Does Respect Require Antiperfectionism?

Gaus on Liberal Neutrality[1]

By Andrew Koppelman

I. Introduction

Liberal neutrality is the idea that no exercise of political power can legitimately be justified by "perfectionism"—the view that some ways of life are intrinsically better than others, and that the state may appropriately act to promote these better ways of life.[2] Its most prominent formulations, in the 1970s and 80s,[3] did not really defend it, but rather took it as an assumption and elaborated its implications. Dworkin offered a pure ipse dixit.[4] Ackerman gestured toward a cluster of arguments without carefully defending any of them.[5] Remarkably, liberal neutrality became a major theme in political philosophy without much substantive reasoning.

Gerald Gaus has now produced a more careful and sophisticated defense of liberal neutrality than any of its earlier proponents. He relies on a strategy that is gestured toward, but never fully elaborated, in some earlier writers: the idea that neutrality is demanded by mutual respect among citizens.[6] If this is correct, then both of the principal objections to neutrality can easily be answered: mutual respect is a coherent ideal, and any complaints about costs in goodness are themselves disqualified from political consideration.

Gaus's argument for neutrality also entails a strong presumption against government-mandated redistribution of property, at least when that redistribution serves purposes that some reasonable citizens do not endorse. The constraints of neutrality will exclude most of the justifications that typically are offered. The two points are intertwined: strong property rights limit the state's ability to use resources for perfectionist purposes.

If Gaus is right, then much of present law must be discarded. Laws that discourage the use of tobacco or other addictive drugs, public museums and parks, and many environmental laws would all have to go. It is not clear that public schools could offer classes in art and music. The principle is, as he says, radical.

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The suspicion of government that he articulates so well has become increasingly influential in American politics. He has done a great service, therefore, by laying out the argument for neutrality so carefully. But other aspects of his own political theory—in particular, his demonstration of the legitimacy of social coordination toward common ends—inadvertently strengthen the case for perfectionism.

II. The argument against perfectionism

The basic structure of Gaus's argument is simple.[7] Coercion is prima facie wrong.[8] Therefore coercive state action is prima facie wrong. State coercion can be justified under some narrow descriptions; coercion to enforce basic rules of justice is justified. Perfectionism, however, is not a basic rule of justice. "Reasons that presuppose values, claims about the good life, or about human perfection rarely if ever can justify coercion by the state."[9]

A moral reason for coercion, Gaus argues, must be a moral reason "from some shared or impartial point of view."[10] A view is not impartial if some "fully rational moral agents are simply incapable of seeing this reason as a justification."[11] If Alf advances a justificatory reason that Betty refuses to acknowledge, "he is committed to the further claim that there must be some rational failure of Betty's that leads to this lack of appreciation"[12] of the strength of that reason. His claim against Betty is weaker "the more all the evidence suggests that she is an excellent cognitive and practically moral rational agent."[13] Put another way, Alf can justifiably impose a norm on Betty only if she can justly be regarded as culpable for violating that norm. "In issuing a moral demand, Alf must be able to claim that there was a reason for Betty to embrace that demand."[14]

In more recent work, Gaus has adopted a different formulation, arguing that it is not necessary for everyone to reach consensus on the same reasons for coercion. It is sufficient if they support the same regime for different reasons. It remains the case, however, that the regime's coercive practices must be justified by reasons that each citizen has an undefeated reason to endorse.[15]

The demand for impartial reasons does not lead to anarchy, because "the total absence of a coercive state is demonstrably impartially worse than a limited state that enforces personal rights and some system of property rights."[16] This is an important move, because Gaus understands that there are some philosophical anarchists who are excellent cognitive and practically moral rational agents.[17] In order to maintain the wedge between legitimate laws that impose rules of justice and illegitimate laws that impose claims about the good life, he must show that it is legitimate to impose the former even upon those who resist. So it must be shown that, however sophisticated the case for anarchism may be, anarchists nonetheless have reasons, accessible to them, for conceding the state's authority.

It is not necessary for all actual citizens to accept those reasons. (It had better not be, because some anarchists will not budge from their views.) "[O]ur aim is not to induce the consent of actual persons but to appeal to the reasons of all moral persons seeking to legislate for (i.e., give imperatives to) other moral persons."[18] Our interlocutors must be understood as what Gaus calls "Members of the Public," idealized persons who deliberate well and seek to legislate impartially for all. Alf can reasonably coerce Betty if he can show that the reasons for the coercion count as reasons within her own evidentiary set. If she does not

see that these reasons are reasons for her, Alf is nonetheless not merely dictating to her, but is relying on a source of authority that they share. "To make genuine moral demands on others, and not browbeat them or simply insist that they do or believe what you want, you must show that, somehow, their system yields reasons to embrace your demand."[19]

There are conclusive reasons for everyone to give some lawmaking authority to the state. Those reasons derive from Gaus's clever reconciliation of the moral philosophies of Hume and Kant. For Hume, morality is valuable because it is useful to human life. For Kant, it is the expression of autonomy. Gaus observes that the Kantian ideal is too indeterminate to yield "moral rules that are sufficiently fine-grained to serve as the basis of our actual social life."[20] Such mundane but morally freighted questions as what is mine and what is yours, or what is a marriage, or whether and how much to tip the cabdriver, can only be resolved by a settled set of shared expectations. The indeterminacy is appropriately resolved by a Humean focus on the evolutionary processes that produce particular moral systems—processes that Gaus anatomizes with an impressive command of recent research in game theory, experimental psychology, and the theory of early childhood development. An evolved positive morality must, in order to deserve adherence, manifest mutual respect. An evolved morality, if it satisfies this requirement, constitutes an equilibrium solution to the problem of social coordination. It then is appropriately regarded as a kind of social contract to which all Members of the Public can reasonably be regarded as bound. A worthy morality must satisfy both Kantian and Humean requirements.[21]

Government is another coordination mechanism. It is precisely because Kantian respect is too indeterminate to generate a unique set of entitlements that we need a state to specify the rights we have against each other. "In these matters political authority is a collective tool of the public to assist in the construction of a moral order of public reason."[22] The state's legitimacy evidently derives from what Gaus calls the umpire model of authority: there are multiple possible resolutions of the question, and everyone has a common interest in having it resolved somehow.[23]

Gaus considers and rejects what he calls the "libertarian dictator" argument, which holds that a more-than-minimal state cannot be justified to any citizen for whom any increment of coercion beyond the minimum is not justified. The argument fails, Gaus argues, because "when engaging in collective justification about a common framework for living, we have reason to endorse common rules even when they do not align with our convictions about what is optimal."[24] For example, a state can justify speed limits, even if some prefer the thrill of speeding to safer roads. The thrill-seekers would prefer a road with speed limits to no roads at all, while others might reasonably think that roads without speed limits are too dangerous to build. So speed limits can be justified to everyone.[25]

What is barred by this argument—here is his robust antiperfectionism—is a law that is justified by "reasons that rational moral agents or citizens can reject as justificatory."[26] Thus, for example, personal values or religious convictions are not public justifications because they cannot be openly justified to others.[27]

The argument also bars state subsidies for perfectionist purposes. Gaus is unpersuaded by George Sher's argument that some perfectionist actions

of the government, such as spending to promote educational programs that support certain ways of life and not others, are not coercive.[28] Gaus thinks that the libertarian response, which focuses on "threats of punishment by the Internal Revenue Service," is correct. There are almost no noncoercive actions of government.[29]

This leads to radical results. Liberal neutrality, Gaus thinks, probably "precludes most contemporary legislation."[30]

III. Implications for religious liberty

Gaus's argument entails a novel justification for religious accommodation. American law gives religion special treatment. Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Sacramental wine was permitted during Prohibition. Today the Catholic Church is exempted from antidiscrimination laws when it denies ordination to women. Jewish and Muslim prisoners are entitled to Kosher or halal food.

This tradition has become intensely controversial. There is a growing scholarly agreement that special treatment of religion cannot be justified. Some think there should never be accommodation. The more common view is that accommodation is appropriate, but under another description; that because it is morally arbitrary and unfair to single out "religion," a different legal category should be used. A number of these have been proposed as substitutes, including individual autonomy, a source of meaning inaccessible to other people, psychologically urgent needs (treating religion as analogous to a disability that needs accommodation), comprehensive views, minority culture, and conscience.[31]

Gaus (in an essay coauthored with Kevin Vallier) proposes an entirely different basis for accommodation. Legislation is impermissible if it has only a religious justification. It also follows that

> this same liberal commitment to non-domination and sanctity of conscience implies that religious citizens must not have laws imposed upon them which they have no conclusive reason to accept. Even if a secular rationale is necessary in our society for a publicly justified law, it can be defeated by a reasonable religious conviction without any secular backing. If, given his or her reasonable religious beliefs, a religious citizen has weightier reason to reject a proposal than accept it, the proposal is not publicly justified. It is here that justificatory liberalism protects the integrity of citizens of faith, as it does all citizens. In a pluralist world, the only integrity that all citizens can simultaneously possess is to be free of coercive laws that violate one's reasonable values and understandings of the good.[32]

Religious conviction is not a good justification for a coercive law, but it may be a good defeater. "We cannot assume that the characteristics of an acceptable proposal for coercion are the same as a good reason to object."[33] This is the basis for "claims to integrity and freedom of conscience."[34]

A common denominator of the justification of both law and exemption from it is the limitation of state action. Very little state action is justifiable, and that little may still be defeated in individual cases.

IV. Accessibility and property

Gaus's reconciliation of Kant and Hume is somewhat spoiled by his neo-Kantian antiperfectionism, which is in tension with his Humean admiration for well-functioning systems of social coordination. (Adopt a less rigid Kantianism, one that accepts the perfectionist elements in existing political arrangements, and the reconciliation would be more attractive.) He criticizes Rawls for condemning "as unjust every existing politico-economic order, going so far as to lump the modern welfare state and Soviet-style command economies together as intrinsically unjust."[35] He is suspicious of esoteric political philosophy that tries to remake the social world in accordance with some abstract blueprint.[36] Yet he ends up doing just that. His convergence model of overlapping consensus is in deep tension with his antiperfectionism. One displays mutual respect by following an existing pattern of moral coordination, for whatever reasons make sense from within one's own evidentiary set. If everyone does this, the consequence can be a publicly shared morality that creates a stable Nash equilibrium.[37] Existing patterns of publicly shared morality, however, include state actions that rely on perfectionist judgments.

Gaus relies on an implausibly narrow understanding of what is interpersonally justifiable. In an extensive discussion of epistemology, he shows that personal reasons need not be public reasons: a person's "having reason to believe something does not imply that all rational others have reason as well."[38] Different people inevitably reason from different evidentiary sets, and so their sets of justified beliefs likewise inevitably differ.

Even stipulating these premises, it does not follow that any particular proposition is outside the set of reasons whose force is accessible to you. Your evidentiary set is surely different from mine, but my epistemic limitations just as surely prevent me from knowing the boundaries of what you can learn. Respect for other people demands that I recognize the stability and integrity of some of their judgments, but their evidentiary sets have neither stability nor integrity. Everyone's evidentiary set is, if they are sane, in constant flux. It is not disrespectful to know that.

In order to be sure that you are simply incapable of seeing the force of my view, I would need to know your entire epistemic history and all possible paths you could travel in the future.[39] Knowing Saul of Tarsus as I do, I feel sure that the views of Paul the Apostle are inaccessible and unjustifiable to him. (Have you *talked* to Saul about Christianity? Don't get him started.) Ordinary experience, however, shows that humans are sometimes capable of cognizing what is true. The fact that (I am persuaded that) X is true therefore gives me a powerful prima facie reason to think that X is accessible to you.[40] A different kind of disrespect is manifested by the notion— one, incidentally, that is impossible to prove— that your mind is so defective that it is irremediably incapable of cognizing some truths.

Christopher Eberle argues that the obligation of mutual respect permits the religious citizen to freely offer her religious reasons for proposed legislation so long as she continues to pursue a search for public reasons and thinks that it will eventually be possible to do so.[41] There is a sense in which Eberle is proposing terms of public reason; his argument is intended to persuade religious and secular citizens alike, and to be the object of overlapping consensus.[42] The obligation it

describes, however, is not interpersonally enforceable. It cannot even be a basis of interpersonal reproach. Only the speaker herself can know whether she is satisfying these conditions.[43]

Similarly with the question of whether you have a conscientious objection that should defeat the application of a law to you: how can I know whether you really have such a defeater, or whether you simply would prefer not to obey the law? Hobbes thought human beings were impenetrable, even to themselves, their happiness consisting in "a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later;"[44] their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."[45] There is no common good for men to orient themselves toward: "since different men desire and shun different things, there must need be many things that are good to some and evil to others…therefore one cannot speak of something as being simply good; since whatsoever is good, is good for someone or other."[46] Conscience, thus understood, is incommensurable with public reason—a term that Hobbes coined. Hobbes devised the idea of public reason for the specific purpose of defeating this defeater of laws.[47] No appeal to "such diversity, as there is of private Consciences"[48] is possible in public life for Hobbes.[49] Private conscience is too capricious to be an appropriate basis for exemption from legal obligations. Gaus does not explain how Hobbes's objection can be answered. Gaus's sophisticated epistemology *strengthens* Hobbes's objection to exemptions, by providing a modern theoretical elaboration of Hobbes's insistence on the unmanageable diversity of private conscience.

In practice, accommodation has been justified, not from within the evidentiary perspective of the objector, but from that of the state. The law as a whole has purposes other than those of each individual statute, and so a statute's operation may be properly defeated by one of those other purposes. One such purpose is treating religion with the respect that, American law supposes, it deserves. The law may not be able to probe the psyche of each dissenter, but its own ends are not so unfathomable. Gaus cannot accept this justification for accommodation. American law treats religion as a good, and this cannot be justified within public reason as Gaus understands it.

Gaus's specific argument against perfectionist public expenditure and redistributive taxation (beyond that necessary to ensure minimal rights of agency and welfare[50]) faces a different difficulty. It depends on an underspecified account of property. He understands that there are no presocial property rights, and there are many possible legitimate ways of constructing such rights.[51] He thinks that coercion is prima facie wrong. There can be no property rights without coercion, however, so property must be justified like any other deployment of the state's coercive power.[52] Thomas Nagel and Liam Murphy argue that taxes are not, strictly speaking, the government taking your money. They are part of a system of property rights in which some subset of the social output is allocated for collective rather than individual determination of the use to which it will be put. There is no uniquely justified specification of that subset's size or use. Private property has no meaning outside that total system, which includes taxation: the state did not find me sitting in the state of nature with my brokerage account.[53]

It would seem to follow that the question of what degree of taxation to have, and how to spend the money, is just the kind of issue that is appropriately subject to the umpire model of authority.[54]

Gaus responds that the justification for any law "occurs against a background of one's already justified rights."[55] That means that any proposed taking of property via taxation must reckon with the presumption against coercion. "[T]he order of justification may affect the outcome of what is justified": if the eligible set of regimes "will contain only laws with a strong commitment to private ownership and economic freedom," then property rights are justified in advance of any redistributive proposal.[56] "Once property rights have been justified, they form the background for further justifications; they can be justifiably overridden in order to tax, but this must be justified."[57]

Gaus offers two reasons why property is a basic right that any justifiable regime must respect. One is the need for a private space of decision-making in which individuals are not answerable to the collectivity.[58] It is morally necessary that there be "a system whereby the natural and social world is divided into different jurisdictions in which the evaluative standards of the 'owner'—the rightholder—will be determinative."[59] The other reason is that "extensive private ownership—including private ownership of capital goods and financial instruments and institutions—is for all practical purposes a requirement for a functioning and free social order that protects civil liberties."[60]

Neither reason excludes in principle the Nagel-Murphy conventionalist account of property rights. Both are consistent with a large amount of collective property.[61] Neither entails much about the level of taxation or the understanding of what can count as a public good.[62]

Gaus also claims that high tax rates will require increasingly coercive enforcement and make entrepreneurial options less eligible, thus constricting citizens' life chances.[63] From 1950 to 1964, the top marginal tax rate in the United States exceeded 90%. Enforcement of the tax laws did not noticeably outrage human liberty,[64] and business activity was not depressed by oppressive taxation. (During the 1950s, the U.S. economy grew by 37%.[65]) So the anticoercion rationale can't categorically denounce perfectionism that operates primarily through taxing and spending.[66]

Jonathan Quong's critique of perfectionist taxation relies upon a similar fallacy. He argues that perfectionist subsidies limit citizens' liberty because they "involve the government taking funds from citizens in order to restrict the ways in which citizens can spend those resources."[67] Citizens should rationally disprefer this "relative to what we assume is an otherwise morally justified status quo (i.e. a situation where the resources remain with the individual citizens to spend as they see fit)."[68] But this assumes, once more, that pretax income is fraught with moral significance. It also assumes that the government is in some way distinct from the citizens who comprise it, who may very much want the public goods that the state is paying for. Quong may wish he could live in a world where there are no parks or museums, but where he has a larger bank account. Why assume that all rational citizens share his preference?[69]

V. The perfectionist contract

The argument for property rights itself opens the door to perfectionism. When we decide the outer boundaries of the acceptable range of specifications of property rights, it is silly not to think about what is important in the lives of human beings. Property rights ought to allow people "to lead lives in which their fundamental values hold sway over some parts of their life."[70] Which parts? Which values? Gaus rejects socialist property rules, which bar ownership of the means of production, because "[e]ntrepreneurship is itself a form of human flourishing."[71] In determining the scope of property rules, Gaus is already inquiring into what people actually care about.

When you make that inquiry, you are likely to find perfectionist ends. Some of these cannot be realized without state coercion. If, for example, we want to preserve endangered species for future generations because of their beauty and scientific interest, we cannot do that by any means other than coercion: it is not possible to purchase the compliance of everyone who would otherwise kill a polar bear.

There are many possible solutions, consistent with mutual respect, to the social coordination problem.[72] Gaus recognizes this, but does not fully reckon with the fact that some of these are perfectionist. Once more, his convergence model of social morality is in tension with his antiperfectionism. Imagine a community trying to devise terms of social cooperation. Call them Vague Perfectionists: they agree that some ways of life are better than others and they have no principled objection to the use of state power to promote these, but they do not agree about which ways of life these are. They therefore leave that to democratic decision on a case-by-case basis.[73] They may even insist on maintaining a certain level of vagueness about the goods the state is promoting. This is how American law addresses religion, which it treats as valuable, but only at a high level of abstraction, forbidding discrimination among religious views.[74] (They will, perhaps, want to protect citizens from being severely penalized if they dissent from the majority's ideals, but antiperfectionism is not just about protecting dissenters; it condemns even noncoercive perfectionism, or coercion that imposes minor burdens.) The question of which perfectionist policies should be pursued would then be among the "difficult and controversial issues" that "are essentially matters for settlement in the political arena, in which individuals who reasonably disagree on these matters can adjudicate their differences."[75]

Now, however, a Principled Antiperfectionist joins the community.[76] Does he immediately exercise a veto over every perfectionist policy that is in place? Does he disrupt the preexisting solution to the coordination problem? If he does, is he not analogous to the libertarian dictator? And is not the same answer available: if the shape of perfectionist policies is a matter of democratic deliberation, then we have reason to endorse, as a legitimate exercise of democratic authority, even policies with which we disagree.

The population of Vague Perfectionists happens to be a very large one. Even some professed antiperfectionists are closet cases. Ronald Dworkin is perhaps the most prominent defender of liberal neutrality, in part because of his pathbreaking work in jurisprudence and in part because he is easier to read (albeit his arguments for neutrality are less careful and rigorous) than Gaus.

But he cheats in a way that Gaus does not. He needs to cheat in order to avoid Gaus's extreme conclusions. Dworkin claims that government fails to treat citizens with equal concern and respect whenever it justifies its actions on the ground that one citizen's conception of the good life is better than another's.[77] Yet when he considers the question of government subsidies for the arts, he rejects the view that the amount of art produced should be left to the free market.[78] That rejection is not—or at least, Dworkin says it is not—based on what he calls the "lofty approach," which relies on the supposed intrinsic value of art.[79] That approach is defective, Dworkin argues in good antiperfectionist fashion, because it "turns its back on what the people think they want" and instead aims at "what it is good for people to have."[80] Instead, he thinks that subsidies can be justified as protecting "the diversity and innovative quality of the culture as a whole,"[81] which should be understood to be a public good. "We should try to define a rich cultural structure, one that multiplies distinct possibilities or opportunities of value, and count ourselves trustees for protecting the richness of our culture for those who will live their lives in it after us."[82] The only value judgment that the state should make is that "it is better for people to have complexity and depth in the forms of life open to them."[83] A subsidy merely "allows a greater rather than a lesser choice, for that is exactly the respect in which we believe people are better off with a richer than a poorer language."[84]

This rationale leaves us with a problem: which "distinct possibilities or opportunities of value" is it important to preserve? The state still has to decide that. The value of a large menu does not entail the presence on it of any item, or even of any class of items. Why support highbrow art, but not romance novels, kung fu movies, or pornography? These low cultural forms are not devoid of complexity,[85] and some of that complexity will be lost if the state does not act to preserve it.[86] If Dworkin is untroubled by the way in which the state picks and chooses, then it would seem that he is committed to the lofty view despite himself. If you reject the lofty view, then you ought to leave these matters to the market. The question of what forms of culture will survive would not be different in kind from the question of what forms of razor blade, or vacuum cleaner, or laundry detergent will survive.

Gaus pounces on Dworkin's inconsistency, and concludes that such subsidies are prohibited. Any justification for such subsidies would have to be "addressed to all citizens—bowlers and fans of country and western music as well as middle class supporters of the arts."[87] Gaus is confident that this cannot be done. If, however, such citizens are also Vague Perfectionists, then they have a reason to allow their government to consider such subsidies, even if they would not agree with every detail about their allocation.

VI. Gaus vs. Rawls

Gaus's idea of public reason is reminiscent of Rawls, who famously publicized the term. Rawls, however, was less stringent (and so, I will argue, more persuasive) in the scope of his insistence that perfectionist considerations be excluded from politics. He eventually was persuaded that the constraints of public reason do not necessarily apply to all political deliberation. Although "it is usually highly desirable to settle political questions by invoking the values of public reason,"[88]

its moral requirements strictly apply only to constitutional essentials and matters of basic justice.[89] When enacting regulations that do not infringe on basic liberties, or prevent each citizen from having decent minimal resources, it is permissible for a legislature to rely on its comprehensive conception. "Fundamental justice must be achieved first. After that a democratic electorate may devote large resources to grand projects in art and science if it so chooses."[90] Thus political liberalism "does not rule out as a reason the beauty of nature as such or the good of wildlife achieved by protecting its habitat."[91] As Samuel Freeman, an exceptionally careful and reliable expositor of Rawls's philosophy, puts it, "it may well be that majority democratic decision by itself is sufficient 'public reason' for restricting conduct."[92] Thus, for example, the legislature could act to "protect a dwindling and endangered species of moles that live in unspoiled prairie land that Old MacDonald plans to sow in wheat."[93]

Gaus makes no such concessions. "[A] policy coercively securing a public good is publicly justified only if all Members of the Public rank the package of the coercive policy's costs and benefits above not having the public good."[94] Because it is reasonable for Old MacDonald to be utterly indifferent to the protection of endangered species, a coercive law protecting them is unjust. Similarly with laws that discourage smoking, which some people reject because they value its pleasure over health.[95] Such people's preferences must override the much larger number who will bitterly regret that they were ever given the opportunity to sample deadly, addictive drugs.[96] Gaus thus can easily oppose such liberal demons as laws against homosexual sex, but only by assimilating them with trivial impositions.[97] Sodomy laws are unjust because they are like small taxes to preserve the bald eagle.

VII. Reasonableness and commitment

There is a case for neutrality. But it is context-dependent, and it relies on just what Gaus excludes. Gaus thinks that he can generalize from the case of religion, but in fact American religious neutrality is an instance of what Quong calls "comprehensive antiperfectionism," in which the state is neutral between certain competing conceptions of the good life, but the ultimate justification for this neutrality is not itself neutral in this sense, depending instead on some contestable ultimate value.[98] Perhaps there is a case to be made against comprehensive antiperfectionism, but Gaus has not made it.

If most of us have reasons to want a state to pursue perfectionist policies, and all of us have reasons to support a state even when it enacts laws that we do not regard as optimal, we have a basis for agreeing that perfectionist laws are legitimate. Those who violate such laws are subject to reasonable reproach. This will impose certain strains of commitment upon them, and Gaus no less than Rawls worries about this.[99] Gaus notes that the degree of strain is likely to depend on how severe and frequent are the occasions when citizens are coerced in a way they cannot endorse.[100] But it is also relevant if the regime is indifferent to the substantive values we care about and generates consequences we hate. Gaus is right that we can't always please all of our neighbors. But he moves too quickly to the conclusion that it is always sufficient to ask what demands it is reasonable to make upon them—which rules would be endorsed by ideally rational persons

working from their evidentiary sets. If we want relations of respect, not only with idealized Members of the Public, but with our actual fellow citizens, we should also ask what they will actually accept.[101] It isn't possible to do that if we rule out in advance letting our political decisions be based on what they happen to care about.

Notes

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[2] This definition of perfectionism is elaborated in Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge: Harvard University Press, 2013). There are other, more attractive conceptions of neutrality beside the doctrine of liberal neutrality described in the text, notably the idea of religious neutrality that is presently the law in the United States. See Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge: Harvard University Press, 2013).

[3] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971; revised edition, 1999), 94/80–81 rev.; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 33, 312; Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), 11; Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 191; Charles E. Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), 44. Rawls's later views are discussed below.

[4] Dworkin, "Liberalism," 191.

[5] Ackerman, *Social Justice in the Liberal State*, 359–69.

[6] The inadequacy of earlier treatments is shown in George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997), 45–105, and Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993). The point is expressed differently in different writings of Gaus. In *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford: Oxford University Press, 1996), he expressly develops the claim in terms of respect, while in *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011), he emphasizes the obligation not to "make moral demands on others that as free and equal moral persons those others cannot see reason to acknowledge." Ibid., 16. The antiperfectionist conclusion is the same, and the arguments leading there are similar enough that this evolution of his position is irrelevant for this paper's purposes. Thanks to Kevin Vallier for clarification on this point.

[7] His clearest statement of the argument is "Liberal Neutrality: A Compelling and Radical Principle," in Steven Wall & George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, Md.: Rowman & Littlefield, 2003), 137–165. That argument has ten steps, which I compress here. I am obviously not challenging the steps that I omit.

[8] This is a questionable premise, because a decent human life requires law and law always requires coercion. (Thanks to Richard Kraut for this point.) But I will stipulate it. In *The Order of Public Reason*, 341, Gaus refines the claim: "it is wrong to exercise one's liberty so as to interfere with, block, or thwart the agency of another without justification." For present purposes, since we are only focusing on coercive actions of the state, these are functional equivalents.

[9] "Liberal Neutrality," 153.

[10–13] Ibid. (10: 143. 11: 143. 12: 144. 13: 144.)

[14] *Justificatory Liberalism*, 123.

[15] Gerald F. Gaus & Kevin Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry, and Political Institutions," Phil. & Soc. Criticism 35 (2009): 51–76.

[16] "Liberal Neutrality," 156.

[17] See *The Order of Public Reason*, 460–62, engaging the work of Robert Paul Wolff, and noting the views of A. John Simmons, Joseph Raz, and Leslie Green, all of whom deny that citizens have an obligation to obey the law.

[18] Ibid., 26.

[19] *Justificatory Liberalism*, 129. Note the implicit assumption that others have a "system" rather than an untidy, constantly changing collection of beliefs. More on this anon.

[20] *The Order of Public Reason*, 42.

[21] See, for a brief statement of this thesis, ibid., 45–46.

[22] Ibid., 468.

[23] *Justificatory Liberalism*, 188–90. Gaus, however, now at least partly rejects the umpire model, because some of the work done by the political in his early work is now done by evolved social morality. See *The Order of Public Reason*, 24–25, 114. Thanks to Matt Lister for pointing this out.

[24] *The Order of Public Reason*, 502–503.

[25] Ibid., 538. It is, incidentally, doubtful that roads without speed limits are not worthwhile to everyone in the society, if those are the only roads that are available. Even those who are too frightened to ride on them will nonetheless benefit from the improved transportation of goods. Matt Lister has noted in conversation that this point generalizes across a broad range of laws. Perhaps Gaus's view implies the libertarian dictator argument after all. Or perhaps it is indeterminate, depending on how issues are individuated. See David Enoch, "The Disorder of Public Reason," *Ethics* 124 (Oct. 2013): 141–176, at 153–55.

[26] "Liberal Neutrality," 154; see also Gaus & Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity."

[27] *Justificatory Liberalism*, 142.

[28] See Sher, *Beyond Neutrality*, 34–37.

[29] "Liberal Neutrality," 146–47; but see *The Order of Public Reason*, 529–34 (allowing for coercive public goods provisions in certain circumstances).

[30] Ibid., 160.

[31] Koppelman, *Defending American Religious Neutrality*, 131–64.

[32] Gaus & Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity," 63.

[33] Ibid., 64.

[34] Ibid. Gaus makes a similar argument more briefly in *The Order of Public Reason* 541.

[35] *The Order of Public Reason* 445.

[36] See ibid., 255, 296, 440.

[37] See Gerald Gaus, "Moral Constitutions," Harv. Rev. Phil. 19 (2013): 4–22.

[38] *Justificatory Liberalism* 119.

[39] This interpersonal epistemic gap is also emphasized in Nicholas Wolterstorff's critique of Gaus. See "The Justificatory Liberalism of Gerald Gaus," in Terence Cuneo, ed., *Understanding Liberal Democracy* (Oxford: Oxford University Press, 2012), 53–75, especially 65–66.

[40] There are good reasons, in American law, to bar legislation that can only be justified by religious claims, but they are not the reasons Gaus relies upon. See my *Defending American Religious Neutrality* and "Secular Purpose," Va. L. Rev. 88 (2002): 87–166. Notably, both James Madison, the principal author of the First Amendment, and the modern Supreme Court thought that religion

can be corrupted and degraded by state support. See my "Justice Stevens, Religious Enthusiast," 106 Northwestern U. L. Rev. 106 (2012): 567–585; "Corruption of Religion and the Establishment Clause," 50 Wm. & Mary L. Rev. 50 (2009): 1831–1935. School prayer, for instance, was barred because "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Engel v. Vitale, 370 U.S. 421, 431–32 (1962), quoting Madison, "Memorial and Remonstrance."

[41] Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002).

[42] For this point I am indebted to conversations with Russell Sherman.

[43] And even she may not know that. Often we do not know which of our own professed beliefs are actually insincere self-deceiving rationalizations.

[44] Thomas Hobbes, *Leviathan* (C.B. Macperson ed., Harmondsworth: Penguin, 1968), 160.

[45] Thomas Pfau, *Minding the Modern: Human Agency, Intellectual Traditions, and Responsible Knowledge* (Notre Dame: U. of Notre Dame Press, 2013), 189.

[46] Thoman Hobbes, *Man and Citizen* (Garden City: Anchor, 1972), 47.

[47] Bryan Garsten, Saving Persuasion: A Defense of Rhetoric and Judgment (Cambridge: Harvard University Press, 2006), 45. Gaus understands this aspect of Hobbes very well; see Gerald Gaus, "Hobbes's Challenge to Public Reason Liberalism: Public Reason and Religious Convictions in *Leviathan*," in S.A. Lloyd, ed., *Hobbes Today: Insights for the 21st Century* (Cambridge: Cambridge University Press, 2013), 155; but does not consider the effect of Hobbesian mutual opacity on Gaus's justification for religious accommodation.

[48] *Leviathan*, 366.

[49] See Pfau, *Minding the Modern*, 194–95.

[50] *The Order of Public Reason* 358–68.

[51] Ibid., 509–10.

[52] Robert Lee Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," Pol. Sci. Q. 38 (1923): 470–79.

[53] See Thomas Nagel and Liam Murphy, *The Myth of Ownership* (Oxford: Oxford University Press, 2002).

[54] Matthew Lister observes that for Gaus, the unit of evaluation is individual rules, but the same sort of argument could justify a democratic decision procedure. Review of *The Order of Public Reason*, Notre Dame Philosophical Reviews, July 11, 2011, available at http://ndpr.nd.edu/news/24757/?id=24251.

[55] *The Order of Public Reason*, 510–11.

[56] Gerald Gaus, "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt," Soc. Phil. & Pol'y 27 (2010): 244, 259. The idea of an order of justification is further developed at *The Order of Public Reason* 275.

[57] *The Order of Public Reason* 511.

[58] Ibid., 522; *Justificatory Liberalism* 199–204.

[59] *The Order of Public Reason* 377.

[60] The legitimacy of having some collective property is recognized even by Locke. See John Locke, "Second Treatise," in Peter Laslett ed., *Two Treatises on Government* (Cambridge: Cambridge University Press, 1988), 292 (sec. 35).

[61] The legitimacy of having some collective property is recognized even by Locke. See Second Treatise, sec. 35.

[62] On the contrary, so long as the level of taxation is not so onerous as to defeat the purpose of private property, then paying taxes is part of what we owe our fellow citizens. The Order of

Public Reason 470. On the impossibility of determining a priori what could count as a public good, see Daniel Polsby, "What If This Is As Good As It Gets?," Green Bag 2d 2 (Autumn, 1998):121.

[63] *Coercion, Ownership, and the Redistributive State* 264–65.

[64] In 1955, there were 724 criminal convictions for tax evasion. In 2013, there were 3,311, of which 1,366 involved income from non-criminal activities. Commissioner of Internal Revenue Annual Report for Fiscal Year ended June 30, 1955, at 21, available at http://www.irs.gov/pub/irs-soi/55dbfullar.pdf; SOI Tax Stats – Criminal Investigation Program, by Status or Disposition, IRS Data Book Table 18, 2013, in 2013 Internal Revenue Service Data Book (2013), 44, available at http://www.irs.gov/pub/irs-soi/13databk.pdf. Taxation in the United States has also largely relied from the beginning on mechanisms, such as taxing corporate income and withholding income from paychecks, that are difficult to evade. See Ajay Mehrotra, Making the Modern American Fiscal State: Law, Politics and the Rise of Progressive Taxation, 1877–1929 (New York: Cambridge University Press, 2013) and Thomas L. Hungerford, Taxes and the Economy: An Economic Analysis of the Top Tax Rates Since 1945 (Updated), Cong. Research Service, Dec. 12, 2012. (The Hungerford study has become controversial, primarily because some politicians were unhappy with its results. See Bruce Bartlett, How Not to Refute a Tax Study You Don't Like, Tax Notes, Nov. 26, 2012, at 1007.)

[65] *Statistical Abstract of the United States*, 1967, 321 (GNP of $355.3 billion in 1950, $487.8 billion in 1960). More generally, there has been no relation between the top tax rate and economic growth. Reductions in the top tax rate are more clearly associated with concentration of wealth at the top of the distribution. Thomas L. Hungerford, Taxes and the Economy: An Economic Analysis of the Top Tax Rates Since 1945 (Updated), Cong. Research Service, Dec. 12, 2012.

[66] Gaus also argues that, in a regime in which public goods are subsidized through a series of majoritarian bargains, they are likely to be overproduced, leaving everyone worse off. *The Order of Public Reason* at 542–45; see also *Justificatory Liberalism*, 244. It is strange for Gaus to make this argument so confidently in the United States of 2011, with its decaying infrastructure and underfunded public schools.

[67] Jonathan Quong, *Liberalism Without Perfection* 65 (New York: Oxford University Press, 2011).

[68] Ibid., 66.

[69] Quong's important defense of antiperfectionism is beyond the scope of this essay, but I note here that, in order to respond to a telling critique by Joseph Chan, he finds it necessary to rely on the undefended presumptions about property that I critique here. Jonathan Quong, "Liberalism Without Perfection: Replies to Gaus, Colburn, Chan, and Bocchiola," Phil. & Pub. Iss. (n.s.) 2 (2012): 75. For another prominent antiperfectionist who relies on a similar assumption, see Alan Patten, "Liberal Neutrality: A Reinterpretation and Defense," J. Pol. Phil. 20 (2012): 262–64.

[70] *The Order of Public Reason* 379.

[71] Ibid.

[72] On the plurality of regimes consistent with mutual respect, see Andrew Koppelman, "Darwall, Habermas, and the Fluidity of Respect," Ratio Juris 26 (2013): 523–37.

[73] This is one way of satisfying the Wicksell unanimity criterion for funding public goods, which is relied upon by both Gaus and Rawls. *The Order of Public Reason* 533–34; *A Theory of Justice* 282–83/249–50 rev.

[74] See Koppelman, *Defending American Religious Neutrality*.

[75] *The Order of Public Reason* 368.

[76] My narrative is not fictional. This is what did happen in the 1970s, when antiperfectionism was invented.

[77] See, e.g., *Liberalism*, supra.

[78] Ronald Dworkin, "Can a Liberal State Support Art?," in A Matter of Principle, 221.

[79–84] Ibid. (79: 221. 80: 221. 81: 223. 82: 229. 83: 229. 84: 230).

[85] The complexity of various forms of pornography, for example, has been explored in Linda Williams, *Hard Core: Power, Pleasure, and the "Frenzy of the Visible"* (Berkeley: University of California Press, rev. ed. 1999) and Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* (Durham: Duke University Press, 1999). For an argument that First Amendment law has not adequately reckoned with this complexity, see Andrew Koppelman, "Does Obscenity Cause Moral Harm?," Colum. L. Rev. 105 (2005): 1635–79.

[86] Thus, for example, Linda Williams's history of pornography depends in part on fragmentary sources collected by the Kinsey Institute for Sex Research, which is one of the only collections of early stag films in existence. "Many of the films I wanted to see proved to be in a state of such decay that they could not be projected." Williams, *Hard Core*, 60. Had libraries been collecting these films when they were first produced, shortly after 1900, they would not be lost to us now.

[87] Justificatory Liberalism 208. Thomas Nagel is caught in a similar cheat in Joseph Chan, *Legitimacy, Unanimity, and Perfectionism*, 29 Phil. & Pub. Aff. 29 (2000): 26–27.

[88] John Rawls, *Political Liberalism* (New York: Columbia University Press, expanded ed. 1996), 215.

[89] Ibid., 214. Those moral requirements also become more relaxed in Rawls's last writings, in which he held that, even with respect to political fundamentals, citizens may present political arguments based on their comprehensive views, "provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." *Political Liberalism* li–lii. There is no formula for what "in due course" means; such matters must be worked out "in practice and cannot feasibly be governed by a clear family of rules given in advance." "The Idea of Public Reason Revisited," in Samuel Freeman, ed., *Collected Papers* (Cambridge: Harvard University Press, 1999), 592. Rawls's position thus converges with that of Eberle. See Martha Nussbaum, *Rawls's* Political Liberalism*: A Reassessment*, 24 Ratio Juris 1, 18 (2011).

[90] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 152.

[91] Ibid., 152 n. 26; see also *Political Liberalism* 214–15.

[92] Samuel Freeman, *Rawls* (London and New York: Routledge, 2007), 80.

[93] Ibid.; see also ibid., 396–97; T. M. Scanlon, "Rawls on Justification," in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), 162–63.

[94] *The Order of Public Reason* 534.

[95] Ibid., 535–37.

[96] See Andrew Koppelman, "Drug Policy and the Liberal Self," Nw. U. L. Rev. 100 (2006): 279–93.

[97] This is evidently necessary because Gaus thinks "there can be no public way to distinguish actions that are genuinely based on 'deep' evaluative standards from 'mere' personal goals and desires." *The Order of Public Reason* 361–62. This is Hobbes's objection again. Yet, as noted above, he endorses some religious accommodations.

[98] Quong, *Liberalism Without Perfection*, 19. Thus, for example, when the Supreme Court invalidated mandatory prayers in public schools, it declared that the Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Engel v. Vitale, 370 U.S. 421, 431–32 (1962), quoting James Madison, Memorial and Remonstrance Against Religious Assessments.

[99] See *The Order of Public Reason* 315.

[100] Ibid., 493, 499.

[101] For a similar critique, see Enoch at 166–67.