

Liberal Democratic Law, the Ethics of Civility, and Agonistic Politics between Hegemony and Compromise*

Manon Westphal

1 Introduction

In this article, I look at the argument that Johan van der Walt develops in his intriguing article 'Rawls, Habermas and Liberal Democratic Law' through the lens of agonistic democratic theory. My goal is to show that agonism encourages Van der Walt to emphasise the meaning of politics in his theory of liberal democratic law and, more specifically, to consider agonistic forms of conflict processing, which may contribute to circumstances that are conducive to the realisation of societal relationships shaped by what Van der Walt calls an 'ethics of civility.'

Van der Walt's critique of the theories of John Rawls and Jürgen Habermas fits very well with the agonistic perspective and in fact has some considerable proximity to the critique of these theories that agonist Chantal Mouffe has developed.¹ Agonistic democratic theory is internally diverse,² but can be characterised by the understanding that disagreement and conflict are constitutive of social relationships and that the goal of democratic politics must be the transformation of conflicts, not the overcoming of disagreements.³ Van der Walt's argument clearly resonates with this understanding. In particular, his emphasis on the 'dividedness of life' and the need to abandon the 'standard understanding of law and legal systems as an articulation of a concept of justice shared by *all* members of a legal community,'⁴ demarcates an understanding of the law that is well compatible with agonists' emphasis on the conflictual nature of social relationships. Agonists should also sympathise with Van der Walt's conclusion that an 'ethics of civility'⁵ plays an essential role in liberal democracy. If we acknowledge that the capacity of the law to integrate the plurality of views that characterises social life is severely limited, it is vital that citizens are willing to live with disagreement and conflict.

* I thank Johan van der Walt and all participants of the Utrecht conference 'The Fragility of Liberal Democratic Law' for a stimulating discussion and very helpful feedback. In addition, I would like to thank the participants of the workshop 'Agonistic Political Theory' held at the University of Greifswald for great comments on an earlier draft of the paper.

1 Chantal Mouffe, *The Democratic Paradox* (London/New York: Verso, 2000).

2 Mark Wenman, "'Agonistic Pluralism" and Three Archetypal Forms of Politics,' *Contemporary Political Theory* 2, no. 2 (2003): 165-186.

3 Manon Westphal, 'Overcoming the Institutional Deficit of Agonistic Democracy,' *Res Publica* 25, no. 2 (2019): 187-210.

4 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 1 (2023): 18.

5 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25-26.

Manon Westphal

They need not celebrate the fact of pluralism, but they must accept that others view things differently, even when they think that the views of their fellow citizens do not count as ‘at least reasonable’ or ‘reasonable enough.’⁶ Chantal Mouffe, who welcomes even more confrontational forms of adversarial relationships than other agonists, argues that political actors must refrain from hostile activities toward those who fight for opposing political projects.⁷ This argument for tamed forms of political conflict very much resembles Van der Walt’s argument for an ‘ethics of civility.’

The agonist reader thus feels at home with much of the argument set out in Van der Walt’s article. However, reading the article through the agonistic lens also means to find that something important is missing in the picture, namely the role of politics. Van der Walt’s sophisticated critique of Rawls’s and Habermas’s approaches shows that these two theorists expect too much of the law in terms of its capacity to embody views that all citizens can consider as reasonable. While we should indeed take this insight as a reason to think more carefully about the role of citizens’ ethical stances in liberal democracy, we should entwine such considerations with reflections on the political processes in which political actors deal with their disagreements.

Van der Walt argues that law, due to its incapacity to embody unity and consensus, always reflects the ‘division between a majority and a minority.’⁸ It is important to consider that the ethical duty to display ‘appreciation of burdens of judgment’⁹ and accept that one has to live with views that one finds unreasonable, is unequally demanding for parties in situations in which acts of law-making produce winners and losers. For those who manage to implement their views, appreciating the burdens of judgment merely means to accept that there are others who view things differently. By contrast, for those who do not see their views realised in the law, the demands of civility equate with accepting political defeat. If liberal democracies want to be able to count on citizens’ willingness to act according to the ‘ethics of civility,’ it seems important that they avoid situations in which some groups of citizens constantly find themselves on the losing side. The danger would then be that these citizens experience the requirement to act according to the ethical requirements of liberal democracy as a standard that secures the rules of an unfair game.

As I will show in the following, agonistic democrats envision forms of politics that presume the continuation of disagreement and seek to avoid situations in which political procedures produce unchallenged winners and forgotten losers. It is precisely for this reason that agonism represents a valuable complement to Van der Walt’s argument. As stated above, agonism resonates with Van der Walt’s

6 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 26.

7 Mouffe, *The Democratic Paradox*, 101-102.

8 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 19.

9 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 26.

understanding of the law as a ‘reflection of the dividedness of social life’¹⁰ and his conclusion that the incapacity of the law to create a unity among the diverse views in pluralist liberal democracies requires some sort of compensation to be found in the ethical attitudes of citizens. Its value as a potential complement to Van der Walt’s argument lies in the fact that entwining the case for an ‘ethics of civility’ with a case for agonistic politics helps avoid situations in which accepting the terms of cooperation in liberal democracy would become synonymous for some with a readiness to accept taking the role of permanent losers in the political struggle about the law.

I will proceed in three steps. First, I will briefly recapitulate Van der Walt’s argument about the nature of the law as a reflection of the dividedness of social life and the fundamental role that an ‘ethics of civility’ plays in liberal democracy. Second, I will show how agonistic forms of political conflict processing can contribute to circumstances that are conducive to citizens’ willingness to comply with the demands of an ‘ethics of civility’ in the face of the necessarily partial character of the law. More specifically, I will show that Chantal Mouffe’s and James Tully’s versions of agonistic politics embody different possibilities of ensuring that the political struggle about possibilities of determining or interpreting the law does not produce unchallenged winners and forgotten losers. While Mouffe demands that it must always be possible to question, politicise, and re-negotiate an existing hegemony, Tully envisions the creation of compromises. Third, I will present some preliminary considerations on how the agonistic lens contributes to reflections on the problem that Van der Walt refers to repeatedly in his article, which is that liberal democracies may be facing a situation in which citizens’ compliance with the ‘ethics of civility’ erodes.

2 Law as a reflection of the dividedness of social life and the need for an ethics of civility

I cannot do justice to the complexity of Van der Walt’s analysis here, but I will focus on some of the main points of his critical engagement with Rawls’ theory that allow me to recapitulate what he means when he characterises law as a ‘reflection of the dividedness of social life’¹¹ and highlights the importance of an ‘ethics of civility.’ Although my reconstruction of the argument will be selective and does not deal with the details of Van der Walt’s critique of Habermas’s theory,¹² I believe that this procedure suffices to collect the core ideas of Van der Walt’s argument that are relevant to my proposal to bring the argument into conversation with agonism. After all, van der Walt confronts Rawls and Habermas with the same criticism: independent of their theories’ differences, they share a reliance on a ‘constituent ethic that holds their whole frameworks of political liberal legitimacy together’ and make the mistake of embedding ‘this constituent ethic in a transcendental or

10 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 18.

11 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 18.

12 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 20 ff.

Manon Westphal

quasi-transcendental framework that obfuscates it in a cloud of equivocation.¹³ A focused summary of Van der Walt's engagement with Rawls can therefore display the general idea of the critical argument developed in the article.

Van der Walt identifies a constitutive tension between the two fundamental ideas of Rawls' theory, which are (a) the idea of 'moral agency,' according to which all persons are free to think, and capable of thinking, for themselves and determine their own conceptions of the good,¹⁴ and (b) the idea that people see society as "a scheme of cooperation" between all the separate moral agents that constitute the membership of that society.¹⁵ These two ideas 'rarely sit at the same fire,' as Van der Walt puts it, because moral agency often leads to 'irreconcilable ideas about proper cooperation.'¹⁶ It would be unrealistic to think that separately exercised moral agency does not produce, or only rarely produces, incompatible views on what adequate forms of cooperation look like. Here, we encounter a central point of overlap between Van der Walt's theory of liberal democratic law and agonistic democratic theory: both consider disagreement on what adequate ways of organising social life are as the rule rather than the exception.

Van der Walt points out that Rawls seeks to deal with this problem by referring to a 'justification-worthy constitution.'¹⁷ Holding on to the normative ideal that 'governmental powers can only be exercised in ways that all the moral agents making up a political-liberal society can endorse as reasonable and rational,' Rawls advances the implementation of a constitution that guarantees basic liberties, which are "thin enough" to allow the separate and several moral agents [...] to rely on their own moral agency to decide matters of utmost moral importance to them' and at the same time "thick enough" [...] to prescribe governmental exercises of moral agency which all agents consider indispensable for their moral agency.¹⁸ While Rawls is optimistic that a constitution, combined with a high court that settles emerging conflicts through deliberations guided by the constitutional norms, enables liberal democracies to realise the normative ideal, Van der Walt concludes that Rawls' "political conception of the reasonable" carries too much weight.¹⁹ He argues that the legal guarantee of basic rights and the endeavours of a high court to balance the two fundamental ideas of political liberalism in their interpretations of the constitution cannot sidestep the 'aporetic nature' of the relationship between moral agency and social cooperation, to the effect that '[c]oercive governmental action regularly demands that some moral agents take leave of their moral convictions.'²⁰

13 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.

14 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 21-22.

15 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22.

16 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22.

17 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 23.

18 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 24.

19 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25.

20 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 24.

If I understand the argument correctly, the idea is roughly this: the capacity of the constitution to balance the demands of moral agency and social cooperation through legal norms that all citizens can view as reasonable is severely limited to the extent that it depends on the high level of generality on which these norms are formulated. Once the norms of basic liberties must be interpreted and applied to concrete practical questions, the disagreements that are produced by citizens' separate exercises of moral agency come to the fore and foreclose the possibility of defining policies that can be considered as reasonable by everyone. The insight that it is impossible to solve the potential for conflict that emerges from citizens' separately exercised moral agency through the means set out by Rawls is the reason why Van der Walt concludes that an 'ethics of civility' plays a more vital role in liberal democracy than Rawls acknowledges. He defines the meaning of the 'ethics of civility' as follows:

The nuclear essence of that which is at stake when one heeds a call to civility and appreciates burdens of judgment reveals itself when one accepts to live graciously enough with terms of social cooperation that one's moral autonomy (one's separate moral agency) relentlessly prevents one from considering 'reasonable enough.'²¹

According to Van der Walt, the combined implementation of a constitution that determines basic liberties and a court that produces reasonable interpretations of constitutional norms supports the 'ethics of civility,' but it cannot play the unifying role that Rawls expects of it. In the final analysis, liberal democracy depends on whether or not citizens recognise the burdens of judgment and accept that they have to live with views that they find wrong and even unreasonable.

A constitution that is more rather than less respect-worthy, offers more rather than less protection of fundamental rights, is interpreted and enforced by a court or similar forum with a better rather than worse reputation of consistency and integrity (regarding trade-offs between moral autonomy and social cooperation) [...] is very likely going to augment instead of diminish the chances of an ethics of civility and an appreciation of burdens of judgment among the people it serves. In the final analysis, however, the absence or presence of an ethics of civility duly informed by an appreciation of burdens of judgment will always be *the* critical factor, the factor that *ultimately* determines the sustainability of an LPL scheme.²²

This is the conclusion that Van der Walt derives from his critical engagement with Rawls (and Habermas): it is 'a constituent ethics that holds their whole frameworks of political liberal legitimation together.'²³ Both Rawls and Habermas, albeit in different ways, 'embed this constituent ethic in a transcendental or

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

22 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25-26; emphases in the original.

23 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.

Manon Westphal

quasi-transcendental framework,²⁴ but thereby only obfuscate the way in which liberal democracy pivots on a ‘cooperative ethics of decency, civility and truthfulness.’²⁵

3 Agonistic politics and the political processing of disagreement

As mentioned at the beginning, I propose that agonism has something important to contribute to the perspective that Van der Walt develops in his article. Before I introduce two approaches to agonistic conflict processing, I want to highlight that persistent disagreement among citizens on what the law should look like, or how it should be interpreted, is likely to result in conflictual relationships in which some manage to realise their views of what good forms of social cooperation are while others fail to do so and thus find themselves on the losing side in the relevant conflict. The unequal allocation of power is as common a feature of political relationships as is the disagreement produced by citizens’ exercise of moral agency, which means that some are in a better position to realise their views in political struggles and determine the content of the law than others. To a certain extent, this is a natural condition of the circumstances of politics, which is why liberal democracy depends on the willingness of those who do not manage to realise their views to accept the authority of the law even if it expresses the views and preferences of others. However, conflicts can be processed in very different ways. For example, political processes can influence the allocation of chances to win or lose in conflicts and they can create conditions that make winning and losing matters of degree rather than matters of full victory and entire defeat.

It is important to consider possibilities of shaping the processing of conflicts in and through politics, especially if we think that the ‘ethics of civility’ is not a natural disposition or something that all individuals automatically perceive as their ethical obligation when they act in their roles as citizens. Van der Walt forcefully emphasises that the ethical commitments that nourish liberal democracy are contingent and precarious when he points to the crisis tendencies in contemporary liberal democracies and, in particular, the event of 6 January 2021 in the US.²⁶ But if the ‘ethics of civility’ is contingent and precarious, we must ask how liberal democracies can create circumstances that are conducive to its cultivation and render it at least less likely that people develop an unwillingness to abide by its requirements. What circumstances can render it easier for citizens to adopt a tolerating stance towards other views and accept common rules that reflect the views of others who they think are deeply mistaken about what is the right thing to do about matters of common concern? While many factors may play a role here, the extent to which citizens see their views and preferences responded to in the political processing of conflicts is an essential factor. Where some constantly find themselves on the losing side and hardly ever see their views and preferences

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

25 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 43.

26 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 16, 26, 40.

realised, they may lose faith in liberal democracy being a truly inclusive endeavour and experience the requirement to 'live graciously enough with terms of social cooperation that one's moral autonomy [...] relentlessly prevents one from considering "reasonable enough"²⁷ as the rule of an unfair game.

It is at this point that agonistic conceptions of democratic politics can be insightful. In one way or another, all agonistic theories show how democracies can realise political inclusiveness, not through hunting a perfectly inclusive law, but through organising political conflict processing in ways that ensure that no party can cement its capacity to determine the content of the law.

I will illustrate this property of agonistic theories by means of two examples, namely Chantal Mouffe's and James Tully's theories. While Mouffe is more commonly associated with the concept of agonistic democracy, it is particularly interesting to include Tully's account in the discussion because his theory demonstrates that agonism must not be equated with the adversarial fight for hegemony that Mouffe famously advocates. Mouffe's hegemonic agonism represents *one* possibility of interpreting the idea of agonistic politics, but it must be located on one end of a broader spectrum of conceptions of agonistic politics that ranges from more confrontational to more cooperative ones.²⁸ Mouffe's and Tully's theories represent the different ends of this spectrum and thus enable a consideration of the diverse mechanisms by means of which agonistic politics might help ensure political inclusiveness under conditions of deep and persistent disagreement.

Mouffe insists on the need to distinguish between antagonism and agonism in democratic responses to disagreement. Parties who advocate opposing views on what common rules should look like must treat each other not as enemies but as adversaries. While enemies seek to destroy each other, an adversary is 'somebody whose ideas we combat but whose right to defend those ideas we do not put into question.'²⁹ In this sense, an adversary is 'a legitimate enemy, one with whom we have some common ground because we have a shared adhesion to the ethico-political principles of liberal democracy: liberty and equality.'³⁰ It seems that there is some considerable overlap between Mouffe's description of what democratic adversaries owe each other and what Van der Walt dubs an 'ethics of civility': adversaries practice constraint and do not aim at excluding from politics those whose views they struggle to consider even 'reasonable enough.'³¹

The fact that Mouffe does not expect more of political actors than that they acknowledge the status of others as adversaries has direct implications for how she envisions the process in which political decisions on controversial issues are made. For Mouffe, agonistic politics is a fight for hegemony, in which all of the involved

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

28 Westphal, 'Overcoming the Institutional Deficit of Agonistic Democracy.'

29 Mouffe, *The Democratic Paradox*, 102.

30 Mouffe, *The Democratic Paradox*, 102.

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

Manon Westphal

parties seek to realise their own political views and projects as best as possible while recognising that there are limits to the means with which they may legitimately do so. However, the democratic nature of the fight for hegemony hinges not only on the readiness of political actors to refrain from excluding their opponents from politics. In addition, it requires the availability of possibilities to question and challenge an established hegemony. Those who do not manage to decide the struggle for hegemony in their own favour, and those who speak from the margins of political discourse and have not even been recognised as relevant political actors, must be able to demand re-negotiations of the status quo.

Mouffe emphasises that all hegemonic forms of ordering of social relationships ‘have a partial character’³² which must not be concealed by long phases of undisturbed rule by those who manage to realise their views and projects at a certain point in time. Democratic forms of hegemonic politics recognise the ‘necessity not only of challenging what exists but also of constructing new articulations and new institutions’³³ and abandon the idea that such processes can ever come to an end. Therefore, democracies must ensure that no winner of the political struggle for hegemony can translate their political victory into unchallenged rule and that those who experience defeat or exclusion from the struggle for hegemony have a realistic chance to politicise the decisions that have been made.

Mouffe does not discuss the question what means might be suitable to realise this idea in practice in much detail. She highlights the importance of a lively, pluralistic public sphere and the key role of parliamentary procedures shaped by confrontations among political parties representing fundamentally different political projects.³⁴ But even if questions of practical implementation remain, it can be concluded that Mouffe describes a political dynamic that prevents situations in which acting according to the requirements of an ‘ethics of civility’ would equate for some (i.e., those who lose the political struggle for hegemony one time) with accepting the role of permanent losers. If it is ensured that the outcomes of hegemonic politics are temporary and remain open to re-negotiation, all political actors get something for their willingness to comply with the adversarial rules of the game, namely the promise that they remain legitimate players in that game and retain chances to influence the rules in their political community in the future.

Tully’s conception of agonistic politics goes beyond this promise for renewed politicisation and future chances to re-negotiate decisions. It describes political conflict processing as a negotiation of agreements that avoids one-sided realisations of only one political view or project. Tully considers deliberation as the most suitable political mode to realise this objective. What marks his distance from mainstream deliberative democratic theories and qualifies him as an agonist – as a

32 Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (London/New York: Verso, 2007 [1985]), 169.

33 Chantal Mouffe, *Agonistics. Thinking the World Politically* (London/New York: Verso, 2013), 11.

34 Chantal Mouffe, *On the Political* (Abingdon/New York: Routledge, 2005), 21-25.

theorist of agonistic deliberation – is that he assumes that disagreements will not be overcome in deliberative processes: he emphasises that an agreement ‘is always non-consensual to some extent.’³⁵ Tully argues that political actors who disagree ‘over the prevailing constitutional arrangements (or some subset of them)’ should follow the principle of *‘audi alteram partem*, “always listen to the other side” and expect that ‘there is always something to be learned from the other side.’³⁶ Due to his emphasis on the continued presence of ‘disagreement all the way down,’³⁷ Tully’s case for reaching agreement in such a process is best interpreted as a case for compromise. Political actors make concessions to the views of others and thereby create arrangements that realise no view entirely, but all views to some extent.

This means that in Tully’s version of agonistic politics, the political processing of disagreements creates only partial winners and partial losers. Whenever questions of what common rules should look like and how conflicts among different interpretations of constitutional norms should be settled are dealt with through the sort of compromise-oriented deliberative process that Tully envisions, nobody gets everything, and everybody gets something. As a consequence, none of the involved parties must accept the full realisation of a position that they fundamentally disagree with. Parties must accept that the resulting arrangements include concessions to views that they find wrong and maybe even unreasonable, but they do not go empty-handed because the arrangement also includes concessions to their own views.

We can read Tully’s and Mouffe’s agonistic theories as offering different strategies for organising the political struggle about the law in ways that can ensure that compliance with the ‘ethics of civility,’ which includes the readiness to accept the authority of decisions that one does not find (fully) reasonable, does not become equivalent for some with the readiness to accept permanent defeat and the inability to influence the content of common rules. Van der Walt might want to consider such agonistic forms of political conflict processing if he wants to preclude as a possible consequence of his argument for the need to recognise the centrality of an ‘ethics of civility’ that the functioning of liberal democracy depends upon the willingness of the weaker groups in society to sacrifice their political demands to the functioning of political cooperation.

4 Concluding remarks on the precariousness of the ‘ethics of civility’

I want to close with some preliminary thoughts on what the agonistic perspective might have to contribute to the discussion of an important observation that Van der Walt refers to in different places of his article, which is that the precarious

35 James Tully, ‘The agonistic freedom of citizens,’ *Economy and Society* 28, no. 2 (1999): 161-182, 170.

36 James Tully, ‘The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,’ *The Modern Law Review* 65, no. 2 (2002): 204-228, 218.

37 Tully, ‘The Unfreedom of the Moderns,’ 218.

Manon Westphal

nature of the ‘ethics of civility’ becomes particularly visible today. Concretely, Van der Walt refers to the events of 6 January 2021, when the former US president ‘effectively incited a significant mass of supporters to physically prevent the certification of the election results by Congress, thereby staging an anti-democratic coup attempt.’³⁸ For the sake of the argument, I will presume that this particularly dramatic event is reflective of a more general development in the societies of liberal democracies, i.e., an erosion of the readiness of citizens to comply with the requirements of the ‘ethics of civility.’ Indeed, scholarship on affective polarisation³⁹ argues that we are currently witnessing such a development.

What could the agonistic perspective contribute to reflections on this phenomenon? I believe that agonism can contribute to both diagnosis and cure. It encourages observers to ask what the condition of democratic politics in contemporary liberal democracies was in the times that preceded the recent signs of a tendency toward polarisation. In addition, it offers guidelines for reforms of democratic politics. Have liberal democracies done enough to prevent concentrations of hegemonic power? Have there been enough and sufficiently effective possibilities to question and challenge existing hegemonies? Have there been sufficient negotiations of compromises, for example in situations in which it was particularly difficult for some parties to accept political defeat, even if it was only temporary? In case a critical diagnosis guided by such questions shows that there is reason to criticise the condition of contemporary democratic politics, Mouffe’s and Tully’s conceptions of agonistic politics can guide considerations of potential reforms, in the sense that they recommend means that would render democratic politics more resistant to cementations of hegemonic power and more conducive to compromise.

To be clear at this point, taking an agonistic perspective on developments that may indicate an erosion of the ‘ethics of civility’ does not necessarily imply the legitimization of behaviour that violates the ethical requirements of liberal democracy, let alone violent acts such as the events of 6 January 2021. What the agonistic perspective suggests is that scholars and other critical observers of the current situation should be aware of the connectedness between citizens’ inclination to act according to an ‘ethics of civility’ and the functioning of the political procedures in which they experience themselves and others as co-authors of the law under which they all live. At least in situations in which demonstrations of an unwillingness ‘to live graciously enough with terms of social cooperation that one’s moral autonomy [...] prevents one from considering “reasonable enough”⁴⁰ are not limited to just a few individuals or small fractions of society but become a broader social phenomenon, agonists would suspect that critical interrogations of

38 Van der Walt, ‘Rawls, Habermas and Liberal Democratic Law,’ 16-17.

39 For example, Shanto Iyengar and Sean J. Westwood, ‘Fear and Loathing across Party Lines: New Evidence on Group Polarization,’ *American Political Science Review* 59, no. 3 (2015): 690-707; Jennifer McCoy and Murat Somer, ‘Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies,’ *The ANNALS of the AAPSS* 681 (2019): 234-271.

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

the ways in which democratic politics has been dealing with disagreement are in place.