

La tesi centrale di Liveriero, difesa nei cinque capitoli che compongono il suo libro, è che non è né necessario, né desiderabile propendere per un corno del dilemma a scapito dell'altro, come invece hanno fatto molte/i liberali. Al contrario, l'idea di Liveriero è che l'impresa giustificativa del liberalismo può e deve soddisfare entrambi i desiderata. Ciò a patto – questa la proposta sostantiva avanzata – di distinguere tra due momenti differenti ma complementari della giustificazione, aventi quale riferimento due *constituencies* distinte. Anzitutto, in fase *ideale*, agenti idealizzati troveranno un accordo circa un framework normativo liberale di ragionamento che è “a maglie larghe” ed è compatibile con alcune idee di sfondo dei contesti democratici; in seconda battuta, tale framework generale sarà specificato e “sostanziato” in vario modo da cittadini reali in contesti *non ideali*, attraverso pratiche principalmente *deliberative*. In tal modo, secondo Liveriero, il primo desideratum, ossia la necessità di proporre un modello di legittimità che rimanda a ragioni imparziali e universali, è soddisfatto nella fase ideale del modello; il secondo desideratum, invece, vertente sull'opportunità di guadagnare l'adesione di cittadini reali al modello proposto, dovrebbe essere soddisfatto in fase non-ideale, in cui ai cittadini reali è chiesto di prendere decisioni collettive facendo uso delle proprie concezioni comprensive, purché esse siano rispettose della cornice liberale elaborata in sede ideale e siano portate nel dominio pubblico poggiando su argomenti intellegibili per chiunque. La fase non-ideale assume quindi nel discorso di Liveriero un ruolo giustificativo, anche se deflazionato, in quanto si concreta in pratiche deliberative che tengono conto anche delle prospettive degli irragionevoli.

La ragione principale di questa duplicità giustificativa è spiegata da Liveriero in termini tanto *morali*, quanto *epistemici*. Per un verso, è desiderabile un'idea

di legittimità che sia *robusta* rispetto alle opinioni conflittuali dei cittadini, in modo tale da non essere eccessivamente sbilanciata verso lo status quo. Per un altro verso, tuttavia, è altrettanto desiderabile rispettare l'*agency riflessiva* dei cittadini reali, e cioè tentare un'effettiva conciliazione tra i sistemi di credenze da essi sostenuti e il "modulo politico" esito della fase ideale (p. 19).

In questa direzione, nel primo capitolo del libro, Liveriero introduce le *circostanze epistemiche reali della giustificazione*, ossia quei fatti di natura epistemica di cui il liberalismo non può non tenere conto se intende fornire un modello di legittimità rispettoso dell'*agency* riflessiva di cittadini in carne e ossa. Tali circostanze sono la presupposizione doxastica, per cui la giustificazione di una credenza che  $p$  è soddisfatta non solo riferendosi all'insieme di ragioni *proposizionali* in favore di  $p$ , ma anche «alla performance deliberativa dell'agente per cui  $p$  dovrebbe risultare giustificata» (p. 33); la clausola fallibilista, e cioè l'idea che si può essere giustificati a credere che  $p$ , anche quando  $p$  si rivela essere una credenza falsa; l'opacità nella considerazione delle evidenze, visto che le nostre capacità cognitive e probatorie sono limitate (pp. 36-40); e gli oneri del giudizio delineati da Rawls (Rawls 2012, 51-55). Dopo aver sostenuto che il *coerentismo* è il metodo giustificativo che dà meglio conto delle circostanze epistemiche reali, Liveriero afferma che tali circostanze ci «forniscono delle buone ragioni per sostenere la genuinità del disaccordo ragionevole tra agenti» (p. 48). Infatti, poste queste circostanze epistemiche, si può sostenere coerentemente che due differenti agenti possano essere entrambi giustificati nel credere, rispettivamente, che  $p$  e che  $\sim p$ . Ciò ha una conseguenza rilevante circa il disaccordo su questioni valoriali: se è vero che diversi agenti possono credere giustificatamente che  $p$  e che  $\sim p$ , rispettivamente, segue che non esiste un'autorità epistemica indipendente da essi e pubblicamente legittimabile che può decidere che  $p$  o che  $\sim p$ . In altre parole, i cittadini «condividono l'autorità epistemica» (p. 49). Inoltre, dato che le loro capacità epistemiche sono limitate, essi «condividono la medesima probabilità di commettere un errore» (p. 52). Per queste due ragioni, secondo Liveriero, ai cittadini di un contesto democratico va ascritta la *parità epistemica*, ossia l'eguale potere di ragionamento circa questioni valoriali, come uno dei criteri della legittimità democratica. In questa direzione, i cittadini sono *ragionevoli* se riconoscono la prospettiva doxastica e la loro parità epistemica, ossia l'impossibilità di ricorrere a un punto di vista esterno per risolvere i disaccordi valoriali, e, alla luce, di ciò, rispettano un *vincolo di modestia epistemica*, ovvero accettano di essere epistemicamente fallibili e attribuiscono una credibilità minima alle credenze dei propri cocittadini – anche laddove non le fanno proprie.

Nel secondo e nel terzo capitolo – quest'ultimo quello nodale – del libro, Liveriero propone la sua tesi nodale circa la legittimità liberale. L'idea, già accennata, è che il modello rawlsiano di legittimità è adeguato se rivisto distinguendo appropriatamente tra fase ideale e non-ideale del modello, e conseguentemente tra le diverse *constituencies* di riferimento. Nello specifico, ad avviso di Liveriero, in fase ideale, i cittadini idealizzati hanno il compito di trovare un *equilibrio riflessivo ampio e generale* tra i propri sistemi idealizzati di credenze e le idee di sfondo delle società democratiche – idee che, pertanto, saranno viste come legittime. Ciò è in grado di produrre un *overlapping consensus* intrasoggettivo. In secondo luogo, ancora in fase ideale, questi stessi cittadini producono un argomento *freestanding* non circa una concezione sostantiva di giustizia, ma in favore di un framework normativo di ragionamento “a maglie larghe” utile a garantire, in fasi meno idealizzate, disaccordi *giustificativi* ma non *fondazionali* – in altre parole, si concorda su una cornice normativo-liberale di riferimento, seppur restando in disaccordo rispetto ai singoli principi e norme specifici. L'esito finale di questa fase è un *equilibrio riflessivo* di natura *politica*, secondo cui i sistemi idealizzati di credenze dei cittadini risultano compatibili con il framework normativo elaborato, il quale, perciò, risulterà legittimo. In fase non-ideale, invece, questa la scommessa di Liveriero, i cittadini reali dovrebbero essere spinti, tanto alla luce delle istanze di rispetto e reciprocità sollevate dalle circostanze epistemiche reali, quanto dal fatto, normativamente “carico”, di prendere parte al gioco democratico, a trovare un *compromesso riflessivo* sulla bontà di un framework di ragionamento normativo e liberale condiviso – quale quello tratteggiato nella fase ideale, e poi a specificarlo sostantivamente e, in modo diverso nelle differenti società politiche, attraverso pratiche deliberative. In breve, quindi, la legittimità delle decisioni politiche dipenderà «dalla possibilità che la fase non ideale delle deliberazioni pubbliche e dei processi di decision-making ben si concili con il framework normativo di sfondo» (p. 138). Come si vede, dunque, secondo Liveriero la legittimità delle decisioni collettive fa riferimento tanto ad argomenti ideali, quanto a deliberazioni effettive, in cui, mediante compromessi, entrano ragioni sia morali, che prudenziali e strategiche.

Nel quarto capitolo, poi, Liveriero tratta l'ideale rawlsiano di *ragione pubblica*, e lo interpreta come il tramite collegante la prospettiva strettamente *giustificativa* del progetto del liberalismo politico, al versante *deliberativo* dello stesso (p. 146). Liveriero qui si chiede se i vincoli della ragione pubblica, ossia, nella sua interpretazione, il vincolo di reciprocità, la modestia epistemi-

ca e l'ascrizione di parità epistemica (p. 148), siano compatibili con l'ideale liberale di *inclusività*. In altri termini, è plausibile aspettarsi che i cittadini reali, i quali hanno visioni comprensive molto differenti tra loro e non di rado non compatibili, rispetteranno i vincoli della ragione pubblica, nelle loro deliberazioni collettive, cui l'ideale di ragione pubblica si applica? La risposta data da Liveriero a questa domanda è positiva. A suo avviso, infatti, «una volta che si sia dimostrato che i cittadini convergono sulla validità di certi standard condivisi (cosa che può avvenire al livello dei differenti compromessi riflessivi, N.d.A.), è possibile immaginare che essi possano anche essere motivati a rispettare i vincoli normativi e epistemici imposti dalla virtù della ragionevolezza» (p. 148), richiesta dall'ideale della ragione pubblica. Inoltre, questo ideale, se è inteso quale uno strumento deliberativo concernente leggi ordinarie e non un'intera concezione della giustizia, non impedisce che i cittadini facciano appello alle loro visioni comprensive. Tale appello è anzi permesso, visto che «ciò che è rilevante è l'accordo sul valore della norma (N), piuttosto che il consenso sull'insieme di ragioni che giustificano la medesima norma (N)» (p. 152) – ragioni che, di conseguenza, potranno variare da soggetto a soggetto, secondo un modello giustificativo *convergentista* e non *consensualista*. Il capitolo si chiude poi con una sezione intesa a mostrare i relativi vantaggi del liberalismo politico rawlsiano rispetto al liberalismo giustificativo di Gerald Gaus.

Infine, nell'ultimo capitolo del libro, Liveriero avanza l'idea che, nei contesti politico-democratici reali dove si dà disaccordo profondo tra gli agenti, il *compromesso*, ossia la scelta di accettare esiti subottimali rispetto alle proprie preferenze, ma accoglibili da tutti i soggetti coinvolti (p. 189), è lo strumento *epistemicamente e moralmente* migliore per risolvere i disaccordi tra cittadini intesi quali pari epistemici – specie se il termine di paragone è la ricerca di poco realistici accordi *consensuali*. Difatti, i compromessi, specie se *di principio* invece che meramente *pragmatici*, da un punto di vista epistemico, permettono di tener conto delle circostanze epistemiche della giustificazione. Del resto, nel giungere a compromessi scambiandosi ragioni, i cittadini non sono costretti a rivedere le proprie credenze. I compromessi, piuttosto, testimoniano la volontà dei singoli di condividere l'autorità epistemica: benché A creda che  $p$  e B che  $\sim p$ , A e B decidono per il second-best  $q$ , in quanto riconoscono che non si dà un agente C che legittimamente possa decidere che  $p$  o che  $\sim p$  (p. 191). In un'ottica morale, d'altra parte, i compromessi mostrano che i cittadini sono in grado di soddisfare «certi requisiti di rispetto e recipro-

«i compromessi riusciti si instaurano grazie alle concessioni reciproche che ogni soggetto è disposto a fare, rinunciando a parte delle proprie rivendicazioni» (p. 190). In questo senso, nei compromessi si ritrovano soddisfatti i due desiderata che sono distintivi del pensiero liberale, su cui si concentra il libro: per un verso, come si è appena notato, essi hanno un valore normativo; per un altro, però, essi sono l'esito di accordi effettivi di agenti in carne e ossa, col loro bagaglio di credenze.

Sono numerosi i pregi del libro di Liveriero. In questa sede, vorrei soffermarmi su due di essi. Il primo pregio, piuttosto generale, che vorrei menzionare è la ricchezza teorica del libro e la sua coerenza interna. Liveriero riesce infatti a comporre in un tutto unitario e coerente idee e tesi che provengono dai più svariati dibattiti della filosofia politica normativa contemporanea. Nel primo capitolo del suo libro si affrontano tanto le interpretazioni epistemiche del liberalismo, quanto l'epistemologia del disaccordo e l'idea di parità epistemica. Nel secondo e nel terzo, d'altra parte, ci si imbatte nel liberalismo politico rawlsiano e in quello radicalmente antiperfezionista di Johnathan Quong, ma anche nel dibattito tra approcci ideali e non-ideali alla legittimità e alla giustizia. Nel quarto capitolo, poi, è la deliberazione democratica al centro della riflessione, e peraltro tale idea viene interpretata in senso giustificativo. Nell'ultimo capitolo, infine, viene discussa e criticata la letteratura sul consenso e quella sul compromesso, rispettivamente. Come dicevo, una ricchezza teorica degna di rilievo. Tale ricchezza, inoltre, è sistematizzata in un tutto coerente: gli argomenti sviluppati in una prospettiva epistemologica e vertenti sulle circostanze epistemiche della giustificazione in cui si trovano gli agenti, per esempio, non sono utilizzati dall'autrice solo per dare ragione del disaccordo *genuino* tra agenti, ma anche per sottolineare come i presupposti epistemiche del liberalismo politico possono condurre a una revisione della strategia giustificativa del liberalismo politico stesso, e, in tale direzione, ad attribuire un valore giustificativo relativamente "debole" alle deliberazioni dei cittadini. Similmente, la tesi, non scontata, per cui anche la teoria non ideale ha dei compiti giustificativi — ma, è bene sottolinearlo ancora, "deboli" — si rivela utile non soltanto per prendere una certa posizione contro gli approcci strettamente ideali atti a garantire legittimità e giustizia, ma anche per dare un'interpretazione relativamente innovativa del liberalismo politico di Rawls; e per chiarire, nella prospettiva della letteratura sul disaccordo, dove vanno collocati i disaccordi fondazionali, e dove, invece, possono darsi i disaccordi giustificativi. Gli esempi, naturalmente, potrebbero essere moltiplicati, ma il

punto che mi preme sottolineare dovrebbe ormai essere chiaro: uno dei pregi del libro di Liveriero è far comunicare e, dopo un'adeguata elaborazione, mettere a frutto in un insieme coerente, tesi e idee di diversi dibattiti della filosofia politica normativa contemporanea.

Il secondo pregio, sostanziale, del libro di Liveriero su cui mi intendo soffermare è invece relativo alla tesi principale lì difesa, ossia la tesi secondo cui un'idea appropriata di legittimità deve essere sostenuta con argomenti sia ideali, sia non ideali, ovvero in grado di «tenere in conto» i cittadini reali, quantomeno in riguardo alle loro circostanze epistemiche e alle loro credenze non idealizzate. Questa tesi, a mio avviso convincente, ha un duplice vantaggio. Da un lato, consente di mantenere l'istanza strettamente filosofico-normativa e ideale inerente all'idea di legittimità liberale, senza, però, giudicarla sufficiente per giustificare in senso "pieno" la legittimità delle decisioni politiche collettive prese in contesti democratici, e cioè non negando l'importanza di cercare una compatibilità con i sistemi di credenze effettivi dei cittadini – come fanno, invece, molti sostenitori degli approcci ideali alla legittimità. Con una formula inevitabilmente grezza: «ideale, ma con un occhio alla realtà». Da un altro lato, la tesi di Liveriero permette di guardare alle pratiche deliberative effettive dei cittadini, e alle loro credenze non idealizzate, senza, tuttavia, ridurre la legittimità a una mera questione di accettazione concreta, e cioè evitando l'iperrealismo di quanti/e, in nome della stabilità, creano vincoli troppo forti con lo status quo, e quindi perdono di vista il versante eminentemente giustificativo della legittimità. Con una formula complementare alla precedente e altrettanto non raffinata: «non-ideale, ma alla luce di una cornice ideale da rispettare». In breve, Liveriero riesce a trovare un buon bilanciamento tra due istanze della legittimità liberale che sono egualmente rilevanti ma difficili da combinare. Con una metafora, insomma, il maggior pregio del libro di Liveriero è di proporre un'idea di legittimità che riesce a evitare sia Scilla che Cariddi, ma che, allo stesso tempo, riconosce e incorpora le istanze centrali espresse da entrambe.

Nondimeno, è proprio alla tesi principale di Liveriero che intendo muovere una prima obiezione – un'obiezione che, tuttavia, non ne inficia la bontà generale, ma è anzi una richiesta di parziale revisione e completamento. In particolare, mi pare che non sia del tutto chiaro qual è, esattamente, l'esito dell'argomento *freestanding* della fase ideale dell'approccio di Liveriero. A questo riguardo, a più riprese l'autrice parla di un framework normativo e generale di ragionamento, oppure di un framework di principi e standard



molto astratti e generali, che dovrebbe servire, una volta adottato dai cittadini, ad avere disaccordi *giustificativi* ma non *fondazionali*. Il punto problematico è che Liveriero non esplicita in che cosa consiste, specificamente, questo framework, ossia quali sono i principi e gli standard astratti e generali che l'autrice ha in mente. La questione non è marginale: si tratta di intendersi su qual è la *cornice liberale* entro cui i cittadini dovranno muoversi, e poi specificarla, sostantivamente, per giungere a decisioni collettive valevoli per tutte/i. A questo proposito, il testo di Liveriero si presta, nella mia lettura, a due diverse ipotesi interpretative. Secondo una prima ipotesi, il contenuto di questo framework liberale generale è dato dalle *idee di sfondo* delle società democratiche, e cioè l'idea di cittadino quale libero e uguale e di società come un equo sistema di cooperazione sociale, viste, però, come legittimate e giustificate in senso *politico*, invece che meramente assunte come un dato di partenza – come accade, invece, in Rawls (2012). Se questa ipotesi fosse corretta, Liveriero ci dovrebbe ancora dire quali sono i valori e/o i principi generali e astratti alla luce dei quali gli agenti idealizzati giungono a ritenere giustificate e legittime tali idee di sfondo. Diversamente, sapremmo solo che i cittadini ritengono queste idee di sfondo compatibili con i loro sistemi di credenze idealizzate. Ciò, però, non è sufficiente per dire che tali idee di sfondo sono pienamente legittimate e giustificate. Quali sono, dunque, questi valori e principi astratti e generali? A conclusione simile si giunge anche se si esamina la seconda ipotesi interpretativa, secondo cui il contenuto di questa cornice liberale generale sono degli standard e dei principi generali e astratti, che sono compatibili con le idee di sfondo delle società democratiche – in questa interpretazione, in altri termini, l'esito dell'argomento freestanding è più "ricco" di quello risultante dalla precedente interpretazione. La domanda, in questo caso, è, come nell'ipotesi discussa poc'anzi, la seguente: di quali principi e standard si tratta, nello specifico? Senza saperlo, non è chiaro entro quale cornice i cittadini si dovranno muovere, né che cosa dovrebbero specificare nelle loro diverse società politiche. In breve, Liveriero dovrebbe esplicitare qual è il *contenuto* del framework generale di ragionamento che tanto lavoro svolge nella sua strategia giustificativa.

Il secondo interrogativo che vorrei sollevare concerne le ragioni *epistemiche* che sostengono l'ascrizione di *parità epistemica* ai cittadini in materia di questioni valoriali. La mia impressione, in proposito, è che la variante di liberalismo politico proposta da Liveriero sia eccessivamente impegnata dal punto di vista epistemologico, e che, quindi, rischi di assumere un carattere

*comprendivo* invece che strettamente *politico* (Cf. Talisse 2008; 2009). Del resto, Liveriero afferma che «l'ascrizione di parità epistemica deve essere assunta come uno dei criteri per la legittimità democratica» (p. 50). Le ragioni di quest'ascrizione, come ho già evidenziato, rimandano all'accettazione delle circostanze epistemiche della giustificazione, per come caratterizzate, e "riscattate" in senso *coerentista*, da Liveriero. Più nel dettaglio, esse fanno riferimento (i) alla presupposizione doxastica, (ii) alla clausola fallibilista, (iii) all'inevitabile opacità nella considerazione dell'evidenza, e (iv) agli oneri del giudizio. L'idea di legittimità avanzata da Liveriero presuppone, in altre parole, la parità epistemica degli agenti, e a quest'ultima si giunge mediante argomenti eminentemente epistemici, o meglio, per mezzo di un modo particolare di intendere l'epistemologia della giustificazione delle credenze. Da questo punto di vista, è lecito domandarsi quale attrattiva l'approccio di Liveriero potrebbe esercitare su tutte coloro che non condividono alcuni elementi decisivi caratterizzanti la sua versione delle circostanze epistemiche della giustificazione e, in modo particolare, le prima due (i-ii), ossia la presupposizione doxastica da un lato, e la clausola fallibilista dall'altro lato – quest'ultima, nell'interpretazione specifica che ne dà Liveriero. Diverse filosofe politiche, per esempio, potrebbero, con buone ragioni, giudicarle distanti dal o persino in contrasto col proprio approccio all'epistemologia e non accoglierebbero facilmente l'idea che uno dei criteri della legittimità politica comporti una loro accettazione. Con ciò, sia chiaro, non intendo mettere in discussione la tesi secondo cui la legittimità delle decisioni collettive prese in contesti democratici implica l'ascrizione di parità epistemica. Su questa tesi, a un livello generale, concordo. Ritengo, nondimeno, che le ragioni di tipo epistemico a supporto della parità epistemica devono essere (ri-)formulate in modo da risultare più facilmente accoglibili da chiunque, o, detta un poco diversamente, da soddisfare un requisito minimo di pubblicità. In questa direzione – questo è il mio suggerimento –, si potrebbe fare uso di ragioni epistemiche in cui è sottolineato meno il progetto di una giustificazione coerentista – il quale, peraltro, informa, tramite l'equilibrio riflessivo, l'intero approccio alla legittimità di Liveriero: un elemento che rafforza l'impressione di un travalicamento del dominio del politico in senso stretto –, e che sono portate a un grado di maggiore astrazione e generalità, funzionale ad ammettere una pluralità della giustificazione, la quale è, in ultima analisi, coerente con l'approccio generale di Liveriero. Per esempio, se una delle ragioni portate a sostegno della parità epistemica fosse l'intrinseco fallibilismo delle capacità epistemiche umane

(per es. Fricker 2006), e quest'ultimo fosse inteso in senso non tecnico, ma come un elemento epistemico "di base", di cui ciascuno di noi fa esperienza quotidiana, l'epistemologia impiegata sarebbe meno partigiana e dunque più appropriata per il dominio del politico. Anche perché, facendo uso di nozioni "di base" così astratte e generali, essa sarebbe in grado di ricevere una pluralità di giustificazioni epistemologiche "complete", a seconda dell'epistemologia che ciascuna/o ritiene più adeguata. In tal modo, a mio avviso, il sospetto di essersi avvicinati troppo a un approccio comprensivo verrebbe meno.

L'ultima criticità sulla quale desidero richiamare l'attenzione è la seguente. Nel suo libro, Liveriero si occupa principalmente di conflitti valoriali. Nelle democrazie dei giorni nostri, tuttavia, i disaccordi profondi non riguardano solo valori, ma anche credenze fattuali in senso stretto, specie quelle che godono di un consenso scientifico schiacciante all'interno della comunità scientifica riconosciuta pubblicamente. Penso, ad esempio, a quei disaccordi i cui protagonisti sono quante/i – e non sono così poche/i – mettono in discussione credenze come "i vaccini non causano l'autismo", oppure, su un altro versante, "il cambiamento climatico sta accadendo" o "gli esseri umani hanno responsabilità causali in relazione al cambiamento climatico". Mettere in discussione queste credenze, chiaramente, significa non rispettare i risultati pressoché indiscussi della ricerca scientifica, né è in linea con i suoi metodi non controversi. Inoltre, come riconosce Liveriero stessa in una nota del suo libro (pp. 68-69), rispetto a queste credenze è legittimo esigere, quanto meno per ragioni legate alla responsabilità degli esiti delle proprie decisioni collettive (Torcello 2011; McKinnon 2016), che i cittadini mostrino un certo grado di *deferenza epistemica* negli esperti della comunità scientifica pubblicamente riconosciuta. Il problema, però, è che non è chiaro se l'approccio di Liveriero, pur in un dominio diverso da quello valoriale, abbia gli strumenti non solo morali ma anche *epistemici* per andare in questa direzione. In effetti, non solo non è scontato mostrare che i risultati non controversi e le metodologie non discusse della scienza fanno parte dell'idea di ragione pubblica (e.g. Jønch-Clausen, Kappel 2016), ma, problema che mi pare più difficile da risolvere, l'idea di parità epistemica è sviluppata da Liveriero in aperto contrasto con quella di deferenza epistemica, come se ne fosse l'opposto. Bisogna pertanto domandarsi se insistere sulla parità epistemica per come opposta alla deferenza epistemica è poi compatibile con la richiesta di deferire agli esperti in rapporto ai risultati sostantivi e alle metodologie scientifiche non controversi/e. Liveriero sugge-

risce che per fare ciò si può far leva sull'idea di *modestia epistemica* (pp. 68-69), che è parte del suo approccio. La modestia epistemica, tuttavia, per come la intendo a partire dal testo di Liveriero, pare avere un carattere di reciprocità che ben si adatta alle relazioni tra cocittadini, ma non altrettanto bene a quelle tra esperti e non-esperti. Essa, inoltre, richiede di attribuire un *minimo* di credibilità alle credenze altrui, mentre per credenze quali “i vaccini non causano l'autismo” o “il cambiamento climatico sta accadendo” il livello di credibilità che può essere domandato è, e forse deve essere, più elevato. Il suggerimento che dò a Liveriero è allora il seguente. Se Liveriero includesse nella sua caratterizzazione epistemica degli agenti il fatto epistemico generale e “di base” della *dipendenza epistemica* (Hardwig 1985), ossia l'idea per cui in ogni dominio in cui non siamo esperti dipendiamo da autorità epistemiche esterne a noi e, complementariamente, non insistesse sull'opposizione tra parità e deferenza epistemica, sarebbe poi più agevole chiedere ai cittadini un certo grado di deferenza epistemica, specie quando vi sono in gioco credenze indiscusse nella scienza e che si fondano sui suoi metodi non controversi. Questa richiesta, peraltro, e il punto è centrale, non contraddirebbe l'ascrizione di parità epistemica, ma spingerebbe, piuttosto, verso una sua interpretazione relativamente nuova e “allargata” – in un certo senso, questo il limite del mio suggerimento, fin troppo allargata. In altre parole, si giunge alla parità epistemica in senso “lasco” non solo a partire dal fallibilismo degli agenti, ma anche dal riscontro della loro comune e eguale dipendenza epistemica dagli esperti in tutti quei domini in cui non sono esperti, che è anche più difficile da mettere in discussione quando l'ambito di discussione riguarda credenze e metodologie scientifiche non controverse. Questa, per lo meno, è l'idea generale che Liveriero potrebbe sviluppare. Mi sembra che il suo approccio se ne avvantaggerebbe.

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*Alessandro Ferrara*

**How to accommodate *modus vivendi* within normative political theory**

In this paper, the role that the notion of *modus vivendi* can play within a normative political theory inspired by Rawls' "political liberalism" is explored. In the first section, I criticize an alternative concept of *modus vivendi* articulated within an influential "minimalist" (if not downright political-realist) approach to liberalism, championed among others by John Gray and Bernard Williams. Modus-vivendi liberalism is argued to be affected by internal inconsistency. Shying away from the extreme conclusion that stability trumps justice under all conditions, *modus vivendi* theorists often re-introduce normative assumptions and values that lack proper justification and contradict the pretended overcoming of the distinction of justice and prudence. In the second section, I argue that *modus vivendi* retains its full fruitfulness if integrated within a normative political-liberal view of legitimacy, as the notion through which the oppression-free political coexistence of liberal and non-liberal constituencies, domestically and transnationally, is best understood. To that effect, a notion of *modus vivendi* different from the standard conception of *modus vivendi* expounded in Political Liberalism is introduced.

*Valentina Gentile*

***Modus vivendi* liberalism, practice-dependence and political legitimacy**

Contemporary political theory is characterised by a realistic critique of liberalism. Realist theorising is seen as avoiding foundational disagreements about justice mutating into second-order disputes concerning the justifiability of le-

gitimate political institutions. In this sense, the realist critique challenges a key aspect of Rawls' liberal project – that is, its justificatory constituency. McCabe's *Modus Vivendi Liberalism* presents an interesting case of such a critique. Given the condition of deep pluralism that characterizes contemporary democracies, the liberal Justificatory Requirement (JR) should be recast so to include those, illiberal or sceptical, who are excluded by Rawls' justificatory constituency. This paper confronts McCabe's *modus vivendi* justificatory project with Rawls view. It suggests that both views seem to endorse a practice-dependent account of political justice in which “politics is prior to morality”; yet the ways in which reasons are endorsed to justify the shared conception of political authority are significantly different in these two schemes. The paper shows that the most problematic aspect of McCabe contingent model is that it disconnects the idea of legitimacy from a conception of liberal political morality. On this account, political legitimacy that reflects the uncoercive character of extant institutions seems to be sufficient to meet the MVL JR. Yet, from a normative point of view, this might be not enough to ensure morally acceptable outcomes. In conclusion, the paper considers McCabe's model as a version of ‘practice-independent’ moral theorizing committed to a transcendent view of ‘threshold morality’. This move, however, comes at the cost of sacrificing the theory's premises of anti-perfectionism and realism.

*John Horton*

**Political legitimacy and *modus vivendi***

Here I take up one aspect of a political theory of *modus vivendi* by seeking to explore its relationship to questions of political legitimacy. In doing so, I begin by setting out my preferred conception of *modus vivendi* and addressing some of the problems to which it seems to give rise, without claiming to have resolved them. I then explain how I understand the idea of political legitimacy, which gives a central place to the beliefs and values operative in a particular polity. Finally, I briefly sketch how the aforementioned conception of *modus vivendi* can be helpful in grounding that understanding of political legitimacy.

*Federico Zuolo*

**Is *modus vivendi* the best realistic alternative to public justification liberalism?**

In this paper I challenge the claim that *modus vivendi* (MV) is the most realistic alternative to public justification liberalism (PJJL). I focus on those theo-

ries that ground social order on the idea of MV, in particular those proposed by Horton and McCabe. After presenting the penchant for political realism evident in these theories, I test whether MV-based approaches can meet their own standards, and in particular whether they are not liable to the same critiques that MV approaches address to PJJL, namely of being descriptively inadequate with respect to the reality of politics, and, consequently, being normatively inert. To this end, I reconstruct the disagreement concerning the moral status of animals as a case in point to demonstrate that MV can only partially account for such disagreement in a realist manner, because some features of this case cannot be explained without appealing to a more normatively demanding notion. More generally, I argue that MV falls prey to a partial descriptive inadequacy, which has some implications for its practical capacity. The result is that MV-based approaches seem incapable of indicating how a certain MV arrangement can be improved without appealing to other (moralistic) criteria. Although MV-based approaches are right to point out some realistic concerns against PJJL, similar worries may also be addressed to MV approaches. Finally, this analysis casts some doubt on MV's ability to ground an autonomous political theory.





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