

# ‘Should I Stay or Should I Go?’ On the Relevance of an Ontology and Ethics of Non-Cooperation

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## 1 Introduction

Van der Walt’s article raises the pertinent question about how liberal democracy can be sustained in contexts where liberal-democratic ideals are in peril. More specifically, the piece refers to the coup attempt on 6 January 2021 at the United States Capitol, but, with so many challenges to liberal democracy elsewhere (including, but not limited to, the erosion of judicial independence in Poland, the undermining of freedom of the press in Hungary, Israeli apartheid), this question obviously has global relevance. Van der Walt argues, via a detailed reading of Rawls and Habermas, that liberal democracy depends on a ‘constituent ethics.’<sup>1</sup> Importantly, the argument not only aims to engender an urgent reflection on the conditions of liberal democracy, but also defends and develops further key insights presented in Van der Walt’s book *The Concept of Liberal Democratic Law*. In particular, Van der Walt builds on his methodological claim that liberal-democratic law should be distilled or uprooted from metaphysics. This methodology indeed, as Michelman argues, invites a reflection on Rawls’ political liberalism; not unlike Van der Walt, Rawls’ ‘strategy of avoidance’ aims for liberal-democratic ideals that are ‘freestanding’ of controversial metaphysical or ontological doctrines.<sup>2</sup>

While I am in agreement with Van der Walt that liberal democracy depends on a constituent or ‘lively’<sup>3</sup> ethics (a dimension neglected by Rawls), I want to take issue with two, interrelated, claims of his article that, from my perspective, share some problematic aspects of Rawls. First, the methodological claim that liberal-democratic principles can and should be uprooted from metaphysics. I contend that liberal-democratic concepts, such as justice, law and ethics, inevitably invoke metaphysical or ontological assumptions. Instead of aiming for an impossible separation between liberal democracy and ontology, the debate about the

1 Johan Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ *Netherlands Journal of Legal Philosophy* 52 (2023): 40.

2 John Rawls, ‘Justice as Fairness: Political not Metaphysical,’ 14 *Philosophy and Public Affairs* (1985): 223-251; John Rawls, *Political Liberalism: With a New Introduction and the ‘Reply to Habermas’* (New York: Columbia University Press, 1996), 375-378. For Rawls, metaphysics refers to claims about human nature or fundamental statements on the constitutive conditions of being, including the social world, and he uses the term metaphysics interchangeably with ontology: John Rawls, *Political Liberalism*, 29, 379. Van der Walt does not seem to take issue with Rawls’ usage of the term, so I will use metaphysics and ontology interchangeably, along these Rawlsian lines. For more explanation on how metaphysics and ontology is used in political and legal philosophy, including Rawls’ political liberalism, see Irena Rosenthal, *Democracy and Ontology: Agonism between Political Liberalism, Foucault and Psychoanalysis* (Oxford: Hart Publishing, 2018), 6-12, 39.

3 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 39.

foundations of liberal democracy should shift towards the question which ontology offers the best orientation on liberal democratic practices. Secondly, the claim that liberal-democratic ethics ultimately boils down to the acceptance to 'live graciously enough with terms of social cooperation' that one does not consider reasonable.<sup>4</sup> I contend that liberal-democratic ethics should not be reduced to the willingness to cooperate, but also needs to make space for the refusal of norms and practices of cooperation. These two arguments are related in the following way: I argue that an ethics of non-cooperation becomes more pertinent when an ontology of social life takes seriously how power relations structure cooperation. As Van der Walt's ontology pays insufficient attention to the impact of power upon cooperation, his ethics misses that marginalised citizens may, at times, need to resist prevailing forms of collaboration. I conclude with a brief reflection on the refusal of Trump supporters to accept the election results and its implications for ethics.

## 2 Liberal democracy and ontology

Van der Walt argues that liberal-democratic law should start from the premise that life is fundamentally divided and, in contrast to ancient metaphysics and natural law, no longer presents law as an expression of the unity of life. In light of the dividedness of life liberal democracy needs to reckon with the fact that legal communities consist of people who endorse law normatively (from an 'internal' point of view as Hart would say) and those who comply with law out of fear of punishment (Hart's 'external' point of view). This is why, I presume, Van der Walt emphasises the 'precariousness'<sup>5</sup> of the liberal-democratic ideal of reason: liberal-democratic ideals are always contested and thus inherently unstable and in danger of collapse. Rawls' political liberalism to a large extent converges with these points of Van der Walt. Political liberalism too is premised upon the dividedness of life or, as Rawls, puts it, the 'fact of pluralism.'<sup>6</sup> And given the ineradicable disagreement about human nature or the constitutive conditions of being, political liberalism aims for a concept of liberal-democratic justice that is 'political, not metaphysical'.<sup>7</sup> This implies, amongst others, that the later Rawls explicitly rejects natural law's ambition to ground principles of justice in an ahistorical concept of human nature. Moreover, political liberalism acknowledges that any liberal-democratic regime – not just actual regimes that we inhabit today, but even ideal societies – will be faced with people who reject liberal-democratic law (as it becomes clear, e.g., when Rawls remarks 'that there are doctrines that reject one or more democratic freedoms is itself a permanent fact of life'<sup>8</sup>).

To avoid metaphysical controversies about human nature, political liberalism presents principles of justice as reflections of the public culture of liberal

4 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 27.

5 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 16.

6 Rawls, *Political Liberalism*, 37, 59.

7 Rawls, 'Justice as Fairness: Political not Metaphysical,' 223-251.

8 Rawls, *Political Liberalism*, 64, fn. 19.

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democracies. Van der Walt's criticism on Rawls is mainly concerned with this historical approach to justice: 'A hermeneutic reflection on the essential conceptions of justice historically endorsed in a political tradition is not as such less metaphysical than universalist conceptions of natural law.'<sup>9</sup> According to Van der Walt, grounding liberal-democratic principles in the public culture of democratic societies remains metaphysical, because it replaces controversial assumptions about human nature with 'historical essentialism': contestable claims on the 'established goods' of tradition from which principles of justice should be derived.<sup>10</sup> In doing so, political liberalism fails to see that the public culture of liberal democracies consists of irreconcilable views on social cooperation. For instance, some regard a compulsory COVID-19 vaccination scheme a reasonable form of social cooperation whereas others see it as a gross violation of one's autonomy. So while Rawls acknowledges disagreements about human nature, Van der Walt notes that political liberalism also fails to appreciate how the fact of pluralism challenges appeals to the unity of a historical tradition.

The biggest concern that Van der Walt has with Rawls' historicised metaphysics is that it blinds us to the need for ethics. Rawls' historical essentialism presents political liberalism as if it can function automatically, as an 'onto-logic' that 'rolls largely on its own steam.'<sup>11</sup> In doing so, political liberalism shifts our attention away from the precariousness of liberal democracy and its dependence on the ongoing ethical commitment of people. In contrast, Van der Walt argues that claims about a consensus on social cooperation are nothing more than 'working assumptions' and should not be invoked as 'transcendental assumptions' or 'established goods that either conclusively or significantly displace the ongoing ethics that sustain them.'<sup>12</sup>

Van der Walt's nuanced reading of Rawls excavates many stronger and weaker impulses in political liberalism and his argument about the need for an ethics is profound. While Rawls' theory acknowledges the need for ethics here and there, Van der Walt rightly notes it does not figure prominently enough within political liberalism. However, Van der Walt, especially towards the end of his analysis, downplays that Rawls acknowledges the contestability of political liberalism and does not regard his principles of justice as conclusive 'established goods' or transcendental claims. For Rawls, an agreement (or a society's reflective equilibrium on justice) is not a static conclusive achievement, but rather a dynamic 'struggle [that] continues indefinitely.'<sup>13</sup> In fact, political liberalism assumes that no theory of justice can adequately give 'appropriate political voice' to 'groups and interests that arise from social change' and thus concedes that all agreements are contestable

9 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 21.

10 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 28.

11 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 26.

12 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 40, 28.

13 Rawls, *Political Liberalism*, 97.

and instable.<sup>14</sup> Therefore, particularly in his later writings, Rawls regards the ongoing politicisation of hegemonic conceptions of justice integral to a well-ordered society, including new proposals on justice which challenge the status quo.<sup>15</sup> In other words, political liberalism too envisions principles of justice as tentative working assumptions and is less prone to 'epistemic security'<sup>16</sup> than Van der Walt suggest.

From my perspective, the problem with Rawls' scheme is not that it denies the contestability and instability of principles of justice nor, for that matter, that it begins from history (in absence of an eternal perspective – *sub specie aeternitatis*<sup>17</sup> – where else than in a historical context could philosophical thinking begin?). Rather, a more significant problem in political liberalism is the claim that liberal democratic concepts can and should be separated from ontology – a methodology that Van der Walt seems to share with Rawls. Van der Walt and Rawls are surely right that liberal democracies are faced with ineradicable disagreement about ontology and that we need to resist attempts to ground liberal democracy in a timeless, universal account of human nature.

Yet, I am not convinced that liberal-democratic principles can be separated or 'extracted' from ontology altogether. As I have argued extensively elsewhere, liberal-democratic principles and law unavoidably draw upon explicit or implicit controversial assumptions about the constitution of people and the social world.<sup>18</sup> Indeed, as Lefort, notes: "The elaboration attested to by any political society [...] involves an investigation into the world, into Being as such."<sup>19</sup> These ontological assumptions influence normative choices between competing visions on liberal democracy. That is, what we want to see reflected in principles of liberal democracy and law is to some extent guided by our fundamental beliefs on what makes us human (or, rather, part of the non-human world) and how the social and political world is fundamentally constituted. For example, if your ontology asserts that liberal-democratic agency and civility is crucially dependent upon care – the physical and mental work to raise and maintain human life – you are more likely to endorse principles and law that valorise such care than someone whose ontology only highlights human autonomy and disregards the human need for care.<sup>20</sup>

14 Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press), 140.

15 I elaborate on the role of politicising justice in the later Rawls, in 'Ontology and Political theory: A critical encounter between Rawls and Foucault,' *European Journal of Political Theory*, 18, no. 2 (2019): 238-258.

16 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 42.

17 In *A Theory of Justice* Rawls infamously compared moral reasoning with adopting an eternal perspective that enables us to 'regard the human situation not only from all social, but also from all temporal points of view.' *Political Liberalism* departs from this earlier assumption: 514.

18 Rosenthal, *Democracy and Ontology*.

19 Claude Lefort, *Democracy and Political Theory* (Cambridge: Polity Press, 1988), 219.

20 My claim is not that ontology leads to self-evident normative judgments, but rather that it orients us to a range of possibilities that normative reflection can pursue. That is, I see ontology as one of the considerations that along with normative claims shape one's reflective equilibrium on justice and fundamental laws.

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Rather than assuming that liberal-democratic principles can avoid (Rawls) or be ‘distilled’ from ontology (Van der Walt), we should take seriously that conceptions of liberal democracy will remain grounded in a contestable ontology. From my perspective, the challenge for political and legal philosophy is not to separate liberal-democratic principles from ontology entirely – which would be impossible – but rather to search and develop ontologies that are appropriate for liberal democracy. At the very least, a liberal-democratic ontology should, as Stephen White notes, claim a ‘weak’ rather than a ‘strong’ status.<sup>21</sup> ‘Strong’ ontologies continue along the lines of traditional metaphysics and natural law and claim ‘to show us “the way the world is” as if such views are unchanging and of universal reach’ and necessitate self-evident normative principles. In contrast, ‘weak’ ontologies assume that all ‘fundamental conceptualisations of self, other, and world are contestable’ and prefigure liberal-democratic practices that support rather than repress ongoing liberal-democratic contestation.<sup>22</sup>

Van der Walt’s book critically engages with traditional metaphysics so, unlike Rawls, he sees a critique of ontology as an appropriate task for political and legal philosophy. Yet, like Rawls, he does seem to assume that his own alternative conception of liberal democracy can be liberated from ontological controversies. In what follows, I will argue that Van der Walt’s conception of liberal democracy cannot completely be extracted from a controversial ontology. In doing so, I will focus on what I see as the most promising and innovative feature of his theory: the need for an ethics that sustains liberal democracy.<sup>23</sup>

### 3 An ethics of liberal-democracy

Although Van der Walt underestimates how much the later Rawls acknowledges the precariousness of liberal democracy, I completely agree that Rawls did not think through the implications of the fragility of liberal-democratic life. Political liberalism focuses mainly on liberal-democratic institutions and insufficiently attends to the crucial role of ethical practices in sustaining liberal democracy. Van der Walt’s theory of liberal democracy crucially corrects this deficit. He proposes an intriguing and innovative ethics of civility that centers on the ‘community-creating gift’: the willingness to cooperate in the face of radical disagreement and to live with outcomes of democratic procedures, which finds ‘perhaps its most telling expression’ in the acceptance of an adverse vote count.<sup>24</sup> The article under discussion highlights some contours of this ethics, but it has been developed further and in greater detail in another fascinating article – “The Gift of Time and

21 Stephen White, *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory* (Princeton, NJ: Princeton University Press), 8.

22 White, *Sustaining Affirmation*, 8.

23 Perhaps Van der Walt’s distillation method only applies to law and not ethics. However, his critique of Rawls suggests that the method should apply more broadly, and that not just law, but other key liberal-democratic concepts too, such as justice and ethical principles, should be separated from ontology. It would be helpful if the article elaborates on the scope of the method.

24 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 45.

the Hour of Sacrifice' – that, as Michelman rightly argues, should be read in tandem with *The Concept of Liberal Democratic Law*, and I add, with this article. Therefore, the comments below will also refer to the latter article.

In 'The Gift of Time,' Van der Walt argues that political liberalism depends on a gift economy:

Liberals continue to stick to the consensus [without] the secure knowledge that its terms will be enforced. The gift of liberal or constitutional democracy concerns the ultimately irreducible rest of risk-taking in which liberal democratic citizens engage on a daily basis. Liberal democracy pivots on this gift of taking risks with others.<sup>25</sup>

If I understand Van der Walt correctly, the gift that liberal democrats offer each other is 'time,' more specifically, waiting for others to reciprocate. Giving time is risky in precarious and imperfect liberal democracies as one can never be sure that reciprocity will follow or, one might say, that others will also give their time to liberal-democratic life.

Van der Walt grounds his ethics in ontological assumptions about social life. More specifically, the gift is understood as a particular form of sacrifice, that is, giving up something valuable. Following Marcel Mauss, amongst others, Van der Walt understands sacrifice as a condition of possibility of social life: 'as a broad category of all social practices that serve as *transcendental* conditions for all other social practices.'<sup>26</sup> The political-liberal instantiation of sacrifice – the gift – is also understood as a *transcendental* condition:

The liberal heart of the liberal social contract consists in the essential risk that liberals take with one another, the risk which conditions in *transcendental* fashion the time that they give to one another, and the space that comes with this time.<sup>27</sup>

Van der Walt's appeal to transcendental claims may seem surprising given his critique on the alleged transcendental assumptions of Rawls' political liberalism. If political liberalism should refrain from transcendental claims, why, then, does this not apply to Van der Walt's ethics too? After all, just as we disagree about human nature, or the established goods of history, we also fundamentally disagree about the constitutive elements of social life that support ethics. Van der Walt overcomes this critique to some extent, as his ontology of social life is presented as contestable and thus closer to a weak ontology than a strong one:

25 Van der Walt, 'The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics,' in *Law's Sacrifice: Approaching the Problem of Sacrifice in Law, Literature and Philosophy*, ed. Brian Nail (London/New York: Routledge, 2019), 36.

26 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 25.

27 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 32.

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The links constructed in this essay between [...] liberalism and the economy of the gift [...] should [...] be considered unstable and precarious [...]. [T]hey should not be presented in terms of *over-confident* identifications of *fixed essences or stable categories*, but rather in terms of heuristic constructions of *relatively* distinct patterns or constellations of social phenomena that allow for some general and generalising observations while demanding adequate leeway for rather frequent exceptions.<sup>28</sup>

But while Van der Walt identifies his ontology as contestable, his discussion of social life is quite similar to Rawls' reading of history: it reduces the 'thing' that grounds normativity (for Van der Walt: social life underlying ethics; for Rawls: history underlying justice) to just one (contestable) essence and does not reckon with competing interpretations of social life (or history) that emphasise other key elements of social (or historical) life. In doing so, Van der Walt's ontology misses crucial dimensions of social life and does not, I will argue, guide us toward the ethics that contemporary liberal democracies need.

One key feature that is missing in Van der Walt's ontology is that practices of gift-giving in liberal-democratic regimes are shaped by power relations. That is, the burdens of giving time – or more time – to liberal democracy are not similar for everyone nor equally distributed, but stratified. For example, some time investments in liberal democracy are traditionally unrecognised due to the patriarchal power relations. As pointed out by feminist Marxists and care ethicists, care work or social reproductive tasks like raising children, caring for friends and communities are a crucial condition of possibility for society and liberal democracy.<sup>29</sup> Yet much of liberal thought has neglected the sacrifices that care workers make to raise and sustain civil liberal democrats. As Nancy Fraser notes 'Historically, these processes of "social reproduction" have been cast as women's work, although men have always done some of it too. Comprising both affective and material labor, and often performed without pay, it is indispensable to society. Without it there could be no culture, no economy, no political organization.'<sup>30</sup> Van der Walt's account of ethics and his underlying ontology of the gift economy also neglect that liberal democratic practices are fundamentally constituted by the daily sacrifices of social reproduction. For example, he ignores that the acceptance of an adverse vote account is crucially dependent upon the daily sacrifices of care workers who discipline children so that future voters are eventually able to cope with the disappointment of an adverse vote count.

The constitutive role that power relations play in liberal-democratic gift-giving is also missing in Van der Walt's account of the public sphere. The risks of participating in liberal-democracy crucially depend on whether one benefits or suffers from the imperfections of liberal democracy. For example, in liberal democracies shaped by

28 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 35.

29 See, for instance, Silvia Federici, *Wages Against Housework* (Bristol: Falling Wall Press, 1975) and Eva Kittay, *Love's Labor* (London/New York: Routledge, 1999).

30 Nancy Fraser, 'Contradictions of Capital and Care,' *New Left Review*, 100 (July/August 2016).

institutionalised racism the risks of giving time are much higher for a woman of colour than, say, a white man. That is to say, a woman of colour is much less likely to benefit from or be reciprocated by democratic procedures – the laws, democratic fora, judiciary – that emerge from cooperation than someone who is systemically privileged in existing laws and the public sphere. As Danielle Allen notes in her analysis of sacrifice and racial injustice in American democracy: “The hard truth of democracy is that some citizens are always giving things up for others.”<sup>31</sup>

My point in offering these examples is not to suggest that Van der Walt’s article should have analysed in great detail all the intersecting power relations that shape the liberal-democratic gift economy. Rather I want to suggest that by neglecting power relations in his ontology of liberal democratic gift-giving, Van der Walt may have missed the importance of ethical practices that help minorities to challenge structural exclusions.

Overall, the focus in Van der Walt’s ethics is very much on preserving and accepting the status quo, that is, on what ‘sustains the we,’<sup>32</sup> not on how ethics can serve those who are marginalised in the ‘we.’ Or, as he puts it:

[N]uclear essence of that which is at stake when one heeds a call to civility [...] reveals itself when one *accepts to live graciously enough with terms of social cooperation* that one’s moral autonomy [...] prevents one from considering ‘reasonable enough.’<sup>33</sup>

I think that Van der Walt is right in his claim that liberal democracy requires citizens to accept that societies are divided and that one may need to live under terms of cooperation that one considers unreasonable. Yet, a ‘lively’ ethics should also make room for practices that change the way in which divisions are established, that open up opportunities to challenge hegemonic terms of social cooperation and foster, in Allen’s words, the ‘constant redistribution of patterns of sacrifice.’<sup>34</sup> In reducing ethics to sustaining current democratic procedures, Van der Walt’s ethics is strikingly similar to Rawls’s ethics. Although Rawls did not elaborate much on ethics, his focus too is mostly on virtues that, ultimately, ensure compliance with prevailing political liberal principles. For instance, with regard to education he notes that children should be taught ‘to honor the fair terms of cooperation in their relations with the rest of society,’ and makes no mention of the need for educational practices that encourage children to criticise prevailing power relations or structural exclusions.<sup>35</sup> Put differently, missing in Rawls’ and Van der Walt’s account is a reflection on contestatory or *agonistic* ethical practices which are conducive to the ongoing politicisation of the structural exclusions in liberal-democratic regimes.

31 Danielle Allen, *Talking to Strangers* (Chicago: The University of Chicago Press, 2004), 29.

32 Allen, *Talking to Strangers*, 28.

33 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 27.

34 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 39.

35 Rawls, *Political Liberalism*, 88.



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#### 4 Should I stay or should I go now? If I go, there will be trouble. And if I stay it will be double

~ The Clash

An ontology of social life that illuminates how the risks of gift-giving are unequally distributed guides to the ethical potential of withdrawing one's gift to democracy. Van der Walt's ethics assume that staying within the game and continuing to cooperate is always desirable. But for participants in liberal democracies for whom the risks of giving time to democracy are high the question 'Should I stay or should I go now?' makes sense. Going or leaving democracy means trouble: one will be seen as a disloyal citizen and give up (for now) the marginal chance to change prevailing terms of cooperation. But if one stays the trouble might be double: making sacrifices to a regime that does not reciprocate one's gifts or cooperating with others who laugh away criticisms of exclusions as an expression of deluded wokeness.

Van der Walt construes the dilemma between staying and going as if there are two options: there are 'historical gestures of cooperativeness and civility' or the 'refusal to cooperate [which] invariably presents itself in terms of the sublime heroism.'<sup>36</sup> In other words, Van der Walt treats the refusal to cooperate identical to the sublime heroism exemplified by Donald Trump's ambition to 'make one's country great again.' But is the refusal to cooperate invariably similar to violent heroism?

Refusing to cooperate is an important strategy for minorities who are excluded or marginalised in mainstream political fora. It allows these groups to regroup after a political defeat and to develop new strategies to politicise structural exclusions, particularly, when the powerful fail to reciprocate continuously. For example, in 1968, community organiser Saul Alinsky planned the infamous 'shit-in' at Chicago Airport after the city mayor did not follow up on commitments to invest in a poor black neighborhood.<sup>37</sup> Faced with a blocked political arena and dialogues that led nowhere, Alinsky mobilised his movement to occupy toilets at this (at the time) world's busiest airport so that travellers exiting airplanes would be unable to use the lavatories. The 'shit-in' never happened: imagining the scene of travellers barred from relieving themselves, or worse, the newspaper headlines about such an event, was already enough for the administration to deliver on its promises immediately or, one might say, to reciprocate. Alinsky's 'shit-in' is not exactly an example of Van der Walt's notion of civilised decency, that is, the patient waiting for others to reciprocate. But it is not a form of violent heroism either. It is an act of refusal, a withdrawal from dominant structures of cooperation, in order to push the powerful to address structural exclusions.

36 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 38.

37 Saul Alinsky, *Rules for Radicals* (New York: Random House, 1971).

Acts of refusal are also central in the feminist tradition as Bonnie Honig notes in her recent book *A Feminist Theory of Refusal*.<sup>38</sup> Honig's theory of refusal draws inspiration from the *Bacchae*, the Greek drama in which women leave the city of Thebes, defying the orders of the King to stay home and care for their children. While the women in this drama have sometimes been described as mad (or, we might say, uncivilised), Honig offers a feminist reading of the play. The withdrawal from the polis, the refusal to sacrifice more time to social reproduction and sustaining the polis, enabled the women to experiment with new ways of life in 'womenled bands rather than maleheaded households'.<sup>39</sup> As Honig notes, the women's refusal is, of course, highly relevant and, indeed, not only fictional. The insight that the 'personal is political' – the ongoing plea to take the private sphere and social reproduction seriously in liberal thought and within liberal-democratic law – is born from fugitive spaces: book clubs, networks, dinners and office gossip that brought together women who no longer wanted to sacrifice so much to society and liberal democracy and who looked for possibilities to narrate personal experiences that, eventually, developed into a structural critique of patriarchy.

## 5 Conclusion: refusing elections results

The examples of refusal offered here challenge Van der Walt's binary opposition between, on the one hand, accepting a society's terms of cooperation and, on the other, the violent heroism inherent to Trump's politics. Rejecting democracy's demand for sacrifice, refusing to cooperate, can be a breeding ground for challenging dominant forms of cooperation. Highlighting the potential of refusal should of course not blind us to the fact that refusal can collapse into more dangerous forms of opposition. When the women in the *Bacchae* eventually returned to the city, they did not start a new women's band, but killed the king. Fugitive, secluded spaces off- and online can also, and sometimes do, encourage participants to use violence as a means for change. How, then, should we assess the refusal to accept the outcomes of the American elections, and what are its implications for ethics?

What struck me in Van der Walt's argument in the article under discussion is that the principle to accept election results is framed in categorical terms:

The politically virtuous among them would always be adamantly inclined to subject voting procedures and constituency designs to critical reforms that may augment or diminish electoral empowerment. They nevertheless endorse them and stick to their results on the day of the count.<sup>40</sup>

Yet, should the political virtuous always accept a vote count? Just as we allow for exceptions in the most fundamental moral rules ('one shall not kill, unless in case of self-defence'), one would expect an exception in the rule on accepting election

38 Bonnie Honig, *A Feminist Theory of Refusal* (Cambridge, MA: Harvard University Press, 2021).

39 Honig, *A Feminist Theory of Refusal*, 22.

40 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 44.

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results. That is, if elections are truly rigged and corrupted, as they are in authoritarian countries like Belarus, refusing elections results could be part of civilised decency. Why does Van der Walt not endorse such an exception? I expect Van der Walt precludes such an exception, because his argument is set in liberal democracies where ‘systemic logics,’ such as campaign financing, render election results ‘deeply questionable,’ but not completely fraudulent as in authoritarian regimes.<sup>41</sup> Yet, it appears to be at odds with Van der Walt’s basic ontological premises to attribute election procedures in liberal democracies with an a priori reliability. Practices of liberal democratic are, as Van der Walt emphasises, inherently precarious and instable. In this light, we cannot rule out in advance the possibility of a corrupted election and the need to refuse it, even in regimes that are presumably liberal-democratic. So rather than claiming that liberal democrats should always endorse election results, I want to suggest that liberal democrats should endorse election results, unless compelling evidence shows that the elections were so fraudulent that refusing the vote count becomes more virtuous than endorsing it.

With regard to the recent elections in the US, I agree with Van der Walt that the accusations of election fraud were ‘baseless’ as no compelling evidence was presented.<sup>42</sup> Yet, what makes the case of the attempted coup so complicated (and perhaps even more complicated than suggested by Van der Walt’s reading) is that many people who stormed the Capitol – and many people who did not – seemed to believe that the elections *were* rigged,<sup>43</sup> and that the participants in the coup attempt believed they were making a sacrifice for democracy and the constitution. This suggests that the problem here is more epistemic – a conflict about facts – than ethical (the will to cooperate). That is, the attempted coup may confront us with immoral behaviour that stems from what David Luban refers to as a fundamental error in the ‘factual assessment of whether the world was now in a state of exception.’<sup>44</sup>

It would go beyond the scope of this article to elaborate on how we can prevent the huge discrepancies in factual assessment and counter the emergence of conspiracy theories that lack any basis in reality, but that nonetheless appear convincing to a substantial part of the American constituency. Van der Walt seems to believe that, ultimately, the communality of factual reality rests upon our willingness to cooperate: ‘[T]he transsubjective ideal content of factual observations evaporates when the magnanimous willingness to cooperate evaporates.’<sup>45</sup> This claim strikes me as too reductionist, as if the problem of fake news and lying politicians can be solved by one ethical virtue, and not *also* requires substantial institutional measures

41 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 44.

42 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 44.

43 One out of four American voters do not believe that the election results were legitimate. See Kevin Arceneaux and Rory Truex, ‘Donald Trump and the Lie *Perspectives on Politics* 19 (2022): 1-17.

44 David Luban, ‘Hannah Arendt meets Qanon: Conspiracy, Ideology, and the Collapse of Common Sense,’ *Georgetown University Law Center* (2021): 31.

45 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 45.

that control commercial social media companies. With regard to the role that ethics can play, the issue of factual disagreements and conspiracy theories could mean that our ethical repertoire should be broadened and pay more attention to epistemic virtues. For example, Luban emphasises the need for epistemic vigilance:

Given that by far the greater part of what we know comes from other people, vigilance against being misinformed or misled by them is an indispensable trait. It requires us to evaluate testimony from others along the two dimensions of competence and honesty – asking the questions *is my informant in a position to know that?* And *is my informant trying to fool me?*<sup>46</sup>

Epistemic vigilance sits somewhere between paranoia (the incorrigible anxiety that elections are completely rigged) and naïve trust (the belief that election procedures will, not matter what, always be reliable). This virtue complements liberal-democratic procedures that allow for checks and balances upon elections, such as investigations into allegations of fraudulent election results. Such virtues and procedures are essential to ascertain whether we should cooperate, or are confronted with the exceptional case, and the immense trouble, that comes with the refusal of election results.

46 Luban, 'Hannah Arendt meets Qanon,' 27.